THE

# FEDERAL CASES

COMPRISING

CASES ARGUED AND DETERMINED

IN THE

# CIRCUIT AND DISTRICT COURTS

OF THE

# UNITED STATES

FROM THE EARLIEST TIMES TO THE BEGINNING OF THE FEDERAL REPORTER,
ARRANGED ALPHABETICALLY BY THE TITLES OF THE CASES,
AND NUMBERED CONSECUTIVELY

## BOOK 13

Case No. 7010 — Case No. 7560

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## BOOK 13

ILLIUS—JUDKINS

Case No. 7,010—Case No. 7,560

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# FEDERAL CASES.

## BOOK 13.

A COMPREHENSIVE COLLECTION OF DECISIONS OF THE CIRCUIT AND DISTRICT COURTS OF THE UNITED STATES FROM THE EARLIEST TIMES TO THE BEGINNING OF THE FEDERAL REPORTER, (1880,) ARRANGED ALPHABETICALLY BY THE TITLES OF THE CASES.

N. B. Cases reported in this series are always cited herein by their numbers. The original citations can be found when desired through the table of cases.

### Case No. 7,010.

ILLIUS v. NEW YORK & N. H. R. CO.

[43 Hunt, Mer. Mag. 586.]

Circuit Court, S. D. New York. Sept. 14, 1860.

LOCAL LAW — FEDERAL COURTS — DECISIONS OF STATE SUPREME COURT—HOW FAR BINDING.

[On questions of local law, the federal courts will follow the decisions of the highest state judicial tribunal in similar and analogous cases.]

[This was an action by Charles Illius against the New York & New Haven Railroad Company. Defendant demurs to the complaint.]

NELSON, Circuit Justice. The question in this case is whether the defendants are responsible for the spurious certificates of stock issued by Schuyler, the president of the company, and transfer agent of the stock, which certificates have passed into the hands of a bona fide holder for value. The question has been twice before the court of appeals of this state, and, after a very full and able examination, has been determined in the negative. Mechanics' Bank v. New York & N. H. R. Co., 3 Kern. [13 N. Y.] 599, and New York & N. H. R. Co. v. Schuyler, 17 N. Y. 592. The action in the first case was founded on one of these certificates, and presented the question, directly, raised in the present case upon the demurrers. It was also necessarily involved in the second case, and the principle of the first again affirmed. According to our view of the practice of the federal courts in similar and analogous cases, these courts follow the decisions of the highest state judicial tribunal, the question involved being one essentially of local law; and without, therefore, expressing any opinion upon the law of the case, we shall, in pursuance of the decision in the cases above referred to, direct judgment to be entered upon the demurrers in favor of the defendants.

IMBERT (UNITED STATES v.). See Case No. 15,438.

IMBRIE (DENNISTON v.). See Case No. 3,802.

### Case No. 7,011.

IMHAEUSER v. BUERK.

[Cited in Parks v. Booth, 102 U. S. 96. See 101 U. S. 647.]

IMHAEUSER (BUERK v.). See Cases Nos. 2,106–2,108.

IMLAY (GREGERSON v.). See Case No. 5,795.

### Case No. 7,012.

IMLAY v. NORWICH & W. R. CO.

[4 Blatchf. 227; 1 Fish. Pat. Cas. 340.] [1]

Circuit Court, D. Connecticut. Oct., 1858.

PATENTS—EXPIRATION BEFORE HEARING—ACCOUNT ORDERED—CONSTRUCTION OF PATENTS—IDENTITY OF TWO DEVICES.

1. Where a patent expires after the filing of a bill in equity founded on it, and before the hearing, the court can order an account and grant other relief, although no injunction can be awarded.

[Cited in Perry v. Corning, Case No. 11,003; Vaughan v. East Tennessee, V. & G. R. Co., Id. 16,898; Gordon v. Anthony, Id. 5,605; Atwood v. Portland Co., 10 Fed. 283.]

[1] [Reported by Hon. Samuel Blatchford, District Judge, and by Samuel S. Fisher, Esq., and here compiled and reprinted by permission. The syllabus and opinion are from 4 Blatchf. 227, and the statement is from 1 Fish. Pat. Cas. 340.]

2. The invention of Richard Imlay, covered by his patent of September 21st, 1837, for an "improvement in the mode of supporting the bodies of railroad cars and carriages," was two cylinder plates, male and female, one within the other and acting in combination, one attached to the truck and the other to the car body, substantially as set forth in the specification, whereby the truck and carriage were combined to give support to all kinds of eight-wheeled railroad car bodies, upon springs, or in any other form or size, whereby the application of the same essential means was substantially made, to obtain the same object.

3. The use and application of the two cylinder plates, one within the other, to give substantial support to the railroad carriage, is the use and application of the essential means discovered by and patented to Imlay, and is a violation of his patent, even though other means are used, in connection with them, to give the required support, and such other means better accomplish the object.

4. Patents are to be construed liberally and are not to be subject to a strict and rigid interpretation.

[Cited in Hamilton v. Ives, Case No. 5,982; Atwood v. Portland Co., 10 Fed. 285.]

[Cited in Burke v. Partridge, 58 N. H. 351.]

5. Where, in two devices, the end to be accomplished is the same, and the substantial means to accomplish the end are the same, the two devices are identical, though one may accomplish the end more effectually than the other.

[This was a bill in equity to restrain the defendants from infringing a patent [No. 389] for an "improvement in the mode and means of supporting the bodies of railroad cars and carriages, and connecting them with the truck," granted to complainant [Richard Imlay], September 21, 1837, and extended for seven years from September 21, 1851. The claim of the patent was as follows: "What I claim as my invention is the application of the vibrating cylinder-plates, as set forth in the specification, whereby to support all kinds of eight-wheeled railroad carriage-bodies upon springs, or in any other form or size, whereby the same principle is used to obtain the same object."] [2]

Ralph I. Ingersoll and George Gifford, for plaintiff.

Roger S. Baldwin and Edward Perkins, for defendants.

INGERSOLL, District Judge. Exception has been taken by the defendants, that, as an injunction cannot now be ordered, the account and the other relief sought by the bill cannot be granted; that the ordering of the account, and the granting of the other relief, are ancillary to the granting of the injunction; and that an account cannot be ordered, unless an injunction is also ordered. The patent act of July 4th, 1836 (5 Stat. 124), in its 17th section, provides, that all actions, suits, controversies, and cases arising under any law of the United States granting or confirming to inventors the exclusive right to their inventions and discoveries, shall be originally cognizable, as well in equity as at law, by the circuit courts of the United States. And it has been expressly decided by Judge Grier, in a case before him, on the Sickels patent, that, when the patent has expired between the time of the filing of the bill and the hearing an account can be ordered and other relief granted, though, on account of the expiration of the patent, an injunction to restrain the future use cannot issue.[3]

[2] [From 1 Fish. Pat. Cas. 340.]

[3] The case referred to is that of Sickels v. Gloucester Manufacturing Co. [Case No. 12,841], decided by Mr. Justice Grier, in the circuit court for the district of New Jersey, at the September term, 1856. In his opinion in that case, Judge Grier says: "It is contended that courts of equity entertain jurisdiction of patent and copyright cases only for the purpose of injunction; that the equity for the account is strictly incident to the injunction; and that, therefore, if an injunction be refused, or for any reason cannot be decreed, an account cannot be given, but the plaintiff must resort to a court of law. This proposition may be conceded as a correct statement of the general rule, as settled in England. See Adams, Eq. 219; Hind. Pat. 361; Baily v. Taylor, 1 Russ. & M. 73. This doctrine had its origin in the case of Jesus College v. Bloom, 3 Atk. 264, and 1 Amb. 54, as applied to bills to restrain waste; but, since that time, the exceptions to the rule have become so numerous, that the rule can hardly be recognized as existing. The bill needs only to pray a discovery for the purpose of account, and it will be sustained for the account only. See 2 Eden, Inj. (by Waterman) 245. The proposition, it is said, cannot be maintained, that a court of equity will not interfere to direct an account when indebitatus assumpsit will lie at law. Nor is the converse of the proposition true, that equity will decree an account in all cases where an action for money had and received, or indebitatus assumpsit, may be brought. But, whenever the subject-matter cannot be as well investigated in those actions, a court of equity exercises a sound discretion in decreeing an account. See Corporation of Carlisle v. Wilson, 13 Ves. 276 et seq. As it appears, in this case, that, in order to ascertain the extent of the plaintiff's damages, it might become necessary to have a discovery and account of profits from saving of fuel by using his invention, I see no good reason why the court might not retain jurisdiction of the case for that purpose, even on the principle of the English cases. The jurisdiction of the court ought not to depend on the accident of the date of its decree. If, in this case, the decree were dated on the 19th of May, 1856, the jurisdiction of the court could not be doubted, while it is challenged as impotent to give any decree on the 21st of the same month. If the complainants are able to sustain their case on the other points, and it was absolutely necessary, to sustain our decree, that an injunction form a part of it, I would order the decree to be entered nunc pro tunc, as of the date of the 19th of May last. The delays of a court of chancery should not be suffered to operate as a bar to the complainants' suit. But the courts of the United States have their jurisdiction over controversies of this nature by statute, and do not exercise it merely as ancillary to a court of law. The 17th section of the patent law of 1836 ordains, that 'all actions, suits, controversies and cases arising under any law of the United States granting or confirming to inventors the exclusive right to their inventions or discoveries. shall be originally cognizable, as well in equity as at law, by the circuit courts of the United States.' Besides this general and original cognizance or jurisdiction over the whole subject-matter, a special power is conferred on the circuit courts to grant injunctions. Having such original cognizance of these controversies, the courts of

The validity of the patent is not questioned by the defendants. They admit, that the thing patented was new and useful, and that the patent secured to Imlay that which it purported to secure to him. Only that part of the bill is denied, which charges that the defendants are using and have used the device, the exclusive right to use which was secured to Imlay by the patent.

Two questions, therefore, are presented for determination: 1. What does the patent purport to grant and secure to Imlay? 2. What do the defendants use? And, having determined these two questions, then this further question will be presented: Is the device used by the defendants, or any one of the devices used by them, substantially like the device or invention secured to Imlay, or any substantial portion of the same?

The invention of Imlay was designed to afford a new and improved mode of supporting the bodies of eight-wheeled railroad cars upon the trucks on which they are placed; to supply a more safe and useful connection between the truck and the car body than had before been known, by the support which the invention would afford to such connection; to more effectually, usefully and safely unite the two—the truck and the car body—into one, for the use for which the car was designed, the transportation of passengers and freight; to effectually ensure the keeping of the car body on the truck, in its proper position, by the support provided; while, at the same time, the car, composed of the body and trucks, could move with facility and ease, upon the track of the road, as desired. The support for the car body required, was a support while the car was in motion; and the design of the invention was, to give such support, to keep the car body on the truck safely, securely, and in proper position, while the car was in motion. The support particularly required was a longitudinal and lateral support. Without a longitudinal support, there would be no sufficient protection for the carriage to remain on the truck in proper position, either in the forward or backward movements of the car, especially in the case of a collision, or when it should meet with any obstruction. Without a lateral support, there would be no sufficient safeguard to protect the carriage from being thrown off, or turned over on the side. A vertical support was also required. But such vertical support would be of no sufficient use in a car moving at a rapid rate of speed, unless there was both a longitudinal and lateral support; and the object of the patentee, in the invention which he made, and which he described in his specification, was to afford support and protection in these several particulars. By such invention, any movement was allowed in turning curves, and also a complete rotary movement, if desired.

The essential means used to accomplish the desired result, and to afford the support required and intended, in the particulars above stated, are two cylindrical plates, one placed above and within the other, in the middle of the width of the car, at or near each end of the car, one strongly confined and fastened to the carriage, the other strongly confined and fastened to the truck, and which cylindrical plates, being so applied, the one entering the other to a sufficient depth, afford the support desired and intended, without the aid of any other instrumentality.

The specification describes how, by these means, the required support in the particulars above-named is given, and the desired result is obtained, without any aid from any other instrumentality; and the description is intended to show how, by these means, the support in the particulars above-named can be effectually afforded; not only how it can be afforded in one of the particulars named, but in all of them; not only how danger is guarded against, and safety secured from the vertical pressure, but also how, from the longitudinal and lateral pressure.

A hollow round cast-iron bed-plate is made, two feet in diameter, more or less, flat upon the bottom, and of sufficient thickness, for strength, to support the weight which it is intended to sustain. It has an upright rim projecting upwards all around its periphery, two inches high more or less, and about one inch thick. The bottom of this bed-plate is turned, upon the inside, flat or level, and the top edge of the rim horizontal and true, and its inner periphery vertical and smooth. A top plate of the same diameter is made, with a rim, projecting downwards, of nearly the same thickness as that of the bed-plate rim, but not quite so deep. This is turned into the exterior rim, so as to make nearly a close fit. It has a flange projecting sufficiently to cover the exterior rim of the bed-plate, the under side of which is turned smooth, so as to correspond to the top edge of the under rim. The interior of the top plate is made convex, projecting downwards from the rim, towards the centre, and about one-sixteenth of an inch deeper in the finish than the rim of the bed-plate, and is all turned smooth upon the inside, and the centre is made to bear upon the centre of the bed-plate, upon a surface of four inches in diameter, more or less. Upon this centre the whole weight of the car body and load rest, while, at the same time, the bed-plate

the United States do not, in all cases, require a verdict at law on the title, before granting a final injunction, or concede a right to either party to have every issue as to originality or infringement tried by a jury. Exercising our jurisdiction in these controversies, not by assumption for a special purpose only, or as ancillary to other tribunals, but under plenary authority, conferred by statute, the technical reasons which compelled the English chancellor to refuse a decree for an account where he could not decree an injunction, can have no application. This point is, therefore, overruled."

can vibrate or revolve, under the cap-plate, sufficiently for all of the curves and crossings of the road, or can make an entire revolution, if desired. The bed-plate is made fast upon the centre of the truck. The cap-plate is made fast to the carriage body. The centre of the cap-plate being made a grain deeper than the height of the exterior rim, the flange of the top plate is left free from the rim of the bed-plate, except when the cap is out of level, at which time the rims gripe each other, and thus prevent its being tilted out of the bed.

It will thus be seen, that, by the application of these essential means, as described, a mode of supporting eight-wheeled railroad car bodies on their trucks was adopted; that, by the connection made by these means, a support was given to the carriage, to keep and hold it in its proper and desired position on the truck; that the support and protection afforded was a longitudinal one, when the car was moving in a forward or backward direction, or when, by collision or any other cause, force was applied to it longitudinally—a lateral one, when turning curves, or when the car, from any cause, received a lateral or side direction—and a vertical one; that a vertical, longitudinal, and lateral safeguard against danger was provided, which was new and useful. And the patent secured to the patentee the exclusive right, during the existence of the patent, to the use and application of these essential means described — two cylinder plates, male and female, one within the other, and acting in combination, one attached to the truck and the other to the car body, substantially as set forth in the specification whereby the truck and carriage were combined, to give support to all kinds of eight-wheeled railroad car bodies, upon springs, or in any other form or size, whereby the application of the same essential means was substantially made, to obtain the same object.

The devices which the defendants use and apply, to connect their car bodies with the trucks, and to give support vertically, longitudinally and laterally, to the carriage while on the truck, and to keep it in its proper position, and to secure it from being detached from the truck, and to enable the whole to work easily, usefully, safely and securely, are the ordinary king-bolt, such as is used to connect the carriage to the forward wheels in the common road wagon, connecting the carriage with the truck, and passing through the centre of the two cylinder plates hereinafter mentioned; side bearings, near the sides of the carriage, resting on the truck, and which are intended as a vertical support to the carriage; and two cylindrical plates, male and female, one within the other, and acting in combination, one strongly attached and fastened to the truck, the other strongly attached and fastened to the carriage in the middle of the width thereof, and at or near each end. The cylindrical plates used by the defendants, they call "guard collars" for the king-bolt.

It is claimed that these devices, as they are used and applied on the railroad cars of the defendants, are intended to be so arranged and adjusted that the whole vertical support is to be afforded by the side bearings, and the whole longitudinal and lateral support by the king-bolt, or the king-bolt and side bearings combined; and that the two cylinder plates are so arranged and applied that they do not touch each other, and, therefore, do not afford any vertical, longitudinal or lateral support to the carriage while on the trucks; that they are mere guard collars, useful only in case the king-bolt should get out of place, or should, from any cause, not perform its proper function, to hold together, in their proper places, the carriage and the truck, and to give to the carriage the necessary longitudinal and lateral support.

In the practical operation of the devices, as applied and used by the defendants on their cars, it frequently occurs, from the wear of the side bearings, or from the manner in which the devices are adjusted, that the interior of the top cylindrical plate, which projects downward into the cylindrical bed plate towards its bottom, is made to bear upon the bottom of the bed-plate, on the inside thereof, so that the weight of the car body and load rests upon it, either wholly or in part. If, for any cause, the side bearings cease to afford any vertical support, then the whole vertical support is afforded by the cylindrical plates; and it frequently occurs, from the wear of the king-bolt, or from some defect in it, or from an adjustment of the several devices, that the inner cylindrical plate does actually press upon the outer one, on the inside, both longitudinally and laterally, and that thus, by the mode in which they are applied, they do actually afford a longitudinal and lateral support; and whenever, from any cause, the king-bolt and the side bearings become useless, the cylinder plates, as applied are the only essential means which afford the entire vertical, longitudinal and lateral support.

But I do not dispose of the case upon this limited view; for the use and application of the two cylinder plates, one within the other, as the defendants claim they are used and applied on their eight-wheeled railroad cars, would be in violation of the rights secured to the plaintiff by his patent. Such use and application would give substantial support to the railroad carriage, and would be the use and application of the essential means discovered by and patented to the plaintiff. It is not necessary that such use and application should be the only essential means by which the support is afforded, to make such use and application an infringement of the plaintiff's patent. If it were, all patents could be infringed with impunity, by adding something to the means patented. If they

are an essential means, though other means are used in connection with them, to give the required support, the patent has been infringed, even though the object or result to be secured by such other means in connection, is better accomplished.

The application of the cylinder plates, one within the other, as the defendants claim they are applied by them, is for some purpose. Before the invention of the plaintiff, such application to railroad cars had never been known; and the general use of such application, since the invention of the plaintiff, in one form and another, on all eight-wheeled railroad cars, on most, if not all, of the railroads in the country, shows that such use was, and is, for a highly useful purpose. It was, and is, to accomplish a desirable result. The defendants say, that the cylinder plates, as used and applied by them, are merely the guard collar for the king-bolt, which king-bolt affords the longitudinal and lateral support to the carriage. Upon this hypothesis, they are used and applied as an aid to the support afforded—as an essential means to make the support effectual—as an assistant to make the support secure; and it has already been shown, that it is not necessary that the way in which they are applied should afford the sole support rendered, to make the use and application an infringement of the patent. They are means used, the more effectually and securely to keep and hold in proper position the carriage on the truck. The object of support, and the meaning of the word, as it is used in the patent, were to keep and hold the carriage safely and securely in such proper position; and the devices used by the defendants are for that purpose. None of them are for any other purpose. The cylinder plates, as used by them, one within the other, are for that purpose, and are effective in aid of the accomplishment of such purpose, whether called a guard collar for the king-bolt, or called by any other name. Their office is, to securely and safely keep and hold, without any other instrumentality, the carriage in its proper position on the truck, whenever, from any cause, the king-bolt and side bearings are inefficient for that purpose. When, from any cause, the king-bolt and side bearings do not perform their office, they are the only device to keep the carriage in such proper position, and to afford it the necessary vertical, longitudinal and lateral support; and it is not necessary, when the cylinder plates have been used and applied, as they have been used and applied by the defendants, that the king-bolt and side bearings should be inefficient before there can be an infringement of the patent. The patent may be violated, though the inner cylindrical plate may not actually press upon the outer one.

Patents are to be construed liberally, and are not to be subject to a strict and rigid interpretation. The rights secured are to be protected against any substantial violation. Formal and subtle differences are to be disregarded. Where, in two devices, the end to be accomplished is the same, and the substantial means to accomplish the end are the same, the two devices are identical, though one may accomplish the end more effectually than the other.

With this view of the case, there must be a decree in favor of the plaintiff, as prayed for, except as to that part of the prayer which seeks for an injunction to restrain a further use. As the patent has now expired, an injunction against a further use cannot be ordered.

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I. M. LEWIS, The (I—— v.). See Case No. 6,991.

IMPERIAL FIRE INS. CO. (TERRY v.). See Case No. 13,838.

IMPERIAL INS. CO. (CADY v.). See Case No. 2,283.

IMSAND (UNITED STATES v.). See Case No. 15,439.

INCA, The (SNOW v.). See Case No. 13,145a.

INCOME TAX, ASSESSMENT OF. See ASSESSMENT OF INCOME TAX, APPENDIX.

INCONIUM, The. See Case No. 6,995.

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## Case No. 7,013.

The INDEPENDENCE.

[9 Ben. 395; [1] 55 How. Pr. 205.]

District Court, S. D. New York. March, 1878.

MORTGAGE—PURCHASE WITH NOTICE—STATE LAW.

1. Under the act of the legislature of New York passed April 28, 1864 (Laws N. Y. 1864, p. 993), in regard to filing in the office of the auditor of the canal department a mortgage on a canal-boat, and refiling a copy, no filing is necessary, after the original filing of the mortgage and the first filing of the copy, with the proper statement, in order to make the mortgage a continuing security, and there need not be a subsequent refiling.

2. The act of 1864 has never been amended so as to require a copy of the mortgage, with a statement of interest, to be again filed within thirty days next preceding the expiration of each and every term of one year after the filing of the mortgage.

3. The provisions of the act of the legislature of New York passed April 29, 1833 (Laws N. Y. 1833, p. 402), so far as they apply to canal-boats, are superseded and replaced by those of the act of 1864; and the filing of mortgages on canal-boats depends wholly on the act of 1864, and not at all on the act of 1833.

4. A person is not a purchaser of a canal-boat in good faith, within the meaning of the act of 1864, when he purchases with notice of a prior mortgage on the boat.

5. A person who has notice enough to put him on inquiry is bound to make inquiry, and will be held to have had notice of everything to which such inquiry would have reasonably led.

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[1] [Reported by Robert D. Benedict, Esq., and Benj. Lincoln Benedict, Esq., and here reprinted by permission.]

In admiralty.

Beebe, Wilcox & Hobbs, for libellant.
M. M. Budlong, for claimants.

BLATCHFORD, District Judge. On the evidence I am of opinion that there is a considerable sum of money still due to E. Remington & Sons on the mortgage, and that the notes given to them in March, 1874, were not given in settlement or discharge of the mortgage. Prima facie, the claimants are entitled to retain possession of the canal-boat under the mortgage.

The provisions of the act of April 28, 1864 (Laws N. Y. 1864, p. 993), in regard to filing in the office of the auditor of the canal department a mortgage on a canal-boat, and refiling in the same office a copy thereof, with a statement of interest, within thirty days next preceding the expiration of one year from the original filing of the original mortgage, are the same as the provisions in the act of April 29, 1833 (Laws N. Y. 1833, p. 402), in regard to filing, in the office of a register, a county clerk, or a town clerk, a mortgage on goods and chattels, and refiling in the same office a copy thereof, with a statement of interest, within thirty days next preceding the expiration of one year from the original filing of the original mortgage. It was the law of this state, under the act of 1833 (Newell v. Warren, 44 N. Y. 244), that no filing after the original filing of the mortgage and the first filing of the copy, with the proper statement, was necessary in order to make the mortgage a continuing security, and that there not be a subsequent refiling. The same rule must apply to the canal-boat statute. By the act of May 13, 1873 (Laws N. Y. 1873, p. 767), the act of 1833 was so amended as to require a copy of a mortgage on goods and chattels, with a statement of interest, to be again filed within thirty days next preceding the expiration of each and every term of one year "after the filing of such mortgage." The construction in Newell v. Warren, made in 1870, was thus recognized, but no similar amendment was made to the act of 1864. In the present case the act of 1864, as thus construed, was complied with.

It is urged, for the libellant, that it was necessary, in addition, to file the mortgage, and renew it by refiling, in accordance with the act of 1833, because, although the mortgaged property was a canal-boat, it was also goods and chattels, and the mortgagor resided, when the mortgage was executed, in this state, in the town of Mohawk, Herkimer county. I am not referred to any decision of the courts of the state directly upon the point, but the general practice, I understand, has been to file mortgages on canal-boats only in the office of the auditor of the canal department. The act of 1864 was a substitute for the act of April 15, 1858 (Laws N. Y. 1858, p. 396). The act of 1858 provided that any person having any lien or incumbrance on any canal-boat, by a chattel mortgage, "duly filed," could file in the office of the auditor a statement of the date, circumstances, nature, and amount of his claim, with an affidavit thereto; and that "all claims and liens by chattel mortgage, a statement of which shall be filed as herein provided, shall, from the time of such filing, have preference and priority over all other claims and liens, in the same manner and to the like extent of claims and liens arising on chattel mortgages filed and entered in towns where the mortgagor resides, but shall not have any priority over existing liens and claims." The act of 1858 was based on the idea of a double filing. It was only where a chattel mortgage had been "duly filed"—that is, filed under the act of 1833—that the statement and affidavit could be filed in the office of the auditor, under the act of 1858. When both filings had taken place, then, under the act of 1858, the lien by the mortgage was to have preference and priority over all other claims on the canal-boat, except existing claims, to the same extent that claims under mortgages on other property, filed under the act of 1833, would have, under that act, as to such other property, preference and priority. In other words, as to canal-boats, there was made necessary, by the act of 1858, a double filing, and, until it had taken place, mortgages on canal-boats could not acquire the standing which mortgages on other goods and chattels acquired by a compliance with the act of 1833 alone. Then came the act of 1864, superseding the act of 1858 and its provisions, and providing for a single filing in the case of canal-boats, and that in the office of the auditor, on the same plan, as to filing and refiling, as that of the act of 1833 in regard to other goods and chattels. Still more, the act of 1864 went on to provide as follows: "All claims and liens by chattel mortgage, which shall be filed as herein provided, shall, from the time of such filing, have preference and priority over all other claims and liens, but shall not have any priority over existing claims and liens." This enactment strikes out the words, "in the same manner and to the like extent of claims and liens arising on chattel mortgages filed and entered in towns where the mortgagor resides," and manifests an intention, in connection with the other provisions of the act, to dissever the filing of mortgages on canal-boats from the act of 1833, and leave them to depend wholly on the act of 1864. It is enacted, that, when they are filed, as provided in the act of 1864 (which is a filing in the auditor's office alone, and not, as in the act of 1858, a filing of something in the auditor's office in conjunction with a previous filing of something else elsewhere), they shall, from the time of such filing in the auditor's office, have preference over all claims but existing claims, and, of

course, preference over the claims of subsequent purchasers and mortgagees. If some other filing elsewhere is necessary, effect cannot be given to the enactment that the filing under the act of 1864 gives the preference and priority. This makes the provisions of the act of 1833 repugnant to those of the act of 1864, so far as canal-boats are concerned, and makes it necessary to hold, that the provisions of the act of 1833, so far as they apply to canal-boats, are superseded and replaced by those of the act of 1864.

E. Remington & Sons complied, therefore, with all the provisions of law required to make their mortgage a valid continuing security, as against the libellant, even if he was a purchaser in good faith. A person is not a purchaser in good faith, within the meaning of the statute in question, when he purchases with notice of the prior mortgage. Hill v. Beebe, 13 N. Y. 556. In the present case, the libellant claims to have purchased the boat from his mother, who was the owner and the mortgagor. He testifies that he asked her if there were any claims against the boat; that she said the parties of whom she bought the boat were owing her; and that she said nothing about having given a mortgage on the boat. The mortgage was given to E. Remington & Sons for the purchase money of the boat, when the libellant's mother bought it. The libellant's father and mother testify to the same conversation between him and his mother. After such conversation the libellant went to the auditor's office at Albany, and enquired if there were any claims against the canal-boat. The person in charge took down a book, and, after consulting it, replied that there had not been since 1874. The libellant left without inquiring further. All this was sufficient notice to the libellant. He was bound to inquire further. He had notice that the persons who sold the boat to his mother had had a mortgage on the boat, and that such mortgage had been filed in the auditor's office, and that his mother claimed that the mortgage had been paid. He was bound to seek out those parties, whose names were on the book, which, through the clerk, he was consulting, and ascertain from them whether they regarded the mortgage as paid. If he had done so, he would have learned that the mortgage was, in fact, not paid. Jackson v. Post, 15 Wend. 588. His conduct shows that he knew he was bound to inquire, and that he was advised there had been a mortgage filed, but he evidently relied on the view that the mortgage had run out because not refiled from year to year. He had notice enough to put him on inquiry, and he was bound to follow up his inquiry by going to E. Remington & Sons, who were stated in the record before him to be the mortgagees. This was notice to him of everything to which such inquiry would have reasonably led. Carr v. Hilton, [Case No. 2,437]. The libel is dismissed, with costs.

## Case No. 7,014.

The INDEPENDENCE.

[2 Curt. 350;[1] 3 Liv. Law Mag. 490; 18 Law Rep. 151.]

Circuit Court, D. Massachusetts. May Term, 1855.

SALVAGE—EVIDENCE—EXCLUSION OF INTERESTED WITNESSES—CONTRACT AS BAR TO SALVAGE.

1. A vessel, dismasted in a gale, and lying at anchor on a bank in the open sea, is in a condition to have a salvage service rendered.

[Cited in Cheeseman v. The Two Ferryboats, Case No. 2,633; Baker v. Hemenway, Id. 770.]

2. In the admiralty, the state laws of evidence are not applied; and interested witnesses are excluded except in certain cases of necessity.

3. A contract to pay a quantum meruit for an attempt to save property, whether successful or not, is inconsistent with a claim for a salvage compensation; but any thing short of this, though it may affect the amount of the compensation, does not change the nature of the service.

[Cited in Adams v. The Island City, Case No. 55; Coffin v. The John Shaw, Id. 2,949; Collins v. The Fort Wayne, Id. 3,012; Pope v. The Sapphire, Id. 11,276; Bowley v. Goddard, Id. 1,736; The Louisa Jane, Id. 8,532; Harley v. Four Hundred and Sixty-Seven Bars of Railroad Iron, Id. 6,068; The Williams, Id. 17,710; The Silver Spray, Id. 12,857; The Marquette, Id. 9,101; Potomac Steamboat Co. v. Baker Salvage Co., 123 U. S. 49, 8 Sup. Ct. 37.]

4. Where the service rendered is, in its nature a salvage service, it will not bar salvage compensation to show that the service was undertaken at the request of the owner, and upon a promise to pay the bill if thought reasonable, otherwise to refer the claim.

[Cited in The Camanche v. Coast Wrecking Co., 8 Wall. (75 U. S.) 475.]

5. It is not blamable to refuse to interpose to save property without a salvage compensation, or a contract fixing its amount.

6. In this case $7,500 allowed.

[This was a libel by the master, owners, and crew of the steamer city of Boston, against the ship Independence (Hemmenway, claimant), for salvage.]

CURTIS, Circuit Justice. The ship Independence, belonging to Boston, of the burden of 827 tons, sailed from that port on the 28th day of December, 1853, bound to Valparaiso, and while in Massachusetts Bay was struck by a violent gale of wind, which began about twelve o'clock of the night after the ship sailed. At three o'clock p. m. of Thursday, the 29th day of December, the master cut away the foremast, and let go the larboard anchor, and she brought up in ten fathoms of water. In about ten minutes, a sea struck her, which caused her to break adrift. She

[1] [Reported by Hon. B. R. Curtis, Circuit Justice.]

continued to drift, but slowly, till seven o'clock, when the master cut away her main and mizzen masts, and let go the starboard anchor, and she brought up in about twenty fathoms of water. Her hull was uninjured. The place where she then lay was a bank, well known to fishermen and navigators, which lies north by west from Race Point, the extreme end of Cape Cod, and distant from five to eight miles therefrom. The Independence lay at anchor in that place until about twelve o'clock of the night of Sunday, the first day of January, 1854, when she was taken in tow by the steamer City of Boston, and brought to Boston, where she arrived between nine and ten o'clock on Monday, January the second. The master of the steamer, for himself, and the owners, officers, and crew of the steamer, entered his action for salvage in the district court; and the cause was removed into this court, by a certificate that the district judge is related to the libellant.

Three questions have been argued at the bar. First, whether this was in its nature a salvage service. Second, if so, whether it is to be compensated according to the ordinary principles which are applied by the marine law to such cases, or upon the footing of a quantum meruit for the work and labor. Third, what, upon either view which the court may adopt, is to be the amount of the compensation.

Most of the principles upon which the first two questions depend, were quite fully stated in the case of Hennessey v. The Versailles [Case No. 6,365]. I cannot doubt that the Independence was in a condition to have a salvage service rendered to her. She was dismasted, lying helpless at her anchors, in the open sea, exposed to the winds and seas on every quarter except the south and southwest. The place was a bank, or shoal ground, and from the account given by her master of his drifting between three and seven o'clock, and the depth of the water when he let go his first anchor, and the increased depth where she was finally brought up, the latter place must have been near the outer edge of the bank. There was such depth of water around the bank, that there was very little probability of being able to hold on if she had drifted a short distance further to the eastward or southward. There was quite a strong current across the bank at each tide, so that, in point of fact, the chains were fouled while she lay there, and there was hazard of fouling her anchors at each turn of the tide in moderate weather, or upon a change of wind. And although the anchors if fouled, might be sighted and cleared, yet considering that it actually occupied about four hours to get one of the anchors, when the ship was taken in tow by the steamer, and that the other was slipped, and considering also that the ship was lying in such a place on the bank that she had very little ground to spare while sighting her anchors, I think the liability to foul them a circumstance of some importance. At that season, very violent gales are not uncommon in that place, and a continuance of good weather is hardly to be anticipated. There was some danger, though I do not think it very great, of being run down in the night, especially if the weather should be thick. The fact that the master agreed to pay four hundred dollars to the master of a passing schooner, for an attempt to get a letter to Boston, advising the claimant of his condition, and that the claimant and some of the underwriters took such immediate and energetic, and manifestly, in any view, expensive measures, for the relief of the ship, leave no doubt that they considered her subject to considerably more than the ordinary dangers of the sea. Mr. Caleb Curtis, who was examined by the claimants as an experienced mariner and underwriter, though he says he does not think the ship was in much danger, also says that he thinks he should have been willing to insure her to the extent of $10,000 at five per cent.; a premium which must greatly exceed what he would have asked for an ordinary risk of such a vessel at and from Cape Cod to Boston.

To be in a condition to have a salvage service rendered, a vessel must be subject to something more than the ordinary perils of the sea; but a vessel in the condition I have described, is undoubtedly susceptible of having such a service rendered. Hennessey v. The Versailles [supra]; The Reward, 1 W. Rob. Adm. 174; The Princess Alice, 3 W. Rob. Adm. 138. There is a wide range between liability to ordinary perils, and a condition in which the perils are so great that unaided escape is impossible, or nearly so. I do not think this vessel was in either of these extreme cases. She was manifestly subject to marine perils, differing in kind and degree from the ordinary perils of navigation. To use an expression of Doctor Lushington, in a case somewhat like this, it was exceedingly expedient that she should be speedily relieved. But her condition, if not speedily relieved, was not by any means desperate; it was not improbable she might relieve herself, by clearing away the wreck of her masts, and getting up jurymasts, before she would strike adrift; and it was still more probable that she would receive effectual assistance from others. I view the case therefore as free from all doubt upon the first question, though I do not consider the peril of the loss of the property, which the steamer averted by its interposition, to have been of so marked a character, or the chance of relief therefrom by other means, to have been so small, that I can declare the service rendered, one of great magnitude.

Upon the second question, the answer pleads in substance, that Francis Bacon, who was president of the China Insurance Company, who were underwriters on the Independence and her cargo, applied to Mr.

Toby, one of the owners of the City of Boston, on Sunday morning, to hire that steamer to tow the Independence to Boston; that Toby replied he would ascertain if she was in a condition to go; that the claimant and Bacon met him at the steamer, and were informed by him that the vessel was in a condition to go, but he did not like to send her, though by her policies she had liberty to tow vessels, lest by going, she might vitiate the insurance on her cargo; whereupon, Bacon agreed for his company and the others interested, to insure her cargo while engaged in the service; and Toby, having expressed a doubt whether the steamer and her owners would not be held responsible for the non-delivery of her cargo on Monday morning, the claimant, personally, agreed to indemnify the owners of the steamer from such claims, and Toby expressed himself satisfied, and said the steamer might go; that thereupon Bacon inquired what amount he should charge for this service, and Toby replied, "I cannot name the sum, for I do not know how long she will be out, nor what she may have to do." To this Bacon rejoined, "Well, Mr. Toby, on the return of the steamship you shall send us your bill, and if we think it is too much, the sum we are to pay shall be left to disinterested parties;" to which Toby answered, "Well, I agree to that."

In support of these allegations in bar of the claim for salvage, the claimant has produced the depositions of Mr. Bacon and of John H. Pierson, who was present at the interview mentioned in the answer; a correspondence between the claimant and Mr. Toby has also been put into the case. I cannot attach much importance to this correspondence, post litem motam. Each party had their own views both of what had in fact taken place, and of the legal obligations which arose therefrom; and without questioning the sincerity or disposition to do justice, of either of them, it is the duty of the court to come to its own conclusions upon the pleadings and proofs, and to declare the law applicable thereto. Mr. Bacon being interested, as an underwriter on the vessel and cargo, his deposition is not admissible in evidence. Though the thirty-fourth section of the judiciary act (1 Stat. 92) has been held by the supreme court of the United States to adopt the state laws concerning evidence, that section is applicable only to the trials of civil cases at the common law, and the statute of Massachusetts, concerning interested witnesses, can have no effect upon the rules of the admiralty law, which exclude interested witnesses, except in certain cases where they are admitted ex necessitate. This testimony of Mr. Bacon is not within the exception, and it must be excluded. The remaining evidence is that of Mr. Pierson. He states that after the parties met at T wharf, "Mr. Bacon asked Mr. Toby if the steamer could go down and tow up the ship Independence from where she was. There was some demur on the part of Mr. Toby, on account of the insurance of the cargo of the steamer and the steamer. Mr. Bacon said he would insure the cargo of that steamer and that vessel, so far that Mr. Toby was satisfied, and said, 'Let the vessel go.' Now I believe I can give you the very words. Mr. Bacon said, 'Mr. Toby, what will you let the steamer go for?' Mr. Toby said he could not name a price, or would not name a price, for he did not know the nature or extent of the service, or something implying that, at any rate; I think that was the very words. Shortly, a few moments after that, Mr. Bacon told Mr Toby he wished the boat should go down for the ship Independence, and as he could not name a price, when his bill was rendered for services, if it was too much, he would refer it to impartial persons. Mr. Toby said, 'Well.'"

Upon these allegations and proofs, I cannot hold that the claim for a salvage compensation, regulated by the principles of the marine law, is barred. It is incumbent on the claimant, in this case, to plead and prove, such a contract, as displaces the right to such a compensation. In my judgment, a contract, to be paid at all events, either a sum certain, or a reasonable sum, for work, labor, and the hire of a steamer or other vessel, in attempting to relieve a vessel in distress, without regard to the success or failure of the efforts thus procured, is inconsistent with a claim for salvage; and when such a contract has been fairly made, it must be held binding by a court of admiralty, and any claim for salvage disallowed. A salvage service is rendered when property is saved, which is in danger of being lost on the high seas, or when wrecked or stranded, on the shore of the sea (The Emulous [Case No. 4,480]; Bearse v. Three Hundred and Forty Pigs of Copper [Id. 1,193]; The Centurion [Id. 2,554]); but an unsuccessful attempt to save property thus exposed to danger, does not constitute a salvage service, or any service recognized by the maritime law as a subject of compensation. I agree also with Judge Ware, that the right of the salvor is merely a right to proceed against the thing saved to obtain his satisfaction, and not a personal claim on the owner, unless he has, by taking possession of the thing saved, thereby rendered himself personally liable for the reward. The Emblem [Id. 4,434]. And I do not understand that the nineteenth of the admiralty rules was intended to change this law. When, therefore, the subject-matter of a contract, is a mere attempt to save property, and when the owner, or his representative, or both, become personally liable by the contract, to pay either an agreed sum, or a quantum meruit for the labor and service rendered, without regard to its results, the parties do not contemplate, nor engage in, a salvage service, but

quite a different service. I know of no reason which forbids parties, competent to contract, from fairly contracting concerning such a subject-matter; nor do I perceive how a court of admiralty can, after the property has been saved, set aside such a contract, and declare that a salvage service was performed. In The William Lushington, 7 Notes Cas. Adm. & Ecc. 361, the learned judge of the English high court of admiralty declared, that an agreement cannot convert that which was originally a salvage service, into one of a different nature. This may be true; but I do not perceive, why an agreement may not be of such a character that, the service performed under it never was a salvage service, though rendered in saving property exposed to perils of the sea. Indeed, we know that such is often the effect of an agreement; as in case of mariners and others, who by reason of their contract, sustain such relations to the property in peril, that their interposition is not deemed voluntary, but the result of their previous contract. And if third persons have, by a valid contract, stipulated for work and labor and the use of a vessel, in attempting to save property in peril on the sea, and that for these, payment shall be made, whether any thing is saved or not, such a contract is inconsistent, in its nature and objects, and the liabilities which grow out of it, with a salvage service. As Lord Stowell declared in the case of The Mulgrave, 2 Hagg. Adm. 77, it is a case of contract and not one of salvage. I do not intend to be understood, however, that a case in which a contract exists, may not also be a case of salvage. The parties may agree on the amount of a salvage compensation, or on the principles upon which it shall be adjusted; and such agreements, fairly made, no advantage being taken of ignorance or distress, are readily upheld by the courts. The Emulous [supra]; Bearse v. Three Hundred and Forty Pigs of Copper [supra]; The A. D. Patchin [Case No. 87]; The True Blue, 2 W. Rob. Adm. 176; The Henry, 2 Eng. Law & Eq. 564,—are instances in which this has been done. Nor do I intend to express any opinion on the question whether the admiralty has jurisdiction in rem, to enforce a contract for services in assisting a vessel in distress, which are not salvage services. See the opinion of Judge Conklin, The A. D. Patchin [supra]. What I decide is, that to bar a claim for salvage where property in distress on the sea has been saved, it is necessary to plead and prove a binding contract to be paid at all events for the work, labors, and service, in attempting to save the property, whether the same should be lost or saved. This is a bar. But any thing short of this, affects merely the quantum of the compensation, not the nature of the service. And I have been careful to state the opinion I hold on this subject, because it seemed to me that the whole doctrine had not, so far as I know, been explained in any one case, and some misapprehension concerning it, seems to have existed in the minds of the very intelligent gentlemen interested in this case, though I presume not in the minds of their learned counsel.

Now it is manifest, that in this case there was no express contract to pay for the use of this steamer, at all events, nor that what was contracted for was merely an effort to find and tow up the Independence. It is strongly urged, however, that this is fairly to be implied from what took place. It is suggested, that if Mr. Toby had it in his mind during the interview between himself and Mr. Bacon and the claimant, that he should or might claim a salvage compensation, it was his duty to have apprized them of such intention. But, bearing in mind that the nature of the service on which he was requested to send his steamer was, prima facie, a salvage service, and that it is incumbent on those who would change its character by a contract, to make their intention to do so known, and have the assent of the other party, it seems to me the argument really applies to the claimant and Mr. Bacon; and that if they had in mind not to allow a salvage compensation in case of success, but to pay for work and labor at all events, for an attempt to assist the ship, it was their duty to have made their views distinctly known to Mr. Toby, and to have allowed him to judge, whether he would, or would not, send the steamer upon such terms. I do not mean to be understood as intimating that there was any intentional suppression by either of those gentlemen, of any thing which was then thought to be material. I do not think there was. But if there was any failure, from any cause, to make the necessary stipulations, the consequences of that failure must rest on the party who needs their protection. It is true, that if the claimant and Mr. Bacon had gone far enough, clearly to apprize Mr. Toby that they did not wish to engage his steamer in a salvage service, but did desire to have the steamer make an effort to find and tow up the ship, and that for the work and labor performed, a quantum meruit would be paid at all events, whether the ship should be found or not, and whether the steamer should be able to do the work or not, and Mr. Toby, after understanding these views, had sent the steamer, without more, this would have amounted to such a contract as would have barred the claim for a salvage compensation to be adjusted according to the principles of the maritime law. But the evidence does not satisfy my mind that such were the facts. Nothing was said, by either party, concerning salvage compensation, and of course there was no direct explicit notice given to Mr. Toby, that the claimant intended to exclude the idea of such a compensation. Nor was what was said, in my

apprehension, inconsistent with such a compensation. Mr. Toby was requested to let the steamer "go down and tow up the Independence, from where she was." He assented. He was asked, "What will you let the steamer go for?" He replied, "He could not, or would not name a price, for he did not know the nature or extent of the service." Certainly, so far from assenting to a contract which should fix the character of the service, and change it from salvage to mere work and labor, he refused to contract at all, because he was ignorant of the nature and extent of the service desired. All he assented to was, that the steamer should go upon an enterprise which, prima facie, was a salvage enterprise. Some reliance was placed on the fact that, when Mr. Bacon finally requested to have the steamer sent, he told Mr. Toby that "when his bill was rendered for services, if it was too much, he would refer it to impartial persons," and Mr. Toby said "Well." But with the exception of the use of the word "bill," there is nothing in this even, apparently inconsistent with its being a salvage service and to be paid for as such; and to allow any considerable weight to the use of the word "bill," in a conversation between two merchants, and say that because it does not technically describe a claim for salvage, therefore none was intended, does not seem to me admissible. Some reliance was also placed upon the fact that Mr. Toby saw the letter, which Captain Baker took to the master of the Independence. Excluding Mr. Bacon's deposition, as I am obliged to do, I do not find evidence that Mr. Toby saw this letter; and if he had seen it, any inference which might be drawn from it concerning the intentions of the parties would be too remote to affect my judgment. Upon this part of the case I am obliged to come to the same conclusion as in the case of Hennessey v. The Versailles [Case No. 6,365]; and though I think it highly probable that Mr. Bacon and the claimant did not expect to pay an ordinary salvage compensation for the service, yet upon the proofs, I must declare that they failed to make a contract which can displace the claim for such a compensation.

The remaining question is, what amount of compensation is proper in this case? The steamer was one of a regular line, plying between Boston and Philadelphia, and had arrived in Boston on the Sunday morning, when applied for to go to the assistance of the ship. She was of the burden of 558 tons, and her officers and crew, all told, numbered twenty-three. There was on board, cargo belonging to different consignees, of the value of forty-three thousand dollars. The steamer was of the value of forty-one thousand dollars. There was not time to land her cargo, and it was put at risk in the enterprise. Mr. Bacon undertook, in behalf of the China Insurance Company and the other companies interested as underwriters on the Independence and her cargo, to indemnify the owners of the steamer against the risk of the cargo of the steamer. It does not appear that Mr. Bacon had authority to enter into this contract, nor that either of these companies ratified his act; and though he bound himself personally, if without authority, yet, his personal liability was not what was stipulated for. It is pleaded, but not proved, that the claimant agreed to indemnify the owners of the steamer against all claims of consignees, on account of delay in the landing of their merchandise, occasioned by the departure of the steamer for the ship. In point of fact no such claims appear to have been made, but there was some risk that they might be made. The promptness with which the service was entered on, and the sufficiency of the skill with which it was conducted to a successful result, are not contested. The time employed was about twenty-four hours. The season of the year, and the appearance of the weather when the service was undertaken, are to be considered. For though the weather was not decidedly bad, and proved, in the event, to be as favorable as would ordinarily occur in that locality at that season, yet it was somewhat threatening, and the steamer was worked through a rather heavy head beat sea, from Boston light to the ship, under more than her usual head of steam. The towage was performed without damage to the steamer, and, as I think, without any dangerous exertion of her power. Except in the passage of a boat from the steamer to the ship, for the purpose of putting a pilot on board, there does not seem to have been any unusual risk of life. This passage was made in the night, in threatening weather, the sea being quite rough, and owing to the masts and rigging cumbering the lee side of the ship, it was necessary to board on the windward side. This service required skill, and involved some danger, but I do not consider it, in the actual circumstances, to have been great. The labor of the officers and men was not severe, and save that one of them was wet in the boat, there was no exposure beyond what is usual in night service. As respects the benefit received by the claimant, the ship and cargo were of the value of $201,000. Her condition, as I have already declared, was one of distress and exposure to unusual perils, but it was far from being desperate, if not succored. And there is sufficient reason to believe that the necessary assistance could and would have been obtained, in season to relieve her, if this steamer had not gone to her aid. The steamer was insured by time policies, with permission to tow and assist vessels in all situations, so that she remained covered during this enterprise.

It appears that while the ship was lying at anchor, about six o'clock on Saturday evening, the steamer, bound inward, hailed her,

the master of the steamer went on board, and inquired if assistance was wanted. The master of the Independence informed him he did need assistance and inquired for what price the ship could be towed to Boston. The reply was that he had not authority to make any bargain; and the master of the Independence, saying he had sent to Boston by a schooner and expected the R. B. Forbes, steamer, down in the morning, declined to receive assistance without a price being fixed, and thereupon the steamer went on her way. It was urged, that this conduct of the master of the schooner deserves the reproof of the court and detracts from his merit as a salvor. If there had been any immediate and pressing danger to life, on board the Independence, it might be difficult to justify either the refusal to render or to receive effectual assistance, by reason of pecuniary claims asserted or denied. But, setting aside such danger, I am not able to perceive how I can attach blame, either to the master or owners of the steamer, by reason of these occurrences.

The marine law has, for sound reasons, determined that a salvage service is to be paid for as such, and upon principles of compensation more liberal, than those applied to work and labor of a different character. These rules are established, not for the benefit of individuals who may perform salvage services, but for the general advantage of all interested in property exposed to the perils of the sea, either as owners or underwriters. Their object is to hold out to those able to make extraordinary exertions to save property thus exposed, sufficient inducement to cause them to make the attempt. And while administering this system of law, I cannot attach blame either to owners, for failing to give their masters authority to waive the benefit of these principles, or to masters for refusing to waive that benefit. The master of the vessel in distress may, generally, acting on his own responsibility to all concerned, refuse assistance, to be paid for by way of indefinite salvage compensation; and if a bargain is made, a court of admiralty will take care, that advantage be not taken of distress to impose unreasonable terms; but one who is under no obligation to interpose for the preservation of property, cannot be treated by a court of admiralty as insisting on what is improper, if he claims only what the marine law, for the general good, has deemed it fit and proper he should have.

Upon the elements above indicated I am to say what is the proper salvage compensation in this case. I consider the proper sum to be seven thousand five hundred dollars, and the claimant will be decreed to pay that sum into court for the salvors. The libellants may agree on the distribution among themselves, if they can; but their agreement must be reported to the court and sanctioned by its decree. This practice is necessary, generally, for the protection of the rights of the crew, and it is not to be departed from in this case.

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INDEPENDENCE, The (BROWN v.). See Case No. 2,014.

INDEPENDENCE, The (PICKERT v.). See Case No. 7,013.

INDEPENDENCE, The (SNELL v.). See Case No. 13,139.

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## Case No. 7,015.

In re INDEPENDENCE INS. CO.

Ex parte DERRY MILLS.

[7 Am. Law Rev. (1872) 573.]

District Court, D. Massachusetts.

FIRE INSURANCE—RETURN PREMIUM—HOW RECKONED.

[A policy contained a stipulation that the insured might surrender it at any time, and that thereupon the company would retain the customary short time rates of premium for each month entered upon. It was shown that a tariff of short time rates was in general use. *Held*, that the meaning of the stipulation was that, if the insured surrendered his policy during the year, he should allow the company to retain such premium as would have been payable according to the above rates if he had originally insured for the time during which he had actually been insured.]

In bankruptcy.

Before LOWELL, District Judge.

Petition for the allowance of a claim for a return premium. The Derry Mills held three policies issued by the Independence Insurance Company, each for one year. They surrendered the policies during the year and before the bankruptcy of the company. The policies contained a stipulation that the insured might surrender them at any time, and that thereupon the company should retain the customary short time rates of premium for each month entered upon before the surrender. It was proved that a tariff of premiums known as short time rates was in general use in Boston, which fixed the amount to be paid for any time short of a year at a certain proportion of the yearly premium. For instance, the charge for one month was twenty per cent of a yearly premium, for two months thirty per cent, and so on up to eleven months, which was ninety-five per cent. Two of these policies had been for eight months and twelve days, and the third for five months and eleven days before they were surrendered. The insured had proved a claim for a return premium reckoned on a basis of simple proportion of time, charging themselves with so much premium as the time their policies had run bore to the whole year.

The question now was whether this claim should stand in full or be diminished. The judge held that the meaning of the stipulation was that if the insured surrendered his

policy during the year he should allow the company to retain such premium as should have been payable according to the above-mentioned tariff, if he had originally insured for the time during which he had actually been insured, counting a month which had been begun as a whole month. Thus, on two of the policies he must allow the short time rate for nine months, and in the other, the rate according to that table, for six months, and that he might move for the difference between the sum thus ascertained and the amount of premiums originally paid by him in advance. By this calculation it appeared that the debt originally proved by the Derry Mills must be diminished about one-half.

## Case No. 7,016.

### The INDEPENDENT.

[9 Ben. 489.] [1]

District Court, S. D. New York. May, 1878.

MARSHAL'S COSTS—WITHDRAWAL OF KEEPER.

1. The marshal having attached a vessel under process issued in a possessory action and put a keeper in charge, the libellant's proctors, at the time of the issuing of the process, gave the marshal notice not to put a keeper in charge. The libel having been dismissed with costs, the clerk allowed the marshal's disbursements for keeper's fees, and the libellants appealed from the taxation: *Held*, that the marshal must be allowed the keeper's fees.

2. A libellant, desiring to be relieved of the expense of a keeper, should not rely on a notice to the marshal, but make application to the court to direct the withdrawal of the keeper.

[Applied in The San Jacinto, 30 Fed. 268.]

In admiralty.

Beebe, Wilcox & Hobbs, for libellant.
M. M. Budlong, for claimant.

CHOATE, District Judge. Appeal from clerk's taxation of the costs of the marshal. The suit was a possessory suit, and under the mandate issued on the filing of the libel the marshal attached the vessel and put a keeper in charge, December 3, 1877. At the time of the issuing of the process the libellant's proctor gave notice to the marshal not to place a keeper in charge. After return of process, appearance, claim, and answer, and after trial, the libel has been dismissed with costs. In taxing the costs of the marshal, the clerk has allowed his disbursements for keeper's fees. The libellant appeals.

The process which the libellant sued out directs the marshal "to attach the said canal boat, etc. and to detain the same in your custody until the further order of the court respecting the same." I think that a mere notice from the libellant not to put a keeper on board cannot excuse the marshal from the duty of custody imposed upon him by the mandate. The meaning of the notice is, that so far as the libellant is concerned, the marshal is excused from holding the vessel for his benefit, and the effect of it would be that if the vessel should escape, in consequence of there being no keeper on her, the libellant could not hold the marshal responsible to him. But neither the direction in the mandate nor the purpose of it is to hold the vessel merely for the benefit of the libellant and to protect his interest. The theory on which the mandate is based is that the marshal is to dispossess the party in possession of the vessel, and to hold possession of it to await the further order of the court, and after this mandate has been issued and is executed by the seizure of the ship, not only those before in possession, but any other parties having an interest and summoned to appear may well rely upon the terms of the mandate, and upon the fact of the marshal's possession, and its continuance till the court shall otherwise order, and all parties may act upon the belief that the marshal will hold the possession of the vessel. Perhaps the master or owners seldom actually leave the ship in the sole possession of the marshal, but they may do so, and in such case they might suffer injury or the loss of the ship from the withdrawal of the marshal.

For these reasons I think it is clear that a libellant desiring to be relieved of the expense of a keeper, should, instead of relying on a notice to the marshal, apply to the court, and perhaps, on notice to the parties who might be prejudiced, the court may permit or direct the withdrawal of the keeper.

Taxation affirmed.

[1] [Reported by Robert D. Benedict, Esq., and Benj. Lincoln Benedict, Esq., and here reprinted by permission.]

## Case No. 7,017.

### In re INDEPENDENT INS. CO.

[Holmes, 103; [1] 6 N. B. R. 260; 1 Ins. Law J. 735.]

Circuit Court, D. Massachusetts. Feb. 1872.[2]

BANKRUPTCY—"BUSINESS CORPORATIONS"—INSURANCE COMPANIES—EFFECT OF PREVIOUS ACTION BY STATE.

1. An insurance company, duly authorized under the law of a state to transact the business of insurance, is a "business or commercial" corporation, within the meaning of the bankrupt act of March 2, 1867 [14 Stat. 517].

2. In a proceeding by the state insurance commissioner against an insolvent insurance company, under Gen. St. Mass. c. 58, § 6, a decree was made appointing receivers of the company's property, with authority to collect its assets and pay its debts making perpetual an injunction

[1] [Reported by Jabez S. Holmes, Esq., and here reprinted by permission.]

[2] [Affirming Case No. 7,018.]

against the further prosecution of its business, and declaring "that the said corporation be and the same is hereby dissolved." *Held*, that proceedings in bankruptcy against the company, subsequently commenced, could be maintained notwithstanding the decree of the state court.

[Cited in Hudgins v. Lane, Case No. 6,827; Re Green Pond R. Co., Id. 5,786; Re New Amsterdam Fire Ins. Co., Id. 10,140; Platt v. Archer, Id. 11,213; Re Hathorn, Id. 6,214; Re Gorham, Id. 5,624; Edison Electric Light Co. v. New Haven Electric Co., 35 Fed. 237.]

[Cited in Life Ass'n of America v. Fassett, 102 Ill. 318; Republic Life Ins. Co. v. Swigert, 135 Ill. 153, 25 N. E. 680.]

Petition [by Chester I. Reed and others] for revision of a decree of the district court adjudging the Independent Insurance Company of Boston a bankrupt.

Chester I. Reed and J. R. Bullard, for petitioners.

Charles R. Train, J. O. Teele, and H. W. Paine, for creditors.

SHEPLEY, Circuit Judge. The constitution of the United States confers upon congress the power to establish uniform laws on the subject of bankruptcies throughout the United States. Unquestionably, congress is as competent to apply such laws to private corporations created by the states as to natural persons or private corporations created by authority of congress. Sweatt v. Boston, H. & E. R. Co. [Case No. 13,684]. Congress has exercised the power, thus conferred upon it by the constitution, by the enactment of the bankrupt act; and "the provisions of this act apply to moneyed, business, or commercial corporations."

Having thus exercised this power in the enactment of the bankrupt act, and the constitution further providing that the laws of the United States, which shall be made in pursuance of the constitution, shall be the supreme law of the land, the inference is irresistible, that state laws on the subject of bankruptcy and insolvency must yield to the law of congress on the same subject, where the state law applies to the same subject-matter; and where it differs in material respects from the law of congress, it appears clear that the state law is suspended, while the law of congress remains in force. Thornhill v. Bank of Louisiana [Id. 13,992]; Ex parte Eames [Id. 4,237]; Sturges v. Crowningshield, 4 Wheat. [17 U. S.] 122, 196; Ogden v. Saunders, 12 Wheat. [25 U. S.] 213; May v. Breed, 7 Cush. 40; Griswold v. Pratt, 9 Metc. [Mass.] 23.

The Independent Insurance Company of Boston is a corporation created by the laws of Massachusetts to transact the "business" of insurance. It is clearly included in the class of "business or commercial corporations" to which the provisions of the bankrupt act apply. After the passage of the bankrupt act, it became insolvent, and committed such acts of bankruptcy as clearly constituted it one of those "corporations whose pecuniary condition brings them within the provisions of the act, entitled to the benefits which the act confers, and subject to all its obligations and requirements." Sweatt v. Boston, H. & E. R. Co. [supra].

After this time, the operation of any state law regulating the assignment and distribution of the property of the insolvent debtor corporation, and affecting the same persons, property, and rights that would be affected by proceedings under the bankrupt act, was suspended. It was not the intention of the framers of the constitution, or of congress, when it enacted the bankrupt act, to have in existence two distinct and diverse systems affecting the same persons, property, and rights, leaving it to the option of the debtor to elect one or the other at his pleasure. In the language of the supreme court of Massachusetts in Griswold v. Pratt, 9 Metc. [Mass.] 23, "When the power is exercised by congress, and a bankrupt law is in force, it does suspend all state insolvent laws applicable to like cases; and this effect follows the enactment of such bankrupt law, and does not require the actual institution of proceedings in bankruptcy to produce such result."

On the ninth day of January, 1872, the firm of Joseph Nickerson & Co. filed their petition for adjudication of bankruptcy against the Independent Insurance Company. The petition sets forth, inter alia, the insolvency of the company, and alleges that the company committed acts of bankruptcy by fraudulent preferences, on the fourteenth day of October, 1871, to Edward Atkinson, and to Henry Atkins & Co., who were creditors of the company, and whose claims had long been overdue when the payment was made. Upon filing proofs sustaining the allegations in the petition, an order was issued by the district court to the insurance company to show cause why the prayer of the petition should not be granted. On the return-day of this order, Chester I. Reed and George Ripley filed a plea to the jurisdiction of the court, setting out that on the ninth day of January, 1872, they were, by a decree of the supreme judicial court of Massachusetts, rendered in a suit instituted on the second day of December, 1871, by the insurance commissioner in behalf of the commonwealth of Massachusetts, against said insurance company, appointed receivers of said company, and had accepted the trust, and duly entered upon the performance of their duties. The plea further avers, that, by the decree aforesaid of the supreme judicial court of the commonwealth of Massachusetts, the Independent Insurance Company, which was a corporation created and existing under and by virtue of a statute of said commonwealth, was dissolved, and an injunction, which had previously issued in said suit against any further prosecution of its business by said insurance company, was made perpetual. The record of the pro-

ceedings in the supreme court, and of the decree, is annexed to the plea, and makes a part thereof. The decree of the district court proceeds as follows: "And it appearing that no denial of bankruptcy was made on the return-day of the order to show cause, and that said corporation, by its answer, admits the acts of bankruptcy alleged against it; and thereupon, and upon consideration of the proofs in said cause, and the arguments of counsel thereon, it was found that the facts set forth in said petition were true; and it was therefore adjudged, that the Independent Insurance Company became bankrupt within the true intent and meaning of the act entitled 'An act to establish a uniform system of bankruptcy throughout the United States,' approved March 2, 1867, before the filing of said petition; and it is therefore declared and adjudged bankrupt accordingly." A warrant in bankruptcy was accordingly issued.

Within the time prescribed by the rules, the receivers filed in this court their petition for a revision and reversal of these orders and decrees of the district court in bankruptcy.

The errors assigned in the petition in the judgments, orders, and decrees of the district court are: First. That, because of the proceedings in the supreme judicial court of Massachusetts, pleaded as aforesaid, and verified by the record aforesaid, and which record was not in any respect controverted, and because of the statutes of said commonwealth in relation to insurance corporations, the said district court had not jurisdiction to make said orders, adjudication, and decrees. Second. Because of said proceeding of said supreme court and said statutes, and upon the pleading and proofs aforesaid, said corporation had no right to appear in said court, except by said Reed and Ripley, the petitioners; and could not by any counsel, against the objection of said Reed and Ripley, appear, or admit the truth of any averment, plea, or allegation, or matter of fact or law. The petition then alleges that the decree of said court, basing its adjudication of bankruptcy wholly upon the admissions of said parties claiming to act as president and attorney of said company, was erroneous; and it avers that the corporation was dissolved on the ninth day of January.

In support of the petition for the exercise of the revisory power of this court, counsel contend that the corporation was the creation of the state, and existed merely at its pleasure; that it was clearly in the power of the state to dissolve it; that this power has been exercised; that the corporation is defunct, and became so before the adjudication in bankruptcy; that consequently the proceedings abated, there being no provision in the bankrupt act to the contrary; that the state law does not continue the corporation in being so as to change this result, and that, if the corporation is still living, it can only act through receivers; and that therefore the decree of the district court was erroneous.

Unquestionably, under ordinary circumstances, the sovereignty which has called a corporation into being, and which by the terms of the charter or by the provisions of a general law has reserved the right to do so, may amend the charter, or repeal it at will, by its legislature; or, acting through its judicial tribunals, it may declare the charter forfeit, or terminate the existence of the corporation.

Whether, subsequent to the exercise by congress of its constitutional power to establish a uniform system of bankruptcy, it would be within the power of a state, acting either through its legislature or its judicial tribunals, after an act of bankruptcy had been committed by an insolvent corporation, and all state insolvent laws applicable to such cases are suspended, to annul the existence of the bankrupt corporation, so as to prevent the commencement of process, or abate the proceedings after they had been commenced under the act of congress, may well be doubted. If this could be done, the operation of the bankrupt law upon insolvent corporations could be defeated, the whole jurisdiction on bankruptcy foreclosed, the general creditors could only reach the assets within the reach of state process, and all extra-territorial property would be left in the grasp of attaching creditors; and so far as the extra-territorial assets were concerned, payments in full and preferences to favored creditors would be upheld.

It is not necessary to decide this question in this case and at this time. The most cursory examination of the section of the fifty-eighth chapter of the statutes of Massachusetts, under which these proceedings were initiated by the insurance commissioner, will show that it does not contemplate or authorize any such decree as would annul the existence of the corporation. A careful examination of the record will show that no such decree was sought or prayed for in the petition; and the like examination of the decree will as conclusively show that no such decree was made by the court.

Section 6, c. 58, of the General Statutes of Massachusetts provides as follows: "If upon examination the commissioners are of opinion that a company is insolvent, or that its condition is such as to render its further proceedings hazardous to the public or to those holding its policies, they shall apply to a justice of the supreme judicial court to issue an injunction restraining such company, in whole or in part, from further proceeding with its business, until after a full hearing can be had. Such justice shall forthwith issue the injunction, and, after a full hearing of all parties interested, may dissolve or modify the same, or make it perpetual. And he may make such orders and decrees as may be needful to suspend, restrain, or

prohibit the further continuance of the business of the company, and may appoint agents or receivers to take possession of the property and effects of the company, subject to such rules and orders as are from time to time, according to the course of proceedings in equity, prescribed by the court, or a justice thereof in vacation."

It is as clear that this power to suspend, restrain, or prohibit the further continuance of the bankrupt corporation, no more authorized the court in this form of proceeding to annul the being of the corporation, than a similar statute power to suspend, restrain, or prohibit the further continuance of the business of a bankrupt natural person would authorize the court to take his life.

The insurance commissioner, in his petition, represented to the court that the corporation was insolvent, and its condition was such as to render its further proceedings hazardous to the public and to policy-holders. He prayed for a writ of injunction, commanding the corporation, its officers and agents, to refrain from further proceeding with the business of the corporation; for the appointment of receivers, to take possession of the property of the corporation, subject to the order of the court; and for notice to the corporation to show cause why such injunction should not be made perpetual and the receivers appointed as prayed for; and for "such further orders and decrees in the premises as may be needful."

By the final decree of the court, the injunction previously issued in said cause, as prayed for, was made perpetual. Receivers were appointed to take possession of the property and effects of said corporation, and take charge thereof; to collect the debts due the corporation; to pay all debts due from said corporation, if the funds coming to their hands are sufficient therefor, and, if not, to distribute said funds ratably among the creditors of said corporation "who duly prove their claims; and if there is any balance left in their hands after paying the debts as aforesaid, to pay and distribute the same among the persons legally entitled thereto, all under the direction of this court. And to this end the said receivers shall have power to prosecute and defend suits in their own names, and do all other acts which might be done by said corporation if in being, for the purpose of settling any unfinished business thereof."

The decree further commands all persons and corporations holding property or evidences of property of any kind belonging to said insurance company, to deliver the same to the receivers, and commands the receivers forthwith to take possession of the same. Then follows the portion of the decree upon which the argument of counsel is based. It is as follows: "It is further adjudged and decreed, that said corporation be and the same is hereby dissolved."

By virtue of this decree, it is claimed that the corporation ceased to exist, for any purpose, before the adjudication of bankruptcy: that the bankrupt law does not authorize process to issue in bankruptcy against defunct corporations or deceased individuals, or undertake to administer on their estates; that it acts only on the living, and has no dealings with the dead, unless they die after the decree in bankruptcy.

In this view of the case, it becomes important to consider whether this corporation is so far defunct, whether its charter is so annulled, and its franchise to be a corporation is so far taken away by this decree, that it cannot be considered as having any being or existence, for any purpose whatever.

We have already seen that an act annulling the charter and destroying the life of the corporation was not provided for in the section of the statute under which the proceedings were commenced, nor prayed for in the petition upon which the decree was founded.

It is true, nevertheless, that the decree does adjudge the corporation dissolved; but we are satisfied that, by a fair construction of this language, as used in the concluding portion of the decree, it was the intention of the court only so far to dissolve the corporation as, in the language of the statute under which they were acting, might "be needful to suspend, restrain, or prohibit the further continuance of the business of the company;" and that it was not the intention of the court, in the use of this language, to make such a decree, under the sixth section, on the application of the insurance commissioner, as by virtue of the eighth section, and under the other provisions of the General Statutes of the state, they might make in a process of quo warranto instituted by the attorney-general adjudging the charter forfeited and annulled.

In the language of text-writers, of statutes, and not infrequently of judicial decisions, the phrase "dissolving a corporation" is used, sometimes as synonymous with annulling the charter or terminating the existence of the corporation, and sometimes as meaning merely a judicial act which alienates the property and suspends the business of the corporation, without terminating its existence. This is paralysis, not necrosis,—a suspension of corporate action, not a cessation of corporate life. As a solvent liquid, or heat, dissolves a crystal by separating the parts and breaking the continuity of the atoms which compose it, leaving it formless and invisible to the eye, yet with the capacity of being crystallized anew into its pristine form and beauty; "a figure trenched in ice, which with an hour's heat dissolves to water and doth lose its form," and which an hour's cold may restore to its original form and substance [as a meeting, a parliament or assembly, dissolved so as to suspend for a time its unity of action, yet

existing with the capacity for a new aggregation of its original constituent parts],[3]—a corporation may, for certain purposes, be considered as so far dissolved as to be incapable of injury to the public, and yet as retaining all the vitality which may be essential for the protection of the rights of others.

This doctrine has been applied in several cases in the state of New York, in the construction of a statute of that state, concerning manufacturing corporations, which provided, that, for all debts due and owing by the company at the time of its dissolution, the persons composing such company shall be individually responsible, &c. Under this statute, where an insolvent corporation suffered its property to be sacrificed, the annual elections were omitted, and no act was done manifesting an intention to continue the corporate functions, the court, for the sake of the remedy against the individual members and in favor of creditors, presumed a virtual surrender of the corporate rights, and "a dissolution" of the corporation. Yet, in these cases, the courts in New York did not decide that the companies had lost all their rights, or were defunct corporations; but only that, even if they had a right to reorganize themselves, and were so far in being, the case had happened in which they were "dissolved" for the purposes of remedial action by their creditors. Slee v. Bloom, 19 Johns. 456; Penniman v. Briggs, 1 Hopk. Ch. 343, 8 Cow. 387; 2 Kent, Comm. 311, 312.

But in the learned and exhaustive opinion of Judge Gray, in the case of Folger v. Columbian Ins. Co., 99 Mass. 267, is to be found perhaps the most perfect compendium of the law on this subject. In that case, the supreme court of New York had adjudged "that the Columbian Insurance Company be and it hereby is dissolved." But the supreme court of Massachusetts did not hesitate to inquire whether the judgment thus obtained in New York, and relied on in Massachusetts, was rendered by a court having jurisdiction of the cause and of the parties, and to decide that to decree an absolute and final dissolution of a corporation at the suit of an individual was no part of the general jurisdiction of a court of law or chancery, and can only be justified by express statute; and then, after examining the express provisions of the statutes of New York, upon which the proceedings were based, to decide that, notwithstanding the supreme court of New York had adjudged the corporation "dissolved," and Chancellor Walworth had decided that such proceedings had effected "a virtual dissolution of the corporation," yet the supreme court of Massachusetts say, "It does not extinguish its franchise, terminate its legal existence, or render it incapable of being sued at law or in equity." In the light of this opinion, it is not difficult to see the proper construction to be given to the words of the decree of the supreme court of Massachusetts "dissolving" this corporation, as a dissolution adjudged by a court which had decided that such "a dissolution of a corporation cannot deprive its creditors or stockholders of their rights in its property," "does not extinguish its franchise, terminate its legal existence, or render it incapable of being sued at law or in equity." See, also, Coburn v. Boston Papier-Mâché Manuf'g Co., 10 Gray, 243; Taylor v. Columbian Ins. Co., 14 Allen, 353; Bacon v. Robertson, 18 How. [59 U. S.] 485, 487; Lum v. Robertson, 6 Wall. [73 U. S.] 277; Hunt v. Columbian Ins. Co., 55 Me. 291.

This doctrine in relation to the extinction of a corporation is not a novel one; for in 1628 it was adjudged, upon the authority of earlier cases, in the case of Hayward v. Fulcher, W. Jones, 166, that a dean and chapter were not dissolved by a surrender to the king "of all their possessions, rights, liberties, privileges, and hereditaments, which they had in right of their corporation." See, also, the Case of the Dean & Chapter of Norwich, 3 Coke, 75a.

The court, therefore, entertains no doubt that this corporation still exists, for the purpose of being proceeded against in bankruptcy.

The petition also assigns as error in the decree of the district court, that the corporation had no right to appear in said court except by the receivers, and could not by counsel, against the objection of the receivers, appear, or admit by plea or otherwise any matter of law or fact; and that the decree of the district court, basing its adjudication in bankruptcy wholly upon the admission of Sanford as counsel for the company, was erroneous. An examination of the record fails to convince the court that this assignment of error is sustained by the facts in the record, even if it were tenable in law.

Granting, for the purpose of determining this question, which the court is not now called upon to decide, that the receivers were the sole and only proper persons to represent the corporation, yet the only plea or answer made by them was a denial of the jurisdiction of the court in bankruptcy. This plea was heard, considered, and, as we have seen, properly overruled. No answer was put in by them, or any person, denying the acts of bankruptcy; and, after the plea to the jurisdiction was overruled, no cause was shown by them, or by any one, why a warrant in bankruptcy should not issue.

If the president and attorney of the corporation, or those claiming to act as such, had no right to represent the corporation, then there was no denial of the allegations in the petition, and no cause shown why the warrant should not issue upon the applica-

[3] [From 6 N. B. R. 260.]

tion of the petitioners in bankruptcy, and the accompanying proofs. The decree of the court was well founded upon the fact recited in the decree itself; "it appearing that no denial of bankruptcy was made on the return-day of the order to show cause," without taking into consideration the other fact recited in the decree, that the corporation had by its answer admitted the acts of bankruptcy alleged against it.

It is not necessary to determine to what extent the receivers have the authority to represent the corporation itself. But it is clear, that, occupying the position they do,—not as receivers under a mortgage or other lien or incumbrance on the property of the corporation which might take the property out of the operation of the bankrupt law, but as receivers appointed under a state law applicable to insolvent corporations, and to the distribution among the creditors of the assets of an insolvent corporation,—they have no power to withhold the assets of the company, and to liquidate its liabilities and affairs according to the mode provided by state laws for the liquidation of insolvent corporations. As well stated in Thornhill v. Bank of Louisiana [Case No. 13,992], "this cannot be allowed. No mode of proceeding authorized by a state law can be permitted to have this effect. If the forfeiture, under the state law, of the charter of the bank raises an obstacle to the jurisdiction of the federal courts, then the claim authorizing the forfeiture of the charter is suspended by the federal law. To hold otherwise is to allow the states, by a particular form of liquidation, to override a law of congress, on a subject on which congress, by the constitution, has supreme power." In Cushing v. Arnold, 9 Metc. [Mass.] 23, Dewey, J., says: "When the power is exercised by congress, and a bankrupt law is in force, it does suspend all state insolvent laws applicable to like cases; and this effect follows the enactment of the bankrupt law, and does not require the actual institution of proceedings in bankruptcy to produce such result."

The sooner it is understood, that now, when a uniform law of bankruptcy is in operation under the authority conferred upon congress by the constitution of the United States, no power exists to wrest from the jurisdiction of the courts in bankruptcy the assets of such bankrupt individuals and corporations as are within the scope of the provisions of the bankrupt act, the more will the beneficent provisions of that act be felt and appreciated by the mercantile community. Nowhere is this doctrine in relation to the effect of a bankrupt law upon the operation of the insolvent laws of the states more clearly and ably enunciated than in the learned opinions upon this subject to be found in the reported decisions of the supreme judicial court of the commonwealth of Massachusetts.

Petition dismissed.

## Case No. 7,018.

In re INDEPENDENT INS. CO.

[2 Lowell, 97;[1] 6 N. B. R. 169.]

District Court, D. Massachusetts. Jan., 1872.[2]

BANKRUPTCY — PRIOR DECREE OF STATE COURT — WHETHER JURISDICTION OF FEDERAL COURT OUSTED.

A decree of a state court enjoining a corporation from further prosecuting its business on the ground of insolvency, and appointing receivers, does not oust the jurisdiction of the district court to adjudge the corporation bankrupt.

[Cited in Platt v. Archer, Case No. 11,213; Re Safe Deposit & Savings Inst., Id. 12,211; Re New Amsterdam Fire Ins. Co., Id. 10,140; Re Green Pond R. Co., Id. 5,786.]

A creditor of the Independent Insurance Company, a corporation established under the laws of Massachusetts, filed his petition in January, 1872, alleging that the company was insolvent, and had made certain fraudulent preferences. On the return-day a suggestion was made by the receivers appointed by the supreme judicial court of the commonwealth, which suggestion afterwards took the form of a plea to the jurisdiction, by which it was alleged that, in December preceding, application was made to the state court to have the corporation enjoined from further prosecuting its business, on the ground of insolvency; and that earlier on the same day that the petition was filed in this court, a decree, making a preliminary injunction, previously issued, perpetual, was entered in the state court, and receivers were appointed to take possession of and distribute the assets of the company [equally among the creditors of the corporation, and to divide the surplus, if any, among the stockholders.][3]

C. I. Reed, for receivers.

There can be no doubt of the power of a state to dissolve a corporation of its own creation; and this has been lawfully done in the case of the Independent Insurance Company. The effect of such a dissolution is to stay all suits and to render all future judgments erroneous. It is in strict analogy to the death of a natural person. Mumma v. Potomac Co., 8 Pet. [33 U. S.] 281; Curran v. Arkansas, 15 How. [56 U. S.] 304; Bacon v. Robertson, 18 How. [59 U. S.] 480; Merrill v. Suffolk Bank, 31 Me. 57; Greeley v. Smith [Case No. 5,748].

H. W. Paine and J. O. Teele, for petitioning creditor.

1. The supreme court of Massachusetts has denied the power of the supreme court of New York to dissolve a corporation under like circumstances with these, and under a

[1] [Reported by Hon. John Lowell, LL. D., District Judge, and here reprinted by permission.]

[2] [Affirmed in Case No. 7,017.]

[3] [From 6 N. B. R. 169.]

statute which cannot be distinguished: Folger v. Columbian Ins. Co., 99 Mass. 267.

2. The insolvent laws of the state, whether general or special, are superseded by the bankrupt act [of 1867 (14 Stat. 517)]; and the bill of the insurance commissioners, which alleges merely the insolvency of this company, is nothing but a sort of petition in bankruptcy. In whatever way we take it, the jurisdiction of this court is full and exclusive. Thornhill v. Bank of Louisiana [Case No. 13,992]; In re Merchants' Ins. Co. [Id. 9,441].

B. Sanford, for the corporation, filed an answer, submitting to the jurisdiction, and admitting the acts of bankruptcy.

LOWELL, District Judge. The questions necessarily presented by this case do not appear to be difficult of solution; and as the affairs of the company are said to need attention, I have determined to dispose of them without delay. The somewhat startling proposition is made, that by the decree of the supreme court of the commonwealth, dissolving the corporation, the whole jurisdiction in bankruptcy is foreclosed, and the general creditors must be content to take such assets as remain within the reach of the state process, and to leave all extra-territorial property to the mercy of attaching creditors, and all payments which would have been preferences under the bankrupt act to be mere payments in full of so many debts of the company. The corporation is extinct, it is said, and its property has reverted to the state, which never owned it, or to those who happen to be in possession of it at the moment of the dissolution. This view would be equally fatal, of course, to the title of the receivers, and to the suit under which they are acting, as to all other suits and proceedings. They felt the pressure of this situation; for the learned and able counsel who represented them said that he was not sure whether he occupied any other relation to this case than that of an amicus curiae, suggesting the death of the supposed bankrupt.

The cases cited for this position do not support it. One of these cases is Curran v. Arkansas, 15 How. [56 U. S.] 304, in which Mr. Justice Curtis cites, with approval, a note to 2 Kent, Comm. 307, to the effect that this doctrine is obsolete; and all the other cases, excepting two decisions at common law, lay down the rule that a corporation, however it may be dissolved, still exists for the purpose of paying its debts, and of dividing its surplus, if any, among its shareholders, or of having this done by a court of equity. These two cases do say that a judgment at law cannot be lawfully rendered against an extinct corporation; but I have yet to learn that a petition in bankruptcy is an action at law. It is an equitable sequestration, more so than the bill under which the receivers were appointed, in this, that it has a wider reach and a more effectual operation. If it were not, it would make no difference; because the statute of Massachusetts agrees with the doctrine of chancery, and extends it to cases at law, by enacting that all corporations whose charters expire by limitation, or are annulled by forfeiture or otherwise, shall nevertheless be continued bodies corporate for three years, for the purpose of prosecuting and defending suits, and settling their affairs, etc. Gen. St. c. 68, § 36. The charter of this corporation has either been annulled by forfeiture or otherwise, or it is in full vigor; and in either event the corporation may prosecute and defend suits, excepting as restrained by a court of competent jurisdiction.

I do not intend to enter into any race of diligence, or any controversy concerning jurisdiction, until I am obliged to do so. If I see the supreme judicial court exercise a power, I shall assume it to exist, though I may not perceive very clearly the source from which it is derived. Granting, then, for the purposes of this hearing, that the state law by which insolvent insurance companies are wound up is not, so far as the mere winding up is concerned, suspended by the bankrupt law, not even at the demand of the creditors, and that the jurisdiction is co-ordinate, it is yet certain that the decree of the supreme judicial court was not intended by that court to operate, and does not operate, to take away the jurisdiction of this court in bankruptcy. I find in it no injunction against a petition in bankruptcy, even by the corporation, and, of course, none addressed to creditors; and I do not suppose that court would undertake to enjoin such a proceeding. It simply forbids the company to carry on business, except in ascertaining losses and cancelling policies. Nay, more, if the power of the receivers is as extensive as it is said to be, it would be their clear duty under the decree to put the corporation into bankruptcy, since they can in no other way carry out the true intent of the decree, which is, that the property should be equally divided among all the creditors. If we adopt the bold metaphor of the argument, that the defendant is dead, and the funeral rites alone remain to be solemnized, we shall find that only in this place can they be adequately performed.

The cases of Taylor v. Carryl [20 How. (61 U. S.) 583], Freeman v. Howe [24 How. (65 U. S.) 450], and others, which maintain that, when the courts of one jurisdiction have possession of the res, no others can interfere with it, have no application; because, from its constitution and powers, the supreme judicial court cannot have full possession of the res, and does not profess to have it. It knows no such thing as a preference; it cannot deal with property out of the state; and there therefore remains, and must remain, in every case, a possible res for this court to act on, even if the jurisdiction is concurrent

or co-ordinate. That res is shown to exist in this case.

I have not considered with care the question whether the assignees will be entitled to the property. If they are, they can undoubtedly obtain it by application to the supreme judicial court, should the receivers be in possession, of which I am not advised, and refuse to resign it, which I do not expect. If the decree there should be against them, they can have a writ of error to Washington; or they may, I suppose, sue the receivers in a personal action, though not by replevin, in the courts of the United States. I cannot doubt that full and speedy justice will be done them in either jurisdiction. Finding, as I do, that this corporation still exists for the purpose of being proceeded against here, and that its creditors have not been enjoined from proceeding, nor the corporation from defending or being defaulted, and that it admits the acts of bankruptcy alleged against it, I adjudge it to be bankrupt, and order a warrant to issue, as provided by law. Adjudication ordered.

[This decree was affirmed by the circuit court on review. See Case No. 7,017.]

## Case No. 7,019.

In re INDEPENDENT INS. CO.

Ex parte NICKERSON.

[2 Lowell, 187; 7 Am. Law Rev. 362.] [1]

District Court, D. Massachusetts. Nov., 1872.

BANKRUPTCY—PROOF OF RETURN PREMIUM—PREFERENCE—ADMISSION OF DEBTS WITHOUT AFFIDAVIT.

1. A claim founded upon a covenant to repay part of a premium paid for a policy of insurance, issued by a stock company upon cancellation of the policy, is provable in bankruptcy, in the absence of provisions in the state laws, the charter or the by-laws of the company, which would make it void.

2. The actual insolvency of the company before bankruptcy does not discharge such a covenant, or render its performance illegal.

3. The surrender of the policy in accordance with the covenant cannot be a preference of the assured.

4. It seems that, if the interests of the estate require it, debts may be admitted to proof without affidavit, if no creditor objects; also, that several debts may be admitted upon one affidavit.

Petition by creditor of the Independent Insurance Company to expunge the proof of debt made by the firm of C. F. Hovey & Co., of Boston. The case as stated by the parties and certified by the register was: That in August, 1870, C. F. Hovey & Co. procured of the insurance company a policy on goods, in their place of business in Boston, to run for four years, and paid down a premium of $300. The policy contained this clause: "And the said company further covenants and agrees, that, in case there has been no loss, this insurance may at any time be terminated at the request of the insured, and upon the surrender of the policy; in which case this company will retain the customary short-time rates for each month entered upon, during the period such policy has been in force. This insurance may also be terminated at any time, at the option of this company, by giving five days' notice, in writing, to the insured, their agent or attorney; in which case this company will refund, on demand, on the surrender of this policy, a ratable proportion of premium for unexpired term." The insurance company was made insolvent by the fire in Chicago, which took place October 8 and 9, 1871. On the tenth day of that month, the president wrote to the secretary not to make any payments, of any kind, out of the funds of the company, except for the necessary expenses of conducting the office. On the next day, one of the firm of C. F. Hovey & Co. wrote on the back of their policy, "Boston, Oct. 11, 1871. Cancelled this day by agreement," and signed it in the name of the firm; and on the same day the policy, with this indorsement, was sent by the insured to the office of the company, where it was received by the secretary, and retained in his possession until after the bankruptcy of the corporation, which was adjudged in April, 1872, on a creditor's petition, filed Jan. 9, 1872. The proof that was made by the insured, for the amount which would be due them as returned premium under the clause of the policy above recited, was the subject of this petition.

J. O. Teele, for the motion.

B. Sanford, for the insured.

LOWELL, District Judge. It is said that a very great number of claimants, whose debts are each trifling, stand ready to prove them against the assets in this case, if it shall be decided that this proof was well made; and that the mere cost of proving, if assessed on the fund under a construction of rule 30 of the supreme court, which some persons contend for, will amount to thousands of dollars (more than twenty thousand dollars), if all such creditors should prove their debts, making a most serious and intolerable diminution of the assets. This rule is said to allow for affidavits in proof of debts, the price chargeable for examinations, and to make those charges a lien on the fund. I doubt whether the rule is intended to apply to the ordinary affidavit in proof of debts, which, although in some parts of the law called a deposition, resembles rather an affidavit than an examination or deposition such as the rule contemplates. But if the charges, whether greater or less, are necessarily incurred in proving debts of a

[1] [Reported by Hon. John Lowell, LL. D., District Judge, and here reprinted by permission. 7 Am. Law Rev. 362, contains only a partial report.]

dollar or of a very few dollars, it is evident that the creditors will forego their proofs, unless the costs are a charge on the fund; and, if they are a charge, it will be very burdensome, however small each fee may be. This is a very unfortunate state of things, arising out of the system of payment by fees. It seems to me that the assignees may avoid the dilemma, by admitting such debts to proof without the affidavit. If no creditor objected, such a course of proceeding would be supported on the ground, that, in matters of merely private right, a court may waive points of form, even when prescribed by statute, if all parties interested agree. I lay no claim to a power to set aside the statute or the rules: but I do say that both must be construed, if possible, so as to work out their true intent; and that particular rules of evidence, especially the right to have all evidence given on oath, may always be waived by the parties, and are constantly waived in all the courts of law and equity. Another course would be to admit all these debts under one affidavit, or a few affidavits, of the officers of the company, who are as well acquainted with the facts as the several persons insured. This has been done, as I am informed, in a case before one of the registers, Mr. Thorndike, whose experience (part of which was acquired in an office which he held under the insolvent law of Massachusetts) has been very great. Doubtless, a way may be found, and must be found, if possible, to prevent the expenses of administration from being an intolerable burden on the assets, or on the several creditors.

The debt offered for proof in this case is large enough to take it out of any such list as is above referred to; and must be allowed, if it is found to be a provable debt, whatever may be the consequences to other persons. I understand the main objection to be, that the premium which was paid for four years in advance formed part of a fund which is in some way pledged or devoted to the payment of losses. No decisions were cited for this position. That there are many cases holding such a doctrine in regard to the notes given to mutual insurance companies as a guarantee, I am well aware; but those were cases where, by the charters of the companies, or by the law under which they were organized, or by express contract, such notes formed a sort of capital for the security of losses. Brouwer v. Appleby, 1 Sandf. 158; Hone v. Allen, Id. 171, note; Deraismes v. Merchants' Mut. Ins. Co., 1 Comstock [1 N. Y.] 371; White v. Haight, 16 N. Y. 310; Maine Mut. Ins. Co. v. Swanton, 49 Me. 448. These are a few of the decisions. There are others in many courts; but I know of none that hold stock companies to any such rule. The deposit notes, or whatever else they may be called, of mutual companies, represent stock; and are liable to assessment, in whole or in part, under the rules and by-laws by virtue of which they are given: but I have found nothing in the charter of the Independent Insurance Company, nor in the general laws of Massachusetts regulating stock companies, which impresses any such character upon notes or payments given to such a company for premiums to be earned in the future. No by-law of the company was invoked to aid the petition; and I suppose none such exists. The money was paid in accordance with the terms of the policy, one of which was that a part should be repaid if the assured should at any time elect to cancel their policy. If such a stipulation had not been made, it is impossible to say, judicially, that the money would ever have been advanced.

I see no good reason to say that the actual insolvency of the company, before bankruptcy, would discharge this covenant, or render its performance illegal. No evidence has been given even that the cancellation of the policy would work any injury to the other policy holders. It may well be that a cancellation of all the policies on which no loss had been suffered would be advantageous. It would certainly have the effect to fix the exact liabilities of the company, and might be a prudent measure. I do not know how many policies in this company were cancelled, nor when or by whom. Upon those not cancelled the assets would remain liable for losses, until the final dividend shall be declared. A mutual insurance company that had become insolvent, and had been enjoined from continuing its business, cancelled all its outstanding policies, in virtue of a by-law much resembling the stipulation in this contract, and with the consent of the supreme court of Massachusetts, before whom the case was pending; and the court afterwards held that the return premiums were just debts to be paid out of the deposit notes. Fayette Mut. Fire Ins. Co. v. Fuller, 8 Allen, 27. But, apart from that consideration, there is no possible ground, that I can perceive, for saying that the surrender of the policy by the assured, in accordance with his contract, was intended to be, or could be, a preference of the assured over the other creditors, when its only effect is to put him on the same footing with other creditors. If a note is payable, or any duty is to be performed, on demand, I know of nothing in the bankrupt law which prohibits a demand being made after insolvency, in order to fix the rights of the parties, whether in the payment of interest or any thing else. It was an act which the assured had a right to do, with or without good reason, whenever they pleased.

Some question was made upon the construction of the policy, and whether the assured had brought themselves within its terms. It is clear that the stipulation, that the company will retain a certain part of the premium in case of the surrender of the

policy, implies by necessary intendment that they will return the remainder; and there is no more doubt that the surrender by the assured needs no acceptance by the company to give it full effect. When the memoranda were indorsed upon the policy, and they were received and retained by the company, without objection as to form, the surrender was complete, and the rights of the parties were fixed.

Questions which were alluded to in argument, and were said to be of great importance at this time,—such as, whether, in the absence of a stipulation in the policy or in the charter or by-laws, there would be any right to a return of premium under any and what circumstances; whether the office or its assignee could cancel its policies after bankruptcy, or even after insolvency, without an order of court; whether the assured could do so after bankruptcy without such order,—are not material in this case, and have not been considered. Petition to expunge denied.

## Case No. 7,020.

The INDIANA.

[Abb. Adm. 330.] [1]

District Court, S. D. New York. Nov., 1848.

COLLISION—STEAMBOAT UNDER WAY AND SCHOONER AT ANCHOR—ANCHORAGE IN MIDDLE OF RIVER—LIGHTS.

1. Where a collision occurred at night between a steamboat under way and a schooner at anchor in the middle of the Hudson river, opposite Fort Lee, *held*, that the taking up an anchorage in the middle of the river was not an act of culpable conduct on the part of the schooner.

2. It seems that there is no settled usage among those navigating the Hudson river, which requires vessels anchoring over night to take up a position within any particular limits as respects the shore; nor any usage justifying a steamboat making a night trip, in dispensing, while running in the middle of the river, with any care or precautions to avoid collision, which she would be bound to take if running near the shore.

3. The failure to keep out a good light during the night, and the failure to maintain a sufficient watch on deck, are either of them acts of culpable negligence, which will prevent a vessel from recovering damages for a collision.

[Cited in James v. The Hanover, Case No. 7,466; The Frank Moffatt, Id. 5,060; The Clara, Id. 2,787; Id., 102 U. S. 203.]

[Cited in Austin v. New Jersey Steamboat Co., 43 N. Y. 78.]

This was a libel in rem, by Joseph W. Sawyer and others, owners of the schooner Egremet, against the steamboat Indiana, to recover damages for a collision. The facts in the case were, that at about four o'clock one morning, the night being dark and foggy, the schooner was at anchor in the North river, nearly opposite Fort Lee. The steamboat was, at the same time, on her way down the river from Albany, having six canal boats in tow, two on each side and two behind. The pilot of the Indiana saw the schooner a few minutes before striking her, and endeavored to go clear; but there being a strong ebb tide, it was not possible to do so, and the outside canal boat on the starboard side struck the schooner, doing considerable damage. The ground of defence was, that there was negligence on the part of those in charge of the schooner, which contributed to the accident.

E. C. Benedict, for libellants.

C. Van Santvoordt, for claimant.

BETTS, District Judge. The libellants having established a right, primâ facie, to compensation for the injuries received in the collision articled upon, the case rests upon the sufficiency of the defence made on behalf of the claimant. That defence specifies three acts of the libellants which, it is contended, were wrongful under the circumstances, and operated to cause the collision, without fault or negligence on the part of the claimant.

Those facts are the following: (1) That the schooner was anchored, in a thick, dark night, nearly in the middle of the river, in the ordinary route and channel of steam vessels passing up and down the river. (2) That no light, proper and sufficient to warn approaching vessels of the position of the schooner, was exhibited upon her at the time of the collision. (3) That no watch was kept on her deck at the time.

It is contended, that owing to these acts of culpable negligence, those in charge of the steamboat were prevented from discerning the schooner until so near her as to render it impossible to avoid the collision. So far as respects the character of the weather and the position of the schooner, the evidence upon both sides is in substantial harmony. For although some of the testimony introduced on behalf of the libellant charges that the night was so dark that no vessel could be safely navigated, yet the weight of evidence on that side, in concurrence with all the testimony offered for the claimant, is to the effect that it was proper and safe, on the night in question, for steam vessels to run, inasmuch as the land on each side of the river could be seen. And although there was a slight disagreement amongst the witnesses as to the position of the schooner—the claimant's witnesses stating that she lay "in the middle of the river," and the witnesses for the libellant saying that she was "a third or more of the width of the river from the east shore,"—yet the discrepancy is too slight to embarrass the court in applying to the case the rules of law governing cases of a similar kind. For the assertion of the pilot of the Indiana, that the position taken up by the schooner was an unusual one for vessels to

[1] [Reported by Abbott Brothers.]

anchor in, is not contradicted by any evidence upon the other side.

These facts, then, are established by the pleadings and proofs. That the wind was northeast, and the tide a strong ebb. That the schooner lay at anchor wide off in the river. That the night was so thick and dark, that an object of the size and color of the schooner could not, without the aid of a light on board of her, be discovered by those on board of a steamboat running on the same track, at a distance of more than ten or fifteen rods off. That the position thus taken up by the schooner was one far out in the river, there a mile or more in width, and at a place where steamboats were not bound to exercise extraordinary circumspection or precaution in expectation of coming upon vessels at anchor.

In respect to that charge of negligence on the part of libellants, which is based on the position selected by the schooner for anchoring, the rule applicable to such cases requires the promovent to show that there was positive fault or negligence on the part of the colliding vessel, and that there was no blamable conduct in the one injured, conducing to the collision. The utmost that is made out by the claimant is, that the choice of the place where the schooner anchored might possibly have led to the accident. There is no evidence that any fixed understanding exists amongst navigators on the Hudson river, to the effect that vessels will not anchor out towards the middle of the river, even at points where it is of such great breadth; nor any proof that it is the invariable or even the most usual course for steamboats to hold a course directly midway the river during the night time. I do not think, therefore, that this case can be ranged with those where vessels are guilty of culpable negligence in anchoring in the common passages of great thoroughfares. After leaving the immediate harbor of New York, and particularly in those parts of the North river where there is a navigable channel of a mile or more in width, there does not seem to be any rule, or any necessity, compelling vessels to confine their anchorage within any particular limit, or excusing those under way in one part of the channel from exercising the ordinary precaution and vigilance which might be required from them in another part.

The charge of negligence, in not keeping a light conspicuously suspended on the schooner, is better founded. Both the statute law of the state and the equally stringent rule of the maritime law, require a vessel at anchor, under such circumstances as are shown in this case, to maintain a good and sufficient light throughout the night, so placed as to be visible to other vessels approaching her from any direction. Compare, also, The Santa Claus [Case No. 12,327]. 1 Rev. St. 685, § 2; Thain v. The North America [Case No. 13,853]; Simpson v. Hand, 6 Wheat. 324; Bullock v. The Lamar [Case No. 2,129]; Waring v. Clarke, 5 How. [46 U. S.] 441. And the testimony on the part of the claimants is full and satisfactory to show that no light on the schooner was discernible from the steamboat, either before or at the time of the collision.

This evidence is given not by the pilot and other persons on board the steamboat alone, but by others on the canal boats in tow alongside her. The witnesses all assert that they were on a vigilant look-out,—the alarm-bell of the steamer having been rung,—and that they saw a few rods ahead a dark object on the water, but no appearance of a light upon any part of it.

It is proved, by those on board of the schooner, that a globe lamp was trimmed and lighted, and properly set, at about eleven o'clock that night, and that at the time of the collision it remained in the same place, still lighted, and was taken down and used in searching for the damages she might have received. The pilot, however, adds that the wick was found crusted thickly, and he picked the wick before hanging it up again.

After the two vessels were separated, the steamer passed down the river, but returned a short time subsequently to put back upon the schooner one of her crew, who had got on board the steamer during the collision. On that occasion the light of the lamp was plainly seen by those on board the steamer, in season to give them notice of her proximity in ample time to avoid a collision. This circumstance is urged, on the part of the libellants, to show that the lamp had all the time given sufficient light to warn the steamer where the schooner lay; while it is, on the other hand, invoked by the claimant, as evidence that the re-trimming of the lamp was necessary to render it of any service to other vessels approaching her.

I think this particular is not sufficient to countervail the strong proofs furnished by the claimant of the absence of any light exhibited on the schooner at the time of the collision, competent to afford warning to the steamer of her position. The light probably continued feebly kindled and burning too obscurely to give more light than enough to show the men, as they came on deck, that the wick was still ignited; and even that effect might well be produced from the jar of the two vessels in the collision, shaking up or resuscitating slightly the flame.

The weight of evidence, in my opinion, is against the libellants upon this point, and fastens the fault on them of having failed to keep up, burning during the night, a clear light, placed conspicuously on the vessel.

The omission of the libellants to maintain a competent watch on deck throughout the night is clearly proved. That was an act of gross negligence on their part. Compare, also, The Rebecca [Case No. 11,618].

All hands on board the schooner turned in at about eleven o'clock in the evening. A look-out, doing his duty on deck, could have secured the schooner from the accident. He could have given the steamer timely warning, by hailing or by waving a light, and especially would have acquitted the schooner of fault in respect to a standing light on the vessel, by seeing that the lamp was kept in proper condition, and furnished the light required by law. Aside from the positive duty to maintain such a light, enjoined by the local statute, these acts of omission are made by the maritime law evidence of culpable inattention and want of precaution, which bar the schooner of all claim to damages she may have suffered in consequence of the neglect. The libel must therefore be dismissed, with costs to be taxed.

## Case No. 7,021.

INDIANA ex rel. v. AMERICAN EXP. CO.

[7 Biss. 227.] [1]

Circuit Court, D. Indiana. June, 1876.

STATE TAX ON INTER-STATE TRANSPORTATION.

1. The penalties against a foreign corporation prescribed by the seventh section of the Indiana statute of 21st December, 1872, for omitting to make return of its receipts for transportation through the state cannot be enforced.

2. A tax by a state upon transportation through the state is an interference with interstate commerce, which it is not competent for a state to restrict.

[Cited in Indiana v. Pullman Palace Car Co., 16 Fed. 194, 195, 201.]

[3. Cited in Elston v. Piggott, 94 Ind. 19, to the point that, for purposes of taxation, foreign corporations may be regarded as citizens.]

Claypool, Mitchell & Ketchum, for state of Indiana.

Baker, Hord & Hendricks, for American Exp. Co.

DRUMMOND, Circuit Judge. On the 8th of March, 1873, the legislature of Indiana passed an act amendatory of "An act to provide for the uniform assessment of property, and for the collection and return of taxes thereon; approved December 21, 1872."

By the sixth section of this act, it was made the duty of every corporation, whether foreign or domestic, engaged in the business of transporting or carrying passengers or freight on any railroads in the state, by virtue of any contract or agreement with the railroads, to make returns in the months of January and July in each year to the auditor of state of the gross amount of all receipts received in the state for the transportation of passengers or freight for the six months preceding, and it was required of the company that at the time the report was made there should be paid into the treasury the sum of $1.00 on every $100 of receipts received for transporting freight.

There was a proviso attached to this section, which declares that when the amounts received by the corporation, whether received within or without the state, and when a part of such receipts were on account of fare or transportation over roads within the state, there should be included as a part of the report such proportion of the amount of the receipts as the distance traversed in the state bears to the whole distance paid for.

The seventh section of this amendatory act imposes the penalty of $100 per day for every day's delay in which there should be a failure after thirty days, to render an accurate account of the receipts as provided in the foregoing section.

It is for a violation of this sixth section of the amendatory act, and to enforce the penalty of the seventh section that this action is brought. The complaint sets forth the facts; that the defendant, the American Express Company, is a company chartered by the legislature of another state; that it transacts business in this state, and perhaps it is a fair inference from all the circumstances of the case that it is one of those foreign corporations which is authorized to transact business under the laws of this state within the limits of the state.

To the declaration, or complaint, the answer sets forth the facts connected with the mode in which the defendant transacts business; being a corporation of another state, it receives merchandise out of the state, transports it into the state, receives merchandise in the state and transports it out of the state; and also receives and delivers merchandise transported on railroads in the state; that by virtue of an arrangement with railroad companies it sends its own agents on the cars, a certain space being given to the agent for the accommodation of the packages of the express company; that it takes to the railroad cars and receives from them and delivers the packages with its own horses and wagons, and its own servants and agents, and that all this business is so mingled together that it is impossible to separate what may be considered the receipts growing out of the one or the other; and that there is an amount charged for the whole of the business done, as well for the delivery of the goods on board of the cars as their delivery to the consignee. It is also insisted on the part of the defense that a large proportion of the receipts consists of money received out of the state for the transportation of merchandise and carried through the state to other states.

To these defenses there is a demurrer, and the demurrer, if there is a defect in the declaration, or if the suit cannot be maintained, can of course be carried back to the complaint. And I think that upon carrying the

[1] [Reported by Josiah H. Bissell, Esq., and here reprinted by permission.]

demurrer back to the complaint the result is that the action cannot be maintained.

Without deciding whether the 6th section of the amendatory act referred to applies to an express company, but conceding that it does, which I am rather inclined to think is the fact—and without deciding whether the subject matter of the amendatory act is sufficiently set forth in the title as required by the constitution of the state, about which I think there may be great doubt, but conceding for the purpose of the argument that the act is valid in that respect, still I think that the penalty cannot be enforced; and for this reason:

The 6th section of the amendatory act, it will be observed, imposes certain duties upon all foreign or domestic corporations, and requires that they shall make returns of their gross receipts received in the state of Indiana, but there is to be included in and as constituting a part of the returns, all receipts, whether received within or without the state, and whether the goods are transported entirely through the state without being landed, or whether received from other states and delivered within the state, or received in the state and delivered in other states.

Now what is the law in case there is a failure to comply with the provisions contained in the 6th section? It is that if the party does not within thirty days render an accurate account of the receipts as herein provided; if there shall be a failure in any particular to render an account as required, there is a penalty to be enforced; so that it must appear, I think, that the state had the right to require everything to be done as specified in the sixth section before the penalty named in the seventh becomes operative. So that if it shall appear that the state has not the right in any one or more particulars to demand of this defendant the returns to be made as therein required, then the penalty is not enforceable.

I think the state has not that right. In the first place this is a foreign corporation; and conceding, as I am inclined to do, that the state would have the right to say to a foreign corporation doing business in this state under law that there should be levied and paid a tax upon its gross receipts received in the state whether for transportation of property or merchandise outside of the state or through the state; and conceding also that the rule laid down in 15 Wall. [82 U. S.] 284, in "The State Tax on Railway Gross Receipts," is applicable to a foreign corporation doing business within the state, still it is clear, I think, that it is not competent for a state to require of a foreign corporation the payment of a tax on gross receipts not received in the state. And it is certain that it is not competent for a state to impose a tax upon the receipts of a foreign corporation for the transportation of merchandise received out of the state and delivered out of the state and simply carried through the state. That is what this law requires, and it is an interference on the part of the state with that which solely belongs to congress; namely, it affects inter-state commerce, which the supreme court of the United States in the case in 15 Wallace, above cited, decided could not be done; and it is obvious that if it could be, it would be competent for a state to restrict in such measure as it seemed proper the transportation of merchandise which simply might pass through its territory. It would be therefore a tax upon inter-state commerce. This clearly cannot be done. This is what this statute attempts to do. The state says to the corporation that unless it will make this return, which under the constitution it is not required to do, the penalty shall be imposed. The answer is, I think, on the part of the corporation that a requisition is made which the state has no right to make, therefore it can protect itself under the constitutional prohibition against the right of a state to interfere with inter-state commerce.

For these reasons the demurrer must be carried back and sustained to the complaint.

## Case No. 7,022.

INDIANA v. MILLER et al.

[3 McLean, 151.] [1]

Circuit Court, D. Indiana. May Term, 1843.

SALT SPRINGS—PATENT—TITLE OF STATE.

1. Under the act of April 19, 1816 [3 Stat. 289], lands reserved for salt springs, within the limits of Indiana, were vested in the state. And these were certified by the commissioner of the land office, to be all the lands, within the state, reserved for that purpose.

2. The act of 1816 limited the grant to thirty-six entire sections. In 1831 a patent was issued for certain land, claimed by the state, as coming within the grant of the act of 1816, as containing a salt spring. This reserve, not having been so entered on the records at Washington, or at the land office in Cincinnati, and not coming within the thirty-six sections conveyed to the state, was *held* not to be vested in the state, but in the patentee.

3. A salt "lick" or "spring," in the acts of congress, seem to have been referred to as words of substantially the same meaning.

[This was an action by the state of Indiana against Jane Miller and others, to recover possession of a tract of land.]

Mr. Stevens, for plaintiff.

Mr. Lane, for defendants.

OPINION OF THE COURT. This action is brought by the state of Indiana, to recover possession of a certain tract of land, which is claimed under certain acts of con-

[1] [Reported by Hon. John McLean, Circuit Justice.]

gress. The action having been brought in the state court, has, by consent, been transferred to this court. The defendants hold the land under a patent, dated in 1831. They claimed the land under a pre-emption right, by virtue of the act of the 29th May, 1830 [4 Stat. 420]. The facts of the case being agreed, the questions of law are submitted to the court. As the legal title is vested in the defendants, the plaintiff can only recover by showing that it holds a prior grant, or that the patent has been fraudulently obtained by defendants, or that it has been issued without the authority of law. The plaintiff contends that the tract in controversy contained a salt spring, and was conveyed to the state as such, long before the patent was issued to the defendants.

In the 2d section of the act of the 18th May, 1796 [1 Stat. 465], it is provided, that "every surveyor shall note in his field book, the true situations of all mines, salt licks, salt springs, and mill seats, which shall come to his knowledge; all water courses over the line he runs shall pass, and also the quality of the lands." This field book was required to be copied and transmitted to the officers, who may superintend the sales of the land. By the 6th section of the act of the 26th of March, 1804 [2 Stat. 279], it is declared that, "the several salt springs in the said territory, together with as many contiguous sections to each as shall be deemed necessary by the president of the United States, shall be reserved for the future disposal of the United States: and any grant which may hereafter be made for a tract of land, containing a salt spring, which had been discovered previous to the purchase of such tract from the United States, shall be considered as fraudulent and null." By the act of the 29th February, 1808 [Id. 470], lands heretofore reserved were authorised to be sold, except section numbered sixteen, and the salt springs, and the lands reserved for the use of the same. Congress, by reserving salt springs, could only have intended to include those that were valuable, for the purpose of making salt. This is evident from the reservation of as many contiguous sections as the president should deem necessary. It seems that on the north-east quarter of section 25, the tract in controversy, the surveyor indorsed, "there is an extraordinary salt spring, said to be superior to any other in the territory." Symmes, the register, swears that this land was always reserved. Findlay states that it was reserved; that it was marked on the plat, "U. S." The act of 24th February, 1815 [6 Stat. 150], authorises "Perine to enter at private sale the north-east quarter of the above section; if, on inquiry, the register and receiver shall be satisfied that it does not contain any salt spring or springs, valuable for the purpose of making salt."

By the act of the 19th of April, 1816 [3 Stat. 290], in the 6th section, it is provided, "that all salt springs within the said territory of Indiana, and the lands reserved for the use of the same, together with such other lands as may, by the president of the United States, be deemed necessary and proper for working the said salt springs, not exceeding in the whole, the quantity contained in thirty-six entire sections, shall be granted to the said state of Indiana for the use of the people of the said state, the same to be used under such terms, conditions and regulations, as the legislature of the said state shall direct: provided, the said legislature shall never sell nor lease the same for a longer period than ten years at any one time." Under this legislative grant, the state claims the lands in controversy. But as this grant conveys, by a general description, the state must show that the land claimed by it, comes within the description. It appears that the salt lick or spring in question, was found of no value for the manufacture of salt. After some few attempts to make salt, it was found that the water was not of sufficient strength to make it of any value for this purpose. It was resorted to by animals, which drank the water, and this created an impression that it was a valuable salt spring. A distinction is made between a "salt lick" and a "salt spring," by defendants' counsel, and it is insisted that the terms convey different meanings. That a lick is formed where salt water appears on the surface of the ground; but that a spring is a fountain of water. These terms seem to be used in the acts of congress, as synonymous. A "salt lick" is so called, in the Western country, from the fact that deer and other wild animals resort to it, and lick or drink the brackish water. And in this respect no distinction is perceived between a "lick," as frequently used, and a "salt spring."

Although this salt lick or spring was noted by the surveyor, yet it was not entered as a reserve on the books of the general land office, or on the books of the register's office in Cincinnati. And it appears, that in 1826, the commissioner of the general land office instructed the register of the land office at Cincinnati, that the existing law authorised him to sell the land in question at the next public sale. And by the act of the 12th of February, 1831 [4 Stat. 441], the president of the United States was authorised to offer, at public sale, the three remaining quarters of section twenty-five, the other quarter section having been entered by Perine, under the act of 1815, as above stated. On the 10th of August, 1836, E. A. Brown, commissioner of the general land office, certified a list of the lands selected under the sixth section of the act of the 19th of April, 1816, which, by that act, were granted to the state, as having been reserved from sale on account of salt springs. This list includes

the quantity of thirty-six sections, which was the limitation of the grant, and among them the tract in controversy was not included. Under a general law of the state of Indiana, in relation to lands on which salt springs were situated, a lease for the premises in question was executed. But the lessee never entered into the possession. On the 3d of February, 1832, a joint resolution of the legislature of Indiana was passed, in which facts, in relation to the land in controversy, were stated through misapprehension, and the governor was requested to correspond on the subject with the commissioner of the general land office. The application of the legislature was rejected by congress. But on the 3d of July, 1832 [4 Stat. 558], congress authorised the state to sell the lands granted to it by the act of 1816. This was done in pursuance of a memorial of the Indiana legislature, dated the 23d of January, 1829, in which they represented that a township had been reserved for making salt, which had been conveyed to the state by the act of 1816, and that all attempts to make salt had proved abortive, and they prayed for an act to authorise the state to sell the lands, etc.

From the foregoing facts and acts of congress, it clearly appears that the land in controversy never vested in the state. It was not entered as a reserve on the records at Washington, or at Cincinnati. The state received, under the act of 1816, thirty-six entire sections, which were all it was entitled to under that act; and the land now claimed was not included in the above. The commissioner of the general land office certified that the state had received all the lands within it, which had been reserved for salt springs. All of which land, it appears, under the act of congress, the state has sold. We are, therefore, clearly of opinion, that the sale of the land to the patentee was authorised by law, and, consequently, that the patent is valid. No ground is perceived, on which the claim of the state can be sustained. Judgment for the defendants.

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INDIANA, The (TREE v.). See Case No. 14,165.

INDIANAPOLIS (KENNEDY v.). See Case No. 7,703.

INDIANAPOLIS & B. R. CO. (COLUMBUS, P. & I. R. CO. v.). See Case No. 3,047.

INDIANAPOLIS & C. R. CO. (MOWREY v.). See Case No. 9,891.

INDIANAPOLIS & ST. L. R. CO. (DUNHAM v.). See Case No. 4,151.

INDIANAPOLIS & ST. L. R. CO. (ST. LOUIS, A. & T. H. R. CO. v.). See Cases Nos. 12,236 and 12,237.

INDIANAPOLIS, B. & W. RY. CO. (RISLEY v.). See Case No. 11,859.

INDIANAPOLIS, B. & W. RY. CO. (TURNER v.). See Cases Nos. 14,258–14,260.

## Case No. 7,023.

In re INDIANAPOLIS, C. & L. R. CO.

[5 Biss. 287; 8 N. B. R. 302; 18 Int. Rev. Rec. 79; 21 Pittsb. Leg. J. 4; 5 Leg. Gaz. 275.] [1]

Circuit Court, D. Indiana. May, 1873.

BANKRUPTCY — WHERE MAJORITY OF CREDITORS DESIRE IT AND OFFER TO SECURE CLAIMS OF THOSE OBJECTING — WHEN FOR BEST INTERESTS OF ALL PARTIES — A BANKRUPT COURT HAS FULL EQUITABLE DISCRETION — THE PROPER PRACTICE.

1. Where the stockholders of a bankrupt railroad company purchase in good faith all the outstanding floating indebtedness of the company, except a few minor claims, and all the creditors, except those representing these few claims, desire such a result, they should be allowed to have the bankruptcy proceedings dismissed, on giving proper security for the payment of the objecting creditors.

2. It being evidently for the best interests of all parties, and the desire of a large majority, that the corporation be managed in the customary manner, the bankrupt court will not retain the custody and control of its property, to assist minor creditors in coercing their claims.

3. A bankrupt court has full equitable discretion, and can allow a case to be withdrawn, provided it is done without prejudice to the interests of any party.

4. The proper practice in such case is to require the deposit of adequate security for the payment of the claims of the non-assenting creditors, to remain until any contingency about them is ultimately settled by the highest court to which a case can be taken; the claims to be prosecuted with reasonable diligence.

[Cited in Re Great Western Tel. Co., Case No. 5,739.]

This was a petition under the second section of the bankrupt act, by the Whitewater Valley R. R. Co., a creditor of the bankrupt, for the review of an order of the district court dismissing the proceedings in bankruptcy, on the motion of all the creditors except the petitioner and Charles Dwight. The order of the district court required security for the payment of Dwight's claim, but made no provision for securing whatever claim the petitioner might be able to establish against the bankrupt. [Case unreported.] Prior to the commencement of proceedings in bankruptcy in this case, some of the stockholders of the bankrupt company, under a special law of Indiana, had filed a bill in the state court for relief against the company, on the ground that it had become insolvent, and receivers were appointed by the state court to take charge of the property of the company, and, under the order of the court, went into possession of all its effects. On the 5th of May, 1871, a petition in bankruptcy was filed against the company. Between the date of filing the petition and the adjudication of bankruptcy by the district court, on the 8th of November, 1871, the case in the state court was transferred to this court under the acts of congress of July 27, 1866 [14 Stat. 306],

[1] [Reported by Josiah H. Bissell, Esq., and here reprinted by permission. 18 Int. Rev. Rec. 79, and 21 Pittsb. Leg. J. 4, contain only partial reports.]

and March 2, 1867 [14 Stat. 558], and the receivers appointed by the state court were recognized by and continued to act as receivers under the authority of the circuit court, and when the proceedings in bankruptcy were commenced the usual order to take possession of the goods of the bankrupt was not put in force, for the reason that the property was in the hands of receivers. After the transfer of the case to the circuit court of the United States, various parties intervened and filed bills and cross-bills, claiming to be bondholders under mortgages which had been given by the company prior to the commencement of the proceedings in the state court, and which it was conceded were valid and prior liens against the railroad company, both as to the stockholders who commenced the proceedings in the state court, and as to the parties who commenced the proceedings in bankruptcy in the district court. The value of the property and effects of the company was between twelve and fifteen million dollars. Independent of the bonded debt of the company there was at the time of the commencement of these various proceedings a large floating debt, amounting to nearly a million dollars. On the 13th of February, 1873, a petition was filed in the bankrupt court to vacate the proceedings in bankruptcy, by certain parties who represented themselves as trustees of the stockholders, and who, as appeared from the statements in the petition, and which were not controverted, had been so appointed for the purpose of buying up all the floating claims against the company by means of a fund which had been voluntarily advanced for that purpose by the stockholders; and they had accordingly bought up all these various claims with the exception of one contested claim of about ten thousand dollars, due to Charles Dwight, and a claim of the Globe National Bank against the bankrupt company as acceptors of sundry bills of exchange held by the bank. They also stated in their petition that all the various creditors, including the bonded creditors and the Globe National Bank, and all the creditors of the floating debt which they represented, desired that the proceedings in bankruptcy should be superseded, and the company be once more permitted to take possession of its property and effects; the only party dissenting to this arrangement being Charles Dwight. When this petition was filed by the trustees of the stockholders, Dwight appeared by counsel and objected to granting the order to supersede the proceedings in bankruptcy on various grounds. The Whitewater Valley Railroad Company also appeared and objected to the prayer of the petition of the trustees for the reason that they had previously made a contract with the Indianapolis, Cincinnati and Lafayette R. R. Co., by which the latter had run the railroad of the Whitewater Valley R. R. Co., stating that there were various claims existing or contingent, for which the Indianapolis, Cincinnati and Lafayette R. R. were liable under their contract. It was not stated who were the owners of these claims, nor the amounts, nor on what grounds they were payable, except in a general way that they were for the right of way, and for stock that had been injured in the operation of the road while leased by the bankrupt company. The petition of the trustees to the district court, while denying the validity of Dwight's claim, proposed to make provision for its ultimate payment if it should be sustained before any competent court. The district court made an order superseding all the proceedings in bankruptcy, but requiring as a condition a deposit of United States bonds sufficient to secure Dwight's claim (which deposit was in point of fact made by the trustees), but making no provision whatever for any claim which might be found due the Whitewater Valley R. R. Co. To review this order of the district court the Whitewater Valley R. R. Co. filed this petition under the second section of the bankrupt law, on the ground that the claim of Dwight had been proved, among a large number of other claims, in the district court, and before the order was made superseding the proceedings the petitioner had also presented its proof of a claim as drawer of the bill of exchange held by the Globe National Bank, a portion of which had been paid to the bank, and insisted that there could be no dismissal of the proceedings in bankruptcy while any claim was pending in the district court, and especially when there was no provision made for the claims of the petitioner; that it was not competent for the district court to retain as a fund of the bankrupt and subject to its disposition the bonds which were deposited for the security of Dwight; that the proceedings should have been retained, or else entirely dismissed.

Porter, Harrison & Hines, for petitioner in review, cited In re Sherburne [Case No. 12,758]; In re Boston, H. & E. R. Co. [Id. 1,677]; In re Ellerhorst [Id. 4,381].

Hendricks, Hord & Hendricks and Joseph E. McDonald, for respondents, cited In re Miller [Id. 9,553].

DRUMMOND, Circuit Judge. It is to be observed that there was no property in possession of the bankrupt court. Assignees had been appointed, but they were nominal and were the same persons that were receivers under the order of the state court, and that of the circuit court of the United States; and all the property of the bankrupt was held by the receivers of the road, managed by them, and, of course, subject to all valid liens subsisting against the company; and if the property had been ultimately controlled by the bankrupt court, it, of course, would have been disposed of in such a way as to marshal the different claims and liens existing against the road,

and they must have been paid according to their priority, the bondholders confessedly holding the first lien.

It was to avoid the sacrifice of so much property, which it was thought would be necessarily incurred if it remained in the bankrupt court, that the stockholders made the arrangement which has been referred to, and which was assented to by all the creditors except only Charles Dwight and the Whitewater Valley R. R. Co., and the question is, whether with such an immense property, with so many and various liens and incumbrances upon it, and such a great preponderance, both in numbers and amounts, of those holding these liens, desiring the withdrawal of the case from the bankrupt court, it should be prevented by the opposition of the two creditors already named. It is quite clear that if the case had been wound up in the bankrupt court, and the property disposed of, the probability of its realizing anything for the two non-assenting creditors would not have been very great, as all these other claims would have first to be paid; and, in fact, there would be great doubt, perhaps, whether any portion of the floating debt would be paid, under which, of course, would be included that of the two non-assenting creditors, and, therefore, it may be a question whether it was not most for the interest of those non-assenting creditors themselves that the case should be withdrawn from the bankrupt court, and some arrangement made by which their claims could be satisfied, and thus leave this large property in the control of the company, with the assent of the other creditors, to be made available, if it can be, for the ultimate payment of the claims which might be brought against it.

It is also a question, whether, in a case like this, it is for the interest of all the various parties that the property should remain in the bankrupt court, or be withdrawn from it. For example, there could be no controversy that it would be entirely competent for the party against whom a decree in bankruptcy was made, with the assent of all his creditors, to withdraw it from the bankrupt court, and the question is, whether the opposition of an insignificant portion of the creditors can prevent that result. I think that the bankrupt court, as a court of equity, has a full equitable discretion upon this subject, and can allow a case to be withdrawn from it, provided it is done without prejudice to the interests of any of the parties, debtors or creditors, who are before it. And in this case I think it was competent for the bankrupt court to allow the case to be withdrawn from it, protecting the interests of the different non-assenting creditors. And if the court had given the same protection to the claims of the Whitewater Valley R. R. Co. that it did to that of Dwight, this court would not feel inclined to interfere with the decree. The reason why the district court made a distinction between the claims of the two non-assenting creditors was undoubtedly because that of the Whitewater Valley R. R. Co. was not set forth so distinctly as the other, being somewhat vague and uncertain, and depending more or less upon contingencies. But it seems to me, as long as there was a creditor who prima facie had a claim against the bankrupt company which was liable to be proved, before the court could dismiss the proceedings it should have given some security or protection to that claim. And it will be recollected that there was an allegation, which was not denied, that the Whitewater Valley R. R. Co., had paid a considerable amount as drawer of bills of exchange, held by the Globe National Bank, and which, therefore, was a distinct and positive claim, either legal or equitable, against the bankrupt. And it is further to be observed, perhaps, as a reason why the district court made a discrimination between the claims of the non-assenting creditors, that the proceedings in bankruptcy had been pending some time; that all the other claims had been proved in the bankrupt court except that of the Whitewater Valley R. R. Co. Some excuse is given for the fact that these claims of the latter company were not proved in bankruptcy, that one of these assignees, who was also one of the receivers, had requested that the proof should be postponed and should not then be presented in the bankrupt court.

On the whole, then, it seems to me, that if the proper protection can be given to the claims of Dwight and of the Whitewater Valley R. R. Co., it would be unwise, and contrary to the best interests of all concerned, for the property to remain in the bankrupt court; and that it is desirable that it should be restored to the company, to enable it, with the aid and co-operation of all the principal creditors and that of the stockholders, to endeavor to retrieve itself from its present embarrassments. The property is very large, the business done is apparently quite profitable, and there is certainly strong reason for supposing that with time the company may be able to extricate itself from the load of debt which now oppresses it. It seems to me, therefore, nothing more than the exercise of a reasonable equitable power which rests in the bankrupt court, to allow the case to be withdrawn from its jurisdiction under circumstances like these, and giving adequate security to one or two parties holding claims, who are opposed to the withdrawal, from causes which do not fully appear, and which are either real or imaginary, but the prominent object of whose opposition is to coerce some settlement from the great mass of the creditors. Therefore, this court, while conceding the correctness of the principle upon which the decree of the district court was made, will modify its order dismissing the proceedings in bankruptcy, and will allow it to be done upon the con-

dition that the bonds which have been deposited for the security of Mr. Dwight, shall be put in some safe place as indemnity for any decree or judgment which he may obtain for his claim against the Indianapolis, Cincinnati & Lafayette R. R. Co., there to remain until the case is ultimately disposed of by the highest court to which it can be taken; and in this particular instance, as Mr. Dwight is a citizen of Ohio, the court will require the suit to be brought in the circuit court of the United States for this district; and also upon the condition that adequate security is given for any claims which may ultimately be established by the Whitewater Valley R. R. Co. against the Indianapolis, Cincinnati and Lafayette R. R. Co.—the claims both of Dwight and the Whitewater Valley R. R. Co., to be presented and prosecuted with reasonable diligence, and in default thereof, any of the parties in interest to have the right to apply to the district court for the withdrawal of the bond and securities so deposited.

Decree accordingly.

NOTE. For a case in which claims against a partnership had been purchased in the interest of two of the partners, see In re Lathrop [Case No. 8,104]. There is nothing illegal or immoral in buying up the claims against a bankrupt for the purpose of staying proceedings. In re Pease [Id. 10,880].

## Case No. 7,024.

The INDIAN HUNTER.

LOWE et al. v. The INDIAN HUNTER.

[6 Adm. Rec. 343.]

District Court, S. D. Florida. Aug. 10, 1859.

SALVAGE—COMPENSATION.

[A large number of wrecking vessels and men were employed, weather permitting, for one month, in rescuing cargo from a ship stranded on the Florida reef, and succeeded in saving property of the value of $91,076.70. *Held*, that the salvors were entitled to $33,852.62 as compensation.]

[Cited in Baker v. The Slobodna, 35 Fed. 542.]

[This was a libel filed by John Lowe and others against the cargo and materials of the ship Indian Hunter, Austin, master, to recover compensation for salvage services.]

Winer Bethel and W. C. Maloney, for libellants.

S. J. Douglas, for respondent.

MARVIN, District Judge. It appearing to the court that this ship, laden with three thousand seven hundred and fifty bales of cotton, bound from Mobile to Liverpool, on the night of the 25th of June last stranded upon the Florida reef, and was totally lost, and that a large number of wrecking vessels and men were employed, off and on, as the weather would permit, one month, in saving the cargo and materials; that they have saved of the cargo three thousand four hundred and thirty-two bales of cotton, eighteen hundred and twenty-five bales of which were saved from the lower hold by diving, and all of it saved in a more or less damaged condition; that the whole cargo has been sold under an interlocutory decree of the court for the sum of $88,220.75, and the materials for the sum of $2,855.95: Now, therefore, the premises considered, it is ordered, adjudged, and decreed that the clerk pay out of the proceeds of the sale of the said cargo and materials, to the libellants and petitioners, as follows, to wit: To the parties comprising the first consort ship, the sum of eight thousand five hundred and seventy-two dollars and twelve cents, for their services in saving seven hundred and sixty-eight and a half bales of cotton, sold by the marshal as "dry," being one-quarter of the value thereof; to the same parties, ten thousand three hundred and twenty dollars and eight cents, for saving eleven hundred and forty-one bales sold by the marshal as "slightly damaged" and "damaged," being forty-two per cent. upon the value thereof; to the same parties, one hundred and eighty-two dollars and fifty-three cents, for saving portions of the ship's materials; to the parties comprising the second consort ship, three thousand one hundred and fifty-five dollars and thirty cents, for saving three hundred and ninety-one bales of cotton sold as "damaged," being forty-two per cent. of the value thereof; to the same parties, five hundred and forty-six dollars and thirty-seven cents, for saving portions of the ship's materials; to the owners, masters, and crews of the schooners Libbie Sheppard, Champion, and Nonpareil, nineteen hundred and ninety-five dollars and fifty cents, being one-half the value of two hundred bales of cotton saved by them by diving; to the owners, masters, and crews of the schooners Champion and Nonpareil, two hundred and thirty-three dollars and thirty-six cents, being one-half of the value of twenty-four bales saved by diving; to the schooner Harriet B. Hawkins, six hundred and sixty-eight dollars and fourteen cents, being one-half the value of sixty-six and a half bales, saved by diving, and twelve dollars and thirty-seven and a half cents for saving materials; to the Libbie Sheppard and Alice, eleven hundred and ninety-three dollars and fifty cents, being one-half the value of 119½ bales, saved by diving; to the schooner T. E. Bond, sixteen hundred and forty-eight dollars and forty-three cents, being one-half the value of 177 bales saved by diving, and twelve dollars and twenty-one cents for saving materials; to the schooners T. E. Bond and Belle of the Cape, eighteen hundred and sixty dollars and ninety-three cents, being one-half the value of 194 bales saved by diving; to the schooners Temperance, Fashion,

and Wye, eight hundred and forty-eight dollars and eighty-one cents, being one-half of the value of 89 bales, saved by diving; to the schooners Dudley and Sea Drift, four hundred and twenty-eight dollars and ninety-four cents, being one-half the value of 46 bales, saved by diving; to the schooner Sea Drift, one hundred and ninety-two dollars and ninety-three cents, being one-half the value of 21 bales, saved by diving; to the schooner Young America, one thousand twenty-three dollars and eighty-one cents, being one-half the value of 107 bales, saved by diving; to the schooner Dudley, five hundred and sixty-two dollars and fifty cents, being one-half the value of 60 bales, saved by diving; to the schooner Livinia, one hundred and one dollars and seventy-five cents, being one-half the value of eleven bales, saved by diving, and one dollar thirty-seven cents, for saving ship's materials; to the sloop Union, nine dollars and thirty-seven cents, being one-half the value of one bale, saved by diving; to the sloop Alice, one hundred and fifty dollars, being one-half the value of fifteen bales, saved by diving, and one dollar and eighteen cents for saving materials; to the schooner Louisa Tift, ninety-eight dollars ninety-two cents; to the schooner F. J. Moreno, thirteen dollars and eighty-seven cents; to the schooner Mary Browne, seven dollars eighty-eight cents; and to the B. W. Roberts, four dollars and forty-five cents,—for saving portions of the ship's materials; the total salvage herein allowed for saving the materials of said ship being eight hundred and eighty-one dollars and fifteen cents, and the total salvage for saving the cargo being thirty-two thousand nine hundred and seventy-one dollars and forty-seven cents,—making the aggregate salvage on cargo and materials $33,852.62. That the clerk pay out of the residue of the proceeds the costs and expenses of this suit and other charges, as allowed by the court. That the cargo and materials be severally charged with the expenses incurred on account of each separately, and that such expenses as have been incurred for the common benefit be apportioned between the cargo and materials, according to their respective values. And the said costs, expenses, and charges being now ascertained and apportioned as herein directed, it appears that the total salvage, costs, and charges upon the ship's materials are ten hundred and ninety dollars and eighty-nine cents, and the residue of the proceeds of said materials is $1,765.06, which is hereby ordered to be paid to Capt. Austin for and on account of whom it may concern. And that the total salvage, costs, and charges upon the cargo are $40,902.27, and that the residue of the proceeds of said cargo is $47,356.31, now remaining in the hands of the marshal and clerk to abide the further order of the court. That the salvage be referred to Commissioner Baldwin to divide among the salvors, according to the standing rule of court.

## Case No. 7,025.

INDIA RUBBER COMB CO. v. PHELPS.

[8 Blatchf. 85; 4 Fish. Pat. Cas. 315.] [1]

Circuit Court, S. D. New York. Dec. 13, 1870.

EQUITY PRACTICE—AMENDMENT OF ANSWER—NEW DEFENCE.

1. It is a proper construction of the 60th rule, of the rules in equity prescribed by the supreme court, that good cause for allowing an amendment of an answer, so as to set up a new defence, ought not to be regarded as being shown, where it appears that the matter of the proposed amendment could, with reasonable diligence, have been sooner introduced into the answer.

[Cited in Hitchcock v. Tremaine, Case No. 6,540; Colgate v. W. U. Tel. Co., 19 Fed. 829.]

2. In this case, a motion to amend an answer, by setting up a new defence, in a suit in equity for the infringement of letters patent, after an interlocutory decree in favor of the plaintiff, awarding an account and a perpetual injunction, had been made, and the accounting had been proceeded with, was denied, the new defence being one dependent wholly on parol evidence, and it not being shown that information of the matter of such new defence could not, with reasonable diligence, have been obtained prior to the making of such decree.

[Cited in Ruggles v. Eddy, Case No. 12,118; De Florez v. Raynolds, Id. 3,743; Page v. Holmes Burglar Alarm Tel. Co., 2 Fed. 333; Gillette v. Bate Refrigerating Co., 12 Fed. 110; Spill v. Celluloid Manuf'g Co., 22 Fed. 96; Witters v. Sowles, 31 Fed. 10.]

[This was a motion to amend an answer, after final hearing and decree for injunction and account in a suit in equity, brought to restrain the defendant [Samuel F. Phelps] from infringing letters patent [No. 72,324], for an "improvement in combs," granted to William Pauley, December 17, 1867, and assigned to the complainants.] [1]

Charles M. Keller and Charles F. Blake, for plaintiffs.

George Gifford and Peter Van Antwerp, for defendant.

BLATCHFORD, District Judge. This is a suit in equity, founded on the alleged infringement of letters patent granted to William Pauley, December 17, 1867, for an "improvement in combs," and assigned to the plaintiffs. The bill was filed June 22, 1869. The answer, which was filed September 6, 1869, sets up that Pauley was not the inventor of the improvement claimed, and also denies any infringement. It does not set up

[1] [Reported by Hon. Samuel Blatchford, District Judge, and by Samuel S. Fisher, Esq., and here compiled and reprinted by permission. The syllabus and opinion are from 8 Blatchf. 85, and the statement is from 4 Fish. Pat. Cas. 315.]

any prior knowledge or use of the invention. A replication was put in to the answer, and evidence was taken on the part of the defendant, with a view to show that Pauley did not invent the improvement, but obtained knowledge of it from some one else, but the proof wholly failed. The case went to a hearing, and a decree for the plaintiffs was made April 27, 1870, awarding an account and a perpetual injunction. The accounting has been proceeded with, and the defendant now moves, on affidavits, that the decree be vacated, the injunction be set aside, and the defendant be allowed to amend his answer and to put in evidence sundry matters set up in the affidavits, which it is claimed go to show that Pauley was not the first inventor of the improvement covered by his patents, but that it was previously known and used by others.

The sixtieth rule, of the rules of equity prescribed by the supreme court, provides that after a replication is put in, the answer shall not be amended in any material matters, as by adding new facts or defenses, except by special leave of the court or a judge thereof, upon motion and cause shown, after due notice to the adverse party, supported, if required, by affidavit. The twenty-ninth rule of such rules provides that, after replication filed, the plaintiff shall not be allowed to withdraw it, and to amend his bill, except upon a special order of the judge of the court, upon motion or petition, after due notice to the other party, and upon proof by affidavit that the same is not made for the purpose of vexation or delay, or that the matter of the proposed amendment is material, and could not with reasonable diligence have been sooner introduced into the bill, and upon the plaintiff's submitting to such other terms as may be imposed by the judge, for speeding the cause. In administering the 60th rule, it is, undoubtedly, a proper construction of it, in analogy to the requirements of the 29th rule, that good cause for allowing an amendment of an answer, so as to set up a new defence, ought not to be regarded as being shown, where it appears that the matter of the proposed amendment could, with reasonable diligence, have been sooner introduced into the answer. In Smith v. Babcock [Case No. 13,008] it is said: "When application is made to amend an answer in material facts, or to change essentially the grounds taken in the original answer, courts of equity are exceedingly slow and reluctant in acceding to it." In Baker v. Whiting [Id. 786], where a rehearing was sought by the defendant, on the ground of newly-discovered evidence, after an interlocutory decree had been made in favor of the plaintiff, it was held, that, if the party could, by reasonable inquiry and diligence, have obtained knowledge of the evidence before the decree, he was not entitled to the relief asked. In Walden v. Bodley, 14 Pet. [39 U. S.] 156, 160, it is said, that amendments which change the character of a bill or answer, so as to make substantially a new case, should rarely, if ever, be admitted after the cause has been set for hearing, much less after it has been heard.

The excuse set up by the defendant for not sooner bringing into the case the matters of defence he now alleges is, that, at the time he put in his original answer, he relied upon information which he had received, that Pauley had brought with him from Europe a comb containing the patented improvement; that he caused Pauley and others to be examined as witnesses, and was greatly disappointed in the result; that he had sold the infringing combs under the impression that they were covered by letters patent of the United States granted to one Orrin B. Gallup, April 30th, 1869; that he has obtained the alleged new information since the decree was made; that he used all the diligence, and made all the search, to get testimony, which he supposed or believed was necessary for his successful defence; that he believes that such diligence was reasonable diligence; and that, after the hearing and decision in the suit, he employed persons to make search, and travelled himself to make search, among early comb manufacturers, to ascertain what had been done in this country respecting such combs, and found the information set forth in the affidavits on which the application is made, and of which he had no knowledge or information prior to the hearing.

On these facts, it is impossible to say that the defendant has shown that the information he has acquired since the decree was made, could not, with reasonable diligence, have been obtained prior to that time. He set up no defence of the kind in his answer. He rejected wholly such a defence, and reposed on one of another character. He made no search whatever to obtain the information he now sets up, until after the decree was made. He shows no reason to suppose that, if such search had been before made, it would not have been attended with the same result which it is now claimed has followed the search. The fact that the information set up has followed the search, coupled with the fact that no search was before made, the defendant being himself a comb manufacturer, acquainted with the trade and with those versed in it, and knowing how to prosecute such a search, leads inevitably to the conclusion, that reasonable diligence, exercised at the proper time, would have been attended with the same result which is now set up. The case is one where the new defence is dependent wholly on parol evidence. In such cases, courts of equity hesitate in allowing any practice which may encourage carelessness, negligence or inattention in making answers, or which may leave room for the introduction of testimony manufac-

tured for the occasion. Smith v. Babcock [supra].

The motion is denied.

## Case No. 7,026.

INDSETH v. PIERCE et al.

[11 Chi. Leg. News, 256; 7 Reporter, 675.]

Circuit Court, D. Minnesota. 1879.[1]

FOREIGN BILL OF EXCHANGE—DUE PRESENTMENT—PROTEST—PROOF OF FOREIGN LAWS.

[1. In an action upon a foreign bill of exchange payable in Norway, the seal and certificate of protest of a notary public of that country is good evidence to prove the presentment and non-payment of the bill.]

[See note at end of case.]

[2. One protest to a bill of exchange is sufficient, and that must be according to the laws of the place where the bill is payable.]

[3. The question as to whether the presentment of a bill of exchange was made in due time is determined by the law of the place where the bill is payable; and the tenor, existence, and effect of such law may be proven by parol evidence.]

[See note at end of case.]

Action by holder of foreign bill of exchange to recover against drawer. Tried by the court without a jury.

J. C. McCluer and Palmer & Bell, for plaintiff.

Williston & Hall and Bigelow, Flandrau & Clarke, for defendants.

NELSON, District Judge. I find the following facts:

I. Pierce, Simmons & Co., bankers at Red Wing, on February 1, 1877, for value received, sold to the agent of the plaintiff a foreign bill of exchange of that date in the words following, viz.:

J. C. Pierce. T. K. Simmons. A. W. Pratt.

Pierce, Simmons & Co., Bankers.

Red Wing, Minn., Feb. 1, 1877.

Exchange for 15,441.50 kr.

At sight of this original of exchange (duplicate unpaid) pay to the order of O. A. Indseth fifteen thousand four hundred and forty-one 50-100 kroner, value received, and charge same to account of Sk-P., I. & Co., Chicago, as per advice from them.

Pierce, Simmons & Co.

To Christiana Bank of Kredit Kasse, Christiania, Norway.

No. 2,004.

II. I find that the plaintiff's agent sent the draft to the payee, which was received by him in Norway at his residence in Eidsvold, about fifty miles from Christiania, the place of business of the drawee on February 27, 1877, and was presented for payment on April 12, 1877, and payment was then and there refused, and the plaintiff, the payee, caused the bill of exchange to be protested by a notary, which was done, and protest duly certified and authenticated in the manner and form and words as follows:

1537.

No. 3 { Coat of arms stamp. } One crown—(26 2-5 cents.)

SCHOYEN. { For an amount of over 100 kr. & not over 1.0 kr. }

1877.

Notary Public in Christiania makes hereby known in the year 1877, April 12, there was delivered to me from Mr. O. A. Indseth, by Anthony Bjerke, a bill of exchange reading as follows:

FALK YTTOR.

"Exchange for 15,441 50 100 kroner.

"Red Wing, Minnesota, February 1st, 1877.

"At sight of this original of exchange (duplicate unpaid) pay to the order of O. A. Indseth fifteen thousand four hundred and forty-one 50-100 kroner, value received, and charge the same to the account of Sk-P., I. & Co., Chicago, as per advice from them.

"Pierce, Simmons & Co.

"To Christiania Bank of Kredit Kasse, Christiania, Norway."

—With the request that the bill of exchange "de non salutione" might be protested. In accordance with this request, and as there was answered in Christiania Bank of Kredit Kasse that the firm in question had failed, protest was entered on the same day by me, and in presence of P. Eide, as witness, as it is hereby protested—in optima forma de non salutione—besides which the right of the owner of the bill of exchange to demand and receive from all concerned full restitution for exchange, interest, commission and all other costs, loss and damage already caused by such non-payment is reserved, in accordance with the statutes and laws concerning bills of exchange.

In witness of this, this protest of the bill of exchange is issued under my hand and official seal.

N. L. Jurgensen. (Notarial seal.)

Paid 9 kr., nine kroner. N. L. Jurgensen.

III. I find the defendants were notified that payment had been refused, by letter to the firm from the plaintiff, the payee, which letter was received by them at Red Wing, aforesaid, at least as early as May 15, 1877, and also by the original certificate of protest, and a translation shown Pratt, one of the defendants, about that date by the plaintiff's agent, to whom the protest was sent for that purpose.

IV. I find the time required to communicate by mail between the residence of the plaintiff in the kingdom of Norway and Red Wing, Minnesota, the residence and place of business of defendants, the drawers of the

[1] [Affirmed in 106 U. S. 546, 1 Sup. Ct. 418.]

bill of exchange, is between twenty and thirty days.

V. I find the two letters, copies of which are here given, were written and mailed to the plaintiff by the defendants on the days they bear date, and were received by the plaintiff in Norway on the 13th and 15th of March, respectively:

(Copies.)

Pierce, Simmons & Co., Bankers, Foreign Exchange and Passage Tickets.

Red Wing, Minn., Feb. 13, 1877.

Dear Indseth:—We are very much annoyed by learning that our notice or your last large draft was not received by our friends, and consequently not advised to Christiana, Bk., as we fear it will cause you trouble. We bought gold at best rates and gave draft to Boxrud same day. Still it will be all correct soon.

Hastily yours, Pratt.

We hope you will not be worried.

Pierce, Simmons & Co., Bankers, Foreign Exchange and Passage Tickets.

Red Wing, Minn., Feb'y 15, 1877.

Dear Friend Indseth:—Fearing that our last large draft might not be paid owing to loss of our advice, we to-day cause a cable dispatch to be sent to Christiana directing payment, so you will be put to no trouble or expense. Your kind favor of Jan. 15, recd. We telegraphed and bought gold at best rate for you and hope you will be satisfied with our action and rates. Business very dull—never saw it so at this season. Warm and pleasant here now.

Yours truly, Pierce, Simmons & Co.

VI. I find the defendants had no money to their credit with the Christiania bank in Norway, when the bill of exchange was drawn, and depended for its acceptance and payment by the drawee upon the advice of Skow-Peterson, Isberg & Co., bankers of Chicago, to the Christiania bank to pay the same.

VII. I find the firm of Skow-Peterson, Isberg & Co., of Chicago, failed and made an assignment on March 21, 1877, and from February 28th to March 21, 1877, inclusive, had to their credit with Christiania bank money enough to meet this draft, but that no portion of the same had been set apart by the Christiania bank to meet this particular bill of exchange, and the assignee of Skow-Peterson, Isberg & Co. has received from the Christiania bank all moneys in its hands belonging to this firm.

VIII. I find the deposition of C. B. Bonnevie, a citizen of the kingdom of Norway, and a lawyer of seven years' practice at the supreme court, superior court and lower courts of the kingdom, was taken in the kingdom and he testifies that he is "familiar with the laws and rules relating to bills of exchange valid in the kingdom of Norway," and that "the Norwegian law of August 20, 1842, relating to bills of exchange, enacts in its paragraph one, that bills of exchange may be drawn with so long respite that they will fall due in Europe at the latest twelve months from their issue. Relating to sight drafts it is enacted in the paragraph two, that they shall be presented for acceptance so early that their time of payment falls within the time prescribed in the paragraph one. The provisions of the paragraph one, of the said law do evidently refer only to bills of exchange drawn within this country. The paragraph 2, refers exclusively to aviso bills, as it is not required in that country that sight drafts be presented for acceptance. * * * The laws of Norway do not establish any special rule concerning bills of exchange drawn in America and payable in Norway. The drawer of a bill whose liability is to be judged of under the Norwegian law will be exempt from any liability incident to the bill of exchange if the bill was not presented within a year from its issue; provided, however, he can prove that owing to the delayed presentation he suffered a loss in his accounts with the drawee. If he cannot prove that he is liable as if having only signed a simple bond. Our laws establish no rule concerning presentation of bills within a reasonable time."

IX. I find the law of Minnesota (Revision 1866, p. 526, tit. 7, § 53) enacts: "The existence and the tenor or effect of all foreign laws may be proved as facts by parol evidence, but if it appears that the law in question is contained in a written statute or code, the court may, in its discretion, reject any evidence of such law that is not accompanied by a copy thereof."

Conclusions of Law.

I. The protest purporting to be sealed and the impression affixed to the notary's name, declared to be his seal, is sufficient, and upon general principles of commercial policy is accredited. [Townsley v. Sumrall] 2 Pet. [27 U. S.] 179; [Nicholls v. Webb] 8 Wheat. [21 U. S.] 326, 333; U. S. v. Wilson [Case No. 16,730]; 3 Phil. Ev. p. 1277, note 884; Id. p. 1053, note 704; Id. p. 1259; 3 Kent, Comm. p. 93, note b; Byles, Bills, p. 146; 20 Wend. 85, as to seal; [Pillow v. Roberts] 13 How. [54 U. S.] 473; Greenl. Ev. p. 6; Chit. Bills, p. 215.

II. The statute of the state of Minnesota is a rule of evidence which this court will apply, and, although the written foreign law may be proved by a copy properly authenticated, it is not requisite that all foreign written law be so proved. Tayl. Ev. 1231; Best, Ev. 31, 652; Pow. Ev. 302; 99 Mass. 253; 14 Mass. 455; [Ennis v. Smith] 14 How. [55 U. S.] 426; and authorities cited.

III. The presentment for payment to the Christiania Bank in Norway was in time to hold the drawer liable, on the refusal to pay,

and the notice to drawers of such refusal to pay and protest was legal and sufficient. [Clifton v. U. S.] 4 How. [45 U. S.] 245, and authorities cited.

IV. The plaintiff is entitled to judgment for the amount of the principal of the bill of exchange, in dollars—$4,469.35—and interest thereon from April 12, at the rate of 7 per cent. per annum, to-wit: $616.14; in all, principal and interest, $5,085.49, with costs.

[NOTE. From this judgment of the court, the defendants took the case to the supreme court on writ of error. The judgment was affirmed, in an opinion by Mr. Justice Field. 106 U. S. 546, 1 Sup. Ct. 418. In regard to the seal of the notary, it was held that the use of wax or other adhesive substance has long since ceased to be important. It is enough that the imprint of the seal be made upon the paper itself in such a manner as to be readily identified upon inspection. "The court will take judicial notice of the seals of notaries public, for they are officers recognized by the commercial law of the world." In giving a bill upon a person in a foreign country, the drawer is deemed to act with reference to the law of that country. The general rule as to proof of foreign laws may be modified by statute.]

## Case No. 7,027.

The INDUS.

[Cited in Tremlett v. Adams, 13 How. (54 U. S.) 297. Nowhere reported; opinion not now accessible.]

## Case No. 7,028.

The INDUSTRY.

[1 Gall. 114.] [1]

Circuit Court, D. Massachusetts. May Term, 1812.

CUSTOMS DUTIES—SEIZURE OF GOODS — UNLADING WITHOUT PERMIT.

1. The 50th section of the collection act of March 2, 1799, c. 128 [1 Story, Laws, 617; 1 Stat. 665, c. 22], applies to all cases of unlading goods without a permit in any port or place within any collection district, whether such port or place be the port originally intended for the port of discharge of the cargo or not.[2]

[Cited in The Harmony, Case No. 6,081; Jackson v. U. S., Id. 7,149; The Active, Id. 33; The Sarah Bernice, Id. 12,343; U. S. v. Hutchinson, Id. 15,431; The Saratoga, 9 Fed. 328; U. S. v. One Raft of Timber, 13 Fed. 798; U. S. v. Huff, Id. 633; U. S. v. Curtis, 16 Fed. 187; The Lizzie Henderson, 20 Fed. 529; The Coquitlam, 57 Fed. 714.]

[Cited in Buck v. Danzenbacker, 37 N. J. Law, 361.]

2. Quaere,—if the 27th section of the same act applies to cases of illegal unlading after the vessel has arrived at a port of delivery, or at least of illegal unlading within such a port.

[Cited in The Active, Case No. 33; U. S. v. Twenty Cases of Matches, Id. 16,559; Clark v. Protection Ins. Co., Id. 2,832.]

[Appeal from the district court of the United States for the district of Massachusetts.

[This was a libel against the schooner Industry (William Wilson, claimant) for unlading goods without a permit. The vessel was condemned in the district court, and the claimant appealed.]

G. Blake, for the United States.

S. Dexter, for claimant.

STORY, Circuit Justice. An information has been filed against the schooner Industry, upon a seizure on account of certain foreign goods, exceeding $400 in value, having been unladen from said vessel, at the port of Edgartown, in the night time, without a permit, &c. contrary to the statute in such case provided. The facts are admitted to be as stated in the decree of the district court; and by that decree it appears, that the schooner Industry is a foreign vessel, and being bound on a voyage from the Havana to New York, put into Edgartown, in Martha's Vineyard. While lying there, in February, 1809, 400 boxes of cigars and several boxes of sugar, parcel of her cargo, were unladen, in the night time, without a permit, and put on board the brig Hannah, then lying at the same port, and bound for Boston, without the duties thereon having been paid or secured. The value of these goods exceeded $400. The schooner was not permitted to proceed to New York, the collector of the port considering, that foreign ships, under the 9th section of the embargo act of April 25, 1808, c. 66 [2 Stat. 501], were prohibited from going from one port to another of the United States. The residue of the cargo was therefore entered and bonded at the custom house at Edgartown, and shipped coastwise to New York. The forfeiture is claimed under the 50th section of the collection act of March 2, 1799, c. 128 [1 Stat. 665, c. 22], which provides, that "no goods, wares, or merchandize, brought in any ship or vessel from any foreign port or place, shall be unladen or delivered from such ship or vessel within the United States, but in open day," except by special license, nor at any time without a permit from the collector, &c. on pain of forfeiture of the goods, &c. and also of the vessel, if the value of the goods, &c. exceed $400.[3]

The facts of this case bring it completely within the terms of the 50th section. But it is contended on behalf of the claimant, that though within the terms, the case is not within the purview, of that section. That it is designed to apply solely to vessels which had arrived at their ports of destination and discharge, and not to arrivals at any intermediate ports, as was the case of the Industry. And the 27th section of the act has been cited in support of the argument. That section (the 27th section) clearly applies to vessels, which have not reached their port of destination and discharge. It provides, that if after the arrival of any ship or vessel la-

[1] [Reported by John Gallison, Esq.]

[2] See U. S. v. Burnham [Case No. 14,690].

[3] See The Harmony [Case No. 6,081].

den with foreign goods, and bound to the United States, within the limits of the districts of the United States, or within "four leagues of the coasts thereof, any part of the cargo of such ship or vessel shall be unladen for any purpose whatsoever, from out of such ship or vessel, as aforesaid, before such ship or vessel shall come to the proper place for the discharge of her cargo, or some part thereof," the part so unladen shall be forfeited, &c. Now the argument is, that as this section covers the case, and contains different forfeitures from the 50th section, it ought not to be deemed to be within the purview of the 50th section, because in this way the same offence would be punishable with various penalties. And it is said, that the legislature might with good reason omit a forfeiture of the vessel on account of an illegal unlading at an intermediate port, because in such case no fault or negligence could be justly imputable to the owner, on account of his absence from the scene of action.

The argument is certainly not without weight, and is favored by the natural construction of the words "before such ship or vessel shall come to the proper place for the discharge of her cargo, or some part thereof.". But it should be considered, that revenue laws rarely proceed upon the ground of such a distinction, as to the owner. In general the act of the master, who is the confidential agent of the owner, is imputed to the owner; or at least the latter is held responsible for the acts of the former, so far as the laws inflict forfeitures of the property on account of illegal traffic. Nor is it sufficient to authorize a court to extract a case from the express prohibitions of one section of an act, that already the same offence is punished by a different penalty in another section. If the wording of both sections clearly embrace the same case, which is to be held nugatory? I know of no principle of law, that would enable me to reject either. If, therefore, it should be proved, that the 50th section might embrace some cases (for clearly it cannot reach all) within the prohibitions of the 27th section, I am not aware how I would get over the express language. I should be obliged to hold the forfeiture cumulative in such cases, unless the legislature had enabled me, by direct or constructive exceptions, to escape from such a conclusion. The prohibitions of the 27th section certainly do not reach cases, where the illegal unlading is after the arrival of the vessel at her intended port of discharge. If the words of that section, "after the arrival, &c. within the limits of any of the districts of the United States," are to be construed as embracing an arrival in any port of entry or of delivery within such districts, which is not the port of intended discharge of the cargo, so as to make the unlading thereof in such port illegal within the same section, then it may reach cases within the express language of the 50th section. But perhaps there is some reason to doubt, whether the 27th section contemplates any case of unlading in any place within a district, which is a port of entry or delivery. The sections, from the 23d section to the 30th section, manifestly contemplate a progressive advancement in the voyage towards our ports; and the 30th section seems the first which contemplates an arrival of the vessel within the limits of a port, at which an officer of the customs resides. From that section onwards to the 50th section, the provisions seem to refer to vessels actually in port. There seems, therefore, some reason to contend, that the 27th section is confined to cases of unlading before the arrival of the vessel at a port of delivery, or at least to an unlading without such port. On this however I give no opinion.

It seems to me, that the 50th section clearly embraces all cases of the unlading of goods, without a permit, in any port or place within any district of the United States. It is not even stated in the section, that such unlading is to be in a port, in order to make the forfeitures attach; much less is it asserted, that the unlading must be in the port of intended discharge. The public mischiefs of such an illegal unlading are equally great, whether it be at the port of destination or not. The object of the law is, to prevent frauds upon the revenue, which is essentially aided by making it for the interest of the owner of the ship, as well as of the owner of the goods, to exercise due vigilance, and conduct with fidelity and honesty. We are undoubtedly bound to construe penal statutes strictly; and not to extend them beyond their obvious meaning by strained inferences. On the other hand we are bound to interpret them according to the manifest import of the words, and to hold all cases, which are within the words and the mischiefs, to be within the remedial influence of the statute. And this is what I understand by expounding a statute liberally, as to the offence. On the whole, the words of the 50th section embrace the present case; and I do not feel at liberty, upon ingenious suggestions, to narrow these words, so as to save from their operation a case, also fully within the mischiefs which the legislature designed to remedy. I affirm the decree of the district court. Condemned.

## Case No. 7,029.

The INDUSTRY.

[The case reported under above title in 35 Hunt, Mer. Mag. 446, is the same as Case No. 13,926.]

INDUSTRY, The (JOHNSON v.). See Case No 7,391.

## Case No. 7,030.

### The INFANTA.

[Abb. Adm. 263.] [1]

District Court, S. D. New York. April, 1848.

SEAMEN'S WAGES — DISCHARGE — ADMIRALTY PLEADING—COMMISSION TO TAKE TESTIMONY.

1. When a lien is claimed for labor and materials furnished in fitting out a vessel for sea, the admiralty courts of the United States observe the lex loci contractûs, and grant or refuse the remedy sought, according as it is allowed or denied by that law.

[Cited in The Maggie Hammond v. Morland, 9 Wall. (76 U. S.) 450; The Hermine, Case No. 6,409.]

2. Where a sworn answer is not demanded by the libel, the libellant may contradict its allegations, by proofs, without filing a replication thereto, or notice of such proof.

3. The testimony of witnesses may be taken on a commission sent abroad, whose names are not inserted in it, on satisfactory proof furnished after its return that their names or materiality were unknown when the commission was sued out or transmitted.

4. The admiralty courts of the United States will decline jurisdiction of controversies arising between foreign masters and crews, unless the voyage has been broken up or the seamen unlawfully discharged.

[Cited in The Hermine, Case No. 6,409; Slocum v. Western Assur. Co., 42 Fed. 236.]

5. It is expected that a foreign seaman, seeking to prosecute an action of this description in the courts of this country, will procure the official sanction of the commercial or political representative of the country to which he belongs; or that good reasons will be shown for allowing his suit in the absence of such approval.

[Cited in Ex parte Newman, 14 Wall. (81 U. S.) 169.]

6. The testimony of the master of a foreign vessel that he had discharged a seaman in this port, will not be allowed in a suit by the seaman, in this court, against the vessel for wages, to countervail his official report to the consul of his nation, that the seaman deserted the ship.

Two libels in rem were filed against the bark Infanta—the one by Robert Wood, the other by George States—both to recover wages. The facts in each cause being nearly the same, the causes were heard and decided together. The bark Infanta was built in Nova Scotia, by a British subject resident in that province; and prior to the commencement of these actions was sold and transferred by her builder to John S. De Wolf, a British subject, resident in Liverpool, England; who was the claimant in these suits. The libellant Wood shipped as first mate on board the bark, at Parrsborough, in Nova Scotia, on April 29, 1847. States shipped as mariner, at the same place, on the 26th of May following. The shipping contract was for a voyage to New York, and from thence to Liverpool, Great Britain, and back to a port in the United States or British America.

[1] [Reported by Abbott Brothers.]

Both libellants alleged that they were discharged from the bark at New York. The answer admitted the discharge of the libellant Wood, but denied the discharge of States, and averred that he deserted the vessel, and that his wages had been paid him in full. The answer in each cause, also, imputed a fraudulent collusion between the master of the vessel and the libellants with intent to charge the vessel with unjust demands, and to exaggerate the amount of wages due to the libellant. By a schedule attached to his libel, the libellant Wood stated his claim, as follows: [2]

| | | |
|---|---|---|
| Wages under the shipping articles.... | | $ 40 43 |
| Wages as mate, while fitting the bark for sea, from Jan. 12 to April, 1847, 3½ months, at £5 per month..... | | 77 70 |
| Cr. by cash..... | $ 40 43 | |
| Balance claimed ..... | 77 70 | |
| | $118 13 | $118 13 |

By a like schedule annexed to the libel of States, his claim was thus stated:

| | | |
|---|---|---|
| For wages, as carpenter, &c., on the vessel, from Nov., 1846, to May, 1847, 66 days, at $1.50 per day..... | | $ 99 00 |
| Wages, as mariner, from May 17 to July 17, 1847, two months, at $18 per month ..... | | 36 00 |
| Cr. by cash..... | $ 20 00 | |
| Balance demanded ..... | 115 00 | |
| | $135 00 | $135 00 |

W. Wordsworth, for libellants.

Francis Griffin, for claimant.

BETTS, District Judge. The libels article upon services rendered by the libellants anterior to the shipping agreement, and charge that they form liens upon the vessel to be enforced in this court. The answers deny the indebtedness, and also assert that if it exists, it is in both instances the personal debt of May, the master of the vessel, who, it is alleged, furnished the work of fitting up the vessel under contract with the owner. Each answer, also, excepts to the jurisdiction of the court on the subject-matter. Voluminous proofs have been taken on these issues.

The competency of the evidence offered by the libellants is denied on the part of the claimant, on the ground that no replications were filed to the answers; nor did the libellants give the notice, in writing, allowed by the practice of the court to be given in place of a replication, that they would take testimony in contradiction of the answers. So, also, the admissibility of the testimony of several witnesses taken on a commission to Nova Scotia, is excepted to by the libellants,

[2] It will be noticed that there are discrepancies in the statement of Wood's claim, given above. The computation was so presented in the pleadings, and we give it as it there appeared. The inconsistency has no bearing on the question discussed in the cause.

because the names of those witnesses were not furnished them previous to the examination.

Neither objection is maintainable. The libels do not demand the answer of the claimant under oath. Rule 87 of the district court declares, that "an answer need not be put in under oath, unless so required by a sworn libel." Both answers, in these cases, were put in without attestation by oath. Rule 88 dispenses with a replication or written notice in all cases except those in which the libellant intends to offer proof in opposition to the allegations of a sworn answer. Accordingly the libels and answers are before the court merely as pleadings, forming issues between the parties, and open to the same proceedings as if the answers had been sworn to and replications filed.

It is satisfactorily proved, on the part of the claimant, that the names of the witnesses referred to, or the importance of their evidence, were not discovered by the claimant until the commission was put in execution abroad, and in such case the testimony may be taken without previous designation of the witnesses to the opposite party. Rules 42 and 49 of the circuit court supply authority for executing the commission in the manner pursued in this case, and those rules regulate concurrently the practice of this court. Dist. Ct. Rules, 240.

Although these cases must be disposed of on other and general principles, governing actions of this character in the courts of the United States, yet in view of the great labor and expense incurred by the parties in taking these proofs, and with the desire of acquainting myself fully with the merits of the case,—supposing that a suggestion from the court in behalf of the libellants, if they have succeeded in establishing meritorious claims against the vessel, might conduce to an adjustment between the parties, and spare further litigation,—I have taken the pains to go over the evidence in full. A careful examination of the proofs discloses no reason why the court should not apply to these causes the rules which deny jurisdiction to enforce in rem, payment for services rendered to a foreign vessel in her home port, and authorize the court to decline jurisdiction of an ordinary suit for wages, prosecuted between foreigners, for services in a foreign vessel.

First, as to the claim to a lien for the services performed on the vessel while in Nova Scotia. The rendering of these services by each of the libellants was a transaction in a British port and between British subjects. Each contract for those services, whether direct or implied, had its origin within that jurisdiction, and was manifestly intended to be there performed upon both sides. The first element in the claim of a privilege in such debts, attaching them to the body of the vessel, is this: indisputable evidence that the debt had that operation and privilege under the laws of the place where it was contracted. In England, such a debt as is shown in this case would have no privilege, nor could admiralty courts take cognizance of it. Abb. Shipp. 143. The act of 3 & 4 Vict. c. 65, § 6, extending the jurisdiction of the admiralty, applies in respect to necessaries furnished, only to foreign vessels. The law in the provinces stands upon the same footing as in the mother country, in respect to the rights and liabilities of ship-owners. U. S. v. The Recorder [Case No. 16,129]. This court originates no right in respect to debts or contracts which did not accompany their inception. It administers the general maritime law, but will never, in controversies wholly of foreign origin, and between citizens and subjects of the same foreign country, give to either a hypothecation or privilege which he would not have possessed in the home and common jurisdiction. The lien is regarded as being, in effect, an element of the original contract itself and inherent therein. The Nestor [Id. 10,126]; Read v. Hull of a New Brig [Id. 11,609]; The St. Jago de Cuba, 9 Wheat. [22 U. S.] 409.

Courts of general jurisdiction, and proceeding according to the course of the common law, are governed by somewhat different considerations. They give their own remedy in every case suable before them, and it in no way affects their jurisdiction in the matter, that the suitor was not entitled to a like remedy, or indeed to any, in the place of the contract. But the admiralty courts of the United States restrict themselves in this respect. They will not entertain jurisdiction in rem over cases which, in the place of their origin, would not be entitled to that relief. The General Smith, 4 Wheat. [17 U. S.] 438; Peyroux v. Howard, 7 Pet. [32 U. S.] 324; The Marion [Case No. 9,087]; Read v. Hull of a New Brig [supra]; The Nestor [supra]. And as they would not permit the citizens of a state which denies a lien upon its domestic vessels for repairs and supplies, to pursue a vessel into another state allowing such a remedy against its vessels, and to enforce it there, so, for more cogent reasons, in respect to the subjects and ships of a foreign country, a privilege denied them at home would be refused here.

Independent of these legal objections to the actions, the cases could not, I think, be sustained upon the proofs before me, if the claims had originated in this state, or in favor of citizens of a different nation and of different residence from the owners of the vessel.

Second, as to the claim for wages. A suit for wages between parties circumstanced as those now before the court, cannot be sustained. The ship is still on her voyage, and bound from this port to one of the ports of Great Britain. There is no proof that these libellants were forcibly discharged from her. They should, accordingly, have accompanied

her to a home forum, and there pursued their rights. This court has repeatedly discountenanced actions by foreign seamen against foreign vessels not terminating their voyages at this port, as being calculated to embarrass commercial transactions and relations between this country and others in friendly relations with it.[3]

It is expected that a foreign seaman seeking to prosecute an action of this description in the courts of this country, will procure the official sanction of the commercial or political representative of the country to which he belongs, or that good reason will be shown for allowing his suit in the absence of such approval.

Upon the libel of Wood, however, it appears that he gives a credit to the exact amount of his wages, and upon the shipping articles there is endorsed the certificate of the British vice-consul at this port, "that the master has, with his sanction, discharged and paid off Robert Wood, the first mate," dated July 3, 1847. If this evidence does not conclude Wood in any court, it, at all events, affords satisfactory reasons to this court for declining cognizance of the matter, and for remitting him to the tribunals of his own country, where the validity and effect of these official transactions may be properly investigated and determined.

On the same day, the vice-consul certified in the articles, that the master "reports the desertion of George States and other seamen." Any court would receive with great distrust any document or deposition of the master, attempting to set up his free discharge of States from the ship, anterior to such official report that the seaman had deserted. It certainly presents a case more pertinent to the jurisdiction of the British courts, which can more appropriately measure the acts of the official agent of their government, and determine the rights of their own subjects, than can a foreign though friendly tribunal, which might fail of setting a just appreciation upon the polity of her laws of navigation and trade, and might thus unintentionally counteract important public interests in attempting to adjudicate upon the individual demands of her subjects.

Upon these considerations, I shall dismiss both these libels; and to protect the vessel and her master in the ports of the United States against a repetition of these suits, a decree for costs will be ordered against the libellants. Decree accordingly.

[The libellants subsequently appealed to the circuit court. Motions were then made by the claimant that the appeals be dismissed, or the libellants be required to execute new stipulations upon the suits pending. The motions were denied. Case No. 7,031.]

[3] See, also, Davis v. Leslie [Case No. 3,639], where the grounds upon which the jurisdiction in these cases rests, and the limits within which it will be exercised, are fully stated.

## Case No. 7,031.

### The INFANTA.

[Abb. Adm. 327.] [1]

District Court, S. D. New York. July, 1848.

ADMIRALTY—PRACTICE—STIPULATION—DEFECTIVE EXECUTION.

1. The requisites of a valid stipulation in admiralty considered.

2. An irregularity of practice must be objected to by the party affected by it, within the term of the court next subsequent to its becoming known to him.

3. A defective execution of a stipulation will be deemed waived unless excepted to before the close of the term next after the opposite party has notice of the defect.

4. This rule is strictly observed in the case of stipulations given in behalf of seamen.

Two libels in rem were filed by seamen against the bark Infanta—the one by Robert Wood, the other by George States—both to recover wages. The causes were brought to final hearing together in April, 1848,—see [Case No. 7,030],—and the court then decreed that the libels be dismissed with costs. The final decrees therein were perfected early in May following. The libellants thereupon appealed to the circuit court. Motions were now made in behalf of the claimant that the appeals be dismissed, or the libellants be required to execute new stipulations upon the suits pending in court unexecuted, before the appeals should be allowed to take effect. The motions were founded on two alleged irregularities on the part of the libellants, in putting in and perfecting their stipulations under the rules of the court, on entering their appeals. 1. That only one surety was given, and that each libellant was a non-resident of this district, and did not himself sign the stipulation. 2. That justification by the stipulators was taken in surprise of the claimant's proctor, and at a time different from the one appointed for the purpose.

J. Larocque, for the motion.
Wm. Wordsworth, opposed.

BETTS, District Judge. In suits in the admiralty courts, each party is required to give security apud acta, in open court, or by bail or stipulation out of court, on initiating an action or defence. Dist. Ct. Rule 44; Sup. Ct. Rule 5. This proceeding was attended with much formality under the ancient practice, and became a branch of critical learning, and of no inconsiderable perplexity. The topic is ably investigated by Judge Ware, in Lane v. Townsend [Case No. 8,054], and the methods pursued are pointed out in Clarke, Praxis, Adm. tit. 4–12; 2 Browne, Civ. & Adm. Law, 356. The subject is now one rather of curious inquiry than of practical importance in this court,

[1] [Reported by Abbott Brothers.]

because it is here fully regulated by the standing rules of this and the supreme court, at least in so far as the points arising under these motions are concerned. To effectuate the appeal so as to suspend execution on the decree in this court, it was necessary for the libellants to give security by stipulation within ten days after the decree was rendered (Dist. Ct. Rule 153), and also to serve upon the claimant four days' notice of the names of the sureties proposed, and of the time and place of giving the stipulation. Rule 154. The libellants, if resident within the district, must execute the stipulation personally, with at least one surety resident therein. Non-resident parties must supply at least two sureties. Rule 59. This seems to be the usual course of practice in the American courts of admiralty, and the formal steps for carrying out the regulations are indicated in the elementary books. Dunl. Adm. Prac. 155, 156; Betts, Adm. 25, 26.

The allegations set forth in the papers, upon which this motion is founded and attested to on the part of the claimants, are contradicted and repelled by the greater weight of evidence given in behalf of the libellants, except that both libellants are not proved to have been residents of this district at the time the stipulations were executed. They were transient seamen, employed backwards and forwards in voyages between New York, the West Indies, and Portland in Maine.

The sole defect or irregularity established by the proofs, then, is that two sureties were not furnished in the stipulations objected to. All the proceedings excepted to by the claimant took place with his full knowledge in May last, but he has forborne applying for relief against the alleged irregularities until the present term of July.

It is the settled practice of this, and it is believed of all other courts, that irregularities of proceeding, known to the party concerned, must be objected to at the first legal opportunity in court, after the time of its occurrence. If the fraction of the May term remaining after the steps had been taken by the stipulators to justify their sufficiency might be disregarded by the claimant, yet he was bound to make his objections to the stipulations at the June term, or he will be held to have waived all exceptions to matters of irregularity.

One surety is sufficient in the stipulations, where the principal is a resident within the district, and it is not indispensable to the validity of a stipulation in any case, that it be executed by two sureties. It is a privilege of the party, which he may enforce or not, at his option. Dist. Ct. Rule 59. It would be grossly inequitable to suffer the claimant to stand by and witness the signature of the stipulations by one surety only, without objecting to it, and subsequently permit him to vacate the act for irregularity. The signatures of two sureties are not vital to the stipulation. It is a formality only, which the opposite party may waive, and which, under the facts, the court will deem him to have done in this instance. This would be done on general principles; but there are additional reasons why the most liberal intendments and presumptions should be applied in favor of seamen, to uphold their acts, and prevent sharp practice to their disadvantage, in litigations for the recovery of their wages. The claimants may have now selected a time to exact their present execution of the stipulations, when they are absent on foreign voyages, and their present inability to fulfill that formality might bar their seeking relief by appeal from the decisions made in this court against their demands; and the addition of their names to the stipulations may usually be regarded as the emptiest formality, for it is not to be supposed that the personal responsibility of men of their class can supply any aid to the obligations, or any pecuniary advantage to the claimant. Independent of the laches of the claimant, in delaying his application to the court for a period of six weeks after notice of this informality, if it be one, I hold that the claimant must be deemed to have intentionally waived the execution of the stipulations by the libellants. The motions are accordingly both denied. Order accordingly.

## Case No. 7,032.

In re INGALLS.

[5 Law Rep. 401.]

Circuit Court, D. Massachusetts. Oct. 15, 1842.

BANKRUPTCY—PARTNERSHIP—COSTS—SEPARATE CREDITORS.

1. Where one member of a copartnership became a bankrupt, and no decree was entered against the copartnership, and the funds paid into court by the assignee were derived both from the separate estate of the bankrupt and from the partnership estate; it was *held*, that the costs of the proceedings ought to be apportioned upon the separate fund of the bankrupt, and upon the joint fund of the partners, in proportion to the relative value thereof pro rata.

2. The separate creditors of the bankrupt were solely entitled to be paid out of the separate estate of the bankrupt, and the joint creditors were entitled solely to be paid out of the joint estate of the partnership.

[Cited in Mead v. National Bank of Fayetteville, Case No. 9,366.]

This case having been referred to a commissioner, to make up the dividend sheet, he made a report, that the balance in court from which the costs taxed were first to be deducted was $796.00; of which sum $53.33 belonged to the estate of William Ingalls, and $742.67 belonged to the estate of Harvey & Ingalls, of which firm said Ingalls was a member. The petition for the benefit of the act of congress of 1841 was presented by William Ingalls, and no decree of bankrupt-

cy had been entered against Harvey & Ingalls. Debts to the amount of $65 had been proved against William Ingalls, and to the amount of $1392.53 against Harvey & Ingalls. Upon these facts, the commissioner asked the instruction of the court upon the following questions: (1) How shall the costs be apportioned? (2) How shall the funds be distributed between the private creditors of William Ingalls and the partnership creditors of Harvey & Ingalls? Upon which report the district court ordered, "that the questions contained in the accompanying report of the commissioner be adjourned into the circuit court, to be heard and determined." The case was now submitted without argument.

STORY, Circuit Justice. The first question is; how in this case shall the costs be apportioned? And to that I answer, they ought to be apportioned upon the joint and separate estates of the bankrupt and of his partners, according to their relative value pro rata; for the separate creditors of the bankrupt are benefited by the proceedings, to the extent of the dividends, which shall be payable to them out of the separate estate of the bankrupt, and the joint creditors to the extent of the benefit derived from the dividends, which shall be payable out of the joint effects. They ought, therefore, to contribute towards the costs, in proportion to the amount of the respective funds, that is, in the proportion, which $53.33, the amount of the separate estate of the bankrupt, bears to $742.67, the amount of the fund of the joint estate of the partners.

In respect to the second question, as the separate debts of the bankrupt exceed his separate estate, and the joint debts exceed the joint estate of the partners, there can be no surplus, which shall be auxiliary to either. Now, the general rule of law upon this subject, in all cases of bankruptcy, is, that the separate estate must first be applied to the payment of the separate debts of the bankrupt, and the joint estate must first be applied to the payment of the joint debts of the partners; and the surplus, if there be any, and that alone, can be applied to the benefit of the separate or joint creditors, beyond the fund, to which they have primarily a right to resort. This rule is expressly adopted and sanctioned by the fourteenth section of the bankrupt act of 1841, c. 9 [5 Stat. 440]. Applying the rule to the circumstances of the present case, it is plain, that the separate creditors of the bankrupt can have recourse only to a dividend out of his separate estate, and the joint creditors only out of the joint estate of the partners. I shall direct a certificate accordingly to the district court.

In the matter of William Ingalls, in bankruptcy. It is ordered by the court, that the following certificate be sent to the district court upon the questions adjourned by that court into this court, viz.: (1) Upon the first question, it is the opinion of this court, that the costs of the proceedings ought to be apportioned upon the separate fund of the bankrupt, and upon the joint fund of the partners, in proportion to the relative value thereof pro rata. (2) Upon the second question, it is the opinion of this court, that the separate creditors of the bankrupt are entitled solely to be paid out of the joint estate of the partnership, there being no surplus beyond the amount due to the creditors upon either fund or estate.

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INGALLS (HASKELL v.). See Case No. 6,193.

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## Cas No. 7,033.

### INGELS v. MAST.

[6 Fish. Pat. Cas. 415:[1] Merw. Pat. Inv. 450.]

Circuit Court, S. D. Ohio. May, 1873.

PATENTS—CONSTRUCTION—JOINT TORT FEASORS—"GRAIN-DRILLS."

1. A patent should be liberally construed, so as, if possible, to uphold it, and in this construction the patent specifications and drawings are all to be taken together.

2. An inventor is entitled to protection in all the functions his invention will perform.

3. Complainant having claimed in his patent the combination of the concave or secondary hopper, the seeding-wheel turning therein, and the projecting flanges or cheeks on the inside of the hopper and opposite the ends of the seed-wheel, and the drawing of the patent showing that the seed-cup, or secondary hopper, had an elevated delivery, the patent is *held* to be for a combination of four elements: the concave, the seed-wheel turning therein, the cheeks, and the elevated delivery.

4. This patent is not anticipated by the double cup patented by Jessup, which shows on one side the concave, the seed-wheel, the cheeks, but no elevated delivery; and on the other side, a seed-cup, performing similar functions, and having the elevated delivery, but without the cheeks.

5. The patent is not anticipated by the Moore or Strayer devices.

6. Whatever may be the effect at law of releasing one of two or more joint tort feasors, where the release is not under seal, in equity such a release should not be extended beyond the intent of the parties.

In equity. Final hearing upon pleadings and proofs. Suit brought upon the reissued letters patent [No. 3,976] granted Joseph Ingels, May 17, 1870, for "improvement in grain-drills," and letters patent No. 90,268, dated May 18, 1869, for same. The claims of the reissue are stated in the opinion. The defendant [Phineas P. Mast] had formerly been engaged in the manufacture of seed-drills with one Thomas, with whom complainant settled, giving him a release in full, but not under seal. The present defendant declining to settle, suit was brought against him. He set up the release to Thomas as a

[1] [Reported by Samuel S. Fisher, Esq., and here reprinted by permission.]

defense, and also denied infringement, and denied the validity of complainant's patent, alleging that the same was void for want of novelty. The case was heard by Judges SWAYNE, EMMONS, and SWING, and the opinion delivered by Judge SWING. The report below was prepared soon afterward, from the notes of the judge and the notes of the reporter.

Wood & Boyd, for complainant.
Fisher & Duncan, for defendant.

SWING, District Judge. This is a bill in equity, filed by the complainant to restrain the defendant from infringing letters patent, No. 90,268, dated May 18, 1869, and reissued letters patent, No. 3,976, dated May 17, 1870. The bill contains the usual allegations of infringement, and avers that Thomas & Mast were formerly partners in making and selling seed-drills, and that after the partnership was dissolved, the complainant settled with Thomas, giving him a release from all liability on account of such manufacture and sale.

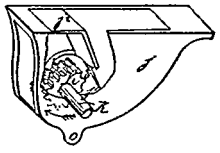
To this bill the defendant files an answer, containing these grounds of defense: 1. That complainant's patents are void for want of novelty. 2. That the defendant does not infringe; and, 3. That the release given to Thomas operates as a release to the defendant.

In considering this case, we shall content ourselves with giving the conclusions to which we have arrived, without going through the various steps which lead to those conclusions.

The first question is, what has the complainant patented? In ascertaining this fact, certain important rules have been laid down as guides for us in this examination. The first is that the patent shall be liberally construed, so as, if possible, to uphold it. Davoll v. Brown [Case No. 3,662]; Parker v. Stiles [Id. 10,749]; Goodyear v. Central R. Co. [Id. 5,563]; Gibson v. Van Dresar [Id. 5,402]; [Turrill v. Michigan S. & N. I. R. Co.] 1 Wall. [68 U. S.] 510. Secondly. In the construction, the patent, specifications, and drawings are all to be taken together. Parker v. Stiles [supra]; [Hogg v. Emerson] 11 How. [52 U. S.] 606; Goodyear v. Central R. Co. [supra]; Gibson v. Van Dresar [supra]; Kittle v. Merriam [Case No. 7,857].

Taking these rules, following and applying them, let us consider what Ingels has invented. The first three claims of the reissue are: 1. In combination with the concaves or secondary hoppers, and a seeding-wheel turning therein, the projecting flanges or cheeks on the inner sides of said hoppers, and opposite the ends of the seed-wheel therein, substantially as described and represented. 2. Also, in combination with the secondary hoppers or seed-cups, the casting of the cheeks or flanges, on and with the concave hopper or cup, when it is cast, substantially as represented. 3. Also the combinations of the concave, j, inclined plate, $j^2$, cheeks, $j^1$, and feeding or seeding wheel, K, as and for the purposes described and represented.

[Drawing of Patent No. 90,268, published from the records of the U. S. Patent Office.]



So that we find complainant in his claims has a concave, a seeding-wheel turning therein, of a peculiar construction, and in combination with this the casting of the flanges or cheeks upon the inner side of the concave, in the manner described.

It is said, however, by defendant, that he has no particular form of seed-cup or hopper described. True, so far as the claim is concerned, there is none. But the reissue says the feed-box is to be formed in a particular manner, and the drawing shows the seed-cup, in concave form, with an elevated delivery, and the expert Dennis shows that, taking the specification, claims, and drawings together, he has had no difficulty in constructing the feed-box. It is said, moreover, that the fact that the seed-cup is constructed with the elevated delivery, in many ways changed the function to be performed.

In cases of this character, the testimony of experts is competent, and we are to be governed to a certain extent by them. In the present case, two have been placed upon the stand, one by complainant and one by defendant, and the testimony of Fulgham may be taken in the same connection. Their testimony establishes the fact that there are two classes of feed-cups—to wit, gravitating feed and forced feed. In the first, the seed is allowed to drop through the simple force of gravitation; in the second, there must be a wheel so constructed as to carry the grain around and up to the elevated orifice. This testimony shows further, that if that orifice is on a level, in going over rough ground, the grain may be easily thrown out in too large quantities; while if it is elevated, this can not occur. Dennis and Fulgham both recognize these two classes of feed-cups.

It is true that the specification and claims make no mention of the elevated delivery, but it is shown clearly in the drawings, and construing these in connection with the specification and claims, as they must be construed, we find that the complainant has the seed-cup, the elevated delivery, the wheel with extended cogs, and the cheeks.

It is said, however, that the complainant, in his specifications, describes the function to be performed by the cheeks or flanges as that of end-bearings for the wheels only. It is true that this is the only function described by him, and yet it is equally true,

according to the testimony, that they perform an additional function in holding the grain, and enlarging the feed-wheel, thus performing a positive function in the distribution of the seed, and I take it to be the established law, that an inventor is entitled to protection in all the functions which his invention may perform, whether claimed or not; or, in other words, that the claim will be extended, co-extensive with the improvement.

As to the shape of the hopper or seed-cup, it is described in the patent as a concave, and in the drawing it is clearly described as having an elevated discharge orifice, which gives it the distinguishing feature of a forced or compulsory feed-drill, as contra-distinguished from gravitating or agitated feed-drills.

The experts clearly recognize the division of grain-drills into these two classes. By the improvement of the elevated cogs, this makes complainant's combination consist of the concave or seed-cup of the particular form, with the flanges or cheeks, with the plate, and the seed-wheel with the elevated cogs.

Having thus ascertained in what the complainant's invention consists, let us ascertain whether it is void for the want of novelty, or whether it has been anticipated. That it has been anticipated in most, if not all its elements, we readily agree; but has it been anticipated in its combination of elements? Three machines or devices are put in evidence to anticipate the complainant's machine.

The first is the Jessup device, and I will say that this device has given us a great deal of trouble in deciding this case. To some extent, it does seem that these elements are combined here. We have the concave, with the seed-wheel turning therein, the cheeks and the elevated cogs projecting beyond the cheeks. But we have not in combination with these three the elevated discharge. The discharge in the Jessup device is on a level.

On the opposite side of the same device, and separated only by a thin plate, we have a wheel performing a similar function and with the elevated discharge. But we can not take this out of its place to make the four elements. It is said, however, that this is a mere duplication. If it were, whether the complainant would be entitled to a patent is not quite clear. But all the testimony shows that the Jessup cup that has the elevated delivery has only been used for a particular kind of grain, and has never been applied to all kinds.

Between the two parts of his seed-cup, Jessup had a slide, and this must be closed when used for certain kinds of grain. The invention of Ingels does away with this, makes a simple device, and enables it to discharge all different kinds of grain. But we place the decision upon the other ground, that in the Jessup device there is wanting the elevated discharge.

The second is the Moore device. Although his device may have the cheeks or flanges and elevated cogs, yet it does not possess the elevated discharge orifice. In other words, its specifications and drawings bring it within the class of drills denominated as those whose seed is discharged by gravitation, and not by force or compulsion.

The Strayer device possesses the elevated discharge orifice, and comes within the class of forced or compulsory feed-drills, but it possesses neither the cheeks nor flanges, nor the wheel projecting-plate, j. Thus we find that the three devices relied upon in defense all lack a combination of the four elements that we find in the Ingels patent.

The next question is, does the defendant infringe? There are some minor differences, yet the defendant, without doubt, uses the device covered by complainant's patent, and therefore infringes. He uses the three elements, combined with the elevated discharge.

As to the question of release, we find in most, if not all the cases in which a release of one joint wrong-doer has been held to operate as a discharge of all, notwithstanding a stipulation or reservation to the contrary, have been technical releases under seal. Without, however, determining what might be the effect of such a release not under seal, with such a stipulation at law, we think, in equity, it should not be extended beyond the intent of the parties.

We hold, therefore, that simply as a combination of four elements, there is an infringement of complainant's patents. The elevated orifice is all. We have upheld the patents on that alone; otherwise, we should have discharged the suit.

[For another case involving this patent, see Case No. 7,034, which is a hearing upon exceptions to the master's report.]

## Case No. 7,034.

INGELS v. MAST.

[2 Ban. & A. 24; 1 Flip. 424; 7 O. G. 836; 2 Cent. Law J. 349; 9 Pac. Law Rep. 189.] [1]

Circuit Court, S. D. Ohio. Feb., 1875.

PATENT LAW—MEASURE OF DAMAGES FOR INFRINGEMENT—IMPROVEMENT.

Where the complainant's invention consisted of a combination of certain old elements to which some new features were added, the master reported the damages, based upon a license fee on the whole combination. *Held*, that the complainant was entitled only to the value of the improvements which he had added.

[Hearing on exceptions to master's report. The opinion of the court on the question of

[1] [Reported by Hubert A. Banning, Esq., and Henry Arden, Esq., and by William Searcy Flippin, Esq., and here compiled and reprinted by permission. The syllabus and opinion are from 2 Ban. & A. 24, and the statement is from 1 Flip. 424.]

infringement is reported in [Case No. 7,033]. The court there held that complainant's patent was for a combination of four elements, a seed cup for grain drills having a concave hopper; a seed wheel turning therein, with projecting cogs, to draw forward the grain; an elevated delivery orifice, so as to make the drill force feed; and cheeks or bosses between which the wheel turned. It held that the Strayer patent, earlier in date than that on which the suit is brought, showed all these except the last, to-wit, the cheeks. The master reported damages to the amount of nearly $20,000, on a basis of a license fee, for the whole combination covered by the patent in suit, and others. There was other testimony in the record as to the value of the whole combination. To this report exceptions were filed. On the hearing, complainant contended [under the decision of Judge Grier, in Livingston v. Jones [Case No. 8,414], and other decisions],[2] that he was entitled to the profit on the entire combination, while respondent claimed that under the rule finally settled in Whitney v. Mowry [14 Wall. (81 U. S.) 620], complainant could recover only for the additional profit that he had made by using the whole combination, over what he might have made by using all except the cheeks [the only thing Ingels added to the combination of Strayer].[2] And as complainant had rested his case, without apportioning the profits, he was entitled to recover nominal damages only. Respondent referred to Wayne v. Holmes [Case No. 17,303]; Ransom v. Mayor of New York [Id. 11,573]; Poppenhusen v. New York Gutta-Percha Comb Co. [Id. 11,283]; Goodyear v. Bishop [Id. 5,559]; Carter v. Baker [Id. 2,472]; Scwarzel v. Holenshade [Id. 12,506]; Graham v. Mason [Id. 5,672]; Curt. Pat. (4th Ed.) 458–461; City of New York v. Ransom, 23 How. [64 U. S.] 487; Jones v. Moorhead, 1 Wall. [68 U. S.] 155; Seymour v. McCormick, 16 How. [57 U. S.] 480; Mowry v. Whitney, 14 Wall. [81 U. S.] 620; Philp v. Nock, 17 Wall. [84 U. S.] 460; Whitmore v. Cutter [Case No. 17,601]; and Burdell v. Denig [Id. 2,142].

[The court gave simply its conclusions.] [3]

Wood & Boyd, for complainant.
Hatch & Parkinson, for defendant.

Before EMMONS, Circuit Judge, and SWING, District Judge.

EMMONS, Circuit Judge. 1st—The testimony, when analyzed, does not show any certain basis upon which the finding of the master can rest. No one witness swears to any license fee which is applicable to the precise thing here used, and for which damage is claimed. There is no claim that the report of the master is warranted by any proof of profits.

2d—Subject to reconsideration when the master's further report comes in, it is suggested that the proper measure of damages is the difference between the value of the improvement used by the defendant, and any other like device which was open to him without royalty, or by payment of a less royalty. This is said notwithstanding the suggestion in Judge Grier's decision in Livingston v. Jones [Case No. 8,414], that there is no warrant for subdividing the elements in an improvement and giving the complainant the value only of that peculiar feature in it which he has added. He seems to argue that the portion of the device which is improved must be taken as a unit, and the complainant entitled to its whole value as improved. We rule for the present, on the contrary, that he is entitled only to the value of that which he has added, and that such a subdivision should be made (see Jones v. Moorhead, 1 Wall. [68 U. S.] 155), which, although not deciding the question of damages, modifies Judge Grier's doctrine of unity.

3d—The master will, however, make an additional report, upon the basis that the complainant is entitled to damages for all the profits which the defendant has made by the use of the improved cheeks described in the patent. This, as distinguished from the rule which would confine him to the difference of the value of the cheeks, and such as he might have used without royalty.

It will be recommitted to the master to make a further report in accordance with these views. Ordered accordingly.

[See Case No. 7,033.]

## Case No. 7,035.

INGELS v. MAST.

[See Case No. 7,034.]

## Case No. 7,036.

INGERSOLL v. BENHAM et al.

[14 Blatchf. 362; 3 Ban. & A. 179.] [1]

Circuit Court, S. D. New York. Dec. 22, 1877.

EQUITY PRACTICE — INTERLOCUTORY DECREE — WHEN OPENED—NEWLY-DISCOVERED DECISION.

Under the circumstances of this case, the court refused to open an interlocutory decree.

[Cited in United States Stamping Co. v. King, 7 Fed. 868.]

[Bill by Lorin Ingersoll against Darius Benham and others.]

Frederic H. Betts, for plaintiff.
Benjamin F. Lee, for defendants.

[2] [From 9 Pac. Law Rep. 189.]
[3] [From 1 Flip. 424.]

[1] [Reported by Hon. Samuel Blatchford, Circuit Judge; reprinted in 3 Ban. & A. 179; and here republished by permission.]

WHEELER, District Judge. This cause has been heard on the petition of the defendants to open the interlocutory decree heretofore entered therein, because of the discovery of new matter, and the failure of their then counsel to fully represent their interests, and the answer of the orator thereto. It appears therefrom, that there has been no discovery of any new evidence, but only a discovery of a new use of that which was before well known. It is not claimed but that the facts were all fully known to the defendants and their counsel, but that the circuit court of the United States in the district of New Jersey has made a decision upon the facts, which they did not know of, and the like of which neither they nor their counsel saw fit to ask to have made here. If that was the only decision that had been made, and the question was open, doubtless, it would have great and, perhaps, controlling weight here. But, not only is the question foreclosed by this interlocutory decree, but also by a judgment the same way in an action at law, on the law side of this court, between these same parties. So that, if this decree were removed, that judgment would still stand as a conclusive adjudication of the rights of the parties involved, which would bind the court to make the same decree again. Therefore, it would be useless to open the decree, under the circumstances, if it was allowable, under the usual rules applicable, to open a decree for such a reason. But, further, the reason is not adequate. The decree in the district of New Jersey might as well be opened on account of the one here, as vice versa.

There is nothing to show but that the defendants were in fact fully and properly represented by their counsel, according to his best judgment. The petition alleges, in substance, that they did not know he was so situated that he could not so represent them, but scarcely, if at all, sets forth that, in fact, he was so situated. But, if it be taken as an allegation to that extent, the allegation is not admitted in the answer nor proved by evidence, and it would be unsafe and unjust, not only to the orator but to the solicitor, to assume that he did not do his full duty, without full proof that he did not. Let the petition be dismissed.

[For a hearing upon exceptions to the master's report, see Case No. 7,040.]

INGERSOLL v. BENHAM. See Case No. 7,040.

## Case No. 7,037.

INGERSOLL v. The CARBARGA.

[The case reported under above title in 29 Hunt, Mer. Mag. 716, is the same as Case No. 2,276.]

## Case No. 7,038.

INGERSOLL v. The CARBARGA.

[N. Y. Times, June 6, 1852.]

District Court, S. D. New York. 1852.[1]

CONTRACTS—DAMAGES FOR BREACH — ADMIRALTY.

[1. A libel may be maintained in admiralty for damages sustained by reason of the refusal to accept boats built under contract with the master of the vessel.]

[2. The boats having been built under the superintendence of the master, who ordered one sent to the vessel, where it was refused, and the other having been rejected for insufficient workmanship, the vessel was nevertheless liable.]

[3. The measure of damage is the actual amount of loss on the contract price, deducting the amount received on the sale of the boats to others.]

This was a proceeding by way of libel in the admiralty court, to recover a balance due the libellant [Chandler L. Ingersoll] for building two boats for the Carbarga, to take out to Chagres, in which he was to be paid a stipulated price, deducting $30, as the value of an old boat to be taken by the libellant as part payment. The orders for the boats were signed by the captain of the bark, and he superintended the building of them from day to day, and gave an order in writing for one to be sent down to the ship. It was taken to the vessel, but not received, and the other was refused at the yard of the builder, on alleged insufficiency as to the workmanship. The boats were sold by the libellant at a loss, and it was claimed, that the vessel was liable for the entire cost, $320.40.

THE COURT (JUDSON, District Judge) held that the action was properly brought in the court, and the libellant must recover, but that the rule of damages must be the actual amount of loss on the contract price, deducting the amount received on the sale of the two boats. A reference must be had to ascertain the amount of damages.

[This decree was reversed by the circuit court on appeal. Case No. 2,276.]

INGERSOLL v. The CARBARZ. See Case No. 7,038.

## Case No. 7,039.

INGERSOLL v. JEWETT et al.

[16 Blatchf. 378; 4 Ban. & A. 361; 9 Reporter, 105.][2]

Circuit Court, N. D. New York. June 5, 1879.

PATENTS—INFRINGEMENT—LICENSE—ESTOPPEL.

L. sued J., in equity, for infringing a patent. J. set up, by plea, that, in June, 1875, L. sued T. for infringing the same patent; that T.

[1] [Reversed in Case No. 2,276.]

[2] [Reported by Hon. Samuel Blatchford, Circuit Judge; reprinted in 4 Ban. & A. 361, and here republished by permission. 9 Reporter, contains only a condensed report.]

was a licensee under a patent granted to W. before the patent to L. was granted which embodied the improvement described in the patent to L.; that W. assumed the defence of that suit; that it was therein adjudged that W. was the first inventor, and that the patent to L. was void for want of novelty; and that J. was a licensee of W., under a license granted in October, 1874, and was making the article described in the patent to W.: *Held*, that the fact that the license was granted before the judgment was rendered was alone sufficient to prevent the judgment from operating as an estoppel against the plaintiff.

[Cited in United States Stamping Co. v. King, 7 Fed. 860; Brush v. Naugatuck R. Co., 24 Fed. 373; Consolidated Roller-Mill Co. v. George T. Smith Mid. P. Co., 40 Fed. 306.]

[This was a bill by Lorin Ingersoll, trustee, against John C. Jewett and others, for the alleged infringement of letters patent granted for an improvement in metallic cuspidors.]

A. T. Compton Attlebury and Frederic H. Betts, for plaintiff.

Charles F. Blake, for defendants.

WALLACE, District Judge. The proofs taken under the bill, plea and replication present the question of the effect of a former adjudication against the validity of the complainant's patent. The plea sets up this former adjudication as an estoppel in favor of the present defendants. The bill charges infringement, by the defendants, of letters patent [No. 119,705] granted to Eugene A. Heath, bearing date October 10th, 1871, for an improvement in metallic cuspidors. The plea alleges, that, in June, 1875, the complainant filed a bill, in the United States circuit court for the district of New Jersey, against Mary Turner and William Turner, for an infringement of the same patent; that the Turners were licensees, under letters patent granted to William H. Topham, bearing date August 2d, 1870, and reissued July 29th, 1873, which embodied the invention described in the complainant's patent; that Topham assumed the defence of the suit; and that it was therein adjudged by the court, that Topham was the original and first inventor, and that the complainant's patent was void for want of novelty. [7 Fed. 859.] The plea further alleges, that the present defendants are licensees of Topham, and are manufacturing the article described in Topham's patent.

The proofs show, that the present defendants became licensees of Topham in October, 1874; and this fact is decisive against the defendants' position, that the decree in the former suit precludes the complainant from maintaining the present action, and renders it unnecessary to look into the proofs, to ascertain whether, as matter of fact, Topham was a party or privy to the former suit.

Assuming that Topham was a party to the former suit, in the sense that every person is a party who has a direct interest in the subject-matter of the suit, and who is permitted, although not named in the record, to control its prosecution or defence, the present defendants cannot avail themselves of a decree in his favor. The defendants, as licensees of Topham, have an interest carved out of Topham's grant, analogous to that of a lessee of real estate, and are privies in estate with Topham; and if prior to the time they acquired their license, it had been adjudged, in a suit between Topham and the complainant, that Topham's grant, under his letters patent, was valid, and that of the complainant was invalid, that adjudication would have been conclusive, as an estoppel.

It is essential to the operation of an estoppel, that it be mutual, and, in considering the effect of a former judgment, which is invoked as an estoppel, if it be found that it would not be conclusive upon the rights of the parties, had it been adverse to the party invoking it, instead of in his favor, this consideration will be decisive against its efficacy. Therefore, in this case, if it is clear, that, had the former judgment sustained the complainant's patent and defeated Topham's, yet, nevertheless, the present defendants would not be concluded by that adjudication, it must follow, that the complainant is not concluded, as against these defendants, by that judgment.

Estoppels are sometimes said to be odious, and no one would dispute the truth of the aphorism, if a defendant, who had acquired a vested right in real or personal property, could be deprived of his right by the result of a suit brought subsequently, to which he was not a party, and in which he could not be heard. Judgments are binding upon privies as well as upon parties; but this rule is to be understood with the qualification, that only those are privies, within the meaning of the rule, who acquire their interest in the subject-matter of the suit subsequent to the suit. It is stated, in Freeman on Judgments (section 162), to be well understood, "that no one is privy to a judgment whose succession to the rights of property thereby affected occurred previously to the institution of the suit. A tenant in possession prior to the commencement of an action of ejectment cannot, therefore, be lawfully dispossessed by the judgment, unless made a party to the suit. The assignee of a note is not affected by any litigation in reference to it, beginning after the assignment. No grantee can be bound by any judgment in an action commenced against his grantor subsequent to the grant; otherwise, a man having no interest in property could defeat the estate of the true owner." As tersely put by Judge Selden, in Campbell v. Hall, 16 N. Y. 575, 579, the rule relative to estoppel "can have no application, except where the conveyance is made after the event out of which the estoppel arises." See, also, Doe v. Earl of Derby, 1 Adol. &

E. 783, and Winslow v. Grindal, 2 Greenl. 64.

If the former suit had been decided against Topham, the defence of the invalidity of the complainant's patent would still be open to the defendants, and the complainant would not be permitted to say to the defendants—"I have deprived you of your rights as licensees, by a litigation with your grantor, to which you were not a party, commenced after your license was granted"; and, because of this, the defendants cannot now insist that their rights as against the complainant are conclusively established by a judgment which could not enure to the advantage of the complainant, if it had been in his favor instead of being adverse. Judgment is ordered for the complainant.

[For other cases involving this patent, see Ingersoll v. Musgrove, Case No. 7,040; Same v. Turner, 7 Fed. 859; United States Stamping Co. v. King, Id. 860; Same v. Jewett, Id. 869.]

## Case No. 7,040.

INGERSOLL v. MUSGROVE et al.

SAME v. BENHAM et al.

[14 Blatchf. 541;[1] 3 Ban. & A. 304; 13 O. G. 966.]

Circuit Court, S. D. New York. June 24, 1878.

PATENTS — DAMAGES FOR INFRINGEMENT — HOW PROVED—NATURE OF EVIDENCE.

1. Where a patentee claims, in a suit, damages for a reduction of his prices caused by the defendant by infringing the patent, he must establish, by satisfactory evidence, not only that a reduction of his prices was caused by the infringement, but how much such reduction was, and how much of it was occasioned by the acts of the defendant, and how much was due to the fact that the infringing articles contained the invention patented. Such evidence must not be estimate, conjecture and opinion, but must be such as to afford a sound and safe basis of calculation.

[Cited in United States Stamping Co. v. King, Case No. 16,793a; Burdett v. Estey, 3 Fed. 571.]

2. Where a patentee claims, as damages, a loss of profits caused by a loss of sales, resulting from an infringement, he must establish, by satisfactory evidence, that he would have sold more of the patented articles than he did sell if the infringing articles had not been sold, and what profit he would have made on them, and what part of such profit is to be assigned to the invention patented. Such evidence must not be conjecture and speculation.

[Cited in Star Salt-Caster Co. v. Crossman, Case No. 13,320.]

[These were bills by Lorin Ingersoll against William Musgrove and Edgar F. Musgrove, and against Darius Benham and others, for an injunction, and to recover damages for the infringement of letters patent No. 119,705, granted to Eugene A. Heath, October 10, 1871, for an improvement in metallic cuspidors. An interlocutory decree was entered for complainant, and the cause was referred to a master to ascertain the damages. The case is now heard on exceptions to the master's report.

[A petition to set aside the decree was filed by the defendants Benham and others, and dismissed, in Case No. 7,036.]

Frederic H. Betts, for plaintiff.

Benjamin F. Lee, William H. L. Lee, and John H. Miller, for defendants.

BLATCHFORD, Circuit Judge. The master reports that the defendants realized, as profits from the sale of infringing cuspidors, at least $300 in the first case, on 1,003, and at least $275, in the second case, on 2,225, but, that he is unable, from the proofs, to report what amount of such profits to them is attributable to the distinctive patented feature of said cuspidors, "the business of the defendants being different from the complainants' in relation to these goods." The plaintiff does not except to this part of the report.

The plaintiff sold, during the same time, 90,554 of the patented cuspidors, for a sum less by $10,325 84 than the sum for which they would have sold at rates which ruled prior to the commencement of the infringements. The master reports that such reduction in price was, to a great extent, occasioned by such infringements by the defendants and other parties; that the infringements by the defendants occasioned a loss to the plaintiff, by the compulsory reduction of his prices, of 30 per cent. of the $10,325 84, being $3,097 76; that such loss was occasioned by reason of the fact that the infringing articles contained the patented features of the plaintiff's patented cuspidors; and that one half of such 30 per cent. of loss was occasioned by each set of defendants. The master attributes 70 per cent. of the reduction of prices to causes other than the infringements by the defendants. He, therefore, reports against each set of defendants, damages for the above cause, amounting to $1,548 88.

He also reports, that, if the defendants in the first case had not sold the 1,003 infringing cuspidors, the plaintiff would have sold 1,003 more of the patented cuspidors than he did sell, and would have made a profit, on each, of 79 cents, or, in all, $792 37, and that 85 per cent. of this, or $673 56, is the amount of such profit to be assigned to the distinctive patented feature of the cuspidors. He, therefore, reports that amount, $673 56, as additional damages against the defendants in the first suit. The aggregate damages against them he reports at $2,118 94. The figures add up $2,222 44.

He also reports, that it is not made to appear, that, if the defendants in the second case had not sold the 2,225 infringing cuspidors, the plaintiff would have sold an equal number of the patented cuspidors to

[1] [Reported by Hon. Samuel Blatchford, Circuit Judge; reprinted in 3 Ban. & A. 304; and here republished by permission.]

the persons who purchased from said defendants. He, therefore, reports against said defendants damages to the amount of $1,545 48, which should be $1,548 88.

I think it was a correct conclusion that the zinc cuspidor, with the bottom loaded with iron filings, was an infringement of the patent. It was composed of three metallic parts, formed and combined substantially as set forth in the Heath patent, with the excess of weight in the base. Although the self-righting feature is found in the Topham patent, that patent does not show the combination covered by the Heath patent.

The question, whether the price which the plaintiff received for his cuspidors was less than those which he would have received but for the infringements by the defendants, is a question of fact. Such, also, is the question as to the amount of the reduction, and as to how much of it was occasioned by the acts of the defendants, and as to how much of it was attributable to the fact that the infringing articles contained the patented feature of the plaintiff's patented cuspidors. Such, also, is the question as to whether, if the infringing cuspidors had not been sold, the plaintiff would have sold any greater number of the patented cuspidors than he did sell, and what profit he would have made on them, and what part of such profit is to be assigned to the distinctive patented feature of the cuspidors.

It is for the plaintiff to establish, by satisfactory evidence, not only that a reduction of his prices was caused by the infringements, but how much such reduction was, and how much of it was occasioned by the acts of the defendants, and how much was due to the fact that the infringing articles contained the patented feature of the plaintiff's patented cuspidors. I am not satisfied with the conclusions of the master on this subject. The evidence on which those conclusions were reached was in the shape of estimate and conjecture and opinion, and afforded no proper basis for a report of actual damages by a forced reduction of prices. The allotment of 30 per cent. of such reduction to the infringements by the defendants, and to the fact that the infringing articles contained the patented features of the plaintiff's patented cuspidors, and of 70 per cent. of such reduction to other causes, is founded only on the conjectures, estimates and assertions of witnesses, and not on any sound and safe basis of calculation. Moreover, it does not appear that the master at all considered the question as to the weight to be given to the fact that the sales of the plaintiff were unquestionably increased in number by the reduction of prices by him, resulting in profit on the added sales, and counterbalancing, to some extent, at least, diminution of profit on the rest of the sales.

So, also, it is for the plaintiff to establish, by satisfactory evidence, that he would have sold more of the patented cuspidors than he did sell, if the infringing cuspidors had not been sold, and what profit he would have made on them, and what part of such profit is to be assigned to the distinctive patented feature of the cuspidors. I see no proper foundation, in the evidence, for the conclusion, that, if the defendants in the first case had not sold the 1,003 infringing cuspidors, the plaintiff would have sold 1,003 more of the patented cuspidors than he did sell. The conclusion has no other basis than conjecture and speculation.

Only nominal damages should have been reported in each case. The plaintiff is entitled to recover costs other than the costs of the references before the master, and of the reports and exceptions, and of the hearings thereon, and the defendants are entitled to recover the costs of the references before the master, and of the reports and exceptions, and of the hearings thereon. The one set of costs, in each case, must be deducted from the other, and a decree be rendered for the difference, for the party in whose favor it shall exist.

[For other cases involving this patent, see note to Ingersoll v. Jewett, Case No. 7,039.]

INGERSOLL (PERKINS v.). See Case No. 10,988.

## Case No. 7,041.

INGERSOLL v. TURNER et al.

[See 7 Fed. 859.]

INGERSOLL (UNITED STATES v.). See Case No. 15,440.

INGERSOLL (WILBER v.). See Case No. 17,632.

INGHAM (PENN v.). See Case No. 10,933.

## Case No. 7,042.

INGLE v. COLLARD.

[1 Cranch, C. C. 134.] [1]

Circuit Court, District of Columbia. July Term, 1803.

COVENANT—SURETY—EVIDENCE.

In an action against A, who was surety for money advanced to B, the acknowledgments of B, as to receipts of money may be given in evidence to charge A.

Collard covenants that Ambrose White shall repay to Ingle money which Ingle might advance over and above what White might be entitled to for building a house for Ingle.

P. B. Key, for plaintiff, offered to prove White's acknowledgment of the receipt of certain moneys and materials on account of the building.

Mr. Mason, for defendant, objected to giv-

[1] [Reported by Hon. William Cranch, Chief Judge.]

ing White's admissions in evidence. A judgment against White would not be evidence to charge Collard. A judgment against a sheriff shall not bind his sureties; so on an administration bond, the sureties are not bound by plea of the administrator, but may show a plene administravit. Ingle, if he chose to risk it, might examine White himself as a witness. Collard could not object.

THE COURT (MARSHALL, Circuit Judge, absent) suffered the plaintiff to give evidence of the acknowledgment of White, as to the receipt of all such moneys and all such payments for labor and materials as came within the covenant.

[Verdict having been rendered for the plaintiff, defendant moved in arrest of judgment thereon. The motion was granted. Case No. 7,043.]

## Case No. 7,043.

INGLE v. COLLARD.

[1 Cranch, C. C. 152.] [1]

Circuit Court, District of Columbia. Dec. Term, 1803.

PLEADING AT LAW—VARIANCE—VERDICT.

A verdict does not cure a variance between the covenant alleged in the declaration and that produced on oyer.

Verdict at last term for plaintiff. [Case No. 7,042.]

Mr. Mason, for defendant, moved in arrest of judgment; that the breach set forth in the declaration is not a breach of the covenant produced upon oyer. Collard was only bound to refund in case the money which Ingle had paid before the date of the agreement, and the money paid by Ingle afterward to the workmen employed by White, and the money paid by Ingle for materials delivered, should amount to more than the whole house should be valued at by George Blagden. But the breach alleged is, that Ingle had paid to White more money than he was entitled to receive for materials and workmanship, without saying any thing of the money advanced before the agreement, which the defendant had not refunded.

J. B. Key, for plaintiff, contrà. Ingle avers a general performance of his part. The breach is well alleged in substance. The plea follows the breach, and the issue is correctly joined. A general assignment of a breach of a general covenant is sufficient. Esp. Dig. N. P. 298.

Mr. Mason in reply. The breach assigned must be clearly of a matter within the covenant. Esp. Dig. N. P. 299.

Judgment arrested. See Rushton v. Aspinall, 2 Doug. 683.

INGLE (GUNTON v.). See Case No. 5,870.

INGLE (HARTSHORNE v.). See Case No. 6,170.

[1] [Reported by Hon. William Cranch, Chief Judge.]

INGLE (HOGAN v.). See Case No. 6,583.

INGLE (ORR v.). See Case No. 10,588.

INGLEE (FOSTER v.). See Case No. 4,973.

## Case No. 7,044.

INGRAHAM v. ALBEE.

[1 Blatchf. & H. 289.] [1]

District Court, S. D. New York. March 19, 1832.

SEAMEN'S WAGES—WAIVER OF FORFEITURE—ABSENCE—PROOF.

1. A master who receives back into his service a seaman who has deserted, will be *held* to have waived the forfeiture of the seaman's wages.

2. An allowance may, in such a case, be decreed to the owner, for the time of the seaman's absence.

3. Semble, that a deviation from the voyage named in the shipping articles excuses a seaman for leaving the vessel, and bars the charge of forfeiture of wages.

4. Where, in a suit in personam for wages, the answer alleged, by way of set-off, payment of a board bill during the absence of the libellant from the vessel, and the evidence offered raised a strong presumption that such payment had been made: *Held*, that if the libellant would not admit the payment, the respondent might, on filing an affidavit that such payment had been made at the libellant's request, have time to procure proof thereof, and to sue out a commission or a dedimus potestatem for that purpose.

This was a libel in personam, by a seaman [Robert Ingraham] against a master [Stephen Albee], for wages, and for an extra allowance for services as cook. The answer set up a forfeiture by desertion, and also claimed to set off the amount of a board bill of the libellant's, paid, during his absence from the ship, by the respondent. It appeared on the hearing, that the libellant was absent from the vessel, in Havana, for some time. The evidence was contradictory as to the period of his absence, but it was proved that he boarded during the time for one dollar a day, and that the amount of his board bill was $21 62. The respondent met the libellant during his absence, and asked him if he had had his spree out yet, and, on his return, received him back into service. The libellant also proved that the vessel had, before he left her, made a deviation, and proceeded upon a voyage not named in the shipping articles. The respondent offered evidence to show that the libellant was ignorant of his duties; that he could not steer in a blow, nor reef, nor heave the lead; and that, though he had rendered occasional services as cook, yet he knew little of cooking. The respondent also gave evidence going to show payment of the board bill, as set up in the answer, which is more particularly stated in the opinion of the court.

Edwin Burr and Erastus C. Benedict, for libellant.

John Cleaveland and William W. Campbell, for respondent.

[1] [Reported by Samuel Blatchford, Esq., and Francis Howland, Esq.]

BETTS, District Judge. If the libellant has forfeited his wages by leaving the vessel, and continuing absent in Havana, such forfeiture would have been remitted by the consent of the master to receive him on board and overlook his conduct. Or, even if no condonation of that offence had been shown, it is very questionable whether the previous deviation of the vessel, and her performing a voyage not named in the articles, would not have excused the libellant in leaving her on arriving at Havana. As the case stands, no forfeiture of wages is established. The evidence offered by the respondent shows clearly that the libellant was not an able seaman, nor a competent cook; and, had the respondent refused to receive him back into his service, and defended this action upon the ground of the libellant's incapacity to perform the duty he contracted to do, I should have thought it a fair case for a reduction of wages, and should not have been willing to allow the rate stipulated by the articles, for any portion of the time. The master was a better judge of the value of the libellant's services to the vessel than any of the witnesses the latter has called; and the master's acts in reinstating the libellant counteract this branch of the defence, at least when set up by himself. His taking the libellant back, in Havana, under the original contract, without any stipulation for a change of wages, must now be deemed conclusive, as against him, that he was satisfied with the libellant's services, and was to allow him the same rate of compensation, to the completion of the voyage. I do not think, however, on the whole evidence, that the libellant is entitled to more than the agreed wages. His occasional services as cook were not of a character to raise an equity to increased pay. Wages are accordingly decreed at fifteen dollars a month for the voyage (four months and three days), deducting the period of twenty-two days for the libellant's absence in Havana. The answer alleges, that the libellant's absence continued from the 16th of September to the 11th of October, a period of twenty-five days; but no evidence is furnished fixing the dates with certainty. The master claims a credit of $21 62, the amount charged the libellant for board in Havana. The proof being that the price at the house where he boarded was usually one dollar per day, that is sufficient evidence of an absence correspondent to that charge; and, without noticing the fraction, I shall allow a deduction of wages for twenty-two days. The master claims the amount of this board bill as having been paid by him. The fact is stated in the answer, but the allegation is not responsive to the libel in a way to render it, of itself, evidence in the respondent's favor; and there is no direct proof that he paid the bill. There are circumstances, however, raising so strong a presumption in the master's favor, that if the payment is not admitted by the libellant, I shall allow the respondent a reasonable time to furnish further proof of the fact. It is proved that the libellant offered to ship on board of another vessel, for the purpose of having his bill satisfied; that it is usual for masters of vessels to advance the board bills of seamen on such occasions; that the respondent did so with reference to two of his seamen; and that the libellant said he did not know whether it had been done for him or not. That declaration is a plain admission that he had not paid it himself, and would probably justify my making the allowance at once, but for a declaration of the master in Havana, proved by one of the seamen, "that he would not pay for the libellant, and, if his landlord said anything about it, he would put him in prison for harboring the libellant." This leaves the point in so questionable a state, that I think it proper to demand further proofs. The master will be allowed ninety days to prove this payment, on his filing an affidavit that he has actually made it at the libellant's request, and, at the same time, taking out a commission or a dedimus potestatem to obtain the testimony. Decree accordingly.

INGRAHAM (MASON v.). See Case No. 9,238.

## Case No. 7,045.

INGRAHAM v. MEADE.

[3 Wall. Jr. 32;[1] 13 Leg. Int. 372.]

Circuit Court, E. D. Pennsylvania. April Term, 1855.

REFORM OF DEEDS — ILLUSORY APPOINTMENT — GRANDCHILDREN TREATED AS CHILDREN — FRAUD ON POWER OF APPOINTMENT.

1. Where stocks had been loosely settled or transferred by a father to trustees, in trust for his wife and children, the certificate declaring only in general terms on its face that it was for the lady and "her children;" the nature and extent of the lady's interest or control not being, on the certificate or otherwise, in any way specified; the court did not regard such a settlement in favor of children generally as sufficient to control a solemn deed made sometime afterwards by the trustees, the lady and the father, the original founder of the trust, reciting the former loose settlement—reciting further that it was expedient now to declare the said trust, and now declaring the trust to be (among other things) that the lady on her death might dispose of the stocks among such of her children and in such proportions as she by her will might appoint.

2. A power to appoint "among such of the children of R. & M. and in such proportions as M. may appoint" is an exclusive power; that is to say M. may entirely exclude certain children if she pleases.

3. The English equitable practice of setting aside certain appointments as illusory, it seems is not known as part of the Pennsylvania jurisprudence.

4. A power of appointment among "children" in terms, may include grandchildren, if in a general way grandchildren are manifest objects

[1] [Reported by John William Wallace, Esq., and here reprinted by permission.]

of the trust. And in the case before the court, though children alone were mentioned as entitled to receive under appointment, yet as the issue of children were, by the same clause, provided for in defect of appointment, it was *held* that the latter provision transfused its virtue in a manner to the former one; and that such issue was meant to be included within the power of appointment also.

5. Although the donee of a power may not do indirectly that which it is unlawful for him to do directly, yet where the donee has exercised the power, without any agreement with the party in whose favor it in terms beneficially operates, that such party shall apply its benefits in the manner unlawful for the donee to direct, the simple fact that such party has voluntarily, and without any knowledge of what the donee intended to do, applied or agreed with a third party so to apply them, is not enough to make the appointment a fraud and void.

Mr. Richard Meade had, in the year 1812, in a somewhat loose way, transferred certain stocks, about $50,000, to the late Edward Tilghman, Esquire, and others, in trust; with an intent apparently to provide a fund for his wife's separate use, and one with which she might maintain and educate their children, then all minors. No regular declaration of trust was made by anybody, nor was the stock described in the investments thereof, otherwise than as for Mrs. Margaret Meade and her children; the nature and extent of Mrs. Meade's interest, or her control or authority in regard to the trust property, not being, in any way, particularly declared. Mr. Meade having been a consul of the United States in Spain, was, for some years after, much away from the country, and the trust, though kept sufficiently alive at all times, appears to have been treated at none with much formality. However, in 1821, being then at home again, Mr. and Mrs. Meade with the trustees made a formal deed, in which, reciting the looseness of the trust and some other facts of the case, in order that the disposition of neither principal nor interest might be subjected to difficulty, did "mutually agree and declare" that one of the trusts upon which the property should be held was that the trustees should pay and distribute the principal among "such of" Mrs. Margaret Meade's "children" as the said Mrs. Meade, by her last will should appoint; and "for want of such appointment, then in trust for the use of such of the said children as shall be living at the death of the said Margaret, and the issue of such of the said children as may then be dead, share and share alike; the said issue if more than one to take only the share which their parent would have taken if living." Mrs. Meade died leaving seven children and certain grandchildren, the issue of two deceased children, and leaving also a daughter-in-law, Elizabeth, the widow of a deceased son, Robert, spoken of hereafter as Mrs. Robert Meade; and having by her will appointed to one child $500; to three others $4,000; to three others (including one named Salvadora) $9,500; and as regards her grandchildren, $3,000 to one, the issue of one child deceased, and $5,000 to others, the issue of another child deceased. But in regard to these last appointments, st. those among grandchildren, reciting "lest I may not have the power to make the foregoing appointments and direction," she says, "in case it should be determined that the said appointment and direction should be invalid," "then I appoint the last mentioned sums" to A, B, &c., naming certain of her children, "their heirs, executors, administrators and assigns;" no trust or purpose being named by Mrs. Meade in regard to it. A bill in equity was now filed by the daughter to whom but $500 was appointed, against the other appointees and the trustees and executors, to set aside all these appointments as illusory or fraudulent and void.

It is necessary to mention that during Mrs. Meade's lifetime she had, under a particular exigency of her daughter Salvadora, and with a view of securing to the daughter a house which this daughter had herself built but not fully paid for, advanced to her about $3,500 in a purchase of that house. This sum, this daughter, by an agreement or bond subsequently made, bound herself to repay after her mother's death to Elizabeth, already mentioned as the widow of one of Mrs. Meade's sons, Robert, who, as above stated, had died in his mother's lifetime, leaving this widow, but leaving no children. The history of this transaction was thus given by the daughter, one of the defendants, in response to the bill, her account being corroborated generally by testimony from Mr. Gerhard, whom she mentions in it. "In about a year after her mother's purchase of the house (st. about June, 1849) the defendant ascertained in conversation with her, that this matter had prevented her from carrying into effect an object which she had much at heart, st. the raising of a fund to be left as a testimonial of her affection for the widow of her son Robert, who had been a devoted daughter to her, but for whom she had not the legal power to provide out of her trust estate by testamentary appointment. The defendant immediately, of her own voluntary motion and without any prompting or suggestion from her mother, declared that she would pay to Mrs. Robert Meade, the sum which had been advanced in the purchase of her house; and she afterwards wrote to her mother to the same effect, that she would pay to Mrs. Robert Meade out of whatever money might be coming to her at her mother's death. Nothing was said in this conversation about any sum which her mother was to leave her, nor was there then, or at any other time, any understanding or agreement whatsoever, that the voluntary promise of the defendant to pay Mrs. Robert Meade what her mother had advanced out of her income, should form any consideration or condition for her mother's bequest, or testa-

mentary appointment in her favor. The defendant heard nothing more on the subject until she was summoned to see her mother during her last illness, about the 27th December, 1851. She has been informed, and believes, that some months before her last illness, her mother had expressed to her counsel, Mr. Gerhard, her intention to bequeath the amount, which she had as above mentioned advanced out of her income for the purchase of the defendant's house, to Mrs. Robert Meade, so that the same would be payable to her immediately on the testatrix's death, and that she was led to change this intended disposition by the suggestion of Mr. Gerhard, that it might prove highly oppressive to the defendant, if she were laid under an obligation to pay the money immediately on her mother's death. On or about the 28th of December, 1851, the defendant and Mr. Gerhard met at her mother's residence; her mother briefly said to her that Mr. Gerhard had something for her to do, and that she wished her to do it. Mr. Gerhard showed her a paper, which had been prepared by him, in which she agreed to pay to Mrs. Robert Meade, out of the first money she should receive after the death of her mother, out of the trust estate, a sum which was left in blank. The defendant sat down and made a calculation of what her mother had advanced for her. The amount thus ascertained, $3,500, was inserted in the blank, and the paper was signed by her. She had no further conversation with her mother on the subject, except in regard to the person with whom the paper should be deposited, which, upon Mr. Gerhard's suggestion, and with her mother's assent, was deposited with a common friend, Mr. Stewardson." In regard to the appointment over to the children of the sums originally left to grandchildren, the bill charged that they were made under an express or implied agreement that the legatees should apply them to the purpose of the original appointment, and that the legatees were bound in conscience if they received them so to apply them: and it interrogated the legatees, who were defendants in the bill, whether any and what conversations, and what agreement or understanding, expressed or tacit, they had had with Mrs. Meade; and whether they themselves "do intend now or hereafter to hold or apply the said sums which may be received by them under the said alternate appointments for the use of either of the parties to whom by the said will the appointments were originally made;" and whether such holding or application is in pursuance of any verbal or written, tacit or expressed contract, agreement or understanding between them and Mrs. Meade, or because of any request of hers, or intimation from her. The answer denied very fully any such agreement or understanding, conversation, request and intimation; but declined to answer (as not bound to do so) whether since Mrs. Meade's death the legatees ever had made any agreement respecting the application of any sums which may be received by them under the alternative appointments; or to state what their intentions were on that subject; alleging that whatever disposition they might make of the same would not be in pursuance of any verbal or written, expressed or tacit understanding with Mrs. Meade, or because of any request of hers, or intimation from her to them.

Mr. Meredith and Mr. McMurtrie, for complainant, contended that here was a clear trust created in 1812 for the children of Mrs. Meade, generally, i. e., for all the children, and for all alike. Its want of formality was wholly unimportant. A trust "for the children of Mrs. Meade" being a clear expression, and there being no other expression, it is a controlling one also. When the trust was created, in 1812, no reason existed for a distinction between the children, none was meant to be made, and none was made. The trust being for all the children alike, the wife, husband and trustees had no right, without the children's assent, to change it. If the deed of 1821 meant to change it, the terms "such of" and "in such proportions" must be treated as illegally put in, and the deed of 1821 must be read by the light of the settlement of 1812.

II. The head of illusory appointments was a well known one in England at the time of our Revolution. It has never been since repudiated here. It may be often difficult in application; but so are many heads of the law—salvage, commissions and others. But there are certain principles to be inferred from cases; and these will show that such an appointment as this is illusory—$500 to one child, and $10,000 nearly, to another.

III. A power to appoint to children excludes a power to appoint to grandchildren. The power of appointment in this case does not arise on a loose or informal instrument. On the contrary, it arises on an instrument of special form and solemnity; one which was made to originate, give and perpetuate form. Its words therefore are to control; and those words are clear. If the appointment is made by will, the right to appoint is among children alone. If the disposition is effected by intestacy, it is to children and grandchildren. But to take the provisions made in case of intestacy, and apply them to a wholly different, distinguished and preceding case—the case of appointment by will—is to confound a testament and intestacy, and to destroy the whole meaning of legal provisions. At any rate, carry the mode of interpretation through, and if the term "grandchildren" in the last clause—the clause of intestacy—is to control the word "children" in the former one—the clause providing for appointment by will—

then let the last clause control the former altogether; and make an equal division among all parties. To that the complainant will accede. Then with regard to the alternative appointment. Here, in the first place, is a litigious clause. If it "shall be determined that the said appointment and direction is invalid." It can never be "determined" without a suit. The clause invites directly to litigation. But the plan is a contrivance, a fraud on the power. Who doubts that the grandchildren will receive the amount if the legatees receive it? Indeed, the defendants decline, in terms, to give any account of present agreements or intentions. Of course, among persons of intelligence, having as they deserve to have, confidence in each other, there were no contracts or conversations where contracts or conversations would be fatal. But that there is an intention; in fact, an obligation in conscience, to carry it out, and that the alternative bequest was made with the expectation and purpose that it should be carried out fully, faithfully, exactly, who denies or doubts? And this is the very sort of thing from which equity took its rise—which it particularly lays its hands on as contemptuous and offensive, in this instance to herself.

P. M. McCall, contra.

GRIER, Circuit Justice. I. Is this appointment of $500 illusory and therefore void? The theory on which the English chancellors have acted in setting aside certain appointments as "illusory," is apparently founded in equity and justice. But like many other theories which are very plausible in the abstract, experience has shown this one to be difficult in application. The term "illusory" is vague and indefinite, depending on uncertain discretion or opinion of the person using it. Where a power is given by the donor to another to distribute, it is for the purpose of inequality, which future and unknown events may make just and judicious. The donor might do with his own as he pleased—give a penny to one, and ten thousand pounds to another. He has a right to intrust this power to another by substitution. The objects of his bounty are now all equally worthy (infants perhaps); if the division were made now, there is no reason for inequality. But before the time arrives for distribution, there may be a thousand reasons why the distribution should be unequal. When a chancellor undertakes to decide that any degree of inequality is a fraudulent exercise of the power, he is assuming to himself a knowledge of the secret wish and intention of the donor not expressed in the deed, and undertaking to exercise a discretionary power not intrusted to him, but to another. It would perhaps have been better originally to have adopted the adage "stet pro ratione voluntas" in such cases, than to have assumed this indefinite, discretionary and therefore dangerous power over men's property. However much the chancellor may laud his great principle, that equality is equity, how does he know that even extreme inequality was not the very purpose and object of the power? I certainly concur with the scruples expressed on this subject in the English chancery cases of Kemp v. Kemp, 5 Ves. 849; Butcher v. Butcher, 9 Ves. 393; and Bax v. Whitebread, 16 Ves. 15.

We know of no cases showing whether this doctrine, so much disliked by later authorities and finally abolished by act of parliament in England, has ever been adopted by the courts of Pennsylvania. We are, therefore, pleased to be relieved from the responsibility of deciding the question whether the appointment of $500 to one of a class of nine or ten in the distribution of $50,000 be illusory or not.

The power in this case is not only to distribute among, but to select from, the class of persons pointed out. It is what is called an exclusive power. The right to select necessarily implies the power to exclude. No distributee can say his share is illusory, when the distributor was not bound to give him anything. We cannot strike out the words "such of," out of this deed; and unless we do so, the rules of grammar and all legal precedent must be disregarded, before we pronounce this not to be an exclusive power. The cases on the subject are too numerous to be specially noticed, but may be found collected in Mr. Sugden's work on Powers (chapter 7, § 5).

II. Are the appointments to the grandchildren void for defect of power? As the alternative appointments are made to "children" in case those to the grandchildren should fail for want of power, there can be no failure for defect of power or want of appointment. Whether the appointment to the grandchildren be good is, therefore, a question in which the complainants in this bill have no concern. It is a point, nevertheless, on which the court are compelled to give an opinion, and the only one in which we have found any difficulty in arriving at a satisfactory conclusion.

It is undoubtedly a general rule in the construction both of wills and deeds of settlement that while the word "issue" will be construed to include grandchildren, the word "child" or "children" will not receive such construction. Hence it has been laid down as an established rule, that a power of appointment to children, will not authorize an appointment to grandchildren. Neither will a legacy or devise to "children," be construed to include grandchildren. And when there is nothing else in the deed or will to show that the testator or donor did not use these words in a different sense, this rule of construction should not be departed from. But every instrument must be construed from its whole

contents taken together, in order to ascertain the true meaning and intention of the party or parties to it. No one isolated word or term can be seized upon and made to absolutely control the rest of the instrument. The testator or donor may have used particular words either in a wider or narrower sense than that given by philologists or judges. The word "issue" may be found from other clauses to have been used to designate a child or children only, and not to include grandchildren. Lord Alvanley has said (Reeves v. Brymer, 4 Ves. 698) that "children" may mean "grandchildren" where there can be no other construction, "but not otherwise." This dictum, like many other acute dicta, must itself be construed with some latitude, as if taken literally it would deny the right of the court under any circumstances to give such construction. But I presume that Lord Alvanley meant no more than that this term could receive no other construction, unless from the external circumstances of the testator the devise, gift or power would fail altogether, as in Gale v. Bennett, Amb. 681, where it was decreed that grandchildren might claim a devise "to children" where there were no children. Or where a more comprehensive meaning must necessarily be given to the word to render it consistent with other clauses of the instrument clearly expressed. Thus in Deveaux v. Barnwell, 1 Desaus. Eq. 499, grandchildren were decreed to take under the words "my surviving children," under the pressure of circumstances which showed that such must have been the intention of the testator; the court saying with Lord Macclesfield, "if there is no precedent it is time to make one." But such a construction should not be made unless a strong case of intention, or necessary implication requires it.

The deed before us shows a clear and indisputable intention to include grandchildren among the beneficiaries of the trust: it makes the issue of a deceased child the representative of its parent, and as much the object of the bounty of the donor as any living child. The clause giving the mother the power to select and distribute unequally among the beneficiaries, and which uses the word "children" only, is immediately followed by that defining the class of beneficiaries as "such of the said children as shall be living at the death of said Margaret" and "the issue of such children as may be dead share and share alike which their parent would have taken if living." Here the donor himself describes the persons meant in the first clause, giving a power of selection and distribution. They are described as the "children," but not as the children surviving at the death of the mother; but all the children of the donor and his wife, the dead to be represented by their issue or offspring if they left any. To construe this power so as to restrict the objects of it to a part of the beneficiaries, would be inconsistent with the clear intention that the issue of deceased children should stand in "loco parentis." When the deed of settlement was executed, no reason was known why any should be excluded; the grandchildren were equally the objects of the donor's bounty as their parents would have been if alive. If so, the power to select or distribute according to future changes among the objects of their affection in order to its just execution, must be construed to include all the recipients of their bounty. Suppose all the children except one or two died before the mother, leaving issue; the exercise of the right either to distribute or select must be at the expense of nine-tenths of the beneficiaries who would be incapable of receiving anything by appointment. The power to select or distribute cannot be exercised at all, or only injuriously, unless it be as wide as the bounty.

We do not think it would be carrying out the intention of the donor as clearly expressed in this deed, to construe the word "children" so as not to include those deceased before their mother as represented by their issue. Any other construction which would make the exercise of the power of selection or distribution be a necessary exclusion of part of the beneficiaries contrary to the desire of either father or mother, the donor or the donee of the power, would in our opinion be a declaration that the deed is inconsistent with itself, and grossly absurd. We are of opinion, therefore, that the appointments to the grandchildren are valid.

III. Is the appointment to Salvadora a fraud and violation of the trust? It must be admitted that if the bond given by Salvadora to Mrs. Robert Meade stood alone, and without explanation, there would be some plausible grounds for this charge.

It is unnecessary to examine the numerous cases on the subject of fraudulent execution of powers, as we do not consider the facts of this case to bring it within the category. The answer in this case is responsive to the bill and instead of being impeached is fully supported by the testimony of Mr. Gerhard. They amply explain the whole transaction, and show there was no act tending, nor intention on the part of the testatrix to commit a fraud on the power entrusted to her, by improperly diverting the trust fund to herself or others for whom it was not intended. The debt due from Salvadora to her mother was transferred to Mrs. Robert Meade, while the time of payment was extended, till Salvadora should be in funds from the receipt of her share or portion of her expectancy in the trust. The whole transaction was just and honorable, and wronged no one.

Decree: That by the deed, &c., Mrs. Meade had an exclusive power of appointment, &c., which gave her a right to select among the objects of the power; that the appointment of $9,500 to Salvadora was not made in fraud of the power; that the grandchildren were proper objects of the power; and that the

several appointments, including the one of $500 to the complainant, were and are valid appointments under the power.

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INGRAHAM (PENNS v.). See Case No. 10,944.

INGRAHAM (SEGOURNEY v.). See Case No. 12,634.

INGRAHAM (SULLIVAN v.). See Case No. 13,595.

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## Case No. 7,046.

INGRAHAM et al. v. The NAYADE.

[Newb. 366; [1] 15 Hunt, Mer. Mag. 486.]

District Court, D. Louisiana. Oct., 1846.

PRIZE—VIOLATION OF BLOCKADE—INTENT—WANT OF WATER.

1. By the usage of nations, and according to the principles of natural reason, it is not lawful to carry anything to places blockaded and besieged.

2. The act of sailing with the intention of going to a blockaded port, with a knowledge of the blockade, is a violation of that blockade and works a condemnation of the ship.

3. Where vessels sail without a knowledge of the blockade, a notice is necessary. The right to treat a vessel as an enemy, is founded on the attempt to enter, and certainly this attempt must be made by a person knowing the fact.

4. The return of a vessel to a blockaded port, after she has been warned off, affords strong ground for presuming a criminal intent, and it is incumbent upon the master to rebut the presumption and justify his conduct.

5. Where a want of water is alleged as the reason for returning to a blockaded port, the evidence of the fact must be very clear and satisfactory, before it will be received. The testimony of the master and crew alone, unsustained by any corroborating circumstances, would be lightly regarded.

6. But although the rule of law is stringent in its nature, it does not exclude all reasons based upon a want of water or provisions as a ground of justification. On the contrary, a case of overruling necessity may arise from the danger of perishing from famine; and to contend against such a proposition, would be resisting the plainest dictates of humanity. It is, therefore, not the fact itself we are to reject, but the suspicious evidence by which that fact is generally attempted to be proven.

7. Where the court is satisfied that the re-appearance of a vessel off a blockaded port, was caused by a want of water, restitution of vessel and cargo will be decreed.

8. If under all the circumstances, the court is satisfied that the captors had reasonable ground for supposing that a vessel once warned off, returned to the blockaded port, with the intention of violating the blockade, all costs and necessary expenses will be allowed to the captors before the vessel is finally restored. These costs and expenses will be paid by the master of the vessel, as the agent of her owners. The master not being de jure the agent of the owners of the cargo, the latter are not to be held responsible for the consequences of his act.

[This was a libel by Duncan N. Ingraham and others against the brig Nayade.]

[1] [Reported by John S. Newberry, Esq.]

T. J. Durant, U. S. Dist. Atty., for captors.

C. Roselius, for claimants.

McCALEB, District Judge. The vessel against which the libel in this case was filed, was seized off the harbor of Vera Cruz, on the 30th of August last, by the commander of the United States brig of war Somers, belonging to the blockading squadron in the Gulf of Mexico, and sent to this port for condemnation. She was taken as a prize of war, upon the ground that she had violated the blockade now rigidly enforced by our squadron against the ports of Mexico. From the evidence introduced on the part of the claimants, it appears that the Nayade is owned by Solomon and Berrend Roosen, merchants and ship owners of the Hanseatic city of Hamburg: that she sailed from Hamburg on the 5th of June last for Vera Cruz, and arrived off that port on the 27th of August. She was boarded by an officer from the brig Somers, who informed the master that the ports of Mexico were in a state of blockade, and that he must leave the coast. The boarding officer before leaving the vessel, inquired of the master, if he wanted anything, and received for answer that he wanted nothing. The captain, in accordance with the suggestions of the boarding officer, declared his intention to proceed to the port of Havana, and set sail accordingly. He had sailed on his course for forty-eight hours, when finding he had made only fifty miles, and the vessel being then becalmed, he became alarmed lest his supply of water, then reduced to about 250 gallons, would be insufficient, and determined to return to the squadron and obtain an additional quantity, and at the same time get permission to land his passengers, amounting to four men, who were on their way to the mines of Mexico. He returned accordingly, and on the morning of the 30th of August, came in sight of the Somers and sailed directly for her. When he arrived within hailing distance, he asked permission to go aboard. Permission being granted, when he got on board the Somers, he was informed that he had been once warned off, and having returned, his vessel would be taken possession of as a prize of war, for having violated the blockade. A prize master was, on the following day, sent on board the Nayade, which was taken to Green Island, where her passengers obtained permission to land, and an additional supply of water was put on board by Lieut. Berryman, the prize master, under whose command the vessel proceeded to this port. Want of water is the excuse alleged by the master of the Nayade for returning to the squadron, after being warned away. Under the order granted for taking additional proof, the testimony of Lieut. Berryman was taken on behalf of the claimants. He testified that he took charge of the Nayade as

prize master, on the 31st of August. The prize crew, and the number of the crew of the Nayade, left on board, amounted in all to fifteen men. They were sixteen days coming from Green Island to the Balize. There were about one hundred gallons of drinkable water on board when they reached the Balize. The Nayade is a very indifferent sailer. They had little occasion to sail against the wind. She is a poor vessel to sail against the wind. The first five days after leaving Vera Cruz for New Orleans, she did not make more than two hundred and fifty miles, in consequence of light winds, and her very indifferent qualities for sailing under such circumstances. When the witness was put in possession of the Nayade as prize master, he made inquiry but no examination in regard to the quantity of water on board. After he took command, and until he reached New Orleans, the wind was generally favorable, being from the south, and sometimes from the westward. Such winds would have been fair for a voyage to Havana.

The testimony, both on behalf of the libelants and claimants, will be hereafter more particularly noticed, in examining the different questions of law growing out of the merits of the case. It is urged on the part of the captors: First, that the alleged want of water does not present such a case of absolute and overpowering necessity, as will justify the return of the Nayade to the blockaded port, after she received notice of the existence of the blockade. Secondly, that the master, after having been asked by the boarding officer of the Somers, if he stood in need of anything, and especially if he stood in need of water or provisions, and answering that he needed nothing, was inexcusable in returning three days afterwards to the squadron to take in a supply of water. His alleged want of water was a mere pretext for returning to the blockaded port. Thirdly, that even if the declaration that he was in want of water were true, the captain of the Nayade has not shown that he could not go to another port not blockaded. On behalf of the claimants, it is contended that the want of water, under the circumstances established by the evidence, presents such a case of absolute and overpowering necessity, as will, in law, justify the conduct of the master. Secondly, that there is no evidence which will authorize the court in coming to the conclusion that any attempt was made to violate the blockade. Thirdly, that under no circumstances can the cargo be held liable to confiscation, since it is clearly established by the evidence that it is physically impossible that the blockade of the ports of Mexico could have been known at Hamburg, at the time the Nayade set out on her voyage; and there being no evidence to show that the master was the authorized agent of the owners of the cargo, the interest of the latter cannot be affected by the attempt of the master to enter the blockaded port, even if such attempt could be proved.

The principles of law applicable to trade with blockadcd and besieged places, are well understood, and universally recognized by writers upon public law. It is well estabtablished "that by the usage of nations, and according to the principles of natural reason, it is not lawful to carry anything to places blockaded and besieged. It is sufficient that there be a siege or blockade to make it unlawful to carry anything, whether contraband or not, to a place thus circumstanced; for those who are within may be compelled to surrender, not merely by the application of force, but also by the want of provisions and other necessaries. If, therefore, it shall be lawful to carry to them what they are in need of, the belligerent might thereby be compelled to raise the siege or blockade, which would be doing him an injury, and, therefore, would be unjust. And because it cannot be known what articles the besieged may want, the law forbids in general terms carrying anything to them; otherwise disputes and altercations would arise, to which there would be no end." Bynk. c. 11, p. 82; Gro. de J. B. lib. 3, c. 1, § 5, No. 8; Wheat. Hist. Law Nat. 137. With the clear and unequivocal recognition in favor of belligerents of the right of blockade as a right of war, let us inquire what acts on the part of neutrals are regarded as a violation of that right, and under what circumstances those acts may be excused. We shall of course refer only to such acts as have a direct relevancy to the merits of the case before the court, and have been brought to my notice by the authorities which have been here cited in argument.

It is well established that the act of sailing with the intention of going to a blockaded port, with a knowledge of the blockade, is a violation of that blockade, and works a condemnation of the ship. If a ship engaged in the prosecution of her voyage, is advised of the existence of the blockade, and proceeds on her voyage to the port blockaded, she renders herself liable to capture and confiscation. "Where vessels sail without a knowledge of the blockade," says Sir William Scott in the case of The Columbia, 1 C. Rob. Adm. 156, "a notice is necessary; but if you can affect them with a knowledge of that fact, a warning becomes an idle ceremony, of no use, and therefore not to be required." Again; the same eminent admiralty judge, in the same decision, continues, "It is said also that the vessel had not arrived; that the offence had not actually been committed, but rested in intention only. On this point I am clearly of opinion, that the sailing with an intention of evading the blockade of the Texel, was a beginning to execute that intention, and is to be taken as an overt act constituting the offence. From that moment the blockade is fraudulently invaded." A relaxation of the

rule here laid down is found in the subsequent case of The Betsey, 1 C. Rob. Adm. 332, decided by the same authority. It was made in favor of an American ship which had been taken for a voyage from America to Amsterdam, and proceeded against for an intentional breach of the blockade of Amsterdam. "I hardly think," says Sir William Scott, "that there is sufficient evidence to affect the parties with fraud. The ship sailed when the owners were certainly informed of the blockade; but the distance of their country is a material circumstance in their favor. I certainly cannot admit that Americans are to be exempted from the common effect of a notification of a blockade existing in Europe. But I think it is not unfair to say, that lying at such a distance, where they cannot have constant information of the state of the blockade, whether it is continued or relaxed, it is not unnatural that they should send their ships conjecturally upon the expectation of finding the blockade broken up after it had existed for a considerable time." "Properly, every direction to a blockaded port," says Jacobsen, in his Laws of the Sea (page 103), "with a knowledge of the blockade, works a condemnation of the ship. Single exceptions are made of vessels from America, who were permitted to inform themselves of the continuance of a notified blockade off the port of destination; however, it is very doubtful whether the exceptions from the rule will be longer indulged, as Sir William Scott observed that it would be more pertinent to obtain information in sailing through the channel, or other passing opportunity." By an edict of the States-General of Holland, as far back as 1630, relative to the blockade of the ports of Holland, it was ordered that the vessels and goods of neutrals which should be found going in or coming out of the said ports, although they should be found at a distance from them, should be confiscated, unless they should voluntarily, before coming in sight of or being chased by the Dutch ships of war, change their intention, while the thing was yet undone, and alter their course. Bynkershoek, in commenting upon this part of the decree, defends the reasonableness of the provision, which affects vessels found so near to the blockaded ports as to show beyond a doubt that they were endeavoring to run into them, upon the ground of legal presumption, with the exception of extreme and well proved necessity. Wheat. Int. Law, 547. And Sir William Scott, in the case of The Neutralitet, 6 C. Rob. Adm. 35, a vessel found, not in port, but only near to it, held that if the belligerent party had a right to impose a blockade, it must be justified in the necessary means of enforcing that right. And if a vessel could, under pretence of going farther, approach, cy pres, close up to the blockaded port, so as to be enabled to slip in without obstruction, it would be impossible that any blockade could be maintained. "It would, I think," said he, "be no unfair rule of evidence to hold as a presumption de jure, that she goes there with an intention of breaking the blockade; and if such an inference may possibly operate with severity in particular cases, where the parties are innocent in their intentions, it is a severity necessarily connected with the rules of evidence, and effectual to the exercise of the right of war."

Having thus presented the authorities drawn for the most part from the other side of the Atlantic, I will now turn to the opinion of the supreme court of the United States in the case of Fitzsimmons v. Newport Ins. Co., 4 Cranch [8 U. S.] 200, delivered by Chief Justice Marshall. In answer to the question, "is the intention to enter a blockaded port (evidenced by no fact whatever), a breach of the blockade?" the court says: "This question is to be decided by a reference to the law of nations and the treaty between the United States and Great Britain." 3 Vatt. Law Nat. § 177, says: "All commerce is entirely prohibited with a besieged town. If I lay siege to a place, or only form the blockade, I have a right to hinder any one from entering, and to treat as an enemy, whoever attempts to enter the place, or carry anything to the besieged without my leave." The right to treat the vessel as an enemy is declared by Vattel to be founded on the attempt to enter, and certainly the attempt must be made by a person knowing the fact. But this subject has been precisely regulated by the treaty between the United States and Great Britain, which was in force when this condemnation took place. That treaty contains the following clause: "And whereas, it frequently happens that vessels sail for a port or place belonging to an enemy, without knowing that the same is either besieged, blockaded or invested; it is agreed that every vessel may be turned away from such port or place, but she shall not be detained, nor her cargo, if not contraband, be confiscated, unless after notice she shall again attempt to enter; but she shall be permitted to go to any other port or place she may think proper." "This treaty is conceived to be a correct exposition of the law of nations; certainly it is admitted by the parties to it, as between themselves, to be a correct exposition of that law, or to constitute a rule in the place of it. Neither the law of nations nor the treaty admits of the condemnation of a vessel for the intention to enter a blockaded port; unconnected with any fact. Sailing for a blockaded port, knowing it to be blockaded, has been in some English cases construed into an attempt to enter that port, and has therefore been adjudged a breach of the blockade from the departure of the vessel. Without giving any opinion on that point, it may be observed, that in such cases, the fact of sailing is coupled with the intention, and the sentence of condemnation is founded on an ac-

tual breach of blockade." "It cannot be necessary to state that testimony which would amount to evidence of a second attempt—lingering about the place, as if watching for an opportunity to sail into it, or the single circumstance of not making for some other port, or possibly obstinate and determined declaration of a resolution to break the blockade, might be evidence of an attempt, after warning, to enter a blockaded port. But whether these circumstances, or others, may or may not amount to evidence of the offence, the offence itself, in attempting again to enter, and 'unless after notice, she shall again attempt to enter,' the two nations expressly stipulate that she shall not be detained, nor her cargo, if not contraband, be confiscated. It would seem as if, aware of the excesses which might be justified, by converting intention into offence, the American negotiator had required the union of fact with the intention, to constitute a breach of blockade."

These authorities present clearly the principles which are to be my guide in coming to a satisfactory conclusion. I am now to inquire how far they affect the case before the court upon the evidence adduced. It is clear that the master of the Nayade, up to the moment he was warned away, did nothing in violation of law. He sailed from Hamburg in utter ignorance of the existence of the blockade. The proclamation of Commodore Conner, declaring the blockade, is dated the 14th of May last, and the Nayade commenced her voyage on the 5th of June following. It was therefore physically impossible that her master or owner could have known of the existence of the blockade at the time of her departure from Hamburg. From the testimony of her master and crew, which is all that we have on this point, they received information of it for the first time from the boarding officer of the Somers. The violation of the blockade, then (if there has been a violation at all), was committed by the master in returning to the Somers after she was warned off. The fact of returning would afford strong ground for presuming a criminal intent, and it is incumbent upon the master to rebut the presumption and justify his conduct. We have already seen that the alleged cause for returning was a want of water. This is a reason which has been commonly given by masters of vessels who have sought to justify themselves in entering a blockaded port, and the evidence of the fact must be very clear and satisfactory before it will be admitted. The testimony of the master and crew alone, unsustained by any corroborating circumstances, would be lightly received. "It is usual," says Sir William Scott in the case of The Hurtige Hane, 2 C. Rob. Adm. 124, "to set up the want of water and provisions as an excuse; and if I was to admit pretences of this sort, a blockade would be nothing more than an idle ceremony. Such pretences are, in the first instance, extremely discredited on two grounds; that the fact is strongly against them, and that the explanation is always dubious, and liable to the imputation of coming from an interested quarter. I am not deaf to the fair pretences of human testimony, but at the same time I cannot shut my senses against the ordinary course of human conduct. I will not say that cases of necessity may not occur, that would afford a sufficient justification; and I add, that if the party can show that they were under any great necessity, and that for four or five days before they could get into no other port but the Texel, I would certainly admit such an excuse so supported. But if they cannot do this, and unless it is proved, that in coming up the channel there was no other port, either English or French, but the interdicted port of Amsterdam into which they could put, I shall reject the apology." Again; in the case of The Fortuna, 5 C. Rob. Adm. 27, he says: "The want of provisions is an excuse which will not, on light grounds, be received, because an excuse, to be admissible, must show an imperative and overruling compulsion to enter the particular port under blockade, which can scarcely be said in any instance of mere want of provisions. It may induce the master to seek a neighboring port, but it can hardly ever force a person to resort exclusively to the blockaded port."

These decisions show the caution with which such excuses should be received, and they evidently require that the fact should be presented to the court sustained by other evidence than the mere declarations of the master and crew. But although the rule laid down by Sir William Scott is stringent in its nature, I do not understand that it totally excludes all reasons based upon a want of water or provisions, as grounds of justification. On the contrary, I distinctly understand the eminent judge to convey the idea, that a case of absolute and overruling necessity may arise from the danger of perishing from famine. To contend for a moment against such a proposition would be resisting the plainest dictates of humanity. It is therefore not the fact itself we are to reject, but the suspicious evidence by which that fact is generally attempted to be proved. In the present case we are not to be governed by the testimony of the master and crew alone in ascertaining how far the alleged want of water was founded upon reality. There are certain facts material to a correct conclusion, which are satisfactorily established by the testimony of the prize master and boarding officer of the Somers, and which in my opinion, rebut the presumption that the master of the Nayade in returning to the station occupied by the squadron, had any intention of entering the harbor of Vera Cruz. The testimony of Lieutenant Berryman proves the Nayade to be a bad sailer; that she was sixteen days in performing the

voyage from Green Island to the Balize, a distance of about eight hundred miles. When the witness took charge of her as prize master, on the 31st of August, he put on board 240 gallons of water, in addition to about the same quantity, supposed to be then in the casks; and yet there remained only about 100 gallons when the brig arrived at the Balize. The testimony of her master and crew shows that on the second day after they set sail for Havana, she had made only about fifty miles: that on the 28th she was becalmed: that it was extremely warm, and there was a strong southwardly current. The distance from Vera Cruz to Havana is about one thousand miles, and fears were entertained that the current would take the vessel too far south, and that she might be taken by another vessel of war. Fears were also entertained that the water would give out before the vessel could reach Havana, as the quantity on board was on the 29th of September about 250 gallons. When I take into consideration the bad qualities of the vessel, I see nothing unreasonable in this statement, and nothing unreasonable or criminal in the determination of the captain to seek a supply of water from the squadron—the nearest accessible source from which it could be obtained. Is there anything in his subsequent conduct which will justify the conclusion that he returned for the purpose of attempting to enter the harbor of Vera Cruz? His own testimony, which is substantially corroborated by that of the mate and carpenter, shows that he steered back until the evening of the 29th, when he came in sight of land. He shortened sail that he might not get close into the shore. His object was not to go through the blockading squadron, but to approach the Somers to ask for water. He perceived the Somers at daybreak, on the morning of the 30th of August. Just after broad daylight, he perceived that it was the same vessel that had warned them off, which they did not know when they first saw her. He then steered directly for the Somers, and when he got near her he lowered his boat overboard and asked permission to go on board of her. Permission being granted, he repaired on board and asked the captain of the Somers to give him some water and take off his passengers, as he was afraid of having a long passage to Havana, and of not having water enough. The captain of the Somers answered that he would put a prize master on board of the Nayade and make a prize of her. This testimony, which unsupported, the court would feel itself bound to receive with great caution, is in all material points corroborated by the testimony of Mr. Hynson, the boarding officer of the Somers. He says: "The Nayade, after having been warned off, was next seen on the morning of the 30th of August. She was then not far from the position she held on the 27th, being a little farther to the southward. When first discovered on the 30th, deponent could not determine what course she was pursuing; she seemed to be standing off and on. When they made her out, they saw she was heading to the south, towards the Somers, which was also towards the harbor of Vera Cruz." Upon cross-examination he states that "as the Somers in beating, bore off from the land, the Nayade changed her course so as to head continually towards the Somers; while her course into the harbor of Vera Cruz would have been in the direction she was making when first discovered. The Nayade had a boat out some time before she came up to the Somers. The captain of the Nayade hailed and inquired if he might come on board the Somers. Permission was given and the captain came on board, and stated that he wanted to land his passengers, that he had been detained on the coast by light winds, and was in want of water, as he feared that he had not enough to take him to Havana."

There is certainly nothing in the evidence which authorizes the belief that any fraudulent intention was entertained of entering the harbor of Vera Cruz. It would be difficult for the court to presume a fraudulent purpose on the part of the master of the Nayade when it is assured that instead of attempting to run in under cover of the night, he kept his vessel "standing off and on" until he discovered the Somers, and then "as the Somers, in beating, bore off from the land, he changed his course so as to head continually toward the Somers." The conviction thus forced upon my mind is that the alleged want of water was not a mere pretence but a reality, which presented a case (in the language of Sir William Scott) "of overruling compulsion," not certainly to run into the harbor of Vera Cruz, but to return to the squadron. Being convinced that his intentions were honest, I can see no reasons why I should now say that he should have steered for another port than the one blockaded in order to avoid even the semblance of a criminal intent, especially when it is shown that he had started for another port and was compelled to return. The general rule laid down by Sir William Scott on this point, is one which I have no hesitation in declaring should be applied in all cases in which facts are not adduced to rebut the presumption of guilt. There are exceptions to all general rules, and no court can disregard the particular facts which create the exceptions, upon the plea of sustaining a general principle. Compare the evidence in this case with that which governed the court in the case of The Hurtige Hane, 2 C. Rob. Adm. 124, and the distinction will be manifest. The latter was a Danish ship taken in the act of entering the Texel, and therefore there was no doubt as to her real intention. In the case of the Fortuna, the excuse was want of water and strong westerly winds. The general principle contended for

here was recognized, but the court admitted evidence to show that she was forced in by the winds, and afterward released her. And can it be doubted that if, in point of fact, she had been driven in by actual want of provisions, she would also have been released? In most of the cases of condemnation for a violation of blockade decided by Sir William Scott, the offences were committed on the coast of Europe, where the seaport towns were numerous, and ample opportunities were afforded to vessels suffering for want of water and provisions, to run in and procure supplies. The rule laid down by Sir William Scott requiring them to go to some other port than the one blockaded, could seldom be attended with any severity. It will readily be perceived that its rigid enforcement in cases arising on the Gulf of Mexico, where the ports are comparatively few and far separated, might sometimes be accompanied with disastrous consequences. I would not be understood, for a moment, as saying anything in derogation of the rule. I believe it to be salutary in its nature, and absolutely necessary for the effectual maintenance of all blockades; and I have no hesitation in declaring that it will be rigidly adhered to in this court on all proper occasions. But in a case where it is satisfactorily shown that no attempt was made to enter the blockaded port; where, from the evidence, it would be difficult to presume that any intention to do so was entertained; where the vessel was not found, in the language of Bynkershoek, "so near the blockaded port as to show, beyond a doubt, that she was endeavoring to run into it,"—for she came up to the Somers thirty miles from the harbor of Vera Cruz—I can see no reason for its enforcement. The reason for going to the harbor of Havana was such as would, doubtless, have influenced any man under similar circumstances. The captain was well acquainted with the harbor, which he could enter without a pilot; and he was, besides, advised to go there by the boarding officer of the Somers, Mr. Hynson, who informed him that another Hamburg vessel, the Julius, which had been warned off, had gone thither. The master of the Nayade did not pretend that, at the time he returned to the Somers, he was in immediate want of water. But when the progress of his vessel was resisted by the opposing current, and when, on account of calms, he made no progress at all, he naturally became alarmed lest his supply would be insufficient for the voyage to Havana. Still, the case of overruling necessity existed; for whether it was immediate or remote, if it was plain that it must inevitably prove hazardous to continue the voyage, he is more to be commended for providing against the danger which threatened, while it was in his power to do so, than to proceed, in the face of danger, against his convictions, and thus peril the lives of his crew, and, consequently, the safety of a large and valuable cargo.

The proctor of the captors has contended that the pretended want of water was improbable, as appears by the testimony of the master of the Nayade himself. The evidence of the crew of the Nayade shows that they left Hamburg with 1,440 gallons of water, and that when they returned to the Somers they had 240 gallons remaining. To this quantity Lieutenant Berryman, the prize master, added 240 more; making in all 480 gallons, with which the vessel set sail for New Orleans. On her arrival at the Balize, there were remaining on board 100 gallons; showing a consumption of 380 gallons in sixteen days, the time required to perform the voyage from Green Island to the Balize. Upon this statement of facts, the proctor of the captors argued (and certainly with irresistible force, taking this statement as true), that on the voyage from Hamburg to Vera Cruz, lasting, as it did, eighty-seven days, the Nayade would have required 2,088 gallons instead of 1,440. Notwithstanding the declaration of the captain of the Nayade that no more water was used than was really required on the voyage from Green Island to the Balize, I am perfectly well satisfied that he was mistaken, either in his statement of the quantity consumed, or of the quantity which he had on board when the prize master ordered an additional quantity. I considered it my duty to take further evidence on this point, and am fully satisfied from the concurrent testimony of several experienced commanders of vessels now in this port, that a gallon a day would be a liberal allowance for each man on board of a ship. The consumption of twenty-four gallons per day by sixteen men was therefore extravagant, and the only way it could have taken place was through carelessness. Either it was uselessly wasted, or there is a mistake on the part of the witnesses as to the actual quantity on board. That this mistake may have been innocently committed, I have no reason to doubt. None of the witnesses pretend that any measurement was made, and Lieutenant Berryman says that he made inquiry, but no examination, in regard to the quantity on board when he took charge of the vessel as prize master. But I am confirmed in the opinion that the witnesses were mistaken, by the fact, which I have fully ascertained by actual measurement, that they were also mistaken in their statement of the number of gallons they had on board when they set sail from Hamburg. The number of gallons which the casks contained was 1,648, instead of 1,440; and taking as true, or nearly true—for it is evident that there was no accurate information on the subject—that the Nayade had on board 240 gallons when she was boarded the second time from Somers, we find that each person had in the voyage consumed about one gallon and a fifth, which, though a liberal, is not an unreasonable or extravagant

allowance, when we take into consideration the sultry season of the year when the voyage was performed.

There is another fact I have ascertained by actual measurement, which will serve to show the want of accurate information on the part of the witnesses, and the consequent danger there would be in being guided implicitly by statements which are made upon supposition alone. The mate gives the number of casks on board the Nayade, and states that the large casks will contain about 100 gallons each. The report of the city gauger made from actual measurement, shows the sizes to be as follows: One of 150, two of 142, three of 117, one of 138, two of 115, one of 108, one of 121, one of 110, one of 62, and one of 34. This ignorance on the part of officers intrusted with the care of persons and property on a long voyage, is by no means commendable; but I do not allude to it for the purpose of imputing to them a criminality of design in making their statements. They do not profess to be accurately informed, and their ignorance under the circumstances cannot be called dishonesty. The most essential fact to be ascertained after all is, was there a want of a sufficient quantity of water on the Nayade to take her to Havana? As I have before intimated, I am satisfied that on this point the apprehensions of her master and crew were well founded. That these apprehensions were shared in to a certain extent by Lieutenant Berryman himself, is evident from the fact that he ordered an additional supply; and this precaution on his part was justified by the fact that on the arrival of the vessel at the Balize there were remaining on board only 100 gallons. Although I am satisfied that more was used than was actually necessary, it is yet quite clear that without the additional quantity put on board by the prize master, there would not have been sufficient for the voyage; and if there was not sufficient for the voyage to this port, it is perfectly manifest that there could not have been sufficient for the voyage to Havana, at least 200 miles further.

After a calm and deliberate consideration of all the facts of this case, I am satisfied that the return of the Nayade was prompted by no fraudulent design on the part of her master to violate the blockade, but the circumstances under which he was warned away devolve upon the court a duty to the captors which must now be discharged. The evidence is perfectly clear that the master was distinctly asked by the boarding officer of the Somers if he stood in need of provisions or water, and he replied that he wanted nothing. His return and demand for water three days afterwards, naturally created surprise and distrust on the part of the captors, and justified the course they pursued. The master of the Nayade has explained his conduct by saying that the reason he did not accept the offer of water made him on the 27th by the boarding officer, was that that gentleman remained on board the Nayade only fifteen minutes, and told so many things about the blockade, that he (the master), this being his first voyage as captain, was so bewildered that he did not take time to reflect or examine, but was desirous of getting off as soon as possible. Besides, the wind was at that time favorable for a voyage to Havana. The boarding officer, Mr. Hynson, also testifies that the captain, when warned off, seemed undecided what to do and was very much confused. Now, without taking upon myself to decide how far such embarrassment and confusion are inconsistent with that self-possession and decision of character which should always signalize the conduct of a commander of a vessel, but giving to this master all the benefit of his explanation, and believing, as I do, that his confusion arose from having his long and tedious voyage suddenly broken up at the very moment when he believed it was to terminate, and by the consequent loss and disappointment to which not only he but the owners of the large and valuable cargo were about to be subjected, it is yet clear that his private feelings, however honest, could not be taken as the criterion by which the captors were to regulate their public conduct. It was not their duty to institute an examination into all the facts and circumstances connected with the re-appearance of the vessel near the station occupied by the blockading squadron. The case was prima facie one which justifies their conduct; and although I feel bound to order the vessel and cargo to be delivered up, I shall order the costs of this action and the expenses actually incurred by the captors in bringing the vessel to this port, to be first paid by the captain, as agent of the owners. Upon the principle repeatedly recognized by Sir William Scott (The Imina, 3 C. Rob. Adm. 170, and The Adonis, 5 C. Rob. Adm. 258), I am satisfied that the owners of the cargo cannot properly be held liable for these costs and expenses. The master is not de jure their agent, unless so specially constituted by them, and they are not to be held responsible for the consequences of his acts. I therefore decree restitution upon the condition here prescribed.

## Case No. 7,047.

INGRAM v. BUTT.

[4 Cranch, C. C. 701.] [1]

Circuit Court, District of Columbia. March Term, 1836.

FALSE IMPRISONMENT—PLEA OF GENERAL ISSUE—WHAT MAY BE PROVED UNDER.

In an action of false imprisonment against the superintendent of the Washington asylum, he may plead the general issue, and give in evidence his justification under a warrant from a justice of the peace.

[1] [Reported by Hon. William Cranch, Chief Judge.]

This was an action of assault and battery, and false imprisonment [by Washington Ingram,] against [Richard Butt], the superintendent of the Washington asylum.

Mr. Bradley, for defendant, offered to give evidence in justification, under a warrant from a justice of the peace; under the English statute of 7 Jac. I. c. 5, made perpetual by 21 Jac. c. 12, § 2; and also under the English statute of 21 Jac. c. 12, § 5, which statutes, in this particular, were in force in Maryland, and adopted by the act of congress of the 27th of February, 1801 (2 Stat. 103), concerning the District of Columbia. See Kilty's Report upon the English Statutes, 236.

Mr. Dermott, contrà.

THE COURT (MORSELL, Circuit Judge, doubting) permitted the evidence to be given. The plaintiff became nonsuit.

## INHABITANTS OF.

[Note. Cases cited under this title will be found arranged in alphabetical order under the names of the municipalities.]

INLOTS (UNITED STATES v.). See Case No. 15,441.

## Case No. 7,048.

### INMAN v. BARNES.

[2 Gall. 315.] [1]

Circuit Court, D. Rhode Island. Nov. Term, 1814.

ACTION—FORMEDON—BAR.

1. Actions of formedon are within the statute of Rhode Island for quieting possessions, and twenty years' possession under that statute is a good bar.

[Cited in Clark v. Depew, 25 Pa. St. 514.]

2. If the statute of limitations has once run against a tenant in tail, it is a complete bar to a subsequent tenant in tail upon a descent cast.

[Cited in Croxall v. Sherrerd, 5 Wall. (72 U. S.) 289.]

3. A formedon in descender is not within the proviso of the statute of possessions of Rhode Island.

This was an action of formedon in descender, in which the demandant counted that one John Inman, being seised in fee, on the 28th of July, 1741. by his last will duly proved, and approved, devised the demanded premises to one David Inman in fee-tail male general; and that, after the death of the testator, the said David entered into and became seized of, the demanded premises, according to the form of the gift and devise aforesaid, and afterwards, on the 26th day of April, 1808, died; upon whose decease the demanded premises descended, by the form of the gift aforesaid, to the demandant, as the only son and heir male of the said David, and that the tenants unlawfully withheld the same. The defendant pleaded in bar, among other pleas, the statute of Rhode Island entitled, "An act for quieting possessions and avoiding suits at law" commonly called the possession act. and averred, that he, and those under whom he claimed, had, by the space of 20 years and more next preceding the 28th of April, 1785, and from that time to the date of the damandant's writ, been in the uninterrupted, quiet, peaceable and actual, seisin and possession of the demanded premises, claiming the same for and during said time, as his and their property and rightful estate in fee simple. To this plea the demandant replied the proviso of the same act, and averred, that the said David Inman died on the 26th of April, 1808, and that, within ten years next thereafter, the demandant pursued his title to the demanded premises by due course of law in this action. To this replication there was a general demurrer and joinder in demurrer.

Bridgham & Searle, for demandant.
Bowen & Burrill, for tenants.

STORY, Circuit Justice. Without entering into any consideration of the accuracy of the pleadings in this case (respecting which I wish distinctly to be understood as giving no opinion) I shall proceed to the only question, which has been argued by the parties, viz. whether twenty years' possession, under the statute, be a good bar to an action of formedon in descender, the said term having run against a former tenant in tail before the descent cast. At least as early as the year 1700, if not before, the statutes of limitations of 32 Hen. VIII. c. 2, and of 21 Jac. I. c. 16, were adopted in the colony of Rhode Island (see Act April 30, 1700), and in 1749 they were formally declared to be the law of the land, and have ever since continued in force within that colony and state. See Colony Laws 1749, 1760, 1766, p. 55, and also Digest of the Laws in 1798, p. 78. The act for quieting possessions and avoiding suits at law (Rhode Island Acts Dig. 1798, p. 465) was first passed in 1711, without the proviso set forth in the replication, and that proviso was added in 1728; and in the revision in 1766, the whole was moulded into one act, in the shape it now assumes in the printed statute. All these statutes, therefore, may be considered as having a concurrent existence and operation for nearly a century. The second section of the act, stated in the bar, provides, "That where any person or persons, or others, from whom he or they derive their titles, either by themselves, tenants, or lessees, shall have been, for the space of twenty years, in the uninterrupted, quiet, peaceable and actual seisin and possession, of any lands, tenements or hereditaments within this state, for and during the said time, claiming the same as his, her or their prop-

[1] [Reported by John Gallison, Esq.]

er, sole and rightful estate in fee-simple, such actual seisin and possession shall be allowed to give and make a good and rightful title to such person or persons, their heirs or assigns forever. And this act being pleaded in bar to any action, that shall hereafter be brought for such lands, tenements and hereditaments, and such actual seisin and possession being duly proved, shall be allowed to be good, valid and effectual in the law for barring the same." And the proviso stated in the replication is as follows, "Provided further, that nothing above contained shall extend, or be construed, or deemed to extend, to bar any person or persons having any estate in reversion or remainder expectant or depending in any lands, tenements or hereditaments, after the end or determination of the estate for years, life, or lives, such person or persons pursuing his or their title, by due course of law, within ten years after his or their right of action shall accrue, any thing in this act to the contrary notwithstanding."

It has been argued by the demandant's counsel, that actions of formedon are not within the purview of the statute of possession, inasmuch as the limitation of those actions is expressly provided for by the statute of 21 Jac. I. c. 16; and if construed to apply to the same actions, they would be repugnant to each other. But it seems to me, that the statutes may well stand together. The statute of James regulates and limits the time, within which actions of formedon may be brought, and therefore simply operates by way of bar to the remedy of the demandant. The statute of possession, on the other hand, makes twenty years' seisin and possession, under a claim of title in fee, in favor of parties and privies, a good and rightful title in fee forever; and therefore it operates as a bar of the right of every other party. In this respect, it is like the statute of 4 Hen. VII., of fines. The statutes are therefore made diverso intuitu, and the one may take effect, as a bar to the remedy, without the other's attaching as a bar to the right. If, for instance, the party entitled shall omit to bring his formedon within the twenty years limited by the statute of limitations, he is barred of his action; and the tenant may well plead it in his defence. But, although the twenty years have elapsed, yet the tenant cannot plead the statute of possession in his defence, unless he has held, or claims under those who have held, the seisin and possession during the same time, as tenants in fee. The argument also involves this further difficulty, that if it be well founded, it equally applies to the actions limited by the statute of 32 Hen. VIII. c. 2; and then it would follow, in effect, that neither writs of right, nor writs of entry, nor indeed any real actions in modern use touching the fee, were within the purview of the statute of possession. But the language of the act itself is decisive against this argument, for it expressly declares, that such seisin and possession shall be a good, valid and effectual bar "to any action that shall thereafter be brought for such lands, tenements or hereditaments." Were it otherwise, I am not aware how it would help the demandant's case; for, at all events, he would, upon the facts alleged in the plea, be barred by the statute of James, for the present action was not brought until more than twenty years had elapsed after the right of the former tenant in tail to an action for the ouster had first accrued. And I take it to be well settled, that if the time limited has once run against any tenant in tail, it is a good bar not only against him, but also against all persons claiming in the descent per formam doni through him. 3 Cruise, Dig. 541; Dow v. Warren, 6 Mass. 328.

We are now led to the second point made by the demandant's counsel, which is, that if actions of formedon be within the statute of possession, the present action is saved by the proviso. It is a rule applicable to this, as well as other statutes limiting or barring rights, that a party, who would extract himself from the enacting clause by any proviso, must bring his case strictly within the exceptions. It is plain that a formedon in descender is not within the letter of the proviso. That applies merely to persons entitled to reversions or remainders expectant upon estates for life or years. In the case at bar, the tenant in tail, claiming in the descent, is neither a reversioner nor a remainder-man, whose estate is expectant upon any particular estate.—It not being within the letter, I know of no principle, which would authorize the court to construe it within the equity of the proviso. My judgment therefore is, that the plea in bar is good, and that the replication contains no matter sufficient in law to avoid it. Replication adjudged bad.

## Case No. 7,049.

INNES v. CARPENTER.

[4 N. B. R. 412 (Quarto, 139).] [1]

District Court, S. D. New York. Dec. 8, 1870.

NEGOTIABLE INSTRUMENTS—ACCOMMODATION INDORSEMENT.

An accommodation indorsement on a note does not make it commercial paper as to the accommodation indorser.

[Cited in Re Carter, Case No. 2,470; Re Clemens, Id. 2,877.]

This is a proceeding instituted by the petitioning creditor to recover from Jeremiah Carpenter the amount of a note made by Samuel Hanna, and indorsed by Jeremiah Carpenter, and delivered by said Hanna to Edward S. Innes for merchandise sold by said Innes to said Hanna.

[1] [Reprinted by permission.]

BLATCHFORD, District Judge. As the note appears to have been indorsed by said Carpenter for the accommodation of Hanna, and was taken by the petitioners for wool sold to Hanna, I do not think it is commercial paper of Carpenter's as a merchant and manufacturer, within the act [of 1867 (14 Stat. 517)].

INNIS (HUNT v.). See Case No. 6,892.

## Case No. 7,050.

The INNOCENTA.

[10 Ben. 410.] [1]

District Court, S. D. New York. April, 1879.

DELAY IN RECEIVING CARGO—CONTRACT—EVIDENCE OF CUSTOM.

1. A freight broker engaged for a bark 100 tons of oak logs and 100 tons of other timber. The freight contract, which was in writing, said nothing about the time to be occupied in the receipt of the cargo, or the manner in which it was to be delivered to the ship. On the day after the contract was made the shipper of the timber notified the agent of the ship that the wood was heavy timber, and that the bark should be ready with corresponding tackle to take it "off the lighters" as soon as they arrived. The timber was sent alongside in lighters, and, owing to the smallness of the bark's hatch, and the contracted space between decks, though reasonable diligence was used in taking the timber on board, the lighters were detained alongside several days. The shipper filed a libel against the bark to recover the amount of the demurrage of the lighters, claiming that the cargo was agreed to be received from lighters in the customary time, and that by the custom of the port of New York, two days only were allowed for that purpose: *Held*, that, as the contract did not say that the wood was to be received from lighters, the shipper could not, by his notice, impose any new terms on the bark.

2. The shipper had the right to deliver the wood alongside in what way he pleased, and it then became the duty of the bark to receive it.

3. The alleged custom to receive cargo from a lighter in two days, was not proved by evidence of the adoption by "The New York Produce Exchange" of a rule to that effect, such association having no power by their rules to make a custom binding in the port of New York.

4. No unnecessary delay or negligence on the part of the bark in receiving the wood had been shown, and the libel must be dismissed.

In admiralty.

Davies, Work, McNamee & Hilton, for libellant.

W. R. Beebe, for claimant.

CHOATE, District Judge. This is a libel brought by the shipper of cargo against the vessel for the sum of one hundred and twenty dollars, which is described in the libel as "demurrage of lighters." The cargo was heavy oak and black walnut timber. The libel alleges that on the 1st day of March, 1877, the agents of the vessel contracted and engaged with the libellant that the vessel should take and receive on board at New York to be carried to London, about 200 tons measurement of timber; that, by the terms of the contract, the timber was to be delivered and loaded on board of the vessel from lighters to be furnished by libellant, and that such delivery should be completed within the usual and customary time, after the lighters should be moored alongside the vessel and be in readiness for such delivery and loading; that the usual and customary time required in similar cases is two days, by the custom of the port of New York; that the lighters were delayed beyond that time by the slow, tedious and irregular way in which the vessel received the timber, and for this delay the libellant demands damages at the rate of $20 per day, for each lighter, while so delayed beyond the customary period of two days. There was evidence tending to show that the owner of the lighters had made a claim against the libellant for this demurrage, and that the libellant had acknowledged the claim to be just as between himself and the owner of the lighters; but up to the time of the trial, he had paid nothing. It is insisted by the claimants that on this account the libellant had not at the commencement of the suit sustained any damage, and therefore could not maintain the action; that it was not sufficient that he may have incurred a liability, merely. It is, however, unnecessary to decide this question.

The contract between the vessel and the libellant was in writing, as follows: "Freight for London, per Italian Bark 'Innocenta,' at pier 17, E. river, Benham & Boyeson, agents, New York, 1st March, 1877, engaged for account of Andrew Brown, about 100 tons measurement oak logs, 50 to 75 tons walnut, 25 tons white wood, at 25s. and 5p. sterling per 40 cubic feet; Churchill & Sims caliper measurement; Saml. De Bow & Haughton, brokers."

It is very evident that under this contract the vessel never undertook to receive the wood from lighters; nor is any evidence offered that delivery of such cargo is by the usage or custom of the port made in such way. On the day after the contract was made, the libellant notified the agents of the vessel that the wood was heavy timber, and that the vessel should be ready with corresponding tackle to take it "off the lighters," as soon as they arrived alongside. But the contract being already complete and reduced to writing, it is hardly necessary to observe that the libellant could not, by such a notice, impose on the vessel a new obligation not already imposed on her by the contract itself. It was the right of the libellant to bring the wood to the ship in what way he pleased, and when alongside, whether on the pier or otherwise, it was the duty of the ship to take it into her charge and keeping; but the shipper had no right to prescribe the time

[1] [Reported by Robert D. Benedict, Esq., and Benj. Lincoln Benedict, Esq., and here reprinted by permission.]

and manner in which the ship should actually take it on board. The shipper had a right to leave it on the pier, notifying the proper officer of the ship that it was there under the contract. He could not, by bringing up, as it were, another pier on the other side of the ship in the shape of a lighter, make the duty of the vessel in respect to it any different from what it would have been, if he had placed it on the pier already there for the purpose. If it had been agreed that it should come by lighter, there might be an obligation implied on the ship's part, to take it off the lighter in a reasonable time. I am of opinion, therefore, that the libellant has failed to make out the contract alleged in the libel, and that he has only himself to blame for any loss he has suffered from voluntarily converting the lighters he hired into piers, and that under this contract no action will lie against this vessel for loss sustained by the libellant, in consequence of the delay of the lighters while so used. But the libellant has also wholly failed to prove the alleged custom of the port of New York, limiting the time within which a vessel in this port must receive cargo from a lighter to two days. Whether such a custom, if established by the evidence, would bind a foreign ship, need not be considered, for the evidence of the alleged custom is wholly insufficient. There is evidence that the "Produce Exchange," an organization of merchants, has adopted a rule somewhat to this effect; but no such association can, by a rule, make a custom of the port, however the members of it may, as between themselves, bind thmselves to observe the rule. This is matter of contract. But to make a custom of the port, the rule must be so generally known and acknowledged and acted upon, as virtually to be applied by the whole of that part of the business community which it would affect. As it is said in the books, it must be "universal." In this case, of the four witnesses called on this question, who were familiar with the trade in question, two were shown to have no knowledge of any existing custom of the port outside of the rule of the "Produce Exchange," and the strongest witness to its existence doubted its actual application as a usage to a case where, from the nature of the cargo to be received, it could not be taken on board with all possible diligence and despatch on the part of the ship, within the period of two days. Yet to be worth anything as a custom, it should have been proved that it is actually applied and enforced where, but for the custom, the time allowed would be unreasonably short. Otherwise the custom adds nothing to the general rule of law which would allow a reasonable time for taking the cargo on board, having regard to all the circumstances, if the vessel had contracted to receive it from the lighter.

The libellant has also failed to prove any unnecessary delay or negligence on the part of the vessel. It appeared that as soon as the lighters came alongside, the stevedore went to work with a suitable number of men, and the usual appliances for taking the timber on board; that the hatch by which it must be taken in was small, and the space between decks where it was to be stowed, very contracted; that there was great and unusual difficulty in taking the timber on board. I am satisfied that the vessel used all due and proper diligence to take it on board. On the third day, at noon, the work was stopped in consequence of an order given by the owner of the lighters to their masters, which prevented the stevedore from continuing the work, and this stoppage continued about twenty-four hours. It is claimed by the libellant that the occasion for this order was, that the stevedore had positively refused to take on board at all what remained of the heavy oak logs. The libellant's agent appears to have believed that the stevedore had done so upon reports to him from the lightermen and the owner of the lighters. This led to some misunderstanding, but I am not satisfied that there had been such a refusal, and therefore I cannot charge this delay to any fault on the part of the vessel. Libel dismissed with costs.

IN RE.

[Note. Cases cited under this title will be found arranged in alphabetical order under the names of the parties; e. g. "In re Vogel. See Vogel."]

INSDETH v. PIECE. See Case No. 7,026.

## Case No. 7,051.

INSURANCE CO. v. The C. D., JR.

[1 Woods, 72.] [1]

Circuit Court, E. D. Louisiana. Nov. Term, 1870.

CORPORATIONS—CITIZENSHIP — FOREIGN CORPORATIONS—RIGHT TO SUE IN FEDERAL COURTS —CARRIER—INSURANCE.

1. A corporate body created by the laws of one state may maintain an action in the state or federal courts of another state.

[Cited in Amazon Ins. Co. v. The Iron Mountain, Case No. 270.]

2. Where insured property was committed to the custody of a common carrier for transportation, and was lost, and the insurance company paid the owner the value of the property; *held*, that the insurance company could maintain an action against the carrier, although it was not legally bound to indemnify the insured for the loss.

[Cited in Standard Sugar-Refinery v. The Centennial, 2 Fed. 412; The Liberty No. 4, 7 Fed. 231; Sun Mut. Ins. Co. v. Mississippi Valley Transp. Co., 17 Fed. 923; The Sidney, 23 Fed. 96.]

[Appeal from the district court of the United States for the Eastern district of Louisiana.]

[1] [Reported by Hon. William B. Woods, Circuit Judge, and here reprinted by permission.]

Jos. P. Horner and W. S. Benedict, for libellant.

M. Grivot, for claimant.

WOODS, Circuit Judge. On the 28th of November, 1858, between two and three o'clock in the morning, a flatboat called the Delta, loaded with machinery and castings for a sawmill and draining machine, and lying moored to the bank of the Mississippi river, about four miles above Donaldsonville, was run into and sunk by the steamer C. D., Jr., and a large portion of her cargo was carried to the bottom of the river. The machinery on board the flat was the property of the Niles Works, in Cincinnati, and was insured in the Commercial Insurance Company, of Cincinnati. The insurance company paid to the Niles Works the amount of the loss occasioned by the collision, and now brings this suit to recover the sum so paid, from the C. D., Jr., and her owners.

The answer of respondents raises two preliminary questions which demand our attention. It is claimed that the libellant, being a corporate body created by the laws of the state of Ohio, cannot bring suit outside the limits of that state. This position is not tenable. An incorporated company has only to show that it has been regularly and effectually made a corporate body to enable it to sustain a suit beyond the jurisdiction within which it was constituted. Thus in the case of the Dutch West India Company, it was long since decided in England, both in the king's bench and common pleas, that a Dutch corporation might sue in England, though the objection was made that it could not maintain a suit on account of its foreign charter. Henriques Van Moyses v. Dutch West India Co., 2 Ld. Raym. 1535. Since this case, it has been decided that a foreign corporation may maintain an action of assumpsit in England. Chit. Cont. (11th Am. Ed.) 383. Indeed after it has been proved, like any other matter of fact, that an association of persons who bring a suit in any foreign court, by a corporate name, have been incorporated, there is no more reason why their suit should not be sustained, than there is why the suit of a natural individual who is a foreigner should not be. Ang. & A. Corp. (8th Ed.) § 372. Every argument in favor of entertaining in American courts suits by corporations created by the laws of a country not forming a part of the American Union, applies with still greater force to corporations of the states composing the Union.

In Bank of Marietta v. Pindall, 2 Rand. [Va.] 465, Judge Cabell said respecting the power of a corporation, created by the laws of a state, to sue in another state, that "it is rendered doubly necessary by the intimacy of our political union, and by the freedom and frequency of our commercial intercourse." So in the Portsmouth Livery Co. v. Watson, 10 Mass. 91, where the plaintiff was a company not incorporated by the law of Massachusetts, and when it was said that the damages should have been demanded in the name of all the persons constituting said company, suing in their private and individual capacities, the court replied that "the principle suggested by the plea has no foundation in any maxim or in any argument of public convenience or policy. Corporations are artificial persons, and their existence and rights are to be proved, whether the result of a public or private statute, domestic or foreign, as any other fact of that nature is proved. The powers of corporations to sue a personal action in this state are not restricted to corporations created by the laws of this commonwealth." The same doctrine is announced by Chancellor Kent, in Silver Lake Bank v. North, 4 Johns. Ch. 370. See, also, Lombard Bank v. Thorp, 6 Cow. 46; Hartford Bank v. Barry, 17 Mass. 97; and Williamson v. Smoot, 7 Mart. [La.] 31. In the case of Bank of U. S. v. Deveaux, 5 Cranch [9 U. S.] 61, Taney, C. J., held that a corporation aggregate might sue in the courts of the United States, when the persons composing said corporation were citizens of a different state from the opposite party. But in the case of Louisville, C. & C. R. Co. v. Letson, 2 How. [43 U. S.] 497, the supreme court overruled so much of this opinion as authorized a corporation to plead in abatement that one or more of the corporators, plaintiffs or defendants, were citizens of a different state from the one described, and held that the members of the corporate body must be presumed to be citizens of the state in which the corporation was domiciled, and that both parties were estopped from denying it. So we may consider it as the settled law, that a corporation may maintain a suit in either the state or federal courts outside the limits of the state by whose laws it was created.

Respondents further claim that having shown by the testimony, as they allege, that the insurance company was not legally bound to indemnify the insured for the loss the latter sustained by the collision, therefore the libellants have no cause of action against respondents, although they have paid the loss. But I am of opinion that the authorities are adverse to this claim, and adopt the conclusion of the district judge, and refer to the case of Monticello v. Mollison, 17 How. [58 U. S.] 152.

On the merits of the case, I think the right of libellants to recover is clearly established. I am also satisfied from the testimony, that the amount of damage, as found by the commissioner, is correct. A decree in favor of the libellants will be entered accordingly.

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INSURANCE CO. (JONES v.). See Case No. 7,470.

## Case No. 7,052.

INSURANCE CO. v. NEW ORLEANS.

[1 Woods, 85.] [1]

Circuit Court, D. Louisiana. Nov. Term, 1870.

FOREIGN CORPORATIONS—TAXATION—FOURTEENTH AMENDMENT TO CONSTITUTION OF THE UNITED STATES.

1. An incorporated company is not a "citizen of the United States," or a "person," within the meaning of the first section of the fourteenth amendment to the constitution of the United States.

[Cited in Railroad Tax Case, 13 Fed. 760.]

2. Following the construction of the supreme court of Louisiana, it is *held* that a law imposing a higher tax upon a foreign corporation doing business within the state, than upon a domestic corporation, is not in violation of the state constitution, which declares that "taxation shall be equal and uniform throughout the state."

[Cited in Central Pac. R. Co. v. State Board of Equalization, 60 Cal. 60.]

3. The proviso in the revenue act, passed by the legislature of Louisiana March 16, 1870 [2 Stat. 1870, p. 470], that "no insurance company whose license tax shall be one thousand dollars, shall be liable to any assessment throughout the state other than that imposed by this article," applies only to taxes levied by the state, and does not prohibit taxation of such company by the city of New Orleans.

4. The state of Louisiana conferred upon the city of New Orleans the power to levy a license tax upon trades, professions and callings. Under this authority, *held*, that the city might levy a tax upon foreign corporations double that levied upon domestic corporations, and that such a discrimination was not so unreasonable as to render the tax void.

This cause was submitted on the motion of complainant for an injunction.

James B. Eustis and Robert Hutchinson, for complainant.

Geo. S. Lacey, City Atty., for defendant.

WOODS, Circuit Judge. The bill alleges in substance that complainant is a corporation, created by the laws of the state of New York, and having its principal place of business in that state, but also through its agents, James Picton and Charles S. Goode, doing business in the city of New Orleans, and state of Louisiana, and that the city of New Orleans is a municipal corporation created by the laws of the state of Louisiana. That said city, on the 6th day of December, 1870, passed an ordinance for the purpose of levying a license tax on persons pursuing any trade, calling or profession in said city, by which foreign life and accident insurance companies are required to pay a license tax of five hundred dollars, and home companies a license tax of two hundred and fifty dollars. That the ordinance imposing said tax is in violation of the 14th amendment to the constitution of the United States, because it assesses an unequal tax upon the complainant, and for the same reason, is in violation of the constitution of the state of Louisiana, which requires taxation to be equal and uniform. That the city of New Orleans had no right or power to levy said tax upon complainant, because the state of Louisiana, by an act of its general assembly, approved March 16, 1870 (section 3, art. 15), provided that "no insurance company whose license tax should be one thousand dollars, should be liable to any assessment throughout the state other than that imposed by said article;" that complainant has paid a license tax of one thousand dollars to the state of Louisiana for the year 1871, and no other or further license tax can be imposed by state or municipal authority. Finally, that the city of New Orleans had no right to discriminate in the matter of taxation against complainant, which is a right belonging to the state, if it exists at all.

The bill further alleges that John S. Walton, who is charged with the administration of the finances of the city, is about to enforce the collection of said tax from complainant, and prays that said Walton and Benjamin F. Flanders, the mayor of said city, may be enjoined from the collection thereof, or any portion thereof, and for general relief. Instead of demurring to the bill, the city of New Orleans, defendant, files an answer which admits substantially the facts alleged in the bill, but takes issue on the conclusions of law deduced therefrom. The case is submitted on motion for the allowance of the injunction prayed for by the bill.

The first question presented for adjudication is: Admitting the tax to be unequal, is the ordinance providing for its levy and enforcement in violation of the 1st section of the 14th amendment to the constitution of the United States, especially the last clause of the section? The section reads as follows: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privilege or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws." The complainant, to be entitled to the protection of this constitutional provision, must be either a citizen of the United States or a person in the sense in which that term is used in this section.

It has been repeatedly held, by the supreme court of the United States, that corporations were not citizens of the several states in such sense as to bring them within the protection of that clause in the constitution of the United States (section 2, art. 4), which declares that "the citizens of each state shall be entitled to all the privileges and immunities of citizens of the several states." Bank of Augusta v. Earle, 13 Pet. [38 U. S.] 586; Paul v. Virginia, 8 Wall. [75

[1] [Reported by Hon. William B. Woods, Circuit Judge, and here reprinted by permission.]

U. S.] 177. Are corporations citizens of the United States within the meaning of the constitutional provision now under consideration? It is claimed in argument that, before the adoption of the 14th amendment, to be a citizen of the United States, it was necessary to become a citizen of one of the states, but that since the 14th amendment this is reversed, and that citizenship in a state is the result and consequence of the condition of citizenship of the United States. Admitting this view to be correct, we do not see its bearing upon the question in issue. Who are citizens of the United States, within the meaning of the 14th amendment, we think is clearly settled by the terms of the amendment itself. "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside." No words could make it clearer that citizens of the United States, within the meaning of this article, must be natural, and not artificial persons; for a corporation cannot be said to be born, nor can it be naturalized. I am clear, therefore, that a corporate body is not a citizen of the United States as that term is used in the 14th amendment.

Are corporations persons within the meaning of the same amendment? The word "person" occurs three times in the first section, in the following connections: "All persons born or naturalized in the United States"—"nor shall any state deprive any person of life, liberty or property," etc.—"nor" shall any state "deny to any person within its jurisdiction the equal protection of the laws." The complainants claim that this last clause applies to corporations—artificial persons. Only natural persons can be born or naturalized; only natural persons can be deprived of life or liberty; so that it is clear that artificial persons are excluded from the provisions of the first two clauses just quoted. If we adopt the construction claimed by complainants, we must hold that the word "person," where it occurs the third time in this section, has a wider and more comprehensive meaning than in the other clauses of the section where it occurs. This would be a construction for which we find no warrant in the rules of interpretation. The plain and evident meaning of the section is, that the persons to whom the equal protection of the law is secured are persons born or naturalized or endowed with life and liberty, and consequently natural and not artificial persons. This construction of the section is strengthened by the history of the submission by congress, and the adoption by the states of the 14th amendment, so fresh in all minds as to need no rehearsal. We are of opinion, therefore, that the ordinance of the city of New Orleans is not in violation of the provisions of the 14th amendment to the constitution of the United States.

But complainants assert that the tax imposed is not an equal tax, and is therefore forbidden by the constitution of the state of Louisiana, article 123 of which says "taxation shall be equal and uniform throughout the state." Is the tax imposed on the complainant an unequal tax within the meaning of the constitution of the state of Louisiana? This precise question has been passed upon by the supreme court of Louisiana in the case of State v. Lathrop, 10 La. Ann. 402. In that case the court say: "This is a suit for $1,000 tax on a foreign insurance company not chartered in this state, but transacting business therein. The tax is imposed under an act of the legislature, approved April 30, 1853.* It is resisted on the ground that the same statute imposes a tax of but five hundred dollars upon an insurance company incorporated by the laws of the state, and transacting business therein. The defendant contends that the distinction made between these two classes of cases is in violation of article 123 of the state constitution, which declares that 'taxation shall be equal and uniform throughout the state.' The provision of the constitution relied on by the defendant has not deprived the legislature of the power of dividing the objects of legislation into classes. It merely obliges the legislature to impose an equal burden upon all those who find themselves in the same class. Now the class of insurance offices liable to the one thousand dollar tax under the statute in question is entirely different from that which is liable to the five hundred dollar tax." "It is a mere confusion of ideas to put these foreign corporations on the same footing with corporations which are the creatures of our own state laws from the simple fact of their being alike corporations. It is equally unsound to claim for them the personal and constitutional rights of the citizens of the several states throughout the union. Judgment affirmed with costs." To precisely the same effect is the case of State v. Fosdick, 21 La. Ann. 434.

These decisions settle conclusively the point under discussion against the complainant.

But complainant bases his prayer for relief upon the further ground, that the state revenue law, approved March 16, 1870 (section 3, art. 15), which declares that no insurance company whose license tax shall be one thousand dollars shall be liable to any assessment throughout the state other than that imposed by that article, is a contract on the part of the state with the insurance companies, to the effect that on the payment of a license tax of one thousand dollars for the year 1871, the insurance companies should be for that year excepted from all other license tax, state, municipal and parochial, and the complainant having paid one thousand dollars for license tax for the year 1871, cannot be further assessed by the city of New Orleans for that year. If the

* [Laws, p. 136.]

construction given to the revenue law of 1870, by the complainants, is the correct one, then whether it is considered to be a contract or not, it must control and limit the taxing power of the municipal corporations in the state. The question is therefore presented, did the legislature intend by the revenue act of March 16, 1870, to relieve foreign insurance companies from all other license tax on the payment to the state of a license tax of not less than one thousand dollars.

The law under consideration provides that "there shall be levied and collected an annual tax * * * from each insurance company or agency not chartered by this state, and whose annual gross receipts for premiums are more than one hundred thousand dollars, one thousand dollars; when less than one hundred thousand and more than seventy-five thousand, seven hundred and fifty dollars; * * * provided that no insurance company whose license tax shall be one thousand dollars shall be liable to any assessment throughout the state, other than that imposed by this article. Section 7 of the same act provides, "that from every insurer or insurance company not chartered by this state, and transacting an insurance business therein, there shall be collected an annual tax of one per centum upon the gross amount of premiums earned each year from policies issued through agencies in the state." It is only necessary to place these two provisions of the law side by side to see clearly the meaning of the first. The effect of the law is this: When the state license tax of a foreign insurance company, under the first provision, amounts to a thousand dollars or more, the company is relieved from the payment of any further tax to the state, under the provisions of section 7. This is the plain and obvious construction. The law under consideration is an act for raising a revenue for the state, and ought not to be construed to extend to other subjects, when such construction is not obviously necessary to give it full effect.

The view we entertain is strengthened by the fact that the act establishing a new charter for the city of New Orleans, approved on the same day as the revenue act, authorizes the city to levy a license tax upon trades, professions and callings, without limitation or restriction. These two acts must be construed together, and such effect given to both, if possible, as shall allow both of them to stand. Under our construction of the revenue act, this is done. The state is allowed to enforce her license tax upon foreign insurance companies to the amount of a thousand dollars, and any state assessment beyond that is excluded, while the power of the city under her charter to levy a license tax is not interfered with. This construction gives full effect to the proviso in the revenue act, and also to the provisions of the city charter authorizing a license tax upon trades, occupations and callings. We are of opinion therefore that the proviso in the revenue act relied on by complainants does not restrain the city of New Orleans from the collection of the tax complained of.

Finally it is claimed by complainant that even granting that the state of Louisiana has constitutional power to discriminate between foreign and domestic corporations in the matter of taxation, yet the city of New Orleans has no such power. If the state is not forbidden by either the federal or state constitution from levying the tax complained of, it is difficult to see how any constitutional prohibition can rest upon the city of New Orleans. The state has conferred generally upon the city the right to levy a license tax upon trades, professions and callings. The only limitations imposed by law upon this power, are: 1. That the ordinance levying the tax must not be contrary to the constitution of the United States or of the state of Louisiana. 2. That it must be in harmony with the general laws of the state, and with the provisions of the charter; and 3. That it must be reasonable; and to render it reasonable, it should tend in some degree to the accomplishment of the objects for which the corporation was created and its powers conferred. Cooley, Const. Lim. 201. We do not think the ordinance under consideration is open to objection upon either of these grounds. The result of this discussion is that the complainants have not shown, by bill, any ground for the relief prayed. The motion for the injunction is overruled, at complainant's costs.

NOTE. Since this case was determined, the supreme court of Louisiana has decided that under the revenue act of [March 3] 1871 [Laws La. 1871, p. 104], which is identical with the act of 1870, referred to in the foregoing opinion, the payment of a license tax of $1,000 to the state by an insurance company, exempted it from the payment of any license tax to a municipal corporation. See City of New Orleans v. Salamander Ins. Co., 25 La. Ann. 650.

INSURANCE CO. (ROUSE v.). See Case No. 12,089.

INSURANCE CO. (STOCKDALE v.). See Case No. 13,462.

INSURANCE CO. OF NORTH AMERICA (FIELD v.). See Case No. 4,767.

INSURANCE CO. OF NORTH AMERICA (KOHNE v.). See Cases Nos. 7,920–7,922.

INSURANCE CO. OF NORTH AMERICA (NEIDLINGER v.). See Case No. 10,086.

INSURANCE CO. OF NORTH AMERICA (NORMAN v.). See Case No. 10,299.

INSURANCE CO. OF NORTH AMERICA (SCHWARTZ v.). See Case No. 12,504.

INSURANCE CO. OF NORTH AMERICA (SCRIBA v.). See Case No. 12,560.

INSURANCE CO. OF NORTH AMERICA (WATSON v.). See Cases Nos. 17,284–17,286.

INSURANCE CO. OF NORTH AMERICA (WIEDE v.). See Case No. 17,617.

INSURANCE CO. OF PENNSYLVANIA (AZURIA v.). See Case No. 691.

INSURANCE CO. OF PENNSYLVANIA (McGREGOR v.). See Case No. 8,811.

INSURANCE CO. OF PENNSYLVANIA (MURRAY v.). See Case No. 9,961.

INSURANCE CO. OF PENNSYLVANIA (ODLIN v.). See Case No. 10,433.

INSURANCE CO. OF PENNSYLVANIA (PHILLIPS v.). See Case No. 11,102.

INSURGENTS (UNITED STATES v.). See Cases Nos. 15,442 and 15,443.

INTERNATIONAL BANK (SHERMAN v.). See Case No. 12,765.

## Case No. 7,053.

INTERNATIONAL GRAIN CEILING CO. v. DILL et al.

[10 Ben. 92.] [1]

District Court, S. D. New York. Sept., 1878.

PRACTICE—SETTING ASIDE ATTACHMENT—BOND TO MARSHAL—ESTOPPEL—FALSE RETURN.

1. A libel having been filed against D. and R. which averred that "the respondents are in this district or have goods, etc., to wit: the ship Swallow," process was issued against D. and R. with a clause of foreign attachment. D. and R. resided out of the district, but had a regular and well-known place of business within the district, and were usually to be found there during business hours, every day. The marshal made no attempt to find them. He returned to the process that the respondents were "not found" and that he had attached their right, title and interest in the ship. On the return of the process D. and R. failed to appear, their default was taken and a reference ordered. H. and C. claiming to own the ship, finding that she was in custody of the marshal, gave a bond under the act and the vessel was released. They then moved to compel the marshal to amend his return, and to vacate the attachment and have the bond cancelled. In opposition to the motion, the libellants produced affidavits tending to show that D. and R. under a contract to purchase the ship, had paid a large part of the price, but had not got title to her, and that the debt was due and that D. and R. did not desire to have the motion granted: *Held*, that the marshal's return that the respondents were "not found" was a false return; that H. and C. were so interested as to be entitled to make this motion, and were not estopped from making it by having given the bond; and that as there was no dispute about the facts the court could give the relief asked on motion as well as in an action against the marshal for a false return.

[Applied in Provost v. Pidgeon, 9 Fed. 411.]

2. The marshal must be directed to amend his return by striking out the words "the within respondents not found;" that the attachment must be vacated and the bond cancelled, and all proceedings subsequent to the issue and return of process must be set aside.

[Applied in Provost v. Pidgeon, 9 Fed. 411.]

In admiralty.

Abbott Bros., for motion.

W. R. Beebe, for libellant.

Mr. Wakeman, for marshal.

CHOATE, District Judge. This is a libel in personam against [Herman] Dill and Radman to recover $2986, for material furnished to various vessels. The libel alleged that "the respondents are in this district or have goods, etc., to wit, the ship Swallow," and it prayed process with attachment. The process issued required the marshal "to cite and admonish the said respondents if they shall be found in your district to appear, etc., and if the said respondents cannot be found, that you attach their goods and chattels to the amount sued for, and if such property cannot be found that you attach their credits and effects, etc."

On the return day of the process, May 21, 1878, the marshal made return as follows: "The within respondents not found. In obedience to the within process on the 17th day of May inst. on board the ship Swallow, lying, etc., attached the goods and chattels of the within named respondents, to wit: their right, title and interest in the said ship, by delivering to and leaving with Peter Longwood, the first officer and person in charge of said ship, a copy of said process and at the same time exhibited to him the within original, not knowing the extent of their interest."

The respondents not appearing, their default was taken and a reference ordered to compute the amount due. The marshal having put a keeper on board to maintain his attachment, the petitioners Howes and Crowell, claiming to own the ship, finding that she was in the custody of the marshal, on the 25th of May, gave bond under the act of March 3, 1847,—Rev. St. § 941 [9 Stat. 181],—with the petitioners Poillon and Brown, as obligors, conditioned "to abide by and perform the decree of the court." The bond recites the filing of the libel, erroneously stated to be on the 24th of May, and the attachment and the custody of the marshal. Thereupon the vessel was delivered to the claimants. The claimants and their sureties on the bond now move to compel the marshal to amend his return and to vacate the attachment and to have the bond cancelled and to have the libel dismissed on the following facts, which are not disputed. The respondents Dill and Radman reside in the Eastern district of New York, but carry on business in the city of New York, where they have a regular and long established place of business as merchants, their names and business address being in the city directory, and they are usually to be found at their place of business every day during business hours. The marshal made no effort whatever to find the respondents or either of them before attaching the vessel.

The libellants and the marshal having notice of this motion appear, but do not contest these facts, nor is it disputed that Howes and Crowell are the owners of the vessel. Affidavits in opposition to the motion are produced, tending to show that Dill

[1] [Reported by Robert D. Benedict, Esq., and Benj. Lincoln Benedict, Esq., and here reprinted by permission.]

and Radman under a contract to purchase the vessel have paid a large part of the price, and it is claimed that they had an attachable interest in the vessel. The affidavit of the respondents Dill and Radman is also produced, that the debt sued for is justly due and that they do not join in or desire the granting of this motion.

The marshal's return "not found" is clearly a false return. The abbreviated form of return which usage sanctions imports that the respondents were not found within the meaning of his precept, that is, after proper effort to find them in the due execution of his precept.

The form of the process and the long established rule of the court prescribing that form clearly show that there can be no valid attachment in default of personal service of process in a suit in admiralty in personam, except in case the defendant cannot be found within the district. This principle is abundantly recognized also in the authorities. Admiralty Rule 2; Cushing v. Laird [Case No. 3,508]; 2 Pars. Shipp. & Adm. 390; Ben. Adm. (2d Ed.) § 426. Mr. Benedict in his treatise says: "Under such a process (capias with clause of attachment) it is the duty of the marshal to arrest the party if he can be found in his district, and he has no right to attach goods, chattels, debts or effects before he has endeavored to find the party himself." Section 426. This is unquestionably the law. See, also, Harris v. Hardman, 14 How. [55 U. S.] 334. The only difference in the process now in use and that referred to by Mr. Benedict above is, that arrest for debt being abolished the precept now directs the marshal to cite the defendant to appear, instead of directing the marshal to arrest him.

It is clear, therefore, that to attach goods without any endeavor to find and serve personally the defendants when they are to be found within the district, is an abuse of the process of the court, and the facts being clearly shown or admitted, such an attachment cannot be sustained.

Cases may arise raising the question what amount of diligence the marshal must use in endeavoring to find the defendants, or what circumstances in fact will justify him in returning "the defendants not found," but the present case is free from all such question, since upon the undisputed facts the defendants were to be found within the district without any difficulty and there was no attempt to serve them.

It is insisted, however, on behalf of the libellants, that if the return is false, these petitioners have no such standing in court or relation to the cause that they can make this motion; that the respondents alone could have this relief and that they do not ask it and being in default are not entitled to ask it. There is no ground for this claim. These petitioners are directly interested in the result of the suit. Under the act of 1847 judgment may in this very suit be ultimately entered against them. Besides that, they are interested in the property attached and are the parties injured by the abuse of the process of the court. It would be very singular if the court could not relieve them, that abuse being admitted. It is also claimed that the return of the marshal is conclusive, and that the only remedy is by an action for a false return. Where the alleged falsity of the return involves a question of fact, the party aggrieved should be put to his action for a false return that the question may be properly tried and the right of appeal saved. Evans v. Parker, 20 Wend. 622; Stoors v. Kelsey, 2 Paige, 418. So also if a doubtful question of law arises on admitted or uncontested facts it should not be determined on motion. But the power of the court in a proper case to compel an amendment of the return of the officer on motion is not denied, but is recognized by the very authorities which hold that an action for a false return is the remedy where the question is doubtful; and in this case it seems to be wholly unnecessary to remit these parties to their action, because there is no doubt about the facts, nor any doubt that on those facts the return is false. In a clear case the court will on motion or of its own motion set aside proceedings in a cause where they have been without jurisdiction, although in such a case if the jurisdictional question is doubtful the objection should be taken in such form that it may be regularly tried and not determined on affidavits. Dennistoun v. Draper [Case No. 3,804]. In such cases it is not a question of the power of the court over its own proceedings or its own officers, but of the proper mode in which that power shall be exercised with a due regard to the rights and interests of the parties.

But it is claimed that the petitioners are estopped by giving the bond to move to vacate the attachment or to deny the truth of the return or the validity of the attachment; that new rights have intervened in consequence of their giving the bond, which equitably estop them. There is no such estoppel. The libellants have lost no rights by the release of the vessel. They had no attachment, no right in her to lose. The recital of the attachment in the bond does not estop the claimants or their sureties. The libellants have done nothing, nor parted with any value, nor altered their condition on the faith of the claimants' assertion of the fact of the attachment. On the contrary, the recital in the bond is a mere recital of what the libellant has procured to appear to be the fact by his proceedings, that is to say, by the false return which has been made in his behalf. The practice in this case appears to be in effect an ingenious but unwarrantable method of levying execution before getting judgment and a grossly improper extension of the remedy of foreign

attachment; and to hold parties estopped to deny the fact of the attachment, because they have given a bond for the property, the attachment of which they were misled by the libellants or the marshal to believe was in fact made, would encourage and sanction this irregular practice. The attachment being void, the bond necessarily fails and it would be unjust to hold the parties to it, and no technical rules require that they should be held to it. Harris v. Hardman, 14 How. [55 U. S.] 334.

It is also objected that a former motion to vacate the attachment virtually decided this, and that, this motion being the renewal of the former motion, could not be made without leave of the court. It is enough to say on these points, that the former motion was based on alleged deceit on the part of the libellants' proctors in procuring the bond to be given, and it was denied on the ground that such deceit was not shown. No motion was then made to compel an amendment of the return and the return was held conclusive as to the time when the attachment was made for the purpose of that motion. This motion is made on an order to show cause, which itself permitted the renewal, if it is a renewal, of the former motion.

These petitioners cannot ask a dismissal of the libel. Notwithstanding the failure to acquire jurisdiction of the defendants or their property on the process already issued, another process may issue on the same libel. The fact that the defendants have an equitable interest or an attachable interest in the ship (if it be so) is immaterial. The claimants as general owners had a right to make their claim and to bond the vessel. The fact that the respondents have made affidavit that they have no defence and desire to make none, is also immaterial. They have not thereby subjected themselves to the jurisdiction of the court, nor become parties to the action. They have not appeared as defendants. No valid attachment of their property has been made, and their willingness to have the interest of the claimants in this vessel go to pay their own debts, does not affect the claimants' rights in the premises.

An order will be entered directing the marshal to amend his return by striking out the words "The within named respondents not found," and vacating the attachment, cancelling the bond and vacating all proceedings in the cause subsequent to the issue and return of process.

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INTERNATIONAL IMPROVEMENT FUND (VOSE v.). See Case No. 17,008.

INTERNATIONAL INS. CO. (GEIB v.). See Case No. 5,298.

INTERNATIONAL INS. CO. (LIEB v.). See Case No. 5,298.

INTERNATIONAL OCEAN TEL. CO. (COLGATE v.). See Case No. 2,993.

IN THE MATTER OF.

[Note. Cases cited under this title will be found arranged in alphabetical order under the names of the parties; e. g. "In the matter of Brown. See Brown."]

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INVENTORS' MANUF'G CO., In re. See Case No. 4,550.

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## Case No. 7,054.

The INVINCIBLE.

[2 Gall. 29;[1] 6 Hall, Law J. 1.]

Circuit Court, D. Massachusetts. May, 1814.[2]

PRIZE—ADMIRALTY JURISDICTION—CAPTURE—PROBABLE CAUSE.

1. The trial of prizes belongs exclusively to the courts of the country of the captors. No neutral nation can justly interfere, or take cognizance of them, when brought into its territory, except for the purpose of ascertaining whether the vessel be lawfully commissioned, or the prize has been captured in violation of the neutral sovereignty. And it makes no difference, whether the property be claimed as belonging to the subjects of the neutral nation, within whose territory it is brought, or to third persons. A fortiori no suit can be sustained in a neutral tribunal against a lawfully commissioned cruiser, which is brought within its jurisdiction, to recover damages for a supposed illegal capture. Such suit belongs exclusively to the courts of the captors, and their jurisdiction is not destroyed by the recapture of the prize supposed to be illegally captured.

[Applied in Stoughton v. Taylor, Case No. 13,502.]

See Havelock v. Rockwood, 8 Term R. 268; Oddy v. Bovill, 2 East, 475; The Estrella, 4 Wheat. [17 U. S.] 298; [The Adolph, Case No. 86.]

[See note at end of case.]

2. The admiralty has jurisdiction in rem, as well as in personam, in cases of maritime torts, where the thing or the person is within the territory. It may issue a foreign attachment to arrest the choses in action of the offending party.

[Cited in The Bee, Case No. 1,219; Wilson v. Pierce, Id. 17,826; Mendell v. The Martin White, Id. 9,419; Atkins v. Fiber Disintegrating Co., 18 Wall. (85 U. S.) 305.]

See Curt. Adm. Dig. p. 277, note.

[See note at end of case.]

3. What constitutes a probable cause of capture may depend on the ordinances of the country of the captors, as well as on the law of nations.

See La Jeune Eugenie [Case No. 15,551]; The Marianna Flora, 11 Wheat. [24 U. S.] 54–56; Id. [Case No. 9,080]. See The Rover [Id. 12,091]; Maissonnaire v. Keating [Id. 8,978]; U. S. v. Gay [Id. 15,193]. For a definition of probable cause, see The George [Id. 5,328]. See cases of probable cause, The Liverpool Packet [Id. 8,406]; The Apollon, 9 Wheat. [22 U. S.] 362; The Palmyra, 12 Wheat. [25 U. S.] 1; 1 Kent, Comm. 156, note to 5th Ed.; Burke v. Trevitt [Case No. 2,163]; The Fame, Stew. Vice Adm. 112.

[Appeal from the district court of the United States for the district of Maine.]

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[1] [Reported by John Gallison, Esq.]

[2] [Affirmed in 1 Wheat. (14 U. S.) 238.]

[The French private armed ship L'Invincible, duly commissioned as a cruiser, was captured in March, 1813, by the British brig of war Mutine. In the same month she was recaptured by the American privateer Alexander; was again captured on or about the tenth day of May, 1813, by a British squadron, consisting of the Shannon and Tenedos; and afterwards, in the same month, again recaptured by the American privateer Young Teazer, commanded by William B. Dobson, carried into Portland, and libelled in the district court of Maine for adjudication as prize of war.] [3]

Besides the claim of the French consul in behalf of the owners, a special claim was interposed by Hill and McCobb, citizens of the United States, alleging that their ship, the Mount-Hope, with her cargo on board, was, in March, 1813, unlawfully captured on the high seas by said ship, L'Invincible, and carried to places unknown, whereby said ship and cargo were wholly lost to the owners; and praying, among other things, that after payment of salvage, the residue of said ship L'Invincible and cargo, might be condemned and sold for the payment of the damages sustained by them by reason of the premises. By agreement of the parties, an interlocutory decree of condemnation passed, and the ship was ordered to be sold. One moiety of the proceeds was paid to the recaptors as salvage, and the remaining moiety, amounting to $5434.50, being ordered to be brought into court to abide the decision of the several claims above mentioned, was delivered, on stipulation, to the proctor for the owners of the Invincible. At September term, 1813, Maissonnaire and Derouet of Bayonne, owners of the Invincible, by their proctor, appeared under protest in answer to the claim of Hill and McCobb, and alleged, among other things, that the Mount-Hope was lawfully captured, on account of having a British license on board, and other suspicious circumstances inducing a belief of British interest; and that, as the protestants believed, on the voyage to Bayonne, to which port she was ordered, said ship was recaptured by a British cruiser, sent into some port in Great Britain, and there finally restored by the admiralty to the owners, after which she pursued her voyage, and safely arrived, with her cargo, at Cadiz; and thereupon they prayed that the claim might be dismissed. Hill and McCobb, in their replication, deny the legality of the capture, and the existence of a British license on board of the Mount-Hope; and they allege embezzlement and plundering by the crew of the Invincible, admit the recapture and restoration upon payment of expenses, which, together with outfits for the voyage to Cadiz, amounted to about $9000; and pray that the protestants be directed to appear absolutely and without protest. The objections to the jurisdiction having been overruled by the district court, the owners appeared absolutely, and alleged the same matters in their defence, which were stated in their answer under protest; they also prayed the court to assign Hill and McCobb to answer interrogatories, which was ordered by the court. McCobb, who was master of the Mount-Hope, declined answering an interrogatory, requiring a disclosure of the fact, whether there was a British license on board, on the ground that he could not be compelled to answer any question, the answer to which might expose him to any penalty, forfeiture or punishment; and the court allowed the refusal. Hill, in answer to the same interrogatory, denied any knowledge of a British license. The district court having decreed, that Hill and McCobb should recover against the owners of the Invincible the sum of $9000 damage and costs of prosecution [case unreported], the owners appealed to this court, and the preliminary question of jurisdiction now came on to be argued by Mr. Dexter, for appellees, and Mr. Blake, Dist. Atty., for appellants.

Mr. Blake, for appellants.[4]

Before there can be a decree for the libellants, the capture must be adjudged illegal. The question is therefore reduced to one merely of prize, and, by the law of nations, must be determined in a court of the captors. Glass v. The Betsey, 3 Dall. [3 U. S.] 6, 10, 11; Doug. 571; Chit. passim; U. S. v. Peters, 3 Dall. [3 U. S.] 121–128; [Nathan v. Com.] 1 Dall. [1 U. S.] 78. This rule of the law of nations is perfectly reasonable, and is founded on the right of the belligerent to capture the property of his enemy. The right of search is allowed as a mean of enforcing that of capture. By capture, the thing is acquired, not to the individual, but to the state. No neutral power ought therefore to inquire into its justice or injustice. The Elsebe, 5 C. Rob. Adm. 181; 2 Wood. El. Jur. 446; Vatt. 63, § 202; Lee, §§ 2, 238; Doug. 616; Duke of Newcastle's Letter, 1 Coll. Jurid. 129. Another reason of the principle, that the captors are accountable only to the tribunals of their own country, is, that their country is accountable to all other states for what its citizens do in war. French Treaty, art. 17; 2 Ruth. Inst. 513, 594; 1 Bl. Comm. 258; Lee, 46; T. Raym. 473; [Glass v. The Betsey] 3 Dall. [3 U. S.] 15.

Mr. Dexter, for appellees.

It is admitted, as a general rule, that a neutral is not competent to decide between belligerents, and that the only proper court for determining the question of prize is a court of

[3] [From 6 Hall, Law J. 1.]

[4] This was the first case argued after the reporter had assumed the office. He was not present at the opening by Mr. Blake, nor at the commencement of Mr. Dexter's argument.

the captors. It is also admitted, that when this jurisdiction has attached, it draws after it all questions that are merely incidental. The question of damages for an unlawful capture must, in compliance with this rule, follow the principal question, and, in the present case, would have been exclusively cognizable by the French courts, had the Mount-Hope been carried into a French port, and there proceeded against as prize. The allowance or refusal of damages on acquittal might perhaps, upon this supposition, have been conclusive upon every other tribunal, for the jurisdiction would have attached in the court of the capturing power. But the Mount-Hope was not carried in, and as therefore the question of prize can never come before a court of France, neither can the question of damages be exclusively cognizable by a court of that nation. In what court can the complainants obtain redress, if not in this? In cases of damage by running foul, and other marine accidents, the jurisdiction is not controverted. Why should not the same remedy be afforded in the present instance?—Indeed an additional reason for the interference of the court may be found in the protection, which every government owes to its subjects. A citizen calls upon the judicial power of his country to afford him compensation for an injury done on the high seas; the ship, which in the admiralty is regarded as the offending thing, being already in your control by means of a prior libel. But the complaint is not confined to the mere unlawful capture. The libel and claim allege a wanton pillage, which even in a case of capture for just cause, would not be excused. Perhaps it might even be contended, and the principle seems to have been admitted in the supreme court of the United States, that by such malconduct the capture became unlawful ab initio. The case cited from 3 Dall. (U. S. v. Peters, 3 Dall. [3 U. S.] 121) differs essentially from the present. The principal ground of decision there was, that the corvette belonged to the French republic. There was also the further reason, that the prize being at that moment in a French court for adjudication, the jurisdiction had already attached. In the other case cited from 3 Dall. (Talbot v. Janson, Id. 133), the jurisdiction was sustained, and damages awarded. The other facts in the case affect rather the merits, than the question of jurisdiction. The whole case proves, that the courts of the United States have jurisdiction of damages for an unlawful capture on the high seas, as prize, by a vessel acting under the authority of the French government.

Mr. Blake, in reply.

Even conceding what perhaps, upon the principles of the cases cited, may be doubted, that this court would have had jurisdiction, if the Invincible had brought her prize into the United States for any purpose whatever, and Hill and McCobb, finding her here, had proceeded for restitution on the ground of illegal capture, still the subject matter cannot now be within the jurisdiction of the court, for the question would be, whether the Mount-Hope is liable to condemnation or not, and the Mount-Hope is not here.

THE COURT suggested, that Mr. Dexter's point was, that the jurisdiction attached, whenever the party, or thing, committing the offence, is in the country.

Mr. Blake, for appellants.

If jurisdiction is sustained because the vessel is here, so it might be, if any other property, even bank stock, were found in the country. It is true, that the government is bound to protect its citizens, but it is not true, that the party here would be without remedy. A libel in a court of France would afford complete redress, if any injury has been sustained. It is said, that the court have to consider certain irregularities committed by the captors on board of the Mount-Hope. It is denied, that there were any such irregularities, and this, being a question connected with the capture, must be tried in the proper tribunal for taking cognizance of the prize. No distinction is made in the case in Dallas between public and private armed vessels. The reason that public ships are not subject to a process of this nature is, that the injury is a matter for discussion between the two governments. This reason is not less applicable to private, than to public armed ships, for they all act under public authority. The difficulties, which would attend the trial of this question in a court of the United States, afford an unanswerable argument against the jurisdiction. The courts of France, on the other hand, would have every fact before them. Should the trial be in this court, it ought to be conducted in the same manner, as it would have been in a French court; but this, it is well known, would be impossible.

Before STORY, Circuit Justice, and DAVIS, District Judge.

STORY, Circuit Justice (after stating the facts). It is contended on the part of the protestants, that the prize courts of the United States have no cognizance of captures made by a foreign power, but that the right to decide upon the legality of captures belongs exclusively to the courts of the capturing power. On the other hand, it is contended by the counsel of Messrs. Hill and McCobb, that although the general principle be admitted, that the courts of the capturing power have jurisdiction as to the legality of all captures made under its authority; yet the principle applies only where the captured property is actually brought within the jurisdiction of the capturing power, so that prize proceedings may attach upon it. That the admiralty courts of every country have general jurisdiction in all cases

of torts committed on the high seas, wherever the person or thing, by which the tort is committed, is within the territory. That in the present case, the ship Mount-Hope never having been carried into France, the prize jurisdiction of its courts never attached, and therefore the present question, as to damages, could never attach, as an incident to the general jurisdiction of such courts. The general doctrine, that the trial of prizes belongs exclusively to the courts of that state, to which the captor belongs, is now too firmly settled to admit of doubt. In the great argument respecting the Silesia loan, it is laid down, in emphatic terms, that "this is the clear law of nations, and by this method prizes have always been determined in every other maritime country of Europe, as well as England." Coll. Jurid. 129. And this right attaches, not only when the captured property is brought within the territory of the capturing power, but also when it is brought within a neutral territory. The seizure as prize vests the possession in the sovereign of the captors, and subjects the property to the jurisdiction of his courts, and that possession is deemed firm and secure in a neutral port, and cannot be lawfully devested by a neutral tribunal. Bynk. Qu. Jur. Pub. cc. 15, 17 [Heinec. de Nav. ob Vect. Merc. Vet. Com. c. 2, § 9];[5] Hudson v. Guestier, 4 Cranch [8 U. S.] 293; The Henrick and Maria, 4 C. Rob. Adm. 43. And it makes no difference whether the captured property, in such case, belong to an enemy or a neutral. Valin, Traite des Prises, c. 14, § 42; Duke of Newcastle's Letter, 1 Coll. Jurid. 129; U. S. v. Peters, 3 Dall. [3 U. S.] 121; Hudson v. Guestier, 4 Cranch [8 U. S.] 293. It would seem therefore to follow, as a necessary inference, that the courts of neutral nations were bound to abstain from the exercise of all jurisdiction over property captured as prize by a regularly commissioned foreign cruiser, and brought into their ports. But inasmuch as captures may have been made without a lawful commission, fraudulently or piratically, or in violation of the territorial rights of the country, into which the prize property is brought; for the purpose of inquiries of this kind, neutral courts may entertain jurisdiction, and in proper cases award restitution. It seems settled, that if a capture has been made within the territorial seas of a neutral country, or by a privateer illegally equipped in a neutral country, or by persons, who could not, without a violation of their allegiance to a neutral country, act under a belligerent commission, such capture is invalid, and the property, to whomsoever belonging, may be rightfully restored by the prize courts of such neutral country, when brought within its ports. Talbot v. Janson, 3 Dall. [3 U. S.] 133. And the principle, upon which such decisions are sustained, seems perfectly sound, and consistent with the acknowledged rights of belligerent powers. A neutral nation is bound to abstain from every act of hostility, and to conduct itself with perfect impartiality. If it suffer its neutral arm to be used to aid one belligerent, and to oppress its own friends, it becomes a party to the war, and is justly responsible for every act of injustice or hostility, which flows from such conduct. It has a right therefore to protect its own sovereignty from violation, and to punish the offenders; and, as far as is in its power, to restore the parties injured by the illegal act to the same situation, in which they were before it was committed.

So far then, as the sovereignty and rights of neutral nations are concerned, they form an exception to the general doctrine, as to the exclusive jurisdiction of the courts of the capturing power over prizes. The exception seems indeed to have been pressed somewhat farther in some decisions in our own country; farther indeed than in my humble judgment, and I speak with the utmost deference, can be easily reconciled with general principles. It seems to have been held, that whenever neutral or American property is captured on the high seas by a lawfully commissioned ship of a foreign belligerent, and brought into our ports, the courts of the United States have jurisdiction to inquire into the merits of the capture, and, if in their judgment the captors are not entitled to condemnation, to award restitution, notwithstanding even a probable cause for the capture. Glass v. The Betsy, 3 Dall. [3 U. S.] 6; Del Col v. Arnold, Id. 333. In time of war it is an unquestionable right of the belligerents to search neutral ships and cargoes upon the ocean, and, in cases of suspicion, to send them in for adjudication. The evidence to acquit or condemn comes in the first instance from the ship's papers, and the persons on board. If a breach of neutrality or fraud, or gross misconduct appear, the courts of prize are competent in such cases to decree confiscation of the property by way of penalty. If therefore a neutral tribunal shall undertake to try these questions, which regularly belong to the courts of the belligerent, there is certainly some danger, that the case will not always be tried by the same proceedings and rules, which ordinarily govern in prize causes. In cases of capture of enemy's property, strictly so called, under like circumstances, the exercise of such a jurisdiction would be utterly inconsistent with the admitted exclusive rights of the captors, for no neutral country can interpose to wrest from a belligerent prizes lawfully taken (1 C. Rob. Adm. 65); and as all neutral property, when captured, is, if condemned, deemed quasi enemies' property, the neutral tribunal does in fact undertake to decide on the title to the captured property, and settle its hostile or innocent character. If the property turn out to be hostile, it will not undertake to condemn it, for that would be

[5] [From 6 Hall, Law J. 1.]

a voluntary interposition in the war; if neutral, it seems difficult to perceive, how it can rightfully settle the question how far its character of neutrality has been compromitted, or injuriously used against the belligerents.

It is true, that by the ordinance of Louis XIV. (Des Prises, art. 15) it is expressly declared, that if, on board of prizes brought into French ports by foreign armed vessels, there shall be found goods belonging to the subjects of France, or its allies, the goods so belonging to French subjects shall be restored. Valin says, that this right is exercised in favor of subjects by way of compensation for the asylum granted to the captor and his prize; but he expressly states, that the rule does not extend to the goods of allies. 2 Valin, Comm. 274; Valin, Des Prises, c. 7, p. 106. At best this is but a mere municipal regulation of France, and in countries, where no similar regulation exists, it should seem fit, that the general rule of the law of nations should prevail. The true principle seems laid down by Mr. Justice Johnson in his very able opinion in Rose v. Himely [Case No. 12,046]. "A prize, brought into our ports by a belligerent, continues subject to the jurisdiction of the capturing power, although the corpus be within the limits of another jurisdiction. A prize, brought into our ports, would be in no wise subjected by that circumstance to our jurisdiction, except perhaps in the single case of its being necessary to assume the jurisdiction, to protect our neutrality or sovereignty, as in the case of captures within our jurisdictional limits, or by vessels fitted out in our ports." In The Flad Oyen, 1 C. Rob. Adm. 134, 144, Sir William Scott asserts the same doctrine, and declares, that prize of war is a matter "over which a neutral country has no cognizance whatsoever, except in the single case of an infringement of its own territory." The doctrine, which seems asserted in the cases of Glass v. The Betsy, and Del Col v. Arnold, so far as applies to the present discussion, is encountered also, and in no small degree shaken, by the opinion of the supreme court in Hudson v. Guestier, 4 Cranch [8 U. S.] 293, 6 Cranch [10 U. S.] 281. The chief justice, in delivering the opinion of the court, speaking of a vessel captured as prize, says, "in the port of a neutral, she is in a place of safety, and the possession of the captor cannot be lawfully devested, because the neutral sovereign, by himself or his courts, can take no cognizance of the question of prize or no prize. In such case, the neutral sovereign cannot wrest from the possession of the captor a prize of war brought into his ports." And applying the same reasoning to the case of a seizure for the violation of a municipal law, he declares it to be the opinion of the court, "that a possession, thus lawfully acquired under the authority of a sovereign state, could not be devested by the tribunals of that country, into whose ports the captured vessel was brought." It will be recollected, that in this case the property belonged to American citizens, and had been condemned, while lying in a Spanish port, by a French tribunal, and afterwards brought to this country. But in Rose v. Himely, 4 Cranch [8 U. S.] 241, which was argued at the same time, and involved in many respects the same questions as Hudson v. Guestier [supra], the property was actually brought into the United States, and libelled for restitution, before any proceedings were instituted in any French tribunal. The doctrine therefore in Hudson v. Guestier must be supposed to apply to the case of American, as well as neutral, property, captured and brought into an American port. In either respect it would be inconsistent with that, which seems to be assumed in the cases in 3 Dall. [3 U. S.] 6, 333, to which I have alluded. But allowing these cases to have the fullest effect, which the most liberal construction can impute to them, they only decide, that the jurisdiction of our courts, in matters of prizes made by foreign cruisers, attaches, whenever the prize property is within our own ports. In the case before the court, the cruiser itself only is within the country, and not the captured ship in the character of prize. It is therefore clearly distinguishable. The cruiser too comes into port by compulsion in the hands of American recaptors, succeeding to hostile captors. It is not therefore a case, where even a voluntary asylum is sought.

I accede to the position, that, in general, in cases of maritime torts, a court of admiralty will sustain jurisdiction, where either the person, or his property, is within the territory. It is not even confined to the mere offending thing; it spreads its arms over the tangible, as well as incorporeal property of the offending party, to enable it to afford an adequate remedy. The admiralty may therefore arrest the person, or the property, or, by a foreign attachment, the choses in action, of the offending party, to answer ex delicto. But it affords such remedies only, where the tort is a mere marine trespass, and not where it involves directly the question of prize. No case has been produced at the argument, where a neutral tribunal has sustained jurisdiction over a cruiser on account of her having made illegal prizes on the high seas, where the prize was not within its territory. After considerable research, I have not been able to find any such case in modern times. From the works of Sir Leoline Jenkins (volume 2, pp. 714–754) it does however appear, that in 1675, the English admiralty confiscated a French privateer on account of illegal depredations committed on English and Dutch vessels, against the remonstrances of the French government, who claimed a renvoy of the cause, as rightfully belonging to them. But the particular ground of the decision does not appear; and as one charge was for

an infringement of the territorial sovereignty of Great Britain, it might have turned upon that point. 2 Wood, Inst. Eng. Law, 425. On the other hand, in the case of U. S. v. Peters, 3 Dall. [3 U. S.] 121, the supreme court awarded a prohibition to the district court against proceeding on a libel against a French national ship of war for an alleged illegal capture of an American schooner and cargo, the prize having been carried into a French port for adjudication. And the prohibition asserted, that by the law of nations belligerent cruisers duly commissioned had a right, in time of war, to arrest and seize neutral ships, and carry them into the ports of their sovereign for adjudication, and that such cruisers, or their officers and crew, were not amenable before the tribunals of neutral powers for their conduct therein.

It is argued, that this case is inapplicable to that at bar, because the Mount-Hope was recaptured, and thereby the right of the French captors devested, and their courts ousted of jurisdiction. And it is certainly law, that in case of a recapture, escape or voluntary discharge, of a captured vessel, the right of the courts of the belligerent to adjudicate upon the property, as prize, is completely gone; for that right remains, only while the possession of the property remains, either actually or constructively, in the sovereign of the captors. But it does not thence follow, that such courts are deprived of the authority to award damages to the injured party, where the capture has been unlawful, and thereby indirectly to entertain the question of prize. Much less is it to be inferred, that the fact of recapture alone enables a neutral tribunal to take cognizance of the capture itself, and thereby of the question of prize, over which originally it could not assert any jurisdiction. In the first place, it is extremely clear, that the French courts had complete authority, as courts of prize, to award damages for the capture of the Mount-Hope, if it was illegal. The ordinary mode of seeking redress by neutrals for such injuries is, to apply to the prize tribunals of the sovereign, under whose authority the capture has been made, for damages. Such cases are familiar in the annals of the admiralty. The Betsy, 1 C. Rob. Adm. 93. The argument therefore of the counsel for Messrs. Hill and McCobb, that if this court have not jurisdiction to award damages, no court has, and there is a right without a remedy, cannot be sustained. In the next place, the principal question, involved in a trial under such circumstances, necessarily is the question of prize. It is true, that probable cause would justify the seizure, and destroy the claim for damages; but it must be probable cause to seize as prize in reference to a violation of belligerent rights. What constitutes such probable cause depends on the state of the war, the actual operations of the belligerents, the documents required to be on board, the artificial rules applied by prize tribunals, to sift the colorable papers and commerce of neutrals, and the positive directions of the sovereign power. Of some of these questions, at least, the courts of the captors are the most competent judges. Suppose an American ship had been captured under the British orders in council for having a certificate of origin on board, would it have been competent for an American tribunal, if the cruiser had come within our ports, to decide upon the legality of the capture thus made under the orders of the sovereign, who had already declared such certificates to be a good cause of condemnation?—It seems to me difficult to maintain, that such a capture, so made, could, in an American court, subject the party to damages, even supposing it be a clear infringement of our neutral rights, and of the laws of nations. The acts done under the authority of one sovereign can never be subject to the revision of the tribunals of another sovereign; and the parties to such acts are not responsible therefor in their private capacities. If the citizens of a neutral country are injured by such acts, it belongs to their own government to apply for redress, and not for judicial tribunals to administer it. One great object in the establishment of prize courts is to ascertain, whether a capture is made under the authority of the sovereign power. When once the courts of any sovereign have definitely pronounced the capture rightful, it becomes the acknowledged act of the sovereign himself, and the parties, who made the capture, are completely, as to all foreign nations, justified, however repugnant such capture may seem to the law of nations. How can a neutral tribunal decide, that a capture on the high seas is in opposition to the will of the sovereign of the captors?—It may perhaps be competent to decide, that the capture ought not to have been ratified, but could it hence infer, that it would not be? Whether damages then shall in any case of capture be given, must depend upon the law of prize, as understood and administered by the foreign sovereign, or in a case of probable cause, upon the subsequent conduct of the captors. The damages therefore are not an independent and principal inquiry, but a regular incident to the question of prize, in whatever manner the process may be instituted. And this consideration disposes of that part of the argument, in which it is assumed, that although a neutral tribunal may not directly entertain the question of prize, yet it may collaterally, when it is a mere incident to the question of damages.

On the whole I am of opinion, that in the case before the court, the prize tribunals of France had complete jurisdiction by the capture; that, although the right to adjudicate as prize was devested by the subsequent British recapture, yet it was still competent for them to entertain a suit by the owners

for damages, if the capture were illegal; that, consistently with the law of nations, an American tribunal could not adjudge on the question of prize; and the recapture of the prize, or the bringing the cruiser within our ports, did not vest a jurisdiction in such tribunal, which it was otherwise incapable of assuming. I am therefore for sustaining the plea to the jurisdiction, and for dismissing the claim of Messrs. Hill and McCobb with costs. Claims dismissed with costs.

[NOTE. The claimants, Hill and McCobb, took an appeal to the supreme court, where, in an opinion by Mr. Justice Johnson, the sentence of the circuit court was affirmed. 1 Wheat. (14 U. S.) 238. It was held that the exclusive cognizance of prize cases was vested in the courts of the capturing power. "It is a consequence of the equality and absolute independence of sovereign states on the one hand, and of the duty to observe uniform impartial neutrality, on the other," which gives reason to this principle. Every violent dispossession of property on the ocean is, prima facie, a maritime tort, and, as such, it belongs to the admiralty jurisdiction; but that jurisdiction ceases the moment the capture is determined to be one made in the legitimate exercise of the rights of war.

[An action upon a bill of exchange given to ransom the said vessel was also brought. Case No. 8,978.]

## Case No. 7,055.

The INVINCIBLE.

[1 Lowell, 225.] [1]

District Court, D. Massachusetts. Feb., 1868.

SHIPPING—LEAKAGE—NEGLIGENCE—BURDEN OF PROOF—STOWAGE.

1. Libels were brought against a ship for losses by leakage of oil shipped from San Francisco to Boston. The bill of lading contained a printed clause, "Ship not responsible for rust, leakage, or shrinkage," *Held*, that the printed clause changed the general rule that the acknowledgment of goods being received in good order places upon the carrier the burden of proving that he was not guilty of negligence or carelessness.

[Cited in The Moravian, Case No. 9,789; Richards v. Hansen, 1 Fed. 63; The Tommy, 16 Fed. 603; The Saratoga, 20 Fed. 871; The Giglio v. The Britannia, 31 Fed. 432; The Barracouta, 39 Fed. 288.]

2. Proof of greater than average leakage on such a voyage not sufficient; but negligence on the part of the ship must be shown.

3. Although the leakage was probably caused by the drying of the casks; and although dry hides, rags, and wool, supposed to have a heating or drying effect, constituted a part of the cargo, negligence is not shown, it being proved that it is not unusual for these articles to form a part of the cargo of a general ship on such a voyage; and as the shippers did not expressly dissent, their assent is to be presumed to the shipping of these articles.

4. Proof that part of the oil was stowed between decks, where it was more subject to the injurious effects of dryness than in the hold, would not constitute negligence, that manner of loading being usual on such voyages with like cargoes.

[Cited in Janney v. Tudor Co., 3 Fed. 816.]

In admiralty.

T. K. Lothrop and W. W. Crapo (J. H. Clifford with them), for libellants.

S. Bartlett, R. H. Dana, Jr., and D. A. Gleason, for claimants.

LOWELL, District Judge. Three libels against this ship have by consent of parties been heard together. This consolidation is highly convenient, and might have been ordered by the court upon motion of either party. Rich v. Lambert, 12 How. [53 U. S.] 353. The libels are brought by the owners of three several lots of oil shipped from San Francisco to Boston, in November, 1863, by this ship and at the same time. Bills of lading were given to two of the shippers, and one was tendered to the third and refused. It is agreed, however, for the purposes of this trial, that the contracts with the three shippers were precisely alike; and that if the contracts have been broken the libellants have a lien upon the ship, notwithstanding the charter-party. It is further conceded that the clause of the bill of lading exempting the ship from loss by leakage does not extend to leakage arising from bad stowage or other negligence of the carriers; and finally, that the allegation in the libels of a contract or usage requiring the oil to be kept wet during the voyage was inadvertently made and is not to be regarded.

Upon the arrival of the vessel early in the year 1864, it was found that a very serious loss by leakage had been sustained, amounting in value to twelve thousand dollars or more, and the question is, upon whom shall it fall?

The general rule is, that under the ordinary contract of affreightment, the acknowledgment by the carrier that the goods were received in good order throws upon him the burden of proving that any damage which they may show upon arriving at the place of delivery did in fact exist before, or was occasioned by some peril or other cause for which he is not responsible. Nelson v. Woodruff, 1 Black [66 U. S.] 160, and cases there cited.

In Clark v. Barnwell, 12 How. [53 U. S.] 272, this general rule is recognized, with the addition that if an excepted peril is shown, which is adequate to have occasioned the loss, the burden of proof shifts, and the shipper is required to show that it was not occasioned by that peril, but by some negligence of the carrier, which rendered the peril efficient, or co-operated with it, or brought it about without any connection with the sea peril. The bill of lading here contains the printed clause "Ship not responsible for rust, leakage, or shrinkage." Leakage is shown in this case; the casks all arrived, but had lost

[1] [Reported by Hon. John Lowell, LL. D., District Judge, and here reprinted by permission.]

a very considerable part of their oil by leaking. It seems to me that by analogy to the rule adopted in the case last cited, the shipper is bound to show that this leakage was caused by the negligence of the officers or crew of the vessel. It may be that the exception amounts to no more than the law would imply, namely, that the carrier does not warrant against loss arising to certain articles by the operation of time and the ordinary accidents of navigation; but as it expressly recognizes the probability of loss by these causes, and excepts them in terms, it is for the shipper to make out that their loss is owing to other causes. It is not enough to show that it exceeds the average leakage, because it is not that alone which is excepted, but any leakage unless caused, in fact, by negligence on the part of the ship. I have always understood that this was the true and only effect of such stipulation. In the well known case, arising out of the burning of the steamer Lexington, it appeared that the transportation company had contracted with Mr. Harnden, through whom the libellants claimed, that Harnden alone should be responsible for the loss of any goods. The supreme court refused to construe this contract as exonerating the respondents from losses caused by their own negligence or that of their servants, but said that it changed the burden of proof, and that the libellants must show the negligence. New Jersey Steam Nav. Co. v. Merchants' Bank, 6 How. [47 U. S.] 384. See Czech v. General Steam Nav. Co., L. R. 3 C. P. 14, and cases cited. So here leakage is excepted, and although leakage by negligence is not included in the exception, it is for the libellants to show the negligence. I do not rely much on the word "shrinkage," because I doubt whether the shrinkage of casks causing a leak is intended by that word.

The evidence here establishes that the oil was well bedded, chocked, and dunnaged, and that no damage appeared to have arisen from its shifting; two or three casks may have moved, but if so there was no reason to suppose that any loss was occasioned thereby. In this state of the case it is unnecessary to inquire whether a more perfect mode of stowage is known to whalemen.

It is not seriously disputed that the loss was occasioned by shrinkage of the casks, and that this was caused by heat and dryness, but whether by the heat necessarily encountered in passing twice through the tropics, or by the heating and drying character of the dry hides, rags, and wool, which formed a considerable part of the cargo, or partly by the one and partly by the other, is not so clear. The libellants say that the latter was the main efficient cause, and that it was one which might and should have been avoided. The oil was stowed partly in the lower hold and partly in the lower between-decks; mainly in a single tier, and where double, the second tier was oil; it was stowed amidships, and the hides, rags, and wool, were at either end. A careful examination of the losses from the different casks seems to show that the leakage was much greater in the between-decks than in the hold. The dry hides, &c., were not stowed in actual contact with the oil in any place. The only important questions which a fair review of the evidence raises, are, whether the objectionable articles ought to have been carried on this voyage; and if proper to be carried, whether they were properly stowed in relation to the oil; and, lastly, whether all the oil should have been put into the lower hold.

The evidence tends to show that dry hides, wool, and rags are thought to have a drying and heating effect; and that this injurious effect would be likely to be aggravated by stowing them upon the oil. But the testimony is clear and uncontradicted, that some one or more of these articles form part of the cargo of almost every general ship on such a voyage as this; and that it is not unusual to carry all three of them. There is reason to believe that the masters of the three whaling vessels shipping this oil were aware that such would be the case here, and impliedly assented to it. But whether so or not, their assent is conclusively presumed, if the course of trade is proved, and they did not expressly dissent, which they did not; and I do not know that a dissent would have been of much consequence, excepting as evidence of a new and different contract. Clark v. Barnwell, 12 How. [53 U. S.] 272; Rich v. Lambert, Id. 347.

The preponderance of evidence is, that neither hides nor any other cargo was stowed on the oil itself; and this being so, it would seem that the whole duty of the stevedore was performed. There is an intimation from some of the witnesses, that a bulkhead should be put up between these goods and the oil. One says it is usually done in order to save the cargo from being wet with oil; and another, that it is done to save it from water, where the contract requires the oil to be wet down; many of the witnesses are not specially interrogated on this point, either of the fact in this case or its necessity; and I have not been able to satisfy myself, by a careful study of the evidence, that this cargo was stowed differently from usual in these respects, nor that if it was, the difference was of any importance. The preponderance of the evidence, such as there is, seems to be that there was a bulkhead forward, both in the hold and in the between-decks, but none aft; but it is not shown that the presence or absence of a bulkhead had any bearing upon the shrinkage of these casks, or that it is one of the proper precautions in such cases.

An examination of the question of the place of storage results in a similar way. The witnesses are not called on to say that the between-decks was not a proper place; and it was not until the argument that the fact

was distinctly brought out that the leakage had been much greater there. It would seem probable that the heat would be greater there, because it was probably in whole or in part above the water line; but whether there was room for all the oil in the hold, and whether it is commonly considered a safer and better place does not appear. It does appear that the master of the Abigail stipulated that his oil should be stowed in the hold, and that it was stowed there; and that the others were aware that their oil would most or all of it be placed between decks, and made no objection. Under these circumstances, and there being no single expert who has said that this stowage was not usual and proper, I must support it.

The general evidence upon the whole case is very strong that the cargo was of the kind ordinarily carried in a general ship, and that it was well stowed. And this general proof of good stowage must include all particulars to which the attention of the witnesses was not specially directed by the libellants, because they do not point out in their libel the particulars which they rely on, but only that the oil was badly stowed generally, and was unskilfully stowed "with other cargo." This allegation calls attention in a very general way to the cargo carried with the oil, and perhaps to its being in immediate contact with it, or even in the same hold with it, but not to the part of the vessel in which the oil should be placed, nor to any special protection or precautions which might be thought essential to its safety. The allegation would be fully satisfied by showing that too much weight had been placed on the oil, or that they were so stowed relatively to other goods that they would not ride well or make safe stowage.

Much of the evidence was upon the actual cause of the great leakage and shrinkage in this case. It is shown that shippers of oil for such a voyage much prefer to have it wet down as often as twice a week, and are willing to pay for the great labor which is necessary to do this faithfully. There have been some cases in this court arising out of such contracts. This fact seems to show that there is always a considerable risk of leakage if this precaution it not taken. On the other hand, there was evidence that the loss here far exceeds what would ordinarily be expected in such cases. I have not found it necessary to make up my mind upon this point, because upon the whole evidence I am satisfied that this loss did not arise from the fault of the ship itself, nor from the want of care and skill of the claimants' agents in stowing or navigating her, but from the operation of causes which, whether common to all such voyages or not, were common to all in which the vessel happened to have such a cargo, and that such a cargo is not uncommon, but usual and proper, and that the ship was stowed in the usual and proper manner. Libel dismissed.

## Case No. 7,056.

The INVINCIBLE.

[3 Sawy. 176.] [1]

District Court, D. California. Oct. 14, 1874.

CARRIER—NEGLIGENCE.

Although the carrier is exempt from liability for damage or deterioration arising from the nature of the goods or of the voyage, yet, if there has been a want of proper care or skill on his part in guarding against such damages, the injury will be ascribed to his negligence.

In admiralty.

McAllisters & Bergin, for libellant.

E. Casserly and W. H. L. Barnes, for claimants.

HOFFMAN, District Judge. In the spring of 1864 the libellants shipped on board the Invincible, then lying at the port of New York, and bound on a voyage to San Francisco, 750 baskets of champagne in two lots, one of 500 baskets and the other of 250. By the terms of the bills of lading given for the first lot, the wine was to be stowed in the house on deck. The second lot was to be stowed in the cabin staterooms and house on deck. Under these contracts 659 baskets were placed in the house on deck and the remainder in the cabin staterooms.

On the arrival of the ship the wine stowed in the staterooms was found to be in perfect order. But that stowed in the house was damaged to the extraordinary and almost unprecedented extent of 57 per cent. of its entire value. At the hearing the carrier, after proofs of this loss had been given, attempted to excuse himself by showing that the house on deck was an unfit place for the stowage of goods, and that goods so placed were exposed to extraordinary perils to which cargo below decks was not liable. Although it appeared that the voyage was somewhat rough and boisterous, the claimants failed to show that the injury to the goods was attributable to the direct operation of any peril of the sea, in the strict sense of the term, but they established beyond doubt that the loss of the wine was caused by what is known as "blowage and breakage"—that is, escape of the contents of the bottles, either through their mouths or by their bursting.

He thus proved prima facie, that the injury was occasioned by natural causes, arising from the inherent quantities and perishability of the goods themselves and the nature of the voyage. To this the libellants replied that the damage was excessive and unprecedented, and that it could not be ascribed to the intrinsic infirmity of an article which is every year brought to this port in enormous quantities without serious loss. Some other cause for the injury must therefore be sought for, and this was to be found in the total neglect of the master during the

[1] [Reported by L. S. B. Sawyer, Esq., and here reprinted by permission.]

entire voyage to give to the wine proper and necessary ventilation by opening, as occasion permitted, the doors and windows of the house. That through this omission the temperature of the house became so high as to cause the wine to "blow" and the bottles to burst.

It is not pretended on the part of the carrier that any effort whatever was made to ventilate the goods during the voyage by opening the windows or doors of the house. The master seems to have considered it his right and his duty to leave the goods and the house which contained them, in the same condition during the voyage as when they left New York, and this, though apprised by the leakage of wine through the scupper holes of the house for a considerable period, that the goods from some cause were sustaining great injury.

The answer sets up that the excessive heat arose upon the decomposition or fermentation of the straw in which the bottles were packed, caused by its being wetted with salt or fresh water. But the evidence fails to sustain this allegation. No noticeable accident happened to the deck-house during the voyage. The chemical experts failed to detect in the straw when examined here, any trace of the presence of salt, or to discover any signs of chemical changes which could have generated excessive heat.

But even if the heat was due to this cause, it was as much the duty of the carrier to endeavor to mitigate its effects by opening the doors and windows of the house, as to resort to the same expedients to diminish heat caused by the sun's rays. Whether his omission to do so was negligence for which he is liable, is the real point of the case.

The answer also alleges that the champagne in question was a spurious article of inferior quality, and the loss arose from its inherent perishability caused by "defective manufacture, preparation, bottling, corking and packing."

In support of these allegations no proof whatever is offered, save that a few of the baskets were somewhat rat-eaten. The wine was the "Charles Heidseck Champagne," so well known and extensively used in this country, and does not appear to have differed in the mode in which it was manufactured, prepared, bottled and corked, from the wine which the libellants, whose commercial house is of the highest respectability, have for years been in the habit of importing. The fact that all the wine stowed in the cabin arrived in perfect order, would seem to afford decisive proof that there could have been no such defective preparation and packing as the answer alleges.

The whole evidence points, I think, unmistakably, to the conclusion that the blowing and breaking of the bottles was caused by the excessive heat to which they were subjected by being stowed, during the whole of a voyage in which the equator was twice crossed, in a deck-house, tightly closed and exposed on its roof and sides to the direct and reflected rays of the sun.

The question is thus presented, was the omission on the part of the master to cool and ventilate the deck-house by opening its doors and windows when the weather permitted, negligence for which the vessel is liable?

The libellants contend that he was bound to do so by express stipulation, and by his general duty as a carrier—especially when apprised by the leakage of the vessel that the wine was sustaining serious injury. The claimants excuse their omission on the grounds: 1st. That by express agreement the goods stowed in the deck-house were to be at the sole risk of the shipper, and the ship was in no case to be liable for any injury that might befall them. 2d. That the doors and windows were closed and fastened with the full knowledge of Mr. Crosby, the shipper, and with the understanding that they were so to remain during the voyage. 3d. That it was impracticable to open the doors and windows without exposing the goods to injury from salt or fresh water or from the depredations of the crew, and that it was not the duty of the carrier, nor had he the right to meddle in any way with cargo stowed under the supervision and by direction of the shipper.

1. In regard to the alleged agreement, Mr. Hastings, part owner of the ship, testifies that he consented with much reluctance and at Mr. Crosby's earnest request, to the stowage of the wines in the deck-house, and that it was the express understanding that the ship should assume no responsibility and incur no liability "of any name or nature." That the carpenter and stevedore were to fit up the house and stow the goods as Mr. Crosby should direct, and that thereafter the goods were to be at the sole risk of the shipper. In these statements Mr. Hastings is corroborated by Deane, the ship-keeper. Mr. Crosby denies that any such agreement was entered into.

The disputed matter of fact I do not deem it necessary to determine. If the agreement was as broad and absolute as is alleged, parol testimony to prove it was inadmissible, for it is inconsistent with and contradictory to the written stipulations of the bill of lading. Nor if reduced to writing would its legal effect be to exonerate the carrier from the consequences of his actual negligence. The policy of the law will not permit a common carrier to stipulate for exemption from responsibility for the negligence of himself and his servants. Railroad Co. v. Lockwood, 17 Wall. [84 U. S.] 357. Whether there was in this case actual negligence is the very question at issue.

2. The alleged understanding with Mr. Crosby that the doors and windows of the deck-house should be tightly closed and so remain during the voyage, was, if made, un-

questionably binding on him. An agreement between the parties as to the degree and kind of attention and care to be bestowed on the merchandise during the voyage, in no degree contradicts or varies the obligations of the bill of lading. It merely establishes by mutual consent what shall be accounted, under the circumstances of the case, due care and diligence.

The proofs of this agreement rest on the depositions of Mr. Hastings and Mr. Deane. The testimony of these witnesses, with regard to the release of the ship from all responsibility for the goods, "of every name and nature," has already been noticed.

Mr. Hastings testifies in addition: "Mr. Crosby never said one word to me about ventilation of any name or nature. Never raised the question and never mentioned the word ventilation. I know that the windows and holes in the top of the house were stopped up by Mr. Deane at Mr. Crosby's request. The doors were locked and fastened with screws. Mr. Deane, the carpenter, fastened them. Mr. Crosby was there at the time and saw they were fastened, and expressed himself perfectly satisfied with the stowage and everything appertaining to his wine. Mr. Crosby was present at the fastening. I told him the captain said that without their being fastened the locks would be no protection against the crew. I further said I did not think it would be seaworthy and might vitiate his insurance, as all policies require the hatches to be fastened securely down and made impervious to wet."

Mr. Hastings further states that the only reason assigned by Mr. Crosby for not wishing to stow his wine between decks, was the danger of injury by moisture or sweat.

Mr. Deane corroborates, in a very positive manner, Mr. Hastings's statements.

He testifies to Mr. Hastings's reluctance to allow the goods to be stowed in the deck-house, and to his positive and repeated declarations to Mr. Crosby "that he would take no risk whatever—neither from sailors, heat of galley nor heat of the sun upon the top of the house."

He also testifies that the windows were boarded over by Mr. Crosby's direction; that when the goods were all stowed Mr. Crosby told him to fasten the doors with screws or nails, and that he would take all the risk if he (the witness) would fasten up the doors and windows as directed. The credibility of this witness is somewhat impaired by his evident anxiety to shield the vessel from liability. He iterates and reiterates, on almost every page of his deposition, that Mr. Crosby expressly assumed the whole risk of the adventure, and released the ship from all liability, being apparently under the impression that such an agreement would be decisive of the suit.

Mr. Crosby's testimony is substantially as follows: That about the middle of March, 1863, "he made a verbal agreement with Mr. Hastings for stowage of the champagne in the deck-house. That it was to be ventilated and protected from heat when at sea, and during the voyage, by keeping the doors and windows of said deck-house open. Mr. Hastings replied that he would do anything I required, to secure ventilation of the champagne. * * * I directed Mr. Hastings to have strips of boards nailed or fastened across the doors a few inches apart on the inside of the deck-house, to secure the wine from falling out when the doors should be opened for ventilation. He replied that it should be done, and called the carpenter and requested me to give directions to him."

In reply to the ninth interrogatory he states, after repeating the verbal agreement with Mr. Hastings, above detailed, that the latter proposed putting in an iron ventilator, but that he told him he considered it of no importance—that the doors and windows would afford a free circulation of air, and was the ventilation he wanted, which Mr. H. agreed to furnish.

He further states: "I had no knowledge whatever of the fastening and boarding of the windows or the fastening and caulking of the doors of the deck-house."

The testimony on this turning-point of the case is thus found to be irreconcilably conflicting. Neither of the witnesses was examined in court. Their testimony was taken by deposition. They are both believed to be merchants of wealth and respectability. The duty of determining which of them is to be believed is delicate and unpleasant. I shall briefly state the considerations upon which my determination is founded:

Several years previous to the shipment by the Invincible, the attention of the libellants, who were largely engaged in the business of importing champagne into this state, had been drawn to the very serious losses sustained by the goods during their transit. After much consideration they came to the conclusion that ventilation, and a free circulation of air, were indispensable to the preservation of the wine. They therefore determined to ship in the cabin and deck house exclusively, and this mode they had pursued for six years previous to the shipment in this case. The results were of the most satisfactory character. The losses which had previously been so great as to create apprehensions that they would be compelled to relinquish the business became almost nominal. Mr. Dibblee states that out of 18,000 baskets imported during five years, and stowed on deck, the percentage of loss by breakage was less than one-half of one per cent., and by blowage less than one per cent.

The clerk of the libellants gives the exact figures taken from their books: Total loss on 18,602 baskets champagne, imported on sixty different vessels (exclusive of the nominable), 245 baskets; 169 by blowage, 76 by breakage. Nor was this practice confined to the libellants alone. It appears in evidence, and is

admitted by the claimants' witnesses, whose testimony was taken in New York, that it is the general practice of shippers of champagne wine to require that it be stowed in the cabin or house on deck, and that such is the usual mode of carrying it.

Under these circumstances, it has appeared to me incredible that Mr. Crosby, while accepting the increased risk of sea damage incidental to stowing the goods in a deck-house should have renounced the only possible benefit or advantage which he could expect from that mode of stowage; should have consented that the easy and efficient means of ventilation afforded by the deck-house should be wholly neglected, and that the goods should remain during an entire voyage, in which the tropics were to be crossed twice, in a room with windows closed, and doors fastened and caulked, and exposed to a temperature which, as one of the witnesses remarked, would be like that of an oven.

The proofs disclose a fact which affords an important corroboration of the conclusion derived from a priori considerations. Mr. Crosby states he requested that slats should be nailed on the inside of the doorways to prevent the wine from falling out when the doors should be opened. This, Mr. Deane informs us, was in fact done by Mr. Hastings's order. He omits to state the reason for doing it. But what reason can be assigned, save that stated by Mr. Crosby? And can the fact that Mr. Hastings gave orders for the purpose, be reconciled with the supposition that he did not expect that the doors would be opened at all during the voyage?

I think these considerations are decisive, and that it may be concluded with tolerable certainty that Mr. Crosby did not expressly or by implication agree to renounce the advantages to be derived from the mode of stowage, on which he insisted, or relieve the carrier from his obligation to exercise reasonable care and diligence for the security and preservation of the goods during the voyage. I also think that Mr. Crosby expressly stipulated for the employment during the voyage, of means of ventilation which the deck-house afforded, whenever those means could reasonably and properly be used.

But if this last proposition be deemed not to have been satisfactorily proven, I will briefly consider whether, in the absence of express stipulation, it was not the carrier's duty, under the circumstances of this case, to secure the safe transportation of the goods by the employment of the means which Mr. Crosby states he expressly promised to adopt.

That under the common bill of lading the carrier is exempted from liability, not only for loss by perils of the sea, but also for damage or deterioration arising from the nature of the articles or the voyage, is not disputed. But if there has been a want of proper care or skill on his part in guarding against such dangers, the damages will be ascribed to negligence and not to the perils of the sea, or the nature of the articles or voyage. Lamb v. Parkman [Case No. 8,020].

"It is the master's duty, as representing the ship owner, to take reasonable care of the goods intrusted to him, not by merely doing what is necessary to preserve them on board the ship during the ordinary incidents of the voyage; but, also, by taking reasonable measures to check and arrest their loss, or deterioration, by reason of accidents, for the necessary effects which there is by reason of the exception in the bill of lading no original liability." Notara v. Henderson, 4 Marit. Law. Cas. 281. In this case the carrier was held liable for the neglect of the master to take reasonable care (by drying them), of beans which had been wetted by a peril of the sea.

So in the case of The Gentleman [Case No. 5,324], it was held culpable negligence in the master to have omitted to take proper means for the preservation of a cargo of hides by heating, or ventilation, during a detention of the vessel for thirty days at the Cape de Verde Islands by reason of unseaworthiness.

What is the reasonable care which the master must exercise will depend upon the circumstances of the case; and the question under consideration is: Did the failure of the master to take any measures whatever to prevent or arrest damage to the goods, caused by the heat to which they were exposed, constitute a want of reasonable care on the part of the carrier? A large number of witnesses testify that it is neither usual, safe, nor proper to open the windows and doors of a deck-house for the purposes of ventilation, and that to do so would expose its contents to danger from sea-water, from rain, and from the depredations of the crew.

On the part of the libellants many witnesses testify precisely the reverse. I have not ascertained by counting, on which side the witnesses are the more numerous. As to the comparative weight to be given to their testimony, there can be, I think, no room for doubt.

The experience of any one who has sailed in tropical latitudes is sufficient to apprise him that for a large part of the time the doors and windows of a house on deck may be kept open with no appreciable danger of damage to its contents by fresh or salt water. The houses commonly contain rooms used as a galley, a carpenter's shop, a sail-room, and often a forecastle for the crew, and a steerage for passengers. The uses to which these rooms are applied renders it indispensable that the doors and windows should be frequently if not constantly open.

They can be readily closed at a moment's notice. The fact that the houses are con-

structed with windows would seem to indicate that the latter are intended to be used and used with safety, and the pretension that it would have been imprudent or improper to open them during any part of a voyage, in which the tropics were twice traversed, appears to me repugnant to common experience and common sense.

The danger from the depredations of the crew, to baskets of wine, by opening in the daytime the doors and windows of a room where the doorways have slats nailed across them on the inside, and the windows are protected by rods, seems to me wholly imaginary.

I think it clear that in this case it was the obvious duty of the master to use the efficacious means at his disposal to prevent or check the damage which the goods might sustain from natural causes, and that to relieve him from that duty he must establish by a preponderance of proofs, that the shipper dispensed with its performance. This, he has, in my view of the evidence, failed to do. The ship is, therefore, liable for his neglect.

I have not found it necessary to pass upon the questions whether certain notes of counsel, offered as substitutes for depositions which have been lost, are admissible in evidence, as my determination of the case would not be affected by their reception or rejection.

At the hearing, the arguments of counsel were directed exclusively to the question of liability of the vessel. The amount of loss was not discussed. I have not been able exactly to ascertain it from the evidence. Although it is probable that the data for its computation are contained in the proofs. It will therefore be referred to the clerk to ascertain and report the amount of damages, unless the parties can fix it by agreement.

## Case No. 7,057.

The IOLA.

The SAMPSON.

[11 N. Y. Leg. Obs. 263.]

District Court, S. D. New York. 1853.[1]

COLLISION AND SALVAGE—CROSS LIBELS.

1. The allegations of an answer upon a material fact, deliberately pleaded, and under full knowledge of the grounds relied upon by the opposite party, cannot be abandoned; and an amendment will not be allowed, for the purpose of making the allegation correspond with the evidence, on the hearing of the case.

2. A steamboat while looking for towing employ off Sandy Hook, and being under way, *held* responsible for not keeping clear of a vessel sailing with a free wind, and outward bound.

In admiralty.

George D. Betts and Charles Donohue, for the Sampson.

E. H. Owen, W. Evarts, and W. Q. Morton, for the Iola.

HALL, District Judge. On the 27th day of October, 1851, Isaac O. Phillips exhibited his libel in the case first above entitled, and claimed to recover damages to the amount of $75, alleged to have been sustained by the steam towboat Sampson (of which he was part owner) in a collision with the brig Iola; and also claiming salvage for taking the brig in tow after the collision, and towing her to a place of safety at the Atlantic docks. This libel alleged, in substance, that on the 24th day of October, then current, the British brig Iola sailed from New York, bound to sea, with a valuable cargo on board, and with a free wind, blowing fresh from a westerly direction; that while the brig was proceeding down the bay, towards Sandy Hook, the Sampson was lying to, off the Hook, waiting for business, and that, while they were so lying to, those on board the steamer discovered the brig approaching them very rapidly; that there was abundance of sea-room on each side the steamer, and that, if the brig had kept the course she was pursuing when first discovered, she would have gone clear of the steamer, but that, on approaching near to the steamer, the brig several times changed her course, and so frequently as to make it impossible for those in charge of the steamer to determine on which side of said steamer said brig intended to go; that when she had approached very near to the steamer, and so near as to render it impossible for said steamboat to avoid said brig, she again shifted her course, and, although the steamboat took every step in her power to avoid a collision, she was unable to do it, and the brig, notwithstanding the exertions of those on board the steamer, run into and across the bows of the steamboat, and damaged the steamboat to the amount of seventy-five dollars and upwards. The libel further alleged that, owing to the unskilful navigation of the brig, and the collision consequent thereon, she was cut down to the water's edge, and was in a leaky and sinking condition, and that, if it had not been for the prompt assistance of the steamer, the brig and cargo would, undoubtedly, have been seriously damaged, if not totally lost; that the master and crew were about to abandon the brig, and launched their boat for that purpose; that the master of the steamer, on finding they were about to do so, took active and prompt measures for her rescue; that by his direction the leak was partially stopped; and that he took command of the brig, and by the use of the steamer towed her to a place of safety. The libel charged that the collision was caused solely by carelessness and unskilful management on board the brig, and not by any carelessness or negligence of those on board the steamer, and claimed to recover for the

[1] [Affirmed in Case No. 12,279.]

damages to the steamer occasioned by the collision, and a salvage compensation for saving the brig and cargo, and taking them to a place of safety.

The answer to this libel, filed by the owners of the brig, denied that the collision was occasioned by the carelessness or unskilful management of those on board the brig, and alleged that the collision was caused by the carelessness, negligence, and improper conduct of those on board the steamboat. It admitted that the brig was proceeding to sea, and that the steamer was lying to, with abundant sea-room on each side, as alleged in the libel, but denied that the brig changed her course several times, or in any manner, except to keep farther off from the steamer. And it expressly alleged that when the brig neared the steamboat the latter suddenly and unexpectedly put her engines and wheels in motion, proceeded forward in a direction across the track of the brig, and came and continued on towards the brig (notwithstanding she was warned to stop or keep off), until she ran into the brig, and caused the damage in the libel mentioned; that if the steamer had continued to lie to the brig would have passed her without a collision, and that the steamer might easily have avoided the collision, if any proper efforts for that purpose had been made. The answer also contained a full denial of all the material allegations in the libel upon which the salvage claim was founded. This answer was filed December 19, 1851.

Before this answer was filed, the claimant and respondents in the first entitled suit had, on different days, from the 13th to the 26th of November, 1851, examined several witnesses on their behalf, and they had also, on the 1st day of December, 1851, filed their libel in the suit secondly above entitled, claiming to recover the damages sustained by the brig, in consequence of the collision. In the last-mentioned libel (which was sworn to by the captain of the brig), it was alleged (among other things) that the brig was standing east by south, with the wind fresh from the west-southwest, and the weather clear and fine, and that the steamer was first discovered from the brig when about four miles distant; that the steamer was apparently lying to, her wheels not being in motion, and that she was on the starboard bow; that the brig continued on her course (which is alleged in the libel, and is proved by the captain's deposition, and the other proofs in the case, to have been east by south), and running at the rate of about six miles an hour, until she approached within about a quarter of a mile of the steamboat, which was all the while lying still, her wheels not being in motion; that then, in order to give the steamboat a wider berth, and to avoid the possibility of a collision, the course of the brig was changed to east, which course, as well as the one the brig had been previously running, would have carried her entirely free and clear of the steamboat if she had remained still, or had not been improperly navigated; that after the course of the brig was changed to east, and within a few minutes after, the steamboat was put in motion, and proceeded in a northerly direction towards and across the track of the brig; that, supposing the steamer might wish to speak, the brig was kept on her course without deviation, and the steamboat continued to approach the brig without slackening her speed or altering her course; that the master of the brig, fearing a collision, gave the steamboat warning to back her wheels and keep off, which warning was disregarded; that the steamboat did not stop her engines or slacken her speed, but continued her course, on seeing which the brig's helm was put hard up, and she went immediately off until her sails took by the lee; and that, in spite of the efforts of the brig to escape, the steamer ran with unabated speed against the brig, striking her with great force and violence, and causing the injuries specially detailed in the libel. The usual and necessary allegations of carelessness, &c., were made against those managing the steamer, and the libel claimed damages to the amount of $3,000.

The answer to this libel, sworn to by Isaac O. Phillips, the libellant in the first suit, was filed June 19, 1852, which, it will be perceived, was more than six months after the libel was exhibited, and still longer after most of the crew of the brig had been examined as witnesses in the first above entitled suit. The respondent, therefore, doubtless knew, not only from the libel which he was answering, but also from the depositions already taken, that the owners of the brig based their claim, in the suit brought by them, upon the allegations that the steamer had been put in motion, and had, on going ahead, by the propelling power of her engines and wheels, produced the collision. This answer was sworn to at New York, where the crew of the brig had been examined, and near to which port the collision occurred; so that the respondent had every facility for ascertaining the facts, and making that full and frank disclosure of the causes of the collision which, under such circumstances, courts of admiralty require. The answer is long, and appears to have been drawn with skill, care, and deliberation. It takes issue upon many of the material allegations of the libel, and sets up, on information and belief, many facts and circumstances by way of defence. In respect to the causes of collision, and the circumstances attending it, the answer was doubtless well considered, and should have been truthful and precise.

In speaking of the movements of the two vessels, the answer (in the third article) avers that the course of the brig, having been first yawing, was finally changed so

as to bear for the steamboat, which was in motion, heading about north, and the brig's head being continually changed, when near each other, shifted more and more across the steamboat's bow; that had the brig kept on her course, or, even after having kept off, had then kept her course, she would have entirely cleared the steamboat, but from the conduct of those on board the brig, there being no lookout, and no person attending to such duty, no proper attention was paid to the brig's heading. Again, the answer (in the fourth article) alleges "that the brig, being headed and directed so as to head for the said steamboat, and endanger her by a collision, the wheels of said steamboat were put in motion to clear her, when the brig's course was again altered, so much as to pay almost half round the compass, bringing her directly under the bows of the steamboat, then in motion. The answer also admits that about the time of the collision the helm of the brig was put hard up, and that she went immediately off until her sails took by the lee, as alleged by the libellants, and then alleges that the truth is, as the respondents are informed and believe, "the master of said brig was incompetent and inexperienced, and when approaching said steamboat, instead of keeping his course, attempted to cross the steamboat's bows, and when they came near together, and when it was wholly out of the power of those navigating the steamboat to meet such a contingency, put his helm hard up, and so ran his vessel, she being under great headway, right across the stern of the said steamboat, striking said steamboat a violent blow on the forward guard and stern;" also, "that the said vessel had the wind dead or nearly dead aft, and might with ease and safety have gone under the steamboat's stern, but, from the acts of those on board the brig, it appears they did not know which way she was heading; that as soon as it appeared, from the acts of those on board the brig, that a collision was unavoidable, the wheels of said steamboat, as soon as it could be done, were stopped and reversed, and every effort made to avoid the collision." In the sixth article of the answer, it is also charged upon the brig, that she "made an attempt to cross the steamboat's bows, and finally put herself right across the steamboat's track." It can hardly be contended that this answer does not admit that the steamboat had been put in motion, heading and moving to the northward, before the wheels were backed (or "stopped and reversed," in the language of the answer), and in this respect the libel and answer, and the witnesses for the libellants, in the second or cross suit, substantially agree. Nevertheless, the ground taken by the respondents at the trial, and in which they were sustained by the testimony of a part, at least, of their witnesses, was, that neither the steamboat nor the engine was put in motion at all, until they were backed as rapidly as possible, just prior to the collision, and for the sole purpose of averting it. The advocate for the libellants in the cross suit having, in the course of his argument, relied upon the statements of the answer, the advocate for the respondents asked that their answer might be amended, if the court should be of the opinion that it contained allegations and admissions inconsistent with the state of facts sworn to by the respondents' witnesses. I can see no sufficient reason for allowing the answer to be amended in this respect. It was put in after the respondents had the fullest opportunity to ascertain the circumstances attending the collision, and they could not have been ignorant of the fact that the owners of the brig claimed that the steamer had been put in motion, and had, while under headway, ran into the brig. There is no evidence that the statements which they wish to expunge were inserted in consequence of any mistake, or erroneous information, or of a misunderstanding of the information on which such statements were based; and besides, upon the whole evidence in the case, I am satisfied that these statements, and the corresponding testimony of the witnesses produced in behalf of the owners of the brig, are substantially correct.

It must be conceded that the evidence in the case is conflicting, and, in many respects, entirely irreconcilable. It is, however, proved by the witnesses on both sides that the Sampson was lying to until the two vessels were within less than half a mile of each other; and the witnesses for both parties agree that her engine was afterwards put in motion, and her position changed, before the collision. The witnesses who were on board the steamer aver that she was backing from the time her engine was first put in motion; that she had a full head of steam on, and continued to back until after the collision occurred; and that she had backed five or six hundred feet before the vessels struck. On the other hand, the witnesses who were on board the brig declare that the steamer was suddenly put in motion after they had approached quite near, and were intending to give her a wide berth; that her motion was forward, and not backward; and that she was going ahead under full steam until the moment of the collision. Some of them declare that they heard the backing bell of the steamer at or about the time of the collision, and that after it occurred the steamer backed off. The testimony in respect to the relative positions of the two vessels before the steamer was put in motion, the appearance and extent of the injury to the hull of the brig, and the character of the trifling injury sustained by the steamer, are, in my judgment, strongly corroborative of the witnesses who were on board the brig, and who state that the steamer ran forward before the collision occurred. The weight of testimony (independent of the

admissions in the answer) being clearly and decidedly with the libellants in the cross suit upon this point, and consistent with that portion of the answer which the respondents desire to expunge by an amendment, I cannot order the amendment asked for.

Taking the pleadings and evidence into consideration, I am satisfied that the collision would not have occurred if the steamer had remained at rest; and in my judgment there is a clear preponderance of testimony establishing the fact that the steamer was put in motion, and ran forward across the track of the brig, and thereby caused the collision. I am also inclined to think that the engine was "stopped and reversed," as stated in the answer of the owners of the steamer, but that it was not done until shortly before the collision, and when its only effect was to diminish the force of a collision, which it was then too late wholly to avert. I cannot believe that the steamer had backed more than five hundred feet, and was still backing with a full head of steam at the moment of the collision; and this is the case attempted to be made in behalf of the steamer. But, if they had proved their case as attempted, it would not have been free from difficulty, for the steamer, being in motion, and having changed its position some five hundred feet in a direction crossing the course of the brig, was prima facie bound to take the necessary measures to avoid a collision; and I can find nothing in the circumstances of the case to excuse her from the discharge of that duty, or which can authorize the conclusion that there was any fault or mismanagement on the part of those navigating the brig, which could have contributed, in the slightest degree, to the production of a collision. I therefore conclude that the collision was caused by the fault and mismanagement of those in charge of the steamer, and that the owners of the brig are entitled to a decree for the damages sustained by them in consequence of the collision. These conclusions render it unnecessary to examine other questions raised in the two cases, and an order will be entered in the suit first above entitled, dismissing the libel with costs. In the suit secondly above entitled, an order will be entered, declaring that the collision mentioned in the pleadings was caused by the negligence, mismanagement, and fault of those in charge of the Sampson; that the Sampson is therefore liable for the damages which the owners of the Iola sustained thereby; and directing a reference to a commissioner to ascertain and report the amount of such damages. Upon the coming in and confirmation of that report, the libellants in the second suit will be entitled to a decree for the damages reported, and their costs.

[Both parties in the second suit appealed to the circuit court, where the decree of the district court was affirmed, but without costs to either side. The owners of the Sampson also appealed from the decree dismissing their libel, which was affirmed, with costs. Case No. 12,279.]

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IOLA, The. See Case No. 12,279.

IOLA, CITY OF (COMMERCIAL NAT. BANK v.). See Case No. 3,061.

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## Case No. 7,058.

The IONE v. DAVIS.

[N. Y. Times, Oct. 3, 1855.]

Circuit Court, S. D. New York. Oct. 7, 1853.

BILL OF LADING—DELIVERY.

[On libel against a vessel for failing to deliver goods according to the bill of lading it appeared that the goods were consigned to a merchant, leaving it discretionary with him to deliver the same to another on his own responsibility, but were in fact delivered to such other person, who disposed of them, and thereafter became insolvent. The consignee denied that the goods were delivered by his authority, or that he had knowledge of their arrival until some time thereafter, and sought to prove his absence from the locality at the time; but his testimony was evasive and unsatisfactory, while other evidence showed that the goods were delivered by his authority. *Held*, that the vessel was not liable.]

[Appeal from the district court of the United States for the Southern district of New York.]

[This was a libel in admiralty by James L. Davis against the schooner Ione. From a decree of the district court in favor of libelant, the respondent appeals.]

Stoughton & Dodge, for libelant.

Mr. Laban, for appellant.

NELSON, Circuit Justice. The libel was filed in this case to recover the value of a parcel of goods shipped by the firm of Medad Platt & Co., in the schooner Ione to Newbern, N. C., consigned to J. M. Gooding, charging the non-delivery of the goods by the master. The bill of lading bears date the 7th October, 1850. The goods were shipped under the following arrangement: They were ordered by W. G. Blaney of Newbern, and on the 28th of September, Medad Platt & Co. answered by saying that the goods would be shipped on the Ione, and that particulars of the time of sailing would be sent to him. On the 10th of October the firm again wrote to Blaney, enclosing the invoice of the goods, but advising him that they were obliged to use much caution in their affairs, as they had been great sufferers in business transactions at Newbern; that for this reason they had sent invoice and bill of lading to the mutual friend of both parties, J. M. Gooding, with whom they had no

doubt he would be able to make satisfactory arrangements. On the same day the firm wrote to Gooding, enclosing an invoice to him, saying that he had been referred to by Blaney, and leaving it discretionary with him to deliver the goods to Blaney, and be responsible for them himself, or, if not, then to dispose of them for account of the firm. The goods were consigned in the bill of lading to Gooding. On the arrival of the Ione at Newbern on the 16th October, the goods were delivered by the master to Blaney, and were placed in his store, which adjoined Gooding's, where he proceeded to sell them in the usual way of retail stores. Gooding had lent money and his credit to Blaney to assist him in commencing business. Blaney failed, and quit business in January, 1851, and Gooding bought his stock of goods, and took possession of them.

The ground upon which it is sought to charge the vessel is that the goods were delivered to Blaney by the master without privity or authority of Gooding, the consignee. This point is strongly contested upon the evidence, which is very voluminous—a great portion of it taken, however, upon a question that is not left in doubt upon the facts, namely, whether or not Gooding was absent from Newbern on the 16th October, when the vessel arrived. The proofs show that he was not; and the result of this inquiry tends strongly to the conclusion that the position assumed by him, that he did not give authority to Blaney to receive the goods, is a pretext to escape responsibility, and charge it upon the vessel. He admits that when in Newbern he was in the habit of seeing Blaney daily, as his place of business was in the next building. In addition to this, he advised him to go into the business, and lent him money and his credit for the purpose. He had a strong interest, therefore, pecuniarily, as well as from friendship, to look into the state and condition of the business, and must have had knowledge of the arrival of the goods and possession of them by Blaney. Indeed, he admits this; but, under the pretext of absence from Newbern at the time of the arrival of the vessel, he seeks to establish that it was some time afterwards when he first received the information. In this he was clearly mistaken. Besides this contradiction, his whole testimony is loose, evasive, and unreliable. It is impossible to read it without distrust of the facts stated by him. The testimony of Blaney and his wife, proving the authority, is but strengthened by the evasive and unsatisfactory character of the testimony of Gooding. If Blaney received the goods from the master. by the authority of Gooding, then, in judgment of law, they were received by the latter agreeably to the bill of lading, and he is responsible for them to the libelants. The decree of the court below is reversed, and the libel dismissed, with costs.

## Case No. 7,059.

### The IONIC.

[5 Blatchf. 538.] [1]

Circuit Court, S. D. New York. Nov. 21, 1867.

COMMON CARRIER—"BAGGAGE"—LIABILITY FOR.

1. A gold watch and chain, gold ornaments for presents, and American coin, are not "baggage," as between a passenger and a carrier of such passenger.

[Cited in Fraloff v. New York Cent. & H. R. R. Co., Case No. 5,026.]

2. Where a passenger by a vessel from abroad, on leaving it at quarantine, his trunk remaining on board, was asked by the captain if he had any money in his trunk, and replied that he had nothing but clothing, and the trunk was lost, containing wearing apparel, a gold watch and chain, gold ornaments and American coin: *Held*, that the vessel was not liable for the trunk or for any of its contents.

[Cited in Norfolk & W. R. Co. v. Irvine, 84 Va. 556, 5 S. E. 532; Hamburg-American Packet Co. v. Gattman, 127 Ill. 606, 20 N. E. 662.]

[Appeal from the district court of the United States for the Southern district of New York.]

This was a libel in rem, filed in the district court, against the barque Ionic, to recover damages for the loss of a trunk and its contents which the libellant brought with him as a passenger on board of the barque, from Laguna, in Yucatan, to New York, and which were lost after her arrival at quarantine at New York. The district court dismissed the libel [case unreported], and the libellant appealed to this court.

Thomas J. Glover, for libellant.

Charles Donohue, for claimant.

NELSON, Circuit Justice. There were several articles in the libellant's trunk which are not comprehended within the meaning of the term "baggage," as expounded in determining the extent of the liability of the carrier, such as a gold watch and chain, of the value of $471, gold ornaments for presents, of the value of $450, and American coin, to the amount of $60. The rest of the contents were wearing apparel, and comes fairly within the carrier's liability.

But a point was made on the part of the defence, in the court below, which controlled the judgment of that court and led to a dismissal of the libel. It is this: At the time the libellant left the vessel at the quarantine, in company with the captain and another passenger, he was inquired of by the captain if he had any money in his trunk, to which he replied that he had not anything but clothing. The object of this inquiry was apparent, and must have been well understood by the libellant, namely, that if he had money or other valuable articles in his trunk, they ought to be taken care of. The

[1] [Reported by Hon. Samuel Blatchford, District Judge, and here reprinted by permission.]

answer was disengenuous and tended to mislead the captain, who, if the truth had been stated, might, and probably would, have protected his vessel from the responsibility for the loss, by putting the trunk in a place of security. I concur, therefore, with the court below, and affirm the decree.

## Case No. 7,060.

The IOSCO.

[Brown, Adm. 495.] [1]

District Court, E. D. Michigan. June, 1874.

MATERIALS—CONSTRUCTION OF VESSEL.

A hull completed at the place of launching received a small cargo of flour as ballast, was towed with her spars on deck to another port, where her masts were stepped, and the vessel put in condition for navigation: *Held*, that the work was done in building the vessel, and that admiralty had no jurisdiction.

[Cited in The Rapid Transit, 11 Fed. 325; The Paradox, 61 Fed. 861.]

Libel for repairs and materials. The hull of the schooner was built at Alabaster, in this district, and put into the water. The hull was then towed to Bay City, with her topmasts, booms and gaffs on deck, and towing her two masts, to have the same put in place, and to be otherwise completed in the several appointments of a completed vessel, at the latter place, where the same was done by the libellants, and the doing of which constitutes the cause of action in this case. When the hull was so towed from Alabaster to Bay City, it had on board, for ballast, a quantity of flour, some shingles and some knees, to be used so far as necessary in completing the construction of the vessel. The only question in the case is whether libellants have a lien and an action in rem in the admiralty.

W. A. Moore, for libellant.
H. B. Brown, for claimant.

LONGYEAR, District Judge. Whether the claim of libellants arises out of a maritime contract, and whether they have a right of action in this court in rem, depends upon the question of fact whether what libellants did and furnished were to and for a vessel already in existence, or whether they were so done and furnished in part to bring her into existence as a complete thing. If the former, then the action will lie. If the latter, it will not lie, and this court has no jurisdiction. It was so settled fully and definitely by the supreme court in December term, 1857, in the case of People's Ferry Co. v. Beers, 20 How. [61 U. S.] 393, and reaffirmed in December term, 1859, in the case of Roach v. Chapman, 22 How. [63 U. S.] 129. In the mind of the court there is no room for doubt or discussion as to the question of fact. What libellants did and furnished were clearly by way of completing the construction of the vessel, and constituted in no sense within the meaning of the maritime law, repairs and materials, and for which by that law an action in rem will lie. It makes no difference that the vessel was in the water. It is always the case that a portion of the construction of a vessel is done after she has been put in the water. Neither is there anything in the position of libellant's advocate, that the schooner had to all intents and purposes assumed the position and liabilities of a vessel by taking in and transporting freight on her trip from Alabaster to Bay City, and that therefore what was done and furnished to and for her at the latter place by libellants, must be deemed as repairs, etc. The undisputed testimony is that the flour, etc., were taken as ballast. But even if this were otherwise, the position could not be maintained, because it clearly appears that the vessel was not so far completed at the time as to enable her to discharge the functions for which she was intended, and that the sole purpose of the trip was to avail her owners of the greater facilities of Bay City to complete her construction, and that the taking on of the flour, etc., was a barely incidental matter. I hold, therefore, that libellant's claim is for construction merely, and consequently, upon authority of People's Ferry Co. v. Beers, supra, an action in rem will not lie. Libel dismissed.

See contra, The Eliza Ladd [Case No. 4,364].

[1] [Reported by Hon. Henry B. Brown, District Judge, and here reprinted by permission.]

IOWA COUNTY (DURANT v.). See Case No. 4,189.

IOWA, M. & N. P. R. CO. (WINTER v.). See Case No. 17,890.

## Case No. 7,061.

IREGUIST v. MOREWOOD et al.

[39 Hunt, Mer. Mag. (1858) 706.]

Circuit Court, S. D. New York.[1]

SHIPPING—DAMAGE TO CARGO—SWEATING OF HOLD—LIBEL FOR FREIGHT.

[Damage to cargo of coffee on voyage from Sumatra and Java to United States held on the evidence to have resulted from dampness and sweat in the hold, incident to passage from a warm climate to a cold one, and from tempestuous weather, and not to negligent stowage or want of care on the voyage; and *held*, therefore, that the damage was no defense to a libel for freight. Applying Clark v. Barnwell, 12 How. (53 U. S.) 272.]

[Appeal from the district court of the United States for the Southern district of New York.

[This was a libel in personam by Lorenzo N. Ireguist against George B. Morewood, John R. Morewood, and Frederick R. Routh for freight on damaged cargo. From a de-

[1] [Affirmed in 23 How. (64 U. S.) 491.]

cree of the district court allowing the libelant the whole of the freight (case unreported), respondents appealed.]

NELSON, Circuit Justice. The libel in this case was filed to recover freight, amounting to the sum of $9.160 56, upon a cargo of coffee and spices shipped from Padang, on the island of Sumatra, and Batavia, on the island of Java, in the fall of 1853, in the brig Gothland. The respondents set up damages sustained by the cargo on the voyage by way of abatement of the freight in consequence of bad stowage, neglect of proper ventilation of cargo, etc. The vessel arrived at this port in March, 1854, after a voyage of ninety-eight days. The court below decreed the whole of the freight for the libelant, with interest on the same, holding that the ship was not chargeable with the damage to the cargo.

Considerable additional evidence has been taken in this court since the appeal on behalf of the respondents, tending to prove negligence on the part of the master and crew in protecting the cargo in the course of the voyage, and also negligence in the stowage or filling the ship. It is agreed by all parties that the damage to the coffee and spices arose from the dampness and sweat of the hold of the vessel, and the material question in the case, and the one principally discussed by the counsel on the argument, is whether or not the damage could have been prevented by proper care, diligence, and skill of the master and hands, or was occasioned by their neglect. In the case of Clark v. Barnwell, 12 How. [53 U. S.] 272, 282, 283, the court held that damage to goods occasioned by the effect of humidity and dampness in the hold, in the absence of any fault in the ship, or in the navigation of her, or in the stowage, was a damage from one of the dangers and accidents of the seas for which the carrier is not liable. The exception in the bill of lading in the case before us is as broad as in the case of the 12th Howard.

The question, then, is one of fact, and must be determined upon the weight of the evidence. We have examined it with a good deal of care, both that which was taken in the court below and in this court, and have arrived at the conclusion that the cargo was well stored and the ship properly filled; that the usual and proper care was taken by the master in the progress of the voyage, at all times, when the weather would permit, to ventilate the cargo by opening the hatches; and that the damage was the effect of dampness and sweat in the hold of the vessel, incident to a passage from a warm to a cold climate, and especially of stormy or tempestuous weather in the latter, without the fault of the master in the navigation. Decree affirmed.

[The respondents appealed to the supreme court, where, in an opinion by Mr. Justice Grier, this decree was affirmed. 23 How. (64 U. S.) 491. The law governing the subject-matter of the case was not touched, but the court affirmed the principle that a court of admiralty has jurisdiction over contracts of charter party or affreightment.]

## Case No. 7,062.

The IRIS.

[1 Lowell, 520.] [1]

District Court, D. Massachusetts. 1870.

COLLISION—CHANGE OF COURSE.

1. A steamer was navigating a channel with six barges lashed to each side of her, and a schooner was outsailing and passing her. The steamer ported her helm to avoid a shoal, and thus brought one of the barges across the schooner's track. There was time for the latter to change her course, but she failed to do so. *Held*, the schooner was in fault.

2. The libel on behalf of the barge did not mention the steamer's change of course, but only the schooner's fault in keeping hers; the answer on behalf of the schooner averred the steamer's porting her helm. *Held*, the state of the pleadings did not preclude a recovery by the barge.

The steamer Princeton was passing through the channel called the Kills, between the shores of Staten Island and New Jersey, towing twelve barges, six of which were lashed to each side of the steamer, forming a moving body of about three hundred feet in length and of considerable width. Off New Brighton the libellant's barge, which was the rearmost of the tow on the starboard side, came in collision with the schooner Iris, and was sunk and totally lost. This was a proceeding against the schooner to recover the value of the barge and her freight; the cargo being the subject of a separate suit. The libel stated the time and place of collision, and averred that the schooner was bound to clear the barge, but neglected so to do, and kept her course, and thus caused the collision. The answer set up that the schooner was passing between the barges and the shore of Staten Island, as near the shore as was safe, and that the steamer changed her course and drew the barge across the track of the schooner, and that the collision was brought about by the steamer not keeping as near the New Jersey shore as she might have done, and by the want of lights and lookout and steersman on board the barge.

H. C. Hutchins and J. A. Gillis, for libellant.

T. K. Lothrop and I. Lincoln, Jr., for claimant.

LOWELL, District Judge. The evidence is not quite as full and minute as in a case of more pecuniary importance it might be expected to be. Taking it as it stands, I find the facts to be that the pilot of the

[1] [Reported by Hon. John Lowell, LL. D., District Judge, and here reprinted by permission.]

steamer ported his helm some time before the collision without knowing that the schooner was near; but that he did this in order to keep the usual course, that is, to follow a bend of the channel which here sweeps to the right, avoiding a shoal. The schooner was outsailing the steamer and her heavy tow and passing between her and the shore on the starboard hand, which brings the case within the seventeenth sailing rule, that every vessel overtaking another shall keep out of her way, a rule which modifies the otherwise universal rule fifteen, requiring steamers to avoid sailing vessels. The reason given by the master of the schooner for not keeping out of the way is that the steamer ported her helm and brought the libellant's barge into contact with his vessel. This is true; but it also seems to be proved that the change was a proper one, and one that the schooner might have anticipated; and that it was made so long before the collision that the schooner had ample time to conform to it. Her master says he could not luff because there was a lighter on his bow, between him and the shore; but on this point he fails of support by any other witness, and I consider the weight of the evidence to be that he might and should have luffed.

Then the question is, was the steamer to blame in changing her course when and to the extent she did? Might not a less change have been enough to clear the shoal, and was she bound to see the schooner? The general rule undoubtedly is, that when one vessel is to take the burden of avoiding another, the latter is to keep her course. But how far a vessel is bound to keep a lookout aft, or to take measures to know whether another is coming up behind her, has not often been a subject of judicial decision. I should say that if a vessel is making a great change of course, such as going about or the like in a narrow channel, especially if the change is taken suddenly or without obvious necessity, prudence would require that others should not be put in jeopardy, but the time and manner of the change should be adapted as far as possible to meet the necessities of other vessels; but here was a change which was necessary, and which was not so sudden or so great that any danger to vessels on the starboard could naturally be expected; and I am not prepared to say that any other or different course would or ought to have been taken if the pilot had known that the schooner was in the act of passing. The preponderance of the evidence is that this precise change was proper and necessary, and that it was one which would not have endangered the schooner unless she had been either too near or not sufficiently vigilant.

So far as lights or lookout on the barge are concerned, it seems that each vessel was in full view from the other, and that there was nothing necessary or useful to be done on board the barge, except to hail the schooner, which the master of the barge swears he did. When barges are towed in the way these were, that is, by being firmly lashed to a steamer, it is not usual to steer the barges, because they move with the steamer. I must therefore hold the schooner to blame for not keeping out of the way of the barge.

It is urged, however, that there can be no recovery in this case, because the allegations of the libel do not correspond with the proofs. It is true that the libel does not aver that the steamer changed her course; but it does aver that the schooner kept hers, and thus brought on the collision. The answer, not denying that the schooner kept her course, sets up the change on the part of the other vessel. I find that both are true; that the steamer did change her course and that the schooner did not, but that the change was justifiable under the circumstances, and that it did not relieve the schooner from the obligation of keeping out of the way. It turns out then that the libel which imputes fault to the schooner in not changing her course is sustained. I doubt whether, even under the strict rule adopted of late by the privy council in England, as shown by the cases of The Ann, Lush. 55, and The North American, Swab. 358, there could be said to be a variance between the allegations and the proofs. But our practice is somewhat less stringent. The object to be attained is that the defendant should know what he is called upon to meet, and in arriving at this object we allow in the first place great latitude of amendment, and in the next we inquire whether there is in fact surprise in the particular case rather than whether on theory there might be presumed to be such. It has been settled by the highest authority that there is no technical rule of variance in our admiralty practice. Dupont de Nemours v. Vance, 19 How. [60 U. S.] 172; The Clement [Case No. 2,879]. In the former of these cases a libellant, proceeding for the non-delivery of his goods on a contract of affreightment, was permitted to recover a general average contribution for their having been jettisoned; in the other, the owners of a brig who alleged that a schooner caused the collision by changing her course, recovered damages on proof that the schooner kept her course when she should have changed it. Both these cases show a much wider departure than is found in the case at bar. Here there can have been no surprise, because the change of course of the steamer is set up in the answer, and the reason for it is given by one of the claimant's witnesses. It is true that at the trial evidence of the necessity and propriety of the change when offered by the libellant in reply to the claimant's case was objected to, but the objection was not put on the ground of surprise,

but because it was not strictly in reply. The case then comes to this. One party alleges that the other should have changed and did not; and the other that the first should not have changed and did. I find the facts alleged by each to be true, but the explanations of the one to be sufficient and those of the other to be insufficient. There is no rule of pleading which requires me to dismiss the libel under such circumstances.

Decree for the libellant for $1000.

## Case No. 7,063.

IRISH v. KNAPP.

[5 Ban. & A. 47; [1] 18 O. G. 735.]

Circuit Court, E. D. Pennsylvania. Dec. 20, 1879.

PATENTS—NOVELTY OF INVENTION.

The process of preparing and producing colored protographs on glass described and claimed in letters patent dated June 27th, 1876, numbered 179,316, granted to the complainant is, as an entirety, novel.

[This was a bill in equity by Benjamin T. Irish against T. Knapp.]

Strawbridge & Taylor, for complainant.

W. W. Weighley and S. E. Cavin, for defendant.

BUTLER, District Judge. This suit is for the infringement of letters patent No. 179,316, issued to the plaintiff, June 27th, 1876, for certain new and improved methods of making colored photographs on glass, described substantially as follows: Attach the unmounted photograph to a glass by means of paste. After the moisture has dried out, render the paper transparent by grinding down from the back till quite thin with emery-cloth, fine sand-paper, or the like; then place it in a bath of melted paraffine, or other similar substance. After a few minutes, remove it and rub off the surplus wax. After the print is thus rendered transparent, paint it on the back with oil-colors or touch up such parts as need it; then lay a second glass against the back of the picture and put oil-colors on its outer side, placing the various tints opposite such parts as may be proper. The colors on the back of the second glass being separated from the picture as described, it is asserted that greater smoothness and softness are thus obtained, and that while the application of paint directly to the paper requires the skill of an artist, the application of color by means of a second glass does not. The claim is in the following language: "What I claim, and desire to secure by letters patent, is: The process of preparing and producing colored photographs on glass by first mounting the photograph on glass, face downward, then grinding it thin from the back, and then treating it with paraffine or its equivalent, as specified, for the after reception of oil-colors, applied directly to the back of the picture, or to a second glass, to be applied as a backing, substantially as herein described."

While the description or specification seems to contemplate painting or touching up the back of the picture, and also the use of the second glass in all cases, and thus presents a single method of making colored photographs on glass, the claim, as I understand it, has a double aspect, and embraces two processes, the one terminating with the application of paint to the back of the picture and the other with the application of a second glass colored on the outer side.

The defendant does not deny the charge of infringement. The picture obtained from him and produced in evidence was made by the process which embraces the second glass. The defence is rested on the allegation that the plaintiff was not the first inventor or discoverer of this process. To prove the allegation, several witnesses were produced. A careful examination of their testimony has satisfied me that, although the plaintiff was not the first to discover and use the first of the processes embraced in the claim, as before indicated, he was the first to discover the second of these processes, embracing the use of an additional glass. The statements of Mr. Wentworth, Mr. Broadbent, and others leave no room to doubt that the process which is completed by the application of paint directly to the back of the picture did not originate with the plaintiff. The "ivory type," extensively manufactured many years prior to the date of the patent, was made according to this process, the paint being applied sometimes to the face and sometimes to the back of the picture.

As respects the process, however, which embraces the additional glass,—the process here particularly involved—the defendant's allegation is not proved. The testimony of Mr. Loudner, invoked to sustain it, is not sufficient for the purpose. The witness is interested, and cannot, therefore, be supposed unwilling to tell all he knows, and yet when cross-examined and required to describe the process he used, being afforded the fairest and fullest opportunity to do so, he omitted the use of the second glass from his statement. When asked whether it was the same as that described in the Photographic Bulletin, and known as "Krauss's," in which the second glass was mentioned, he said it was "to the best of his knowl-

[1] [Reported by Hubert A. Banning, Esq., and Henry Arden, Esq., and here reprinted by permission.]

edge," and "as near as he could recollect." These expressions show that he had no certain recollection about it. The Photographic Bulletin, put in evidence, contains nothing of value. Its statements are not evidence. The description of this process, after the date of letters patent, and crediting the invention to another, is unimportant. That no photograph having the second glass, made prior to the date of this patent, was produced is a very significant fact. I feel no hesitation in saying that, as respects the process which involves the use of this glass, the claim is well founded, and the patent valid.

The suggestion that the second glass is of no value does not come with much force from one who has adopted its use. The facility it affords for applying color, and the smoothness and softness it imparts to the picture, leave no room for doubt on the question of value. I have passed upon the questions presented by counsel, and do not feel called upon to consider any other, if such might be raised upon the fact.

[Decree: And now, to wit, December 20, 1879, this cause having been heard upon pleadings and proofs and argument of counsel for the respective parties, it is ordered, adjudged, and decreed that letters patent of the United States No. 179,316, dated July 27, 1876, to Benjamin T. Irish, for an improvement in processes of preparing and producing colored photographs on glass, which process consists in applying to the back of a picture mounted upon glass a second glass, upon the back of which second glass, oil-colors are applied opposite such parts of the picture as may be desired, are good and valid to the extent of the process above described. That the title to said letters patent No. 179,316 is duly vested in said complainant, and that said letters patent are infringed by the said defendant, by reason of the use of said second glass having oil-colors placed on its back, said second glass having been placed at the back of the picture, as described and claimed in said letters patent. That the defendant, T. Knapp, his servants, workmen, agents, clerks, and attorneys, be perpetually enjoined, and restrained from making, using or vending any photographs having a second glass with oil-colors on its back applied to the back of photographs on glass, as described and claimed in said letters patent No. 179,316. That the complainant do recover of the defendant, T. Knapp, the profits and gains made and received by him in consequence of the infringement and violation of the exclusive rights of the complainant under said letters patent No. 179,316, dated July 27, 1876, together with the damages the said complainant has sustained thereby, together also with the costs of prosecution of this cause against said defendant.][2]

[2] [From 18 O. G. 735.]

## Case No. 7,064.

The IRMA.

[6 Ben. 1; 6 Am. Law Rev. 763; 15 Int. Rev. Rec. 130.][1]

District Court, E. D. New York. March, 1872.

PRIORITIES—BOTTOMRY—WAGES—MASTER.

1. The master of a vessel had taken up money on bottomry. On the arrival of the vessel at her port of destination, a libel was filed against her by the holders of the bottomry bond. The master also filed a libel against her, to recover a balance due him for his own wages and for advances of wages made by him to the crew. The proceeds of the vessel not being sufficient to pay both claims, an application was made to the court to settle their priority, the bottomry holders claiming that the master was liable to them for any deficiency on the bond, and that he could not, therefore, claim a priority over them. The bottomry bond did not contain any covenant on the part of the master, binding him personally for the debt. *Held*, that, in the absence of such an express covenant, the master would not, by the maritime law, be liable for a deficiency on the bond.

[Cited in The Serapis, 37 Fed. 441.]

2. In respect to the bottomry holders and the master, their claims, in respect to order of payment, must be subject to the general rule, by which wages are entitled to be paid in preference to bottomry claims.

[Cited in The Angela Maria, 35 Fed. 432.]

3. The master of a ship is, in a certain sense, a public officer.

In admiralty.

Martin & Smith, for T. Darling & Co.

Beebe, Donohue & Cooke, for Cummings.

BENEDICT, District Judge. The cases against this vessel have been brought before me, on an application for an order determining the priority of the respective demands in the distribution of the proceeds of the vessel, which are insufficient to pay all the claims against her. The only question which calls for any particular examination has arisen between the libellants, Timothy Darling & Co., whose libel is filed to recover the amount of a botomry bond executed by Cummings, as master of the vessel, and Cummings himself, who has filed his libel to recover a balance due him for his own wages and for advance of wages made by him to the crew. If the demand of Cummings be paid out of the proceeds of the vessel, in preference to the bottomry bond, the remainder will be insufficient to pay the bottomry bond in full, and therefore the bottomry lenders contest the right of the master of the vessel to priority over the bottomry bond. The position taken is, that the master is personally liable to the bottomry lenders for the sum borrowed, and that, supposing that he has a lien for his demand, he cannot be paid in preference to the bottomry bond, when such payment will create a deficiency in the bond, which he is liable to make good.

The question raised is one which has sel-

[1] [Reported by Robert D. Benedict, Esq., and here reprinted by permission. 6 Am. Law Rev. 763, contains only a partial report.]

dom arisen, owing, doubtless, to the fact that in very many, if not in most, cases of bottomry, the master binds himself personally for the debt by means of a special covenant inserted in the bond, and is not therefore in a position to dispute his liability for any deficiency that may arise from the distribution of the proceeds of the ship. But in this instance the bottomry bond contains no such covenant, and the master denies any liability whatever to the bottomry lenders for any part of the bottomry loan. I am, therefore, called on to determine the question of law, whether, in the absence of any special agreement to that effect, the master of a ship incurs any personal liability to repay to the bottomry lender the amount borrowed on bottomry, when the bond becomes due by the safe arrival of the ship, and the proceeds of the ship and freight prove insufficient to discharge it in full.

In considering this question, I am not required to speak of the liability of the ship master for neglect or malfeasance, nor of a case where the bottomry bond proves invalid, or where no risk has ever attached, or where the stipulated voyage is not performed, or where the ship and freight is not abandoned to the bondholder; nor yet of a case where the bond is executed by an owner of the ship. What I have occasion to say is, therefore, intended to refer to the case here presented, where it is sought to hold the master personally liable for the loan, where the bond is a valid bottomry bond, executed by the master as such, in a foreign port, for a voyage which has been duly performed, and where the ship and freight are applied, so far as they will go, to the payment of the bond, and where the master has made no special agreement to be responsible for the loan.

Upon this question, I remark, first, that the bottomry lender, in order to establish a personal liability on the part of the master, cannot resort to the general liability, which the master of a ship is presumed to incur for debts contracted and advances made in behalf of the ship. The implied contract of the master, arising, under the general rule of the maritime law, out of an advance of money for the ship, is extinguished when a lawful contract of bottomry is made, and the debt has been put at risk. All other obligations merge in the new contract, which places the lender in a new and different relation to the vessel, and it is to the rights and obligations arising out of the contract of bottomry alone that the lender must thereafter look. [The holders of a bottomry bond are not therefore ordinary lien creditors, nor are they holders of a mortgage.] [2]

The contract of bottomry, which is not only a contract of great sanctity, but also of great peculiarity, is not a mere agreement for security. "It is neither a sale, nor a partnership, nor a loan, properly speaking, nor insurance, nor a compound of different constructions—undique collatis membris—but it is a contract having a specific name (un contrat nommé), and a character peculiar to itself." Emerigon, Contrat a la Grosse, c. 1, § 2. When once the bottomry risk has attached, the creditor becomes a bottomry lender, and nothing else. "He who lends money on bottomry makes a contract which is to be followed out in all its remedies as such." Curtis, J., The Ann C. Pratt [Case No. 409]; Bray v. Bates, 9 Metc. (Mass.) 250; The Ann C. Pratt, 18 How. [59 U. S.] 63. The holders of a bottomry bond are, therefore, not holders of a mortgage, and the rules applied in cases of mortgage have little or no application here.

But although the only contract, on which these bottomry lenders can rely, is the contract of bottomry, it does not follow that they have not, by that contract, the personal liability of the master, upon the safe arrival of the ship, notwithstanding the circumstance that the instrument given to bind the ship does not expressly provide for any personal liability of the master. A personal liability on the part of the master, in case of the safe arrival of the ship, may form part of a valid contract of bottomry, as has often been held where that liability had been stipulated for in the bottomry bond.

The question here is, whether such a liability does not, by implication of law, constitute an element in every such contract, as, for instance, it does in the contract with the seamen. These bondholders maintain that such personal liability is implied by the maritime law, and that it can be resorted to, at least to make good any deficiency, after exhausting their remedies against the vessel and freight.

In support of their position the words of Lord Tenterden are cited, where he says the remedy of the lender on bottomry is "against the master or the ship" (Abb. Shipp. (5th Ed.) p. 156), and also the statement in Kent's Commentaries (volume 3, p. 355), that "for the repayment of a sum borrowed on bottomry the person of the borrower is bound, as well as the property charged." These two citations from the high authorities named will be found, on examination, not to be to the same point. The borrower alluded to by Chancellor Kent is not the master, but the owner of the ship, as the context shows. On page 360 the master will be found spoken of as distinguished from the borrower. So understood, the citation has no direct bearing on the question under discussion. The remark of Lord Tenterden must be understood as referring to such a bond as he describes in a subsequent paragraph, and sets out at length in his appendix, which contains a special covenant on the part of the master. Abb. Shipp. p. 160.

Reference is also made to the general principle of the maritime law, according to

[2] [From 15 Int. Rev. Rec. 130.]

which the master of the ship is presumed to bind himself personally in every contract made on behalf of the ship, as showing the existence of such a liability in the contract of bottomry. But if such were the rule in all other cases, it would afford little reason for supposing the liability to exist in a contract of bottomry, for bottomry is a contract "resembling nothing and being consistent with nothing but itself" (Curtis, J., The Ann C. Pratt [supra]); and I am of the opinion that the reasons, on which the general rule rests, will be found to be for the most part wanting in the case of bottomry. Take for instance the reasons which led to the personal liability of the master to the crew. The master is personally liable to the seamen, for sailors, because of well known traits, must have every security possible to prevent them from losing their wages and becoming objects of charity. They naturally look for their wages in the first instance to the master, who commands them during the voyage, who provides them their food, who cures them when sick, and punishes them when they disobey; and from long usage he thus becomes personally bound for their wages. Another instance is the personal liability of the master for the bills of material men, and for advances of money. Obligations of this class derive their distinctive character from the fact that they are generally made in foreign ports, where they are to be discharged, and where the owners are not; and it is therefore permitted to look to the master, who is present, leaving him to reimburse himself from the owners, when he returns home. Considerations of this character, coupled perhaps with the fact, that in the earlier history of navigation, as well as afterwards on the revival of commerce in the Middle Ages, the master almost invariably was an owner, unless he was a slave (Macl. Shipp.), led to the establishment of the presumption of personal liability on the part of the master in contracts made for the ship, as a "usage and custom of the seas." But it will be difficult to find in the maritime law any trace of such a presumption in cases of bottomry; and the considerations which press in favor of it, on other occasions have in such contracts little force. The lender on bottomry is not ignorant and poor like the sailor. He becomes beneficially interested in the voyage. His loan is never to be repaid in the foreign port, where it is effected, but on the contrary is payable where the owners are supposed to be, or to have funds; and the ship is specifically bound. No necessity therefore exists for the personal responsibility of the master. Furthermore, great injustice must follow, if such a personal responsibility, on the part of the master, be attached by the law to the contract of bottomry, because the master is without remedy over against the owners of the ship, for any sum thus extracted from him, notwithstanding the fact, that the owners receive the benefit of the loan. This results from the character of the transaction, and the nature of the liability on the part of the ship owner, which grows out of it. The owner of a ship is indeed said to be liable for a bottomry bond as well as the ship, if the ship arrives safe; but this is not a liability arising from a contract of the owner, made by the hand of his agent, the master, with the bottomry lender. The master of a ship although an agent of the owner, is also in a certain sense a public officer. The master of a ship is "not an ordinary agent—but one of a special kind, sui generis." Sir R. Phillemore, The Thetis, 22 Law T. [N. S.] 277. "He is a known and public officer." Sea Laws, art. 2, of the masters of ships. "The rights and duties springing out of the position of ship master are of a public character." Bedarride, Com. de Code, liv. 2, tome 2, art. 359. "The master of a ship has a threefold responsibility: to the owners, to the freighters, and to society—the state." 1 Boulay-Paty, 383. "Though he (the master) receive a salary, yet he is a known and public officer." Molloy, book 2, c. 2, § 2. The contract of bottomry, when made by the master, is made by him, to a certain extent, in an official capacity. He does not, in a transaction of that character, act simply as agent of the owners, but as master of the ship. It is not within the scope of the ship master's authority, as the agent of the owners, to bind them personally as his principals, by a bottomry contract. The owners are liable when the vessel comes to them safe, but not because of the acts of their agent in borrowing money for them. Theirs is an original liability to the holder of the bottomry bond, arising out of their possession of the property bound for the loan, namely, the ship and freight. This peculiarity in the liability of the ship owner, growing out of bottomry, is pointed out by the supreme court of the United States, in the case of The Virgin, where the court says: "In England and America, the established doctrine is that the owners are not personally bound, except to the extent of the fund pledged, which has come into their hands; to this extent indeed they may correctly be said to be personally bound; for they cannot subtract the fund and refuse to apply it to discharge the debt. But in this case, the proceeding against them is rather in character of possessors of the thing pledged, than strictly as owners." The Virgin, 8 Pet. [33 U. S.] 538–554. The later authorities in England and America are to the same effect. The Ann C. Pratt [Case No. 409]; Stainbank v. Fenning, 6 Eng. Law & Eq. 421. Not only is such the law in England and America, but the same law exists upon the continent. By the German mercantile code, which in respect to such a subject may be presumed to state the rule of the maritime law as understood throughout a large part of Europe, it

is declared (article 680, pt. 7) that the bottomry creditor can enforce his claims only to the extent of the bottomried objects, after the arrival of the vessel. The maritime law as administered in France appears to be the same.

If then the owners of a ship are not rendered directly liable by a contract of bottomry made by the master, they cannot be rendered indirectly liable, through a liability on their part to the master for any sum exacted of him by reason of the contract. And if the master be without remedy over against the owner of the ship, it is not to supposed that he can be held personally liable, and thus compelled to bear, without recourse, the burden not only of a loan effected solely for the benefit of the ship owner, but also of the maritime interest; and that too when he is compelled by the responsibility of his office to effect the loan, whether willing or not to assume such a burden. The unjust effect of such a rule warrants the supposition, that it does not exist in the maritime law. Aside from its injustice, there is reason against it, founded in public policy; for to make the master by operation of law liable for the payment of the bottomry bond, or even for the deficiency after the ship and freight are exhausted, is to offer him an inducement to lose the ship, inasmuch as her safe arrival will cast upon him a responsibility which he escapes if she does not arrive. A rule which would in any case place the interest of the mariner in opposition to the welfare of the ship, would be contrary to the whole spirit of the maritime law.

These considerations, which are of a nature entitling them to much weight in determining a question of maritime law, appear to me sufficient to warrant a rejection of the doctrine contended for by this bottomry lender, and I find no adjudged case which impels me to a different conclusion. No case has been cited by the advocates, where the doctrine in question has been sustained, and I find a decision to the contrary in the English admiralty, where the same question arose in the same way, and where the determination was that the master of the ship had not ceded his prior right against the ship by taking up money on bottomry. Dr. Lushington says: "Here the master has not bound himself personally to pay the bond. His covenant in the bond is that he is master, and therefore he has authority to charge the bark, cargo, and freight, and that the bark, cargo, and freight, shall at all times after the voyage be liable to the payment of the money. He has not, therefore, incurred that personal liability which a master giving a bottomry bond generally incurs in express terms." The Salacia, 1 Lush. 548. Many remarks will be found scattered through the other cases in the English admiralty which I have above cited, looking in the same direction. See, also, The Edward Oliver, 2 Marit. Law Cas. p. 507; The Jonathan Goodhue, Swab. 524. It may, therefore be said that the authorities in the English admiralty are adverse to the position here taken by the bondholder. The continental writers are directly opposed to such a position. Thus Emerigon (Traité de Contrats a la Grosse, c. 4, art. 12, § 4) says: "If in the bottomry bond the master has bound himself and his goods (of which I have seen a thousand examples), he is held personally, in spite of the fact that he acted in the known capacity of agent, because he has rendered himself bound for the bond, and the lenders have trusted his credit. If, then, the vessel arrives safely, they may compel the master himself to pay the principal and the maritime interest which he has in his own name promised to pay. But if he has contracted only in the capacity of captain, the lenders, in case of the safe arrival of the ship, will be limited to an action in rem against the vessel and freight, without recourse to the owners, who abandon the property, or to the master, who, having contracted only in a qualified capacity, is not responsible for the unfortunate result of the voyage." Emerigon cites the ordinance in his support. Later continental authority is to the same effect. Bedarride declares that the master cannot be held personally liable for the payment of a bottomry bond which he has signed in his capacity as master for the necessities of the ship. Com. de Code de Com. liv. 2, tit. 9, § 931. And again (section 935) he says: "On principle, therefore, the master, borrowing money on bottomry, contracts no personal obligation, neither on the part of the owner, nor with the lender; but with the exception that it is always lawful for the captain to bind himself directly and personally. The German mercantile code, already referred to, restricts the personal liability of the master on a bottomry contract to those cases where the master has arbitrarily changed the voyage, or arbitrarily deviated, or has improperly assumed new sea risks, and then gives him the opportunity to relieve himself by proving that the non-payment of the bond has not been caused through the change of voyage, or through the deviation, or through the new sea risk. Article 694, pt. 7. And the 18th admiralty rule of the supreme court of the United States clearly recognizes a similar rule of law. Indeed, the 18th admiralty rule goes far to compel the determination of this court in this case adversely to the bottomry lenders upon the question under consideration, although their libel is not in conflict with the rule.

My conclusion, therefore, is, that in the present case no personal liability for any part of the loan has attached to the shipmaster, and the bottomry lender and the master must, therefore, in respect to order of payment upon this motion, be declared to be subject to the general rule by which wa-

ges are entitled to be paid in preference to a bottomry bond. But this is upon the assumption that the master has a lien upon the ship, as averred in his libel. The present being a motion founded upon the respective libels alone for the simple purpose of determining, at this period of the controversy, the question of priority, in order to save expense, the right to a lien is not put at issue. If it is intended to question that right, an issue must be framed by answer or exception, upon which a decree may be rendered.

Upon this motion the order will be that in the distribution of the proceeds in the registry, any decrees that may be entered upon the libels before me will be satisfied out of the proceeds in the following order: first, the wages decreed the mate; next, the pilotage decreed Eugene Gallagher; next, the sum decreed Cummings, the master; next, the sum decreed Timothy Darling upon the bottomry bond. The priority of the other demands among themselves need not be determined, as the demands above mentioned will absorb the whole fund.

IRMA, The (UNITED STATES v.). See Case No. 15,444.

IRON CLAD MANUF'G CO. (TIFFT v.). See Case No. 14,035.

## Case No. 7,065.

In re IRON MOUNTAIN CO.

[9 Blatchf. 320;[1] 4 N. B. R. 645.]

Circuit Court, N. D. New York. Jan. 16, 1872.

BANKRUPTCY—MORTGAGE—FORECLOSURE—INJUNCTION.

1. After the filing of a petition on which I. was adjudged a bankrupt, and after the appointment of an assignee, and the conveyance to him of all the estate of the bankrupt, S. commenced a suit, in a state court, to foreclose a mortgage on real estate of I. The district court, after restraining the prosecution of the suit, made an order dissolving the injunction, and permitting the suit to proceed. The mortgaged premises were worth less than one-half of the amount of the mortgage, the mortgage was given long before the bankruptcy of I., and there was no proof of the invalidity of the mortgage. On a petition of review, by I.: *Held*, that the order of the district court was proper.

[Cited in Re Clark, Case No. 2,801; Re Cooper, Id. 3,190.]

2. The district court has power to restrain the holder of a mortgage, or other lien, on the property of a bankrupt, from enforcing such lien by suit; and, where the value of the property exceeds the amount secured by the lien, or the amount or validity of the lien is in doubt, it is, in general, proper to do so.

[Cited in Re Sacchi, Case No. 12,200; Re Moller, Id. 9,700; Olney v. Tanner, 10 Fed. 104.]

[Cited in Beall v. Walker, 26 W. Va. 750.]

[In review of the action of the district court of the United States for the Northern district of New York.]

In bankruptcy.

William C. Holbrook, for bankrupt.

C. T. Ostrander and S. M. Ostrander, for Smith.

WOODRUFF, Circuit Judge. The bankrupt seeks, by petition of review, to reverse an order of the district court, which, by the dissolution of an injunction, permits the respondent, Samuel C. Smith, to continue a suit brought in the state court for the foreclosure of a mortgage upon certain lands of the bankrupt, which suit was commenced after the filing of the petition whereon the Iron Mountain Company [of Lake Champlain] was adjudged bankrupt, and after the appointment of an assignee, and the conveyance to him of all the estate of the bankrupt. [Case unreported.] It appeared, by uncontradicted evidence, that the mortgaged premises were worth less than one-half the amount of the mortgage, so that it was quite clear that the equity of redemption is of no value whatever. There was no proof that the mortgage is not in all respects valid, and it was given long before the bankruptcy of the company.

There is no doubt whatever of the power of the district court, in bankruptcy, to take the administration of the entire estate, and ascertain and liquidate liens thereon, and to restrain the holder of a mortgage or other lien from proceeding in any suit to enforce such lien; and, where the value of the property exceeds the amount secured by such mortgage or lien, it will, in general, be proper to do so, in order to preserve to the assignee his right, secured by the twentieth section of the bankrupt law [of 1867 (14 Stat. 526)], to receive the excess in value, and release the right of redemption, or to sell the property subject to the mortgage, or to invoke the power of the court to first liquidate and settle the amount of the lien. So, it will be proper to restrain the proceeding in any other court, where the amount or the validity of the lien is in doubt. This may often be necessary to the full protection of the general creditors, who are entitled to such protection in the court in bankruptcy, where they are to look for the fund to be distributed to them. In all such cases, it would be the duty of the assignee to apply to the court in bankruptcy, to assist him in bringing all the assets into that court, to be applied and disposed of according to the rights and interests of all concerned, whether holders of liens or general creditors.

But, where no advantage can result to the estate of the bankrupt, I see no reason why the court should interfere, when neither the assignee nor any creditor invokes such interference, and it appears, without contradiction, that the equity of redemption is of no value. There is no excess of value to be paid to the assignee on his releasing the right

[1] [Reported by Hon. Samuel Blatchford, District Judge, and here reprinted by permission.]

of redemption. There is nothing to be sold subject to the mortgage, which will yield anything; and any action of the district court, for the liquidation and settlement of the amount of the lien, and for the sale of the property to satisfy it, would be a mere expense to the estate, producing nothing. Under those circumstances, the court may, I think, properly exercise a discretion on the subject, and may decline interference. The case should be clear, and the proof that nothing can be saved to the estate should be satisfactory; and, if the court can see that any prejudice to the interests of creditors may happen, it should not permit those interests to be put at hazard by a proceeding to which the general creditors are not parties, and in respect to which they have no protection but through the proceedings in bankruptcy.

Upon the uncontradicted facts in this case, nothing can be gained, and expenses chargeable upon the estate would be incurred, by any interference in the matter. Whether the property, when sold in foreclosure, shall produce one-half, or only one-fourth, of the amount of the mortgage, is not of the least moment. The claimants of the lien, by electing to pursue the mortgaged premises, will deprive themselves of any right to prove their debt in bankruptcy, for the deficiency, (section 20,) and, in that view, it may be greatly for the interest of the general creditors to permit such election to be carried into effect, and thereby enhance the dividends to be made to them.

The order of the district court was a proper one, and must be affirmed.

IRON MOUNTAIN. The (AMAZON INS. CO. v.). See Case No. 270.

IRON MOUNTAIN BANK (PHELAN v.). See Case No. 11,069.

## Case No. 7,066.

In re IRONS.

[5 Blatchf. 166.] [1]

Circuit Court, N. D. New York. Sept., 1863.

ARMY—PRIVATES—LEGALITY OF DRAFT—EXEMPTION FROM SERVICE.

1. A person who is drafted into the service of the United States, under the act of March 3, 1863 (12 Stat. 731), is in the custody and under the control of the provost-marshal from the time he reports to him for duty, at the designated rendezvous, in pursuance of notice to that effect, after the draft has taken place.

2. After the board of enrolment has, under that act, made and published a decision declaring a person exempt from draft, on an election to that effect made in regard to him by his widowed mother, it has no power to revise or reverse that decision.

This was a hearing on a habeas corpus. The petition for the writ stated that the petitioner [Daniel Irons] was drafted into the service of the United States, at Norwich, Chenango county, New York, on the 28th of August, 1863, under the act of congress of March 3d, 1863 (12 Stat. 731); that, on the 31st of August, a notice was served on him, signed by S. Gordon, captain and provost-marshal of the Nineteenth district, New York, notifying him that he was drafted for the period of three years, in accordance with the said act, and that he was required to report, on or before the 7th of September, at the place of rendezvous, in Norwich aforesaid, or be deemed a deserter, and subject to the penalty prescribed therefor, and that transportation would be furnished him on presenting such notification at such headquarters; that, in obedience to such order, he reported himself to the provost-marshal at Norwich, on the 4th of September, and his name was entered on the books of the said provost-marshal, with the day he reported; that, since that time, he had been in the custody of the said provost-marshal, who claimed a right to restrain him of his liberty, as a drafted soldier, under the said act; that his mother, residing in Madison county, New York, caused to be presented to the provost-marshal and board of enrolment, on the 8th of August, 1863, affidavits and certificates, in due form, setting forth that she was a widow and the mother of the petitioner and other sons named, with their ages and residences, that they were enrolled in the first class, and liable to military duty under the said act, that she was infirm, (setting forth the nature of the infirmity,) and had no property, and was dependent upon the labor of the petitioner for support, and that she elected him to be exempt from the draft; that the papers, thus duly authenticated, were received by the provost-marshal and the board, and they decided them to be sufficient in form and substance, and allowed the application; that an endorsement to that effect was made upon the papers, and the petitioner was declared by the board to be exempt from the draft; and that his name, as he was informed by the board, was stricken from the enrolment. The return of the provost-marshal to the habeas corpus stated that the petitioner was not then, nor at the time of the service of the writ, in his custody or under his control; that he was legally drafted into the service of the United States under the said act; that, on the 8th of August, 1863, the mother of the petitioner made application to the board for his exemption from the draft about to be made; that such application was on that day allowed, and the petitioner was exempted; that afterward, on the 19th of the same month, the board reconsidered the claim and disallowed it; that the name of the petitioner was retained on the enrolment list, and he was subsequently drafted; and that he had not yet been examined by the board, in pursuance of the act.

[1] [Reported by Hon. Samuel Blatchford, District Judge, and here reprinted by permission.]

NELSON, Circuit Justice. The first question presented upon the return is, whether or not the petitioner is in the custody and keeping of the provost-marshal, and thus restrained of his liberty, within the meaning of the law which has provided the writ of habeas corpus as a fit and proper remedy. For, although the provost-marshal denies, in the return, that the petitioner is in his custody, or under any restraint from him, yet, if the facts stated or admitted in other parts of the return contradict, in legal effect, this denial, it must be regarded as the denial of a conclusion of law rather than of a fact.

The 12th section of the act of congress provides, that the persons so drawn shall be notified, &c., "requiring them to appear at a designated rendezvous, to report for duty." The 13th section provides, that any person drafted and notified to appear as aforesaid, may, on or before the day fixed for his appearance, furnish a substitute, &c.; and that any person failing to report for duty, after due service of notice, &c., shall be deemed a deserter, and shall be arrested by the provost-marshal, &c. The 14th section provides, that all drafted persons shall, on arriving at the rendezvous, be carefully inspected by the surgeon, &c., and that all persons drafted and claiming exemption, &c., shall present their claims to be exempted to the board, whose decision shall be final.

It is quite clear, from a view of these provisions of the act, that the person drafted is in the custody and under the control of the provost-marshal from the time he reports to him for duty, at the designated rendezvous, in pursuance of notice to that effect, after the draft has taken place. It is true that, on account of the pressure of business, the examination, to ascertain if the conscript is an able-bodied citizen, may not be made immediately on the report. The examination requires time, care, and deliberation, which may occupy days and weeks; but, whatever may be the time required in the given case, the drafted person must, during the intervening period, remain in the custody and under the control of the provost-marshal, unless specially discharged, on a proper application, or otherwise, by the voluntary act of the officer.

The next question on the return is, whether or not it was competent for the board to revise and recall its decision given on the 8th of August, exempting the petitioner from the draft, on the evidence of the election of his mother; or rather, confining myself to the precise question raised by the learned counsel for the provost-marshal, whether or not the board had made and published any decision, upon the evidence presented before them in behalf of the mother, in favor of the exemption of the relator. For, it was candidly admitted by the counsel, that, if a decision had been made and published, it was, upon familiar authority, not competent for it to revise or recall that decision, as its powers were quasi judicial, special, and limited, and its power in the special case was exhausted, and it was functus officio. This principle is so well and firmly settled by authority, that it would be useless, after the frank admission of the counsel, to stop to refer to it.

As it respects the question, whether or not a decision was in fact made, it appears from the original papers which were presented to the board, and which were produced before me by the provost-marshal, on the hearing, that not only was a decision made, upon the evidence, discharging the petitioner, but a record was made upon the papers at the time, to that effect, and the decision was thereupon announced to the parties interested. Indeed, the fact is not denied, in the return. It is admitted, in terms, that the claim of exemption in behalf of the mother, made on the 8th of August, was allowed by the board, but that afterwards, and on the 19th of August, it was reconsidered and disallowed. Therefore, the distinction set up to take the case out of the rule admitted in respect to bodies clothed with special and limited judicial powers, has no foundation, either in fact or in law.

Without pursuing the case further, my conclusion is—1st. That the petitioner was, in contemplation of law, in the custody and under the control of the provost-marshal, at the time of the service of this writ of habeas corpus, and, also, at the time of the hearing; 2d. That the action of the board of enrolment, upon the evidence presented in behalf of the mother, on the 8th of August, exempting the petitioner, and discharging him from the enrolment and draft, exhausted its powers; and that the subsequent revisal of the decision was coram non judice and void.

The petitioner is entitled to his discharge from the custody and control of the provost-marshal, and to be freed from all restraint by him under or by virtue of the authority of the act of congress in question.

## Case No. 7,067.

In re IRONS et al.

Ex parte ADLER.

[18 N. B. R. 95; [1] 26 Pittsb. Leg. J. 11.]

District Court, W. D. Michigan. March 13, 1878.

BANKRUPTCY—COSTS IN ATTACHMENT.

Where an attachment lien fails in consequence of proceedings in bankruptcy, the attaching creditor is not entitled to have his costs allowed and paid out of the bankrupt's estate, unless it is clearly shown that his design was to employ the attachment in aid of bankruptcy proceedings, and that the creditors generally were benefited thereby.

[1] [Reprinted from 18 N. B. R. 95, by permission.]

[This was an application by David Adler, an attaching creditor, to have his costs paid out of the estate of Irons & Coon, bankrupts.]

Albert Jennings, for creditor.
O. H. Simons, for assignee.

WITHEY, District Judge. It has always been held by this court that an attaching creditor is not entitled to have his costs therein allowed and paid out of the bankrupt's estate, where the attachment lien fails in consequence of proceedings in bankruptcy taken against the debtor within the time which renders the attachment void under the bankrupt act, unless it is shown that the attachment was instituted in the interest and for the general benefit of creditors, and not for the benefit of the attaching creditor alone. The only ground on which the clause in the bankrupt law (section 5044) dissolving attachments commenced within four months of the proceedings in bankruptcy can be justified is, that the facts which will authorize an attachment are generally such as would justify proceedings in bankruptcy against the debtor, and that the creditor attaching intended to secure an advantage or preference over other creditors of the debtor. If attachment liens must give way to an adjudication of the debtor and conveyance to an assignee of his estate, where an execution lien does not yield to such proceedings, it must be for the reason stated, and if so, then it is difficult to see why costs made in such attachment proceeding should be paid out of the estate, unless the attachment is employed merely as auxiliary to the bankruptcy proceeding. If employed otherwise, the attachment has for its object a defeat of the purpose of the bankrupt act, and to allow the attaching creditor costs out of the estate in such case would be inviting attachments against insolvent debtors instead of discouraging them. Whenever it is shown that the attachment was levied in aid of the general creditors, and seemed necessary to their protection by seizing the debtor's property in order to protect it until proceedings in bankruptcy could be instituted and a warrant of seizure be issued, I regard it just and proper to allow the necessary costs of the attachment to be paid by the assignee in bankruptcy from assets in his hands, because all creditors are supposed to be benefited by having the debtor's property secured and held to await the appointment of an assignee, in a case where there was good reason to believe the debtor was about to make some improper disposition of his property. But in such cases I have required a plain and full showing that the creditors generally were benefited, and that the attaching creditor's design was to employ the writ of attachment in aid of bankruptcy proceedings. The facts of this case are not within such exception.

There is an exceptional fact in this case, viz.: that composition was proposed and accepted before an assignee was appointed. But as the attaching creditor refused to surrender his lien it became necessary, after the composition was accepted, to choose an assignee and have the bankrupt's estate conveyed to him, under section 5044 [Rev. St. U. S.] before the attachment could be declared dissolved. We think the fact of the proceedings of composition affords no ground to modify the rule of practice as to paying the costs of the attachment, as we have stated it. An assignee was appointed and the debtor's property assigned; the attachment was thereupon dissolved. The evident design of the attaching creditor was to defeat the operation of the bankrupt law. Application denied.

## Case No. 7,068.

IRONS v. MANUFACTURERS' NAT. BANK.

[6 Biss. 301; [1] 1 Thomp. Nat. Bank, Cas. 203.]

Circuit Court, N. D. Illinois. Feb., 1875.

NATIONAL BANK—RECEIVER—INSOLVENT CORPORATION—MARSHALING ASSETS—ACT OF INSOLVENCY—PREFERENTIAL PAYMENTS.

1. The power conferred by the banking act upon the comptroller of the currency, to wind up the affairs of a national bank in certain contingencies, does not exclude the authority of a competent tribunal to appoint a receiver in other cases. In cases not within the special provisions of the banking act [13 Stat. 99], a national bank may be proceeded against in the same manner as any other debtor or corporation.

2. Kennedy v. Gibson, 8 Wall. [75 U. S.] 498, commented on.

3. The proper remedy against an insolvent corporation when its assets are of such a nature that they cannot be levied upon and sold upon execution, is a bill in equity to marshal and distribute its assets.

[See note at end of case.]

4. The term "act of insolvency," in the fifty-second section of the banking act, means any act which would be an act of insolvency on the part of an individual banker, not simply such an act as authorizes the comptroller, under the banking act, to appoint a receiver.

5. Where the officers have been making preferential payments, a court of equity, on the application of a depositor, will appoint a receiver.

[This was a bill in equity by James Irons praying that a receiver be appointed for the Manufacturers' National Bank of Chicago, and for a discovery, and for other relief. The defendant demurs.]

Gardner & Schuyler, for complainant.
J. Hutchinson and Tenneys, Flower & Abercrombie, for defendant.

BLODGETT, District Judge. This is a creditor's bill, setting forth in substance that the complainant was a depositor in the Manufacturers' National Bank; that at the time the bank closed its doors in October, 1873, he had a large sum deposited there;

[1] [Reported by Josiah H. Bissell, Esq., and here reprinted by permission.]

that the bank has since that time gone into voluntary liquidation, or pretended to do so; that it has withdrawn its bonds on deposit with the treasurer of the United States, and has since that time in some manner, through the agency of various officers, converted its funds, under the pretexts of paying portions or some of its debts, and that in the meantime the complainant has brought suit against the bank, and recovered judgment in this court for the amount of his debt,—something over $12,000,—issued his execution, and been unable to make anything. He charges that the officers of the bank have fraudulently applied the funds of the bank to the payment of other persons than himself; that they have made fraudulent settlements and dispositions of the property of the bank; and there is no property subject to seizure or execution which the complainant can obtain by proceeding at law, and asks for the discovery of whatever assets the bank or the officers of the bank may now have under their control belonging to the bank, and for the appointment of a receiver to take possession of these assets; and also, that the adjustments or settlements which have been made by the officers of the bank, which are fraudulent, and in violation of the provisions of the banking law under which the defendant was organized, shall be set aside and held for naught, and the property equally distributed among all the creditors alike.

The bill does not show the fact, but an exhibit filed with the bill, shows that within the last few months certain creditors of the bank have applied to the comptroller of the currency, under the provisions of the general banking law of the United States, asking that he appoint a receiver for this bank under the provisions of that law, and pursuant to it, for the purpose of winding up its affairs, and the comptroller has responded to that request by the statement, in substance, that some time in the early part of January, 1874, the bank deposited government notes with the treasurer to the amount of its circulation, and took up its bonds; and that the relations between the bank and the department of the comptroller of currency from that time on have ceased, and the comptroller now has, or claims that he has, no authority to appoint a receiver; that he has no official notice of any protest of any of the circulating notes of the bank, and thinks that he has no authority to appoint a receiver. The defendant files a general demurrer.

It would seem from an examination of the banking law, that the comptroller of the currency has no authority to appoint a receiver except in certain contingencies, such as the failure to make good a reserve, the failure to redeem circulating notes on demand, the failure to make good the capital stock, whenever the same becomes impaired, and the failure to meet certain other requirements of the banking law. Now, neither of these contingencies are charged in this bill to have occurred, and it is only in the case of such contingencies that the comptroller acquires the right to appoint a receiver.

It is claimed on the part of the defendant, and has been very strenuously and ingeniously argued, that there is no power in any court to appoint a receiver for this bank, because the delegation of the power to the comptroller of the currency to appoint a receiver in certain contingencies to wind up the affairs of the bank excludes the authority of any other tribunal or person to appoint a receiver. I have carefully examined the banking law, and the decisions of the supreme court, and those of various states made since this banking law took effect upon the various questions which have arisen, and do not find that this precise question has ever been made. But I can see nothing in the law itself, nor in the decisions of the courts upon the law, so far as they have gone, to exclude the idea that a corporation created as this is under an act of congress for certain specific purposes, does not come within the general provision of the law regulating the remedies of creditors as against this corporation as much as against any other corporation, except where there are specific provisions to meet those cases. For instance, a holder of the circulating notes of the bank, who had presented them for payment, and payment had been refused, would undoubtedly find this remedy within the special provisions of the banking law itself, because there is a specific provision meeting that case, and his remedy would undoubtedly be found in the action of the comptroller of the currency. But there are many cases like the one before us, where the bank may not have so violated any of the provisions of the banking law as to call for the appointment of a receiver by the comptroller.

The allegations in this bill are very full that this bank was insolvent at the time it closed its doors, and has been ever since; that it failed to pay its debts; that a large amount of its debts are still unpaid; and the question is, what remedy have the creditors of this bank if a court of equity cannot take on itself the administration of its affairs, where the banking law does not provide that it shall be done by the comptroller of the currency? It is true that in the case of Kennedy v. Gibson, 8 Wall. [75 U. S.] 498, the supreme court state that the provision of the banking law making the stockholders liable for the debts of the corporation to the amount of the stock held by them respectively, could not be enforced except under the action of the comptroller through a receiver appointed by him. Whether that opinion will be found to entirely express the full meaning and intention of the supreme court whenever they come to examine it in the light of future cases and facts which may be brought before it, is at least a matter of doubt. I do not feel sure that the su-

preme court will adhere to quite as broad a statement as is made in that case; but still they may. But even that does not oust the jurisdiction of a court of equity to take hold of whatever assets the bank may have aside from the personal liability of the stockholders, and administer those as it would the affairs of any insolvent corporation.

The law is well settled in this state and in the courts of the United States, that the proper remedy of a creditor against a corporation, when the assets are of such a nature that they cannot be levied upon and sold on execution, is by a proceeding in equity to marshal and distribute the assets. It is unnecessary to cite authorities upon that question. The law, I think, is as well settled as any branch of the law can be considered settled in this country.

The general banking law provides, by the fifty-second section, "that all transfers of the notes, bonds, bills of exchange, and other evidences of debt owing to any national banking association, or of deposits to its credit; or assignment of mortgages or sureties on real estate, or of judgments or decrees in its favor; all deposits of money, bullion or other valuable things for its use, or for the use of its shareholders or creditors; and all payments of money to either, made after the commission of an act of insolvency or in contemplation thereof, with a view to prevent the application of its assets in the manner prescribed by this act, or with a view to the preference of one creditor to another, except in the payment of its circulating notes, shall be utterly null and void." Rev. St. U. S. 1874, § 5242.

Now by the fiftieth section of the banking law it is provided in substance that, after making provision for the payment, or rather indemnification, of the government for the redemption of the circulating notes of a national bank, all the remainder of the proceeds of its assets shall be divided pro rata among its creditors, share and share alike, according to the amount due to each. And the section which I have just read makes void all payments and settlements which are made to one creditor, to the exclusion of other creditors, after the commission of an act of insolvency.

The allegations in this bill, which are confessed by the demurrer as true, show that the bank became insolvent, closed its doors, and, I think, was guilty of an act of insolvency within the meaning of the banking law—the organic act of incorporation.

It was urged by defendant's counsel that the only act of insolvency contemplated by this fifty-second section, was such an act of insolvency as authorized the comptroller to appoint a receiver, that would be merely the failure to pay its circulating notes, and that a failure to pay a depositor, or its bills of exchange, or notes, or drafts, would not be an act of insolvency.

It can hardly be possible that congress intended to give all the remedies in the banking law merely to the note-holder of these national banks, and leave depositors and general creditors entirely unprovided for. It must have been in the contemplation of congress in the enactment of this act, that these national banks could receive deposits, because they are specially authorized to do so; that they would issue bills of exchange, and be otherwise liable to individuals and corporations, because there is express provision in various sections for payment of that class of indebtedness. And I think the term, "act of insolvency," mentioned in the fifty-second section, is clearly an act which would be an act of insolvency on the part of an individual banker; that is, the closing of the doors, refusal to pay depositors on demand, refusal to go on in the due course of business to transact its business as a bank, and discharge its liabilities to its creditors.

So that upon the allegations in this bill, which are, as I said before, admitted to be true by the demurrer, it would seem that this bank has been making preferences in direct contravention of the provision of the banking law for a year past. How far a court of equity will deem it its duty to disturb these transactions, and require repayment from parties who have received payment from the officers of the bank in the course of liquidation of its affairs, is a matter for future consideration. But it certainly furnishes the ground for the intervention of a court of equity, it seems to me, when it is made to appear that a bank is going on and paying some creditors to the exclusion of others. It was the plain intention of the banking law that all creditors should share equally, and that no preference should be allowed in favor of one creditor as against others; that the United States government, as the guarantor of the circulating notes of the bank, is the only party that is entitled to any preference whatever; that all other creditors are to share alike. And, therefore, it would seem to follow that, if a bank is not in a condition to pay all its creditors, it can only pay them pro rata,—that it has no right to pay a part in full and have others unpaid.

Entertaining these views, and without taking longer time to explain my views upon the question, it is sufficient to say that I think a case is made by the bill for an appointment of a receiver.

J. D. Harvey was accordingly appointed receiver under a bond of $100,000.

[NOTE. On October 5, 1876, by leave of court, complainant in this case filed an amended bill, seeking to enforce the individual liability of shareholders of the bank, under Rev. St. U. S. § 5151, and under Act June 30, 1876, as to appointment of receivers, the last act having been passed since filing of original bill. The defendants severally answered, setting up certain defenses which were considered by Judge Blodgett of the circuit court. 17 Fed. 308. One of the defendant shareholders in the above case having died, a bill of revivor was filed

against his administrator, to which the latter demurred, on the ground that the liability of a shareholder of a national bank does not survive against his estate. Judge Blodgett of the district court overruled this demurrer. 21 Fed. 197. The report of the master directed by decree in case in 17 Fed. 308, having been made, exceptions were taken to the same by several of the shareholders. These exceptions were considered by the court, and the exceptions overruled. 27 Fed 591. Upon appeal to the supreme court, the whole case was reviewed, including the original bill. Mr. Justice Mathews delivered the opinion of the court, sustaining in some points and overruling in others the proceedings in the district and circuit courts. Touching the original bill, the learned justice said: "It is a mistake to assume that the bill as originally filed was strictly and technically a creditors' bill, merely for the purpose of subjecting equitable assets to the payment of complainants' judgment. That, undoubtedly, was a part of its purpose and prayer. * * * But the main purpose of the bill, as originally framed, was to obtain a judicial administration of the affairs of the bank, on the ground that its capital stock and property was a trust fund." Richmond v. Irons, 121 U. S. 27, 7 Sup. Ct. 788. Upon its return to the circuit court, a decree in conformity with the judgment of the supreme court was entered; and to the master's report made under this decree certain exceptions were taken by one of the creditors, which were overruled. 36 Fed. 843.]

## Case No. 7,069.

### The IRONSIDES.

[4 Biss. 518.] [1]

District Court, N. D. Illinois. May, 1869.

POSSESSION OF PROPERTY ON FILING OF VOLUNTARY PETITION—MARSHAL AS MESSENGER—CONFLICT OF JURISDICTION — ASCERTAINMENT OF LIENS.

1. On a voluntary petition, the court has power to take possession of the bankrupt's property pending the publication of notice and election of an assignee.

2. A maritime lien is not divested by the filing a petition in bankruptcy; the assignee takes the property subject to it.

3. Where the marshal has taken possession as messenger, but without any order of court, his possession is not that of the court in bankruptcy.

4. A party having a maritime lien may, even after the filing of a petition in bankruptcy by the owner, seize the vessel under a libel in another district, and the latter court has jurisdiction to hear and determine the lien.

[Cited in Beall v. Walker, 26 W. Va. 747.]

5. In such case the assignee has the right to appear and be heard, and the court in bankruptcy should accept the determination of the court in admiralty as to the validity and amount of the lien.

6. The words in section one of the bankrupt act [of 1867 (14 Stat. 517)] extending jurisdiction "to the ascertainment and liquidation of the liens and other specific claims" upon the bankrupt's property, apply only to cases where these liens or claims have not been previously determined by other competent tribunals.

This was a libel by Dyer & Payne, of Chicago, for supplies furnished at that place, while the vessel was owned by a person in Cleveland. The owner being, after the date of the furnishing of the supplies, adjudged a bankrupt by the district court for the Northern district of Ohio, the messenger of that court took possession of the vessel at Chicago for the purpose of taking her to Cleveland; and while she was thus in his possession this libel was filed and the vessel seized. The messenger disputed the right of the admiralty court to proceed, and claimed that the vessel was in the custody of the law, and that the bankrupt court alone had exclusive jurisdiction to settle all maritime liens.

Robert Rae, on behalf of libellant, contended that the bankrupt court was but a municipal court, having no extra-territorial jurisdiction and its decrees being only effectual within the territory of the United States; that the admiralty court was a court recognized by and belonging to the law of nations, and that the world were parties to her proceedings in rem; that both courts existed under the constitution of the United States, and claimed exclusive jurisdiction; that the act of congress in reference to bankruptcy was not passed with an intention to oust the admiralty courts of jurisdiction, and it could not be done by implication, the bankrupt court being one of inferior and local jurisdiction, and the admiralty one of superior and universal jurisdiction; that the admiralty court is alone adapted to try maritime matters, especially in cases of collision and suits between foreigners and its own citizens, and can best ascertain what is and what is not a maritime lien, and its decrees are respected throughout the family of nations, etc.

Willey & Cary, of Cleveland, for the messenger.

DRUMMOND, District Judge. A case has been submitted to the court upon, substantially, an agreed statement of facts, upon which it is claimed, on the part of the defense, that the court has no jurisdiction of the case. It was a libel filed by Dyer & Payne, as coal and wood merchants of Chicago, for furnishing to the propeller, in that city, on the 13th day of May, 1868, a quantity of coal on the credit of the vessel, the facts being that neither the owner nor master of the propeller had money or credit to purchase the same.

At the time, the propeller was owned by Dwight Scott, a citizen of Ohio. On the 30th of May, 1868, he filed his petition in bankruptcy in the district court of the United States for the Northern district of Ohio, and on the first of June of that year was duly adjudged a bankrupt by that court. At the time of the seizure under the monition issued in this case, on the 5th of June, 1868, the propeller was in the possession and under the control of the marshal of the North-

[1] [Reported by Josiah H. Bissell, Esq., and here reprinted by permission.]

ern district of Ohio, as messenger under the proceedings in bankruptcy, it being claimed that he was entitled to the possession of the propeller under the rules and regulations in bankruptcy in that court and by virtue of the bankrupt law. When the seizure was made by the marshal of this court a stipulation for release was given, protest being made at the time of the seizure.

When the seizure was made by the marshal, and the answer and claims were filed, no assignee had been appointed by the district court of the United States for the Northern district of Ohio. There is nothing stated in the case from which it can be seen that the marshal of the Northern district of Ohio took possession under any warrant or process from the court in bankruptcy, but the inference is, from the foregoing statement, that he took possession, as already intimated, because he claimed that he had a right of possession under the bankruptcy law, by virtue of the petition filed on the 30th day of May, 1868.

The first question to be determined under this state of facts is: What was the position of the marshal of the Northern district of Ohio with reference to the propeller? Was he in any other or different position from that of the owner of the propeller in case proceedings in bankruptcy had not been instituted? In other words, was the propeller in the custody of the law and not liable to seizure or proceedings against her on the part of the admiralty court?

It will be seen from the statement which has been made that no objection is taken on the ground that it is not a case of a proper maritime lien against the propeller, but the objection only arises from the proceedings in bankruptcy in the court in Ohio. It has been decided by the supreme court of the United States (Taylor v. Carryl, 20 How. [61 U. S.] 583) that where a vessel is in the custody of an officer under a process from a state court it is not liable to seizure by the marshal upon a libel filed, even in the case of a regular maritime lien; that the vessel is in the custody of the law and cannot be seized by the marshal and is not subject to the jurisdiction of the admiralty court in such a case, and this rule would apply if it is plain that the messenger under proceedings in bankruptcy held the vessel in such a way as to make him the custodian of the court, or held the vessel under the process of the court.

From what has been already said I think it will be apparent that this was not the actual position of affairs. It is important under the bankrupt law to determine what is the condition of the property of the bankrupt, in the case of a voluntary proceeding in bankruptcy, between the time of filing the petition and the date of the appointment of the assignee. It is rather a singular omission in the bankrupt law that no distinct provision seems to have been made in the case of voluntary bankrupts for the control and disposition of the property between the date of filing the petition and that of the appointment of the assignee, and the rules established by the supreme court do not appear to have made any distinct provision for such a case.

The 11th section of the bankrupt law states what is to be done where a voluntary petition is filed. It declares that the judge, or, "if there be no opposing party," the register, shall "issue a warrant, * * * directed to the marshal of said district," and it proceeds to declare what authority is given to the marshal as messenger, authorizing him forthwith as messenger, to publish notices in such newspapers (as the warrant specifies[2]), to serve written or printed notice, by mail or personally, on all creditors upon the schedule filed with the debtor's petition, or whose names may be given to him in addition by the debtor, and to give such personal or other notice to any persons concerned as the warrant specifies, which notice shall state: that a warrant in bankruptcy has been issued against the estate of the debtor," &c. The warrant provided by the rules, which is form number 6, makes no provision whatever, and gives no authority to the marshal, as messenger, to take possession of the goods of the bankrupt, and the 13th rule established by the supreme court in bankruptcy, in the first part of it, seems to contemplate only the case of the appointment of the marshal as messenger in an involuntary proceeding in bankruptcy. The only warrant in bankruptcy that is referred to in the rules in the case of voluntary proceedings is form 6. I recollect a case where an application was made to this court for the appointment of a person specially to take possession of the property of a bankrupt between the date of the filing of the petition and the appointment of the assignee, and the court made an order appointing a proper person to take charge of the property during that time.

Now the 14th section of the bankrupt law provides that the assignment shall relate back to the commencement of the proceedings in bankruptcy, so that the property shall all vest in the assignee from that time, and therefore, by relation, the assignee is clothed with all the powers of the owner of the property from the date of filing the petition.

In involuntary proceedings a different provision is made. In that case under the 40th section it is declared that the court may issue a warrant to the marshal commanding him to arrest the alleged bankrupt, and also forthwith to take possession provisionally of all the property and effects of the debtor and safely keep the same until the further

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2 "As the marshal shall select, not exceeding two." Amendment of June 22, 1874 [18 Stat. 178].

order of the court, which is called a "warrant of seizure" and is numbered "form No. 59," under which the marshal, as messenger, can take possession of the property of the bankrupt.

It is difficult to account for this difference between the case of a voluntary and involuntary proceeding as to the property of a bankrupt except upon the presumption that it was supposed that in the case of a voluntary petition the bankrupt thereby manifesting his willingness that all his property might go for the benefit of the creditors, that it would remain subject to the order of the court until an assignee in bankruptcy was appointed, and therefore no special clause was inserted in the law for such a contingency. However this may be, such seems to be the fact, and we have to take the law as it is.

From what has already been stated it is apparent that it is competent for the court in bankruptcy, under certain circumstances, to take possession of the property where a voluntary petition is filed, and it is possible that if that had been done by a proper order or warrant of the court in this case, that the rule might have been different from what it is under the actual state of facts; because I think it is inferable that the marshal merely took possession of this property as the representative of the creditors of the bankrupt, without any other or different power or right from that with which the bankrupt himself would have been clothed if no proceedings in bankruptcy had been instituted.

The question is, what was the intention of the bankrupt law as to the disposition of the bankrupt's property and as to the liens which might exist against it at the time that the petition was filed in a voluntary proceeding. Was it the intention of the bankrupt law to divest and dissolve all liens, and proceedings to enforce a lien in the admiralty court?

Under the 14th section the law manifests its intention clearly to dissolve all process of attachment,—all mesne process of attachment —on the property of the bankrupt, and declares that all such process shall be dissolved if the attachment was made within four months next preceding the commencement of the proceedings in bankruptcy, but it has said nothing about maritime liens.

What is a maritime lien? It is what is technically termed a "jus in re"; that is to say, that the person in whose favor the lien exists can pursue the res and the latter remains subject to the right of the claim until it is finally satisfied, provided it be enforced in conformity with the rules of an admiralty court. In other words, the res, in whosesoever hands it may come, is subject to the lien which exists against it.

Was it the intention of the bankrupt law to divest this lien? Is it fairly within the meaning of the 14th section, in relation to attachments? I am inclined to think that it is not. As already said, the lien exists against the res independent of the process. In ordinary cases of attachment, it is the attachment that operates as the lien against the property, and the bankrupt law intends that in all such cases the attachment should be dissolved, if commenced within a certain time before the proceedings in bankruptcy. The proceedings in bankruptcy would not divest a mortgage lien. They would not divest any valid subsisting lien not named in the bankrupt law, but which could be enforced in conformity with law, and I think that it was not the intention of the bankrupt law to interfere with any valid subsisting lien except those specifically named, but that such liens should be enforced in the usual way. Therefore I think that it was not the purpose of the law to divest any valid subsisting maritime lien which might exist against the property of the bankrupt at the time that the petition was filed, but that it was the intention of the law that the assignee should take the property subject to that lien.

Take the case of a valid subsisting mortgage against the property of a bankrupt, good by virtue of the law of the state where the property exists. There could be no question that proceedings in bankruptcy would not divest that lien; the mortgagee would have a right to enforce the mortgage in a legal and proper manner, notwithstanding proceedings in bankruptcy. So here, where there is a valid maritime lien against the property of the bankrupt at the time of the commencement of the proceedings in bankruptcy, it can be enforced according to the rules of the admiralty court.

The only question is, in what tribunal—a court of bankruptcy or a court in admiralty—it is to be ascertained whether a maritime lien exists.

There really cannot be any conflict of jurisdiction between the court in Ohio and the court here, as there might be between a federal and a state court, but the two courts of the United States necessarily proceed in harmony with each other.

The first section of the bankrupt law declares that "the jurisdiction hereby conferred shall extend" among other things, "to the ascertainment and liquidation of the liens and other specific claims," upon the property of the bankrupt, and it seems to me that the court of admiralty where the proceedings have been commenced in the usual and regular way, and where, in conformity with the law and practice of the court, the case can proceed to proofs, hearing, and decree, is the proper forum to determine whether there is a valid maritime lien.

It is true that the district court of the United States for the Northen district of Ohio, is clothed with the same admiralty power as this court, but it is clear that it may become a very serious question whether there is a lien in a given case, and if the bankruptcy court is to ascertain whether there is a mar-

itime lien upon the property belonging to a bankrupt at the time of filing the petition, it would become the duty of that court to make a great number of collateral issues. For instance, it might have to direct proceedings to be commenced in a regular way in order to determine whether there was a valid maritime lien. Undoubtedly where before a person took possession of the property of a bankrupt under the proceedings in bankruptcy there were proceedings commenced under a state law by which state law it was claimed that there was a lien, it would be proper for the court in bankruptcy to allow the suit and prosecution in the state court to proceed in order that it might be ascertained whether or not there was a valid lien upon the property under the state law. So in this case the court in bankruptcy would be regulated by the adjudication of this court upon the point whether or not there was a valid maritime lien, and would direct the assignee to proceed in conformity with the decree of this court, so that there is no conflict between the two courts. If that court had actually taken possession by virtue of its officer of the property of the bankrupt it might be improper for this court to interfere, but until that is done I think the property of the bankrupt remains subject to all the liens which existed at the time of the filing of the petition, and they can be enforced. So when the first section of the law uses the words "to the ascertainment and liquidation of the liens and other specific claims thereon," it means where those liens or claims have not been already determined and ascertained by other competent tribunals; where, in other words, the question naturally arises in the course of the proceedings in bankruptcy, there the court is to determine whether or not there is a lien, and according as it may determine, decide upon its liquidation, or otherwise.

For these reasons, I think that the objection taken by the defense must be overruled, and the jurisdiction of the court in admiralty maintained. Of course it will be competent for the messenger, or the assignee, if one has since been appointed, to appear in this case as the representative of the creditors and to show, if it can be done, that there is no valid subsisting maritime lien upon this property, but, if there is, I hold it to be the duty of this court to maintain the libellants in their right to that lien.

There is an argument ab inconvenienti which is perhaps not entirely destitute of force. These supplies were furnished to the propeller in this port. All the evidence in relation to the claim and the necessity of the supplies furnished for the use of the propeller exist here. If the question were to be determined by the district court of Ohio, of course it would be necessary that proof should be sent there. That involves additional labor and expense upon the libellant, which, in the absence of any clear provision of law rendering it compulsory I do not feel inclined to subject him to. The jurisdiction of this court will be sustained.

## Case No. 7,070.

The IRONSIDES.

[15 Int. Rev. Rec. 59.]

Circuit Court, S. D. Ohio. Jan. 31, 1872.

[Appeal from the district court of the United States for the Southern district of Ohio.]

In bankruptcy.

Willey, Cary & Terrell, for mortgagees.

Mr. Ranney, Mr. Williamson, Mr. Prentiss, Mr. Griswold, and others, for state liens.

EMMONS, Circuit Judge, in deciding the questions involved in these cases, entered into a very learned and thorough discussion of the history of admiralty law in this country, and of the state lien or watercraft laws of the several states, with the long line of conflicting and varying authorities upon the subject, especially as shown in the history of the decisions of the supreme court of the United States upon the whole subject of admiralty and state law jurisdiction. Held: In affirmance of the decision of Judge Sherman [case unreported], that the mortgages upon these propellers should be paid, without reference to any liens asserted under the state watercraft law. That all such state liens were void under the recent decisions of the supreme court of the United States, although it was difficult to reconcile with these decisions the dictum of Mr. Justice Clifford in the Belfast Case, reported in 7 Wall. [74 U. S.] 624, and referred to in [Leon v. Galceran] 11 Wall. [78 U. S.] 188. The case of The Josephine, 39 N. Y. 19, and a recent decision of Judge Blatchford, reported in the last number of the Internal Revenue Record,[1] and cases in other states, were referred to in furtherance of this doctrine. The judge further said in effect that this view of the case made it unnecessary to decide what would be the relative rank of mortgages recorded under the national law and state liens. if valid.

## Case No. 7,071.

The IRRISISTIBLE.

[Nowhere reported; opinion not now accessible.]

## Case No. 7,072.

IRVIN et al. v. SCHELL.

[5 Blatchf. 157.][2]

Circuit Court, S. D. New York. May 21, 1863.

CUSTOMS DUTIES—STORAGE—ACTION TO RECOVER PAYMENTS FOR.

Where imported goods were entered for warehouse, under the act of March 28, 1854 (10 Stat.

[1] [See The Edith, Case No. 4,282.]

[2] [Reported by Hon. Samuel Blatchford, District Judge, and here reprinted by permission.]

270), but, before they were removed to the warehouse, the importer applied to the collector for a permit to land the goods for consumption, and the collector, under instructions from the treasury department, charged him for half a month's storage of the goods, although they had remained all the time on board of the vessel in which they were imported, and the importer paid the amount under protest, and then sued the collector to recover it back: *Held*, that the charge was an illegal one, but that the payment of it was voluntary, as the importer might have allowed the goods to go to the warehouse and have withdrawn them from there; and that, therefore, the amount paid could not be recovered back.

[Distinguished in Ogden v. Barney, Case No. 10,454.]

This was an action [by Richard Irvin and others] to recover back a sum of money paid, under protest, to [Augustus Schell] the collector of the port of New York.

Sidney Webster, for plaintiffs.

Ethan Allen (Asst. Dist. Atty.), for defendant.

NELSON, Circuit Justice. This suit involves the question of the right of the collector to collect half a month's storage, according to the regulations of the treasury department, under the following circumstances: The plaintiffs, in the case of several shipments of goods, in June and July, 1857, from Liverpool to the port of New York, caused warehouse entries to be made at the custom-house, under the act of congress of March 28, 1854 (10 Stat. 270), but, before the goods were removed to the warehouse, they changed their minds and applied to the collector for permits to land the goods for removal to their own stores, or for consumption; whereupon, the collector charged them half a month's storage, besides the duties. The storage for all the goods amounted to the sum of $98.26, which was paid under protest.

It is admitted, that no act of congress can be found for making this charge against the merchant, under the above state of facts. The charge is wholly an arbitrary one, prescribed by the secretary of the treasury, and a fixed sum might as well have been imposed as the half month's storage. The imposition is sought to be sustained on the idea that, if the goods are entered for warehousing, and if the merchant, before they are landed and removed, applies for a permit to land them for consumption, the vessel may be regarded as being, in the meantime, the warehouse, with the permission of the treasury department. But this is hardly plausible, as it involves the absurdity of charging the merchant for the use of his own vessel. Besides, the government has no interest in the warehousing business, as, according to the act of 1854, the goods are stored at the risk and expense of the importer. The truth is, that the charge is made simply for the favor granted to the merchant, in permitting him to land the goods for consumption, after he has entered them for warehousing. The collector might, doubtless, compel the merchant, after having thus entered his goods, to procure them in the usual way, through the warehouse, which would increase considerably the expense. Hence, if the merchant changes his mind and applies for a permit to land for consumption, this charge is imposed. The charge, as appears from the case, adds nothing to the labor or trouble of the officers of the customs, as is, indeed, obvious, from the usual course of the business.

As I have said already, there is no law for this charge against the merchant, and any other arbitrary sum might as well be imposed; and I have hesitated whether I ought not to put an end to it. I certainly should, were it not for considerations which I will now state. It does not appear, in the case, whether the charge goes to the government, or is a perquisite to the collector. But, as it is imposed by a regulation of the treasury, it is fair to presume that it goes to the government. This is a suit instituted against the collector, and the question arises whether the payment of this storage, under the circumstances, was an involuntary payment. If it was not, then the action will not lie. It is true, that the plaintiffs paid under protest. But their own acts led to the charge. They entered their goods for warehousing, and afterwards changed their minds and asked for a permit to land them. The collector might, probably, under the instructions of the treasury department, have refused this, and compelled the warehousing of the goods.

The secretary of the treasury, however, says: "If you will pay half a month's storage, I will give you a permit." This is a favor extended for a compensation. I do not agree that public officers can make these bargains; but, if the merchant voluntarily accedes to them, I am inclined to think he cannot turn around and sue the collector as for an involuntary payment. The merchant was not compelled to accede. He might have procured his goods through the warehouse. There is no difficulty where the merchant makes up his mind, on the arrival of the goods, what he will do with them—warehouse them, or land them for consumption. He is not compelled to enter them for warehousing. The goods may remain on board of his ship until they are entered, and permits to land them are obtained. Upon the whole, after some difficulty, I have come to the conclusion, for the reasons above stated, that the plaintiffs cannot recover. Judgment for defendant.

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IRVINE (SYMES v.). See Case No. 13,714.

## Case No. 7,073.

In re IRVING et al.

[8 Ben. 463; 14 N. B. R. 289; 2 N. Y. Wkly. Dig. 500.] [1]

District Court, S. D. New York. June 21, 1876.

CONTEMPT OF COURT — VIOLATION OF INJUNCTION —ENFORCING DECREE OF FORECLOSURE MADE BEFORE ADJUDICATION OF BANKRUPTCY.

1. On February 5th, 1876, a petition in involuntary bankruptcy was filed against the above bankrupts, and an order was made, under section 5024 of the Revised Statutes, that an injunction issue to restrain them and one D., "in the meantime and until the hearing and decision of the said petition, and until the further order of the court," from levying on or making any transfer or disposition of the property of the debtors "and from all interference therewith, except to preserve the same." On that day the injunction was issued, and was served on D. personally on February 14th. On the 19th of February an adjudication of bankruptcy was made by default, and an assignee was thereafter appointed. Before the filing of the petition D. had commenced the foreclosure of two mortgages, held by him on property of one of the bankrupts, in which a decree of foreclosure and sale was entered on the 12th of February, 1876; and, on the 8th of March, D. caused the property to be sold under that decree, and bought it himself for $100 and took a deed of the property, and judgment was entered against the mortgagor, one of the bankrupts, for the deficiency. Thereafter the assignee took proceedings for contempt against D. in disobeying the injunction. It appeared that D. acted in good faith under the advice of counsel and had no wilful intention to disobey or disregard the injunction: *Held*, that the injunction, being issued under section 5024 of the Revised Statutes, ceased to operate when the adjudication of bankruptcy was made.

2. The words in the injunction "and until the further order of the court," could not be so construed as to give it a duration beyond that authorized by section 5024 of the Revised Statutes, or beyond that implied by the words "until the hearing and decision on the said petition."

3. Under the authority of Eyster v. Goff, 91 U. S. 521, the filing of the petition in bankruptcy and the adjudication did not divest the state court of jurisdiction over the foreclosure suit previously commenced, nor deprive the plaintiff in that suit of his right to enforce the decree of foreclosure.

4. D. had not committed any contempt of court in what he had done.

[Cited in Cutter v. Dingee, Case No. 3,518.]

[In bankruptcy. In the matter of Mary Irving and Benjamin H. Irving.]

F. Fellowes, for the motion.

D. A. Hawkins, opposed.

BLATCHFORD, District Judge. This is a proceeding in involuntary bankruptcy. The creditors' petition was filed on the 5th of February, 1876, and an order to show cause was issued on that day, returnable on the 12th of February, 1876. It not having been served, a new order to show cause was issued, returnable on the 19th of February, 1876. On the latter day, an adjudication of bankruptcy was made on default of the debtors to appear. On the filing of the petition, an order was made, under section 5024 of the Revised Statutes, that an injunction issue to restrain the debtors and one Dingee, "in the meantime, and until the hearing and decision of the said petition, and until the further order of this court," from levying upon or making any transfer or disposition of the property of the debtors not exempted by the bankruptcy act [of 1867 (14 Stat. 536)] from the operation thereof, "and from all interference therewith, except to preserve the same;" and on the same day an injunction was issued, directed to the debtors and to Dingee, commanding them "to desist and refrain, until the hearing and decision on the said petition, and until the further order of the court," from making any transfer or disposition of the property of the debtors not exempted by the bankruptcy act from the operation of said act, "and from any interference therewith except to preserve the same, until the further order of the court." This injunction was served on Dingee, personally, on the 14th of February, 1876. An assignee having been duly appointed, he represented to this court, by affidavit, on the 3rd of May, 1876, that Dingee had, prior to the 14th of February, 1876, commenced the foreclosure of two mortgages held by him on property owned by Mary Irving, one of the bankrupts; that, on the 12th of February, 1876, a decree of foreclosure and sale, in the usual form, was entered in the action brought for such purpose, in the supreme court of the state of New York; that, subsequently to the service of said injunction, and on or about the 8th of March, 1876, Dingee caused said property to be sold at public auction, and purchased it himself at such auction sale for the sum of $100; that the report of sale had been filed, and Dingee had requested the entry of a judgment for deficiency against Mary Irving, one of the bankrupts, for $22,115.42; and that Dingee was threatening to convey the property. Thereupon, an order was made by this court, that Dingee show cause, before it, why he should not be punished for contempt of court in disobeying said injunction. On the return of such order the assignee and Dingee consented in writing that it be referred to a commissioner, to ascertain and report whether any contempt had been committed, and, if so, what were the extent and nature of such contempt, and an order was made thereon to that effect. The referee has taken testimony in the matter and reported it. It shows the foregoing facts. It also shows, that the assignment to the assignee was made on the 24th of April, 1876; that the property referred to was sold under said decree of foreclosure on the 8th of March, 1876, and was purchased by Dingee for $100, subject to a prior mortgage and interest on it and taxes; that Dingee took a deed of the property; and that thereupon judgment was

[1] [Reported by Robert D. Benedict, Esq., and Benj. Lincoln Benedict, Esq., and here reprinted by permission. 2 N. Y. Wkly. Dig. 500, contains only a partial report.]

entered against the mortgagor, Mary Irving, one of the bankrupts, for $22,115.42, the deficiency on the sale. The report finds that Dingee thereby committed a contempt of court in disobeying said injunction; that the nature and extent of such contempt consisted in proceeding to sell the mortgaged property, and to bid it in, and to take a deed for it, and to enter said judgment; but that Dingee acted in good faith, under the advice of counsel, on which he relied, and that he had no wilful intention to disobey or disregard said injunction.

It is contended that the injunction ceased to operate when the adjudication of bankruptcy was made on the 19th of February, 1876. I am of opinion that this point is well taken. The injunction was issued under section 5024 of the Revised Statutes, which provides, that, on the filing of the petition in involuntary bankruptcy, "if it appears that sufficient grounds exist therefor, the court shall direct the entry of an order requiring the debtor to appear and show cause, at a court of bankruptcy to be holden at a time to be specified in the order, not less than five days from the service thereof, why the prayer of the petition should not be granted;" and that "the court may also, by injunction, restrain the debtor, and any other person, in the meantime, from making any transfer or disposition of any part of the debtor's property not excepted by this title from the operation thereof, and from any interference therewith." The words "in the meantime," cannot be construed to mean a time later than the time an adjudication of bankruptcy is made on the petition, in case one is made. The injunction issued in this case was limited to the time of "the hearing and decision on the said petition," and, when the adjudication was made, the decision had been made. The words "and until the further order of the court," in the injunction, cannot, I think, be so construed as to give a duration to the injunction, beyond the duration authorized by section 5024, or beyond that distinctly implied by the words "until the hearing and decision on the said petition." In re Moses [Case No. 9,869].

There is nothing in this view that is in conflict with the decisions of this court (affirmed by the circuit court, on review) in Hyde v. Bancroft [Case No. 14,513] and in Re Ulrich [Id. 14,328]. There the injunction was issued after adjudication, on a special petition presented by the petitioning creditors, before an assignee was appointed. It was not an injunction issued under the limitation imposed by section 5024.

If it be suggested, that, because of the use, in the injunction, of the words "and until the further order of court," the injunction may properly be regarded as one issued not only under section 5024, but under the authority by virtue of which the injunction in Re Ulrich [supra] was issued, and that it was intended to have the injunction continue in force after the adjudication, the sufficient answer is, that the order for injunction and the injunction show, on their faces, that the injunction was issued wholly under section 5024.

But, it is urged, that, independently of the injunction, the proceedings by Dingee were a contempt of this court, because the petition in bankruptcy was filed on the 5th of February, 1876, and the decree of the state court was not made until the 12th of February, 1876, and the adjudication of bankruptcy was made on the 19th of February, 1876, and the sale of the property and the entry of the judgment for deficiency were made thereafter; that, from the 5th of February, 1876, all the property of the debtors was in the hands of this court; and that the issuing of the order to show cause on that day was a sequestration of such property, conditional until the adjudication, and, after that, absolute. The principle is invoked, that this court has the power to punish for contempt those who interfere with the admitted property of a bankrupt, by selling it after adjudication, such property being thereafter in the custody of this court. This principle is the one recognized and applied by this court and by the circuit court for this district, in the case of In re Vogel [Case No. 16,982]. But this principle has its limitations. In Eyster v. Gaff, 91 U. S. 521, a suit to foreclose a mortgage was begun in 1868. On the 9th of May, 1870, a voluntary petition in bankruptcy was filed by the mortgagor, he was adjudged a bankrupt on the 11th of May, 1870, and an assignee was appointed on the 4th of June, 1870. A decree of foreclosure was rendered on the 1st of July, 1870, by virtue of which a sale took place, under which the plaintiffs in the suit claimed title. They brought ejectment against a tenant who held under the bankrupt, and the defence was, that all of the foreclosure proceedings which took place after the adjudication of bankruptcy and the appointment of the assignee were invalid. The plaintiffs recovered, and the defendant took the case, by writ of error, to the supreme court of the United States, the decision of which court in it is reported as above. That court held, that, as the foreclosure suit was commenced against the bankrupt when the title or equity of redemption to the mortgaged property was in the bankrupt, the assignee in bankruptcy took his interest in the property pending suit, and was bound by the proceedings, and his rights were foreclosed by the decree and the sale; that, jurisdiction of the suit having attached, such jurisdiction was not ousted by the transfer of the bankrupt's interest in the property; that, although the assignee was not made a party to the suit, he was bound by the proceedings which took place in it after his appointment; and that the adjudication of bankruptcy did not divest the court in which the foreclosure suit was pending, of jurisdiction over it. If an

adjudication of bankruptcy does not divest a state court of jurisdiction over a pending suit for the foreclosure of a mortgage on property of the bankrupt, a fortiori, the mere filing of a petition in involuntary bankruptcy against the mortgagor does not divest such jurisdiction. In the present case, the decree of foreclosure was made before the adjudication of bankruptcy was made. The adjudication of bankruptcy did not divest the state court of its jurisdiction, or deprive the plaintiff in the foreclosure suit of his right to execute the decree of foreclosure by a sale of the property. The sale was made before the assignment to the assignee was made. There was no contempt of the authority of this court in executing the decree of sale, so far as to sell the property, and give a deed for it, in the absence of an injunction from this court. Nor was there any contempt committed in entering the judgment for deficiency, and there was no injunction against entering such judgment. But I do not intend now to decide that the judgment can be recognized by this court in these proceedings as a subsisting judgment, as against the assignee, or the estate in his hands, or the creditors thereof, or the bankrupt, Mary Irving, against whom it was entered. I only intend to decide, on the question of contempt, that the entering of such judgment was not a violation of any injunction, or an interference with any of the property of such bankrupt, Mary Irving. The proceedings for contempt are dismissed, with costs to be paid by the assignee out of the funds of the estate of the bankrupt, Mary Irving, in his hands.

[A proof of debt based upon the indorsement of one partner in the firm name was expunged in Case No. 7,074.]

## Case No. 7,074.

In re IRVING et al.

[17 N. B. R. 22.] [1]

District Court, S. D. New York. Sept. 4, 1877.

BANKRUPTCY—PROOF OF DEBT — ACCOMMODATION NOTE—ENDORSEMENT BY ONE MEMBER OF PARTNERSHIP.

Where one member of a firm indorses an accommodation note in the firm name, for the benefit of a third party, without the knowledge or consent of his co-partner, such note cannot be proved against the firm assets.

[See Cutter v. Dingee, Case No. 3,518.]

[In bankruptcy. In the matter of Mary Irving and Benjamin H. Irving.]

E. T. Fellows, for assignee.

W. F. Scott, for creditor.

[1] [Reprinted by permission.]

BLATCHFORD, District Judge. The notes in question being made by Wise and indorsed by Irving & Son, and taken by Wise to E. F. Mead to be discounted, and the money for them being given by Mead to Wise, the transaction showed on its face that the indorsements were only accommodation indorsements. E. F. Mead, and L. Mead through him, were, therefore, chargeable with notice that Irving & Son were only sureties for Wise, and that the notes had not passed through the hands of Irving & Son in the ordinary course of their copartnership business; and, if Mary Irving did not consent to the making of the indorsements, she is not liable on the notes. Is there anything to repel the presumption which arises from the face of the transaction? It is for the creditor to show affirmatively sufficient to rebut the presumption. It is entirely clear that Mary Irving knew nothing of the indorsements, and did not consent to the making of them. It is not shown satisfactorily that the indorsements were in any way for the benefit of Irving & Son, as a firm, or that any of the money paid for the notes was applied to the purposes of the firm or went into the hands of the firm. In view of the conflicting evidence of E. F. Mead and Charles Irving it cannot be regarded as established, that E. F. Mead, or L. Mead through him, had any information before taking the notes and paying the money for them, that the notes or the indorsements were for the benefit, to any extent, of the firm of Irving & Son. There is no doubt that E. F. Mead and L. Mead required the indorsement of Irving & Son before they would take the notes. But that is not sufficient. I cannot concur with the register in his finding that these notes were regularly indorsed by Irving & Son in accordance with the business transactions between them and Wise. On the contrary, it distinctly appears that this was the first occasion on which Benjamin H. Irving had indorsed with the firm name any note made by Wise. The proof of debt by L. Mead against the firm must be expunged.

[Certain proceedings for contempt brought by the assignee against a mortgagee of the bankrupts were dismissed in Case No. 7,073.]

IRVING, The WASHINGTON. See Case Nos. 17,243–17,245.

## Case No. 7,075.

IRVING v. FRAZIER.

[Cited in Picquet v. Swan, Case No. 11,134, and Story's Pl. 9. This is a state case, decided in the supreme judicial court of Massachusetts. Nowhere reported.]

## Case No. 7,076.

### IRVING v. HUGHES.

[2 N. B. R. 61 (Quarto, 20);[1] 7 Am. Law Reg. (N. S.) 209; 6 Phila. 451; 24 Leg. Int. 380; 15 Pittsb. Leg. J. 121.]

Circuit Court, E. D. Pennsylvania. Nov. 12, 1867.

INVOLUNTARY BANKRUPTCY — FRAUDULENT PREFERENCE—REMEDY.

1. In a case of involuntary bankruptcy in which the debtor, being insolvent, or having insolvency in contemplation, and intending to give a preference, or to defeat or delay the operation of the bankrupt law [of 1867 (14 Stat. 517)] has, within six months before the commencement of the proceedings in bankruptcy, given to a creditor who had reasonable cause to believe that a fraud on this law was intended, or that the debtor was insolvent, a warrant of attorney under which judgment has been confessed in a state court, and an execution has been levied upon his stock in trade, which has not as yet been sold under it, the present bankrupt law gives to the court of the United States, for the proper judicial district, jurisdiction to prohibit such creditor, by injunction, from proceeding further under such execution.

[Cited in Markson v. Heaney, Case No. 9,098; Re Brinkman, Id. 1,884; Re Mallory, Id. 8,991; Thames v. Miller, Id. 13,860; Re California Pac. R. Co., Id. 2,315; Re Marter, Id. 9,143; Hudson v. Schwab, Id. 6,835.]

2. The district court, instead of issuing such an injunction under the summary jurisdiction in bankruptcy, may refuse to consider the subject unless under a distinct auxiliary proceeding in equity against such a creditor. The bill at the suit of the petitioning or any intervening creditor, may then be prosecuted in the circuit court on behalf of the general body of creditors, until the assignment in bankruptcy, after which the assignee may be substituted or added as a complainant: and if the proceedings in bankruptcy are duly prosecuted, a preliminary injunction issued by the circuit court may, in a proper case, be continued after answer, under such conditions as will preserve the priority of the creditor thus restrained, if the lien of his execution should ultimately be established.

The first section of the act of congress of 2d of March, 1867, establishing a uniform system of bankruptcy, provides that the jurisdiction conferred upon the several district courts of the United States shall extend to the collection of all the assets of the bankrupt; to the ascertainment and liquidation of the liens and other specific claims thereon, to the adjustment of the various priorities and conflicting interests of all parties, &c. The second section enacts that the several circuit courts of the United States for the respective districts shall have a general superintendence and jurisdiction of all cases and questions arising under the act; and, except when special provision is otherwise made, may, upon bill, petition, or other process, of any party aggrieved, hear and determine the case in a court of equity; and shall also have concurrent jurisdiction with the district courts of the same district of all suits at law or in equity brought by the assignee in bankruptcy against any person claiming an adverse interest, or by such person against the assignee, touching any property or rights of property of the bankrupt transferable to or vested in the assignee. The eighth section enacts that appeals may be taken from the district to the circuit court in all cases in equity. As to involuntary bankruptcy, the thirty-ninth section enacts that any person residing and owing debts, as provided in other parts of the act, who, after the passage of it, shall commit any one of certain acts therein mentioned, shall be deemed to have committed an act of bankruptcy, and, upon petition of a creditor or creditors, in the mode and under the conditions prescribed, may be adjudged a bankrupt, provided the petition is brought within six months after the act of bankruptcy is committed. Among the acts of bankruptcy here specified, are making any assignment, &c., or transfer of the party's estate, property, rights or credits, with intent to delay, defraud or hinder his creditors, and making, when bankrupt or insolvent, or in contemplation of bankruptcy or insolvency, any payment, gift, grant, sale, conveyance or transfer of money or other property, estate rights or credits, or giving any warrant to confess judgment, or procuring or suffering his property to be taken on legal process, with intent to give a preference, or with the intent, by such disposition of his property, to defeat or delay the operation of the act. It is enacted that if such person shall be adjudged a bankrupt, the assignee may recover back the money or other property so paid, conveyed, sold, assigned or transferred, provided the person receiving such payment or conveyance, had reasonable cause to believe that a fraud on the act was intended, or that the debtor was insolvent. The fortieth section enacts that upon the filing of the petition authorized by the next preceding section, the court, if sufficient grounds for it appear to exist, shall, in a prescribed mode, require the debtor to show cause at a time specified "why the prayer of the petition should not be granted, and may also, by its injunction, restrain the debtor and any other person, in the meantime, from making any transfer or disposition of any part of the debtor's property not excepted by this act from the operation thereof, and from interference therewith." The forty-first section enacts that if it appears that the facts set forth in the petition are not true, or that the debtor had paid and satisfied all liens upon his property, in case the existence of such liens were the sole ground of the proceeding, the proceedings shall be dismissed. In several cases of involuntary bankruptcy in this district, the alleged act of bankruptcy has been that under a warrant of attorney, given within six months by the alleged bankrupt, judgment against him had been entered at the suit of a favored creditor in the state court, and an execution levied upon the stock in trade of the defend-

[1] [Reprinted from 2 N. B. R. 61 (Quarto, 20), by permission.]

ant, who (it is alleged) gave the warrant, or procured the levy to be made, when he, with such plaintiff's knowledge, was insolvent, or contemplated insolvency, and that the intent was to give a preference, or to defeat or delay the operation of the bankrupt law; this alternative intent being usually, in the proper language of pleading, alleged conjunctively as a two-fold intent.

In these cases, unless the property levied on has been already sold under the execution, the petitioning creditor, upon obtaining the preliminary order on the debtor to show cause against the adjudication of bankruptcy, has usually asked of the district court an injunction prohibiting the judgment creditor from proceeding further under his execution in the state court. The district court has uniformly refused to grant such a preliminary injunction without a previous citation of the execution creditor; and, upon the return of such citation, has given to him the option of requiring the petitioning creditor to proceed by bill in the circuit court under the auxiliary jurisdiction conferred as above by the bankrupt law. When the urgency has been too great to abide the return of a citation, the district court has required the petitioning creditor to proceed, at all events, in the first instance, by bill in the circuit court. Preliminary injunctions have been granted upon such bills, with saving to the party enjoined of his lien if its priority should afterwards be established either under the proceedings in bankruptcy, or in the suit in equity. The court has remarked that after the appointment of an assignee in bankruptcy, the proceedings in equity could not be continued, except under a supplemental bill at his suit. The execution creditor thus enjoined has, in some cases, moved to dissolve the injunction. In one of these cases an objection to the jurisdiction of the circuit court was that the second section of the act of congress confers jurisdiction upon this court, with an exception of cases for which special provision is otherwise made, and that the case was within the exception because the fortieth section gave a summary jurisdiction to the district court in bankruptcy to restrain, by injunction, the debtor, and any other person, from making any transfer or disposition of the debtor's property and from any interference with it. The answers to this objection were that the summary jurisdiction specially conferred by the fortieth section was not co-extensive with the exigency of the case in which an injunction may be necessary; that this summary jurisdiction was, perhaps, limited to cases of restraint of the alleged bankrupt's own agents or other persons in immediate privity or association with him, and that it was, at all events, in terms expressly limited to the interval between the issuing and the return of the order to show cause. It was suggested that formerly, under the bankrupt law of 1841 [5 Stat. 440], a question had arisen whether the prohibition of the act of 2d of March, 1793, section five [1 Stat. 334], to grant an injunction without previous notice, applied to a proceeding in equity in aid of the jurisdiction in bankruptcy, and the enactment now in question resolves this doubt by allowing the injunction, without previous notice, for this interval of time between the issuing and the return of the order to show cause. The court overruled the objection. In the cases which have been mentioned thus far, the circuit court was held by the district judge sitting alone. The question of jurisdiction was very little contested, the principal discussions being upon the legal and equitable merits of the respective cases.

In the meantime, the district court sitting in bankruptcy had several times refused to interfere, in cases of voluntary bankruptcy, with questions upon the enforcement of prior liens in the state courts by ordinary executions; and some cases in bankruptcy had been decided in the western district of Pennsylvania in which the language used was understood by some persons to imply a doubt of the judicial power of the courts of the United States to enjoin the plaintiff in any judgment in a state court from proceeding under an execution, though the execution itself was a direct violation of the rights of the general creditors under the thirty-ninth section of the present bankrupt law. In these cases, however, the bankruptcy was not involuntary; and there was only one case in which any question as to the right of priority of an execution creditor could be supposed to have in anywise arisen. In the present case in the circuit court, the bill was auxiliary to the jurisdiction in bankruptcy under proceedings against an involuntary bankrupt. The defendant in equity, who was plaintiff in an execution upon a judgment confessed in a court of the state, had been prohibited by a preliminary injunction from proceeding under it. Upon filing his answer, he had moved to dissolve the injunction. The cause came on for argument, first, upon the question of jurisdiction, and second, upon merits. The district judge, holding the circuit court, adjourned the argument of the question of jurisdiction until the circuit judge should be present.

This question was accordingly argued before the two judges (GRIER, Circuit Justice, and CADWALADER, District Judge).

For the defendant the decisions in the Western district were cited, and it was contended on his part, by Mr. Longstreth and Mr. Townsend, that the foundation of an argument for the jurisdiction upon the fortieth section of the bankrupt law was defective, because that section applied only to the period anterior to return of the order to show cause.

THE COURT overruled the objection to the jurisdiction, saying: The cases in bankruptcy in the Western district are inapplicable. The language used in them should be

understood according to their subject matter. The case principally relied on was one of voluntary bankruptcy involving a question which the court of the state was considered by the judge fully competent to decide. Here, on the contrary, the question is not fully cognizable under the jurisprudence or legislation of the state. The courts of the state certainly cannot, in all cases, enforce the adversary rights of the general creditors under an involuntary bankruptcy. The jurisdiction of the courts of the United States does not here depend upon the provision of the fortieth section of the present bankrupt law. This provision does, indeed, impliedly recognize the jurisdiction. But the previous enactments of other sections confer it. The provision of the fortieth section applies only to the primary stage of the proceedings. In that stage it dispenses with conditions and formalities which must otherwise have been fulfilled and observed. As against what parties other than the alleged bankrupt it has thus dispensed with them need not be considered, because the present proceedings in this court, if in proper form, cannot be irregular. Under the former English jurisdiction in bankruptcy, the chancellor would refuse to proceed otherwise than upon a bill, where he thought proper thus to afford an opportunity to appeal from his decision. The present bankrupt law of the United States gives to this court, in addition to its revisory jurisdiction, an auxiliary jurisdiction which may sometimes be so exercised as to secure the benefit of an appeal from the district court without the delay and expense. These courts have no supervisory jurisdiction over proceedings of the state courts. In each of the cases [Diggs v. Wolcott] 4 Cranch [8 U. S.] 179, and [Peck v. Jenness] 7 How. [48 U. S.] 612, 625, the court of the state had full cognizance of the subject of controversy, and of all its proper incidents; and in the case in 7 How. [48 U. S.] the subject was not peculiarly cognizable under proceedings in bankruptcy. In such a case to enjoin the plaintiff in the state court would, in effect, have been to enjoin that court, which the act of the 2d of March, 1793, had prohibited. But, in the present case, if the act of 1793 would otherwise have been applicable, the present bankrupt law would exclude its application so far as the present question is concerned. The state court cannot be enjoined; but the litigant in it may be restrained from doing what would frustrate or directly impede the jurisdiction expressly conferred by the bankrupt act.

The jurisdiction having thus been established, the argument of the motion to dissolve the injunction was heard in the circuit court, on bill and answer, by the district judge sitting alone. He refused to dissolve the injunction, but modified it in a manner which does not concern the question of jurisdiction [so as to save the lien of the defendant when the goods should be sold and the money realized].[2] The injunction, thus modified, continues in force. He said, as to the jurisdiction, that although he had exercised it very cautiously, and would continue to do so, he had never doubted its existence, and that he had asked the attendance of the circuit judge merely in order that any doubts of others might be quieted.

## Case No. 7,077.

IRVING v. SUTTON.

[1 Cranch, C. C. 567.] [1]

Circuit Court, District of Columbia. July Term, 1809.

BILL OF EXCHANGE—LIMITATIONS.

If the holder of an accepted bill of exchange be beyond seas at the time his cause of action accrues, and so continues till suit brought, the statute of limitations is no bar, although the indorser always was a resident of the United States.

Debt on the acceptance of a bill of exchange, at three months, for £245 10s. 6d. sterling, by indorsee against the acceptor. The defendant pleaded the statute of limitations of five years. Replication, that the plaintiff when his cause of action accrued, resided, and has continued to reside beyond seas. Rejoinder, that at the time of the indorsement, and for five years next before, the indorsers were and continued to be residents of the United States. General demurrer and joinder.

N. Herbert, for defendant, contended that as this is an American bill, the assignment to a foreigner cannot take the case out of the statute of limitations.

THE COURT said the rejoinder was bad, and rendered judgment for the plaintiff on the demurrer.

## Case No. 7,078.

IRVING v. SUTTON.

[1 Cranch, C. C. 575.] [1]

Circuit Court, District of Columbia. Nov. Term, 1809.

DEPOSITIONS—NOTICE.

Notice of a motion for a dedimus to take depositions in a foreign country may be given to the attorney at law.

N. Herbert, for defendant, moved for a commission to take depositions of witnesses residing in England. Notice of the motion had been served on E. J. Lee, the attorney at law of the plaintiff, who resided in England.

E. J. Lee objected, that the notice under the act of Virginia, 29th of November, 1792, § 13, p. 279, ought to be given to the party himself or his attorney in fact, or agent. Buddicum v. Kirk, 3 Cranch [7 U. S.] 297.

[2] [From 7 Am. Law Reg. (N. S.) 209.]

[1] [Reported by Hon. William Cranch, Chief Judge.]

THE COURT was of opinion that notice of the motion may be given to the attorney at law. The opinion of Marshall, C. J., in Buddicum v. Kirk [3 Cranch (7 U. S.) 297] is extrajudicial—a mere dictum—and relates to the notice of the time and place of taking the deposition, not to notice of the motion for a commission.

## Case No. 7,079.

IRWIN v. BAILEY.

[8 Biss. 523; 8 Reporter, 421; 11 Chi. Leg. News, 376.][1]

Circuit Court, N. D. Illinois. May 6, 1879.

RAILROAD MORTGAGES—INDORSEMENT—SUBSEQUENT INDORSEE.

1. The president of a railroad company has the right to indorse and assign notes and mortgages given to it to aid in its construction, and the indorsee before maturity takes the notes free from any equities between the maker and the company.

2. Where the note and mortgage were first attached to a bond of the company and transferred as collateral to it, a subsequent indorsement by the president is valid to pass the legal title to the equitable owner.

3. A subsequent indorsee may sue in his own name, though he has no actual interest in the note, if it was indorsed to him for that purpose.

[This was an action by Richard Irwin against Monroe Bailey on a promissory note.]

Sleeper & Whiton, for plaintiff.

Lawrence, Campbell & Lawrence, for defendant.

DRUMMOND, Circuit Judge. The defendant executed a promissory note on the 7th of March, 1856, payable to the Racine & Mississippi Railroad, or order, for $4,000, in five years from May 10, 1856, with ten per cent. interest, payable annually. This note was secured by a mortgage, and was given to the railroad company, to enable it to raise money for the construction of the road. It was agreed on the part of those who represented the railroad company, that a certain indemnity should be given to the defendant by which he should be relieved from apparent liability existing upon the note and mortgage; and certain representations were made by them at the time, or before the note was executed, which constituted the inducement for the plaintiff to execute the note and mortgage; and it may be assumed that upon the faith of these representations the papers were executed and delivered to the railroad company. The railroad company took the note and mortgage and attached them together, with a bond on its own part, and an assignment, as it was claimed, of the note and mortgage contained in the bond, being in a form, as it was supposed, to enable the company to raise money upon it; and accordingly, as the evidence shows, in 1857 money was obtained. The weight of the evidence, I think, is, that the money was raised upon the note and mortgage and the bond, and that they were transferred to the City of Glasgow Bank for value received. The bank thus became the holder of the note and mortgage. This was before the note became due, and of course, unless it had notice of any equities which might exist between the maker of the note and the railroad company, it would not be bound by them. There is no evidence whatever that the City of Glasgow Bank had such notice, and consequently, it cannot be bound or affected in any way by those representations. Then, after the bank became the equitable owner of this note, mortgage and bond of the railroad company, it was transmitted to the plaintiff, and he was instructed to represent the bank. At this time the note was not indorsed; that is to say, it had no memorandum written upon it, which, so far as the indorsement of the railroad company was concerned, would constitute a legal transfer of the property, unless that transfer was made by virtue of the assignment of the railroad company, attached with the note to the mortgage.

It is not necessary to decide what was the effect of the assignment contained in the bond, because when the plaintiff received the note it was transmitted with the bond and mortgage to Messrs. Strong & Fuller, of Racine, in 1858 or 1859, before the note was due. The note not containing the formal indorsement of the railroad company, Mr. Fuller took it to the president, and he indorsed the note in blank, as president of the railroad company. Now, the question is, whether he had the right to make this indorsement transferring the legal ownership of the property to any third person, or to make the note transferable by delivery.

It seems to me, under the evidence, that he had that right. He was the financial agent, or one of them, of the company to make negotiations of the assets of the company, to raise money upon them, and accordingly, under this authority, this particular note, bond and mortgage were transferred to the City of Glasgow Bank, and full consideration received. There is no evidence indicating that the power which was thus given to Durand, as president of the company, was revoked, and in view of the fact that the bank had become the equitable owner of the note, bond and mortgage, whatever view we may take of the effect of the assignment of the bond, undoubtedly Mr. Durand had the right to carry out, in good faith, the contract that had been made with the bank, and to indorse the note. This conferred upon the bank the ownership of the note, making it thus the legal indorsee of the note, as it previously had been the equitable owner.

[1] [Reported by Josiah H. Bissell, Esq., and here reprinted by permission. 8 Reporter, 421, contains only a partial report.]

It is to be observed that at this time the plaintiff was the agent of the bank. The legal effect of the indorsement was, that it transferred the note to the bank, and thus, if the plaintiff had any interest in it, he was simply the indorsee, holder, or bearer, as the agent of the bank. This was before the note had matured, and I can have no doubt, under the evidence in this case, that the plaintiff was clothed with all the equities of the City of Glasgow Bank, and that he can sustain his right to sue and to recover upon the equities and legal rights of the bank. The plaintiff, under what I consider the well-settled principles of law, had the right as the agent of the bank, after the maturity of the note, to bring a suit upon it, and the fact that he has no interest whatever in the note, and paid nothing for it, cannot deprive him of the right, provided it was transmitted to him for that purpose, and the suit was brought as the agent and by the consent of the bank. These being the principles of law, it is immaterial what statements may have been made by the agents of the railroad company at the time this note was executed. It was a negotiable note, transferred to the railroad company, and payable to its order. The defendant trusted to the representations of the railroad company. If they were untrue, or a fraud was practiced upon him, it was he who trusted the company. He transferred the note and mortgage, and the rule is well settled, that when one of two innocent persons must suffer, he must suffer who has enabled a third person to negotiate a security and to obtain money upon it. So as between the bank and the defendant, the latter must suffer, and not the bank which has paid value for this note, and without any knowledge of any circumstances calculated to throw doubt upon it.

The evidence has been allowed to go in with very great latitude; scarcely any restriction has been placed upon it by the court, the case having been tried without the intervention of a jury. Counsel were informed that whatever evidence there was that might have any bearing on the issue, would be admitted, subject to the legal rights of the parties. Consequently all the evidence relating to what is alleged to have been a fraud practiced by the agents of the railroad company upon the defendant, has been admitted, subject, of course, to be controlled and limited by the legal discretion of the court when the testimony was all before it. And the testimony being thus before the court, and as the facts in relation to the execution, transfer and delivery of the note to the City of Glasgow Bank, prove that value was paid for it, and that the bank had no knowledge whatever of any of the alleged frauds or misrepresentations, I think all of the evidence relating thereto is immaterial, and really inadmissible as against the bank, or as against the plaintiff as its agent. The release referred to in the pleadings was given long after this suit was instituted, and can have no legal effect as against the plaintiff. The plaintiff is therefore entitled to recover in this case, and the issue and judgment of the court will be accordingly.

## Case No. 7,080.

IRWIN v. BROWN.

[2 Cranch, C. C. 314.] [1]

Circuit Court, District of Columbia. May Term, 1822.

BILL OF EXCHANGE—FORM—DAYS OF GRACE.

1. If an inland bill of exchange be signed thus: "Witness my hand and seal. W. D. (L. S.)" these words may be rejected as surplusage, and the declaration may be in the usual form as upon the custom of merchants.

2. If the last day of grace upon a bill, be Sunday, the demand must be made on Saturday, and the notice may be given on Monday.

Assumpsit by [Thomas Irwin] the indorsee against [Jesse Brown] the indorser of W. Dulany's bill, on Mrs. Eliza Dulany, in favor of the defendant, in these words: "Alexandria, 14th August, 1820. $252.71. Four months after date, please to pay to the order of Jesse Brown, $252.71, and charge the same to your obedient servant, as per value received. Witness my hand and seal. W. Dulany. (L. S.) To Mrs. Eliza Dulany, Alexandria. Accepted, Eliza Dulany." The declaration was in the usual form, as upon a bill of exchange, drawn according to the usage of merchants, and says nothing of the seal.

Mr. Hewitt, for defendant, contended that this instrument was not such a bill of exchange as is set forth in the declaration, and that it was not a negotiable instrument.

THE COURT (THRUSTON, Circuit Judge, absent) said that this was a new question, but it appeared to them that the bill was substantially set forth in the declaration, and that it might be given in evidence, and that the words "witness my hand and seal," and the scrawl, made in the place of a seal, might be considered as surplusage.

Mr. Hewitt then objected that the demand on the 16th of December, was too soon, and the notice to the defendant on the 18th, by mail, was too late.

The bill fell due on Sunday, the 17th, which was the last day of grace. The demand, upon the acceptor, who resided in Alexandria, was made on Saturday, the 16th, and notice was given by mail of the 18th to the defendant, Brown, who resided in Washington.

THE COURT (THRUSTON, Circuit Judge, absent) said that the demand was not too soon, nor the notice too late.

Verdict for the plaintiff.

[1] [Reported by Hon. William Cranch, Chief Judge.]

## Case No. 7,081.

IRWIN et al. v. DANE et al.

[2 Biss. 442; 4 Fish. Pat. Cas. 359; 3 Chi. Leg. News, 180.] [1]

Circuit Court, N. D. Illinois. Feb. 27, 1871.

PRELIMINARY INJUNCTION—WHEN GRANTED.

1. The same rule obtains in patent cases as in other equitable cases; the granting of a preliminary injunction is a matter of judicial discretion, to be determined by the circumstances under which the case is presented.

[Cited in Brush Elec. Light & P. Co. v. Louisiana Elec. L. Co., 45 Fed. 896.]

2. It is proper to grant an injunction where much more injury would or might result to the complainants from refusal than to the defendants from granting it.

3. Where the defendants had very little invested and no substantial damages would accrue to them, if enjoined, while they might seriously injure the complainants' business by competition, an injunction should be granted.

4. Although a patent case is not like a suit upon a trade-mark, yet the standing of the complainants in the market and their relation to the trade are matters of value, and may pertain so intimately to their patent as to be proper for consideration on a motion for a preliminary injunction.

In equity.

Motion for a provisional injunction to restrain the defendants from infringing five letters patent for "improvements in lamps, lanterns and lamp-burners," granted John H. Irwin May 28, 1867 [No. 65,230]; January 7, 1868 [No. 73,012]; February 2, 1869 [No. 86,549]; May 4, 1869 [No. 89,770]; and February 1, 1870 [No. 99,443], and assigned to complainants. The claims of these several patents were as follows: Patent of May 28, 1867: 1. "In combination with the lamp or its burner, the tube D, or its equivalent, arranged and operating substantially as and for the purpose specified." 2. "In combination with said tube a cooler E, arranged so as to operate substantially as described." Patent of January 7, 1868: "In combination with a burner of a lamp and a globe or protector thereof, one or more tubes or passages D, or their equivalents, arranged so as to operate substantially as specified and described." Patent of February 2, 1869: 1. "The arrangement beneath the funnel plate E of the prolonged tube D, and one or more flanges 5, arranged substantially as and for the purposes set forth." 2. "In combination with the ring F, funnel plate E, and tube D, a spring S arranged to operate in the manner and for the purposes specified." Patent May 4, 1869: 1. "The combination of the concave plate I, ring G, or its equivalent, tubes H and F, and the base A, B, of the lantern substantially in the manner specified and shown." 2. "The combination of the globe G, concave plate I, tubes H and F and base A and B, of the lantern, arranged and operating substantially as and for the purposes shown and set forth." 3. "The combination of the plate I, tubes F, flange T, upon the top of the wick-tube, and the globe G arranged to operate as set forth." 4. "The combination of the perforated plate E, plate I, tubes H, F, and the base A, B, of the lantern, arranged to operate as described and for the purposes set forth." Patent of February 1, 1870: 1. "The air-chamber or space B, in combination with the air-tubes C, when said tubes are inserted in the top of said chamber, as and for the purpose specified." 2. "The thumb-piece I, in combination with the globe-holder F, when constructed and arranged substantially as and for the purposes described."

L. L. Coburn, S. A. Goodwin, and Grant Goodrich, for complainants.

West & Bond, for defendants.

BLODGETT, District Judge. This was a motion for a preliminary injunction made by the complainants against the defendants, to restrain the defendants from the use of certain patents which were granted originally to Irwin. By assignment, his co-complainants have acquired an interest in these patents which are the subject-matter of the complaint. The only doubt I have had in reference to the matter was as to whether it was a proper case for an injunction under the points made by the defendants' counsel, but I am satisfied that the same rule really obtains in patent cases as in other equitable cases. The granting of a preliminary injunction is a matter of judicial discretion, to be determined by the circumstances under which the case is presented, and inasmuch as in this case I think that much more injury would or might result to the complainants from a refusal of the injunction than to the defendants by granting it, I have concluded to grant it.

The aspect of the case is simply and briefly this: The complainants are the owners of patents, and are manufacturing under them; have entered upon the manufacture of the patented articles largely, and been engaged in it for over three years. The defendants had, just prior to the commencement of this suit, also entered upon the manufacture of the competing article; but, according to the proofs, have invested very little money in it, had acquired no reputation for their manufacture in that line, although in other branches of their business they are largely engaged.

I think they can better afford to await the issue of the controversy here, than even to take the chances of the result of a trial, and perhaps be called on to respond in damages. They are in such condition that they can remain still until the termination of the litigation, which should, however, be prosecuted with all possible dispatch.

They have very little invested, and no substantial damages, perhaps, would ac-

[1] [Reported by Josiah H. Bissell, Esq., reprinted in 4 Fish. Pat. Cas. 359; and here republished by permission.]

crue to them in case the determination of the suit should be against them; while if they were to go on with the business as competitors they might seriously injure the complainants' business, and in the end perhaps not be able to respond in damages, and there might be a class of damages for which the complainants could not be entirely compensated, because the complainants are manufacturers, and while this is not, as has been said, a trade-mark case, yet their standing in the market and their relations to the trade are matters of value to them, and pertain so intimately to their patent that the two interests cannot be separated.

As to the last patent on the burner, I should not grant an injunction upon that if it stood alone, but as it is so intimately blended with the complainants' other patents and manufactures, I am not disposed, for the purpose of this preliminary motion, to separate them. I shall grant the injunction as prayed. I make my statement thus briefly in the case, because I do not think on a preliminary hearing the court should commit itself so definitely in regard to the validity of the patent as to prejudice the hearing. It is better always to reserve all final conclusions and determination until all the testimony is in and the case is finally heard. I say this, as I do not wish counsel to understand that I foreclose them on any point by this decision, but the case, as presented to me, shows a prima facie case of infringement.

[For other cases involving these patents, see note to Irwin v. Dane, Case No. 7,082.]

## Case No. 7,082.

IRWIN et al. v. DANE et al.

[9 O. G. 642; Merw. Pat. Inv. 352.[1]]

Circuit Court, N. D. Illinois. 1876.

PATENTS—"IMPROVEMENT IN LAMPS."

Irwin was the first inventor of a device for securing a blast of fresh air to the burner of a lamp, by means of an inverted funnel or bell, and one or more tubes, by which the air heated by the flame of the lamp is caused to rise into the tube, and be thence conducted into a close reservoir below the flame, and from thence supplied freely to the flame, so as to sustain combustion; in other words, the combination of the bell, tube, air-chamber, and burner, as shown by his first patent, was original with him, and all who use a bell and tube or tubes, substantially as and for the purposes Irwin used them, infringe his first patent. So all who use a globe in combination with the bell and tube infringe the second patent; and all who use the bell, tube, globe, and perforated plate E at the bottom of the globe, infringe the third patent.

[Cited in Steam-Gauge & Lantern Co. v. Miller, 8 Fed. 315, 321, 11 Fed. 719, 21 Fed. 515.]

[This was a suit by John H. Irwin and others against James F. Dane and others to restrain infringement of five letters patent granted to the complainant Irwin for improvements in lamps and lanterns. A preliminary injunction was granted in Case No. 7,081.]

Mr. Coburn, for complainants.

West & Bond, for defendants.

Before DRUMMOND, Circuit Judge, and BLODGETT, District Judge.

OPINION OF THE COURT. The bill in this case charges the defendants with the infringement of five letters patent granted to John H. Irwin for improvements in lamps and lanterns. The first patent bears date May 28, 1867, and is numbered 65,230. The second bears date the 7th day of January, 1868, and is numbered 73,012. The third bears date May 4, 1869, and is numbered 89,770. The fourth bears date February 2, 1869, and is numbered 86,549; and the fifth bears date February 1, 1870, and is numbered 99,443. The title of the complainants to the patents in question is not disputed, and the proof shows that the patents have been duly assigned by Irwin to the complainants in the shares claimed in the bill by them respectively.

The defense set up is: 1. That the patents are void for want of novelty. 2. That the defendants do not infringe any of the valid portions, if there are any portions valid, of the several patents.

It was admitted on the hearing that the defendants had manufactured and offered for sale some lanterns constructed substantially as shown by the complainants' Exhibits Nos. 11 and 12. Upon the question of want of novelty, the defendants introduced certain English and French patents, as well as various devices and patents of this country. The first patent set up by the defendants is the French patent, granted June 2, 1826, to P. Tespaz, for smoke-consuming and vapor-condensing apparatus. The second is the French patent issued to Messrs. Orry Nery and De-Corneille, dated the 4th of May, 1827. The third is the French patent to Henry Pape, dated August 20, 1841. The fourth is the French patent to Messrs. Martin and Marini, dated the 27th of April, 1853. The fifth, the English patent to John Braithwaite, dated in 1847. The sixth, the English patent to Edwin Edward Cassell, dated in 1858. Seventh, the American patent, No. 63,480, dated April 2, 1867, to A. R. Crihfield.

The scope and purpose of Irwin's first device, as shown by his drawings and specifications, attached to patent No. 65,230, is for a novel mode of producing a blast or current of air at the burner of a lamp, for the purpose of supplying oxygen thereto, and dispensing with the ordinary chimney in common use for that purpose; and it consisted in so constructing a lamp that the heated air, rising above the flame of the lamp, should cause a current of air to descend into a close air-chamber below the flame, and thence ascend to feed the

[1] [Merw. Pat. Inv. 352, contains only a partial report.]

[Drawings of patent No. 65,230, published from the records of the United States patent office.]
(First patent.)

Fig. 1

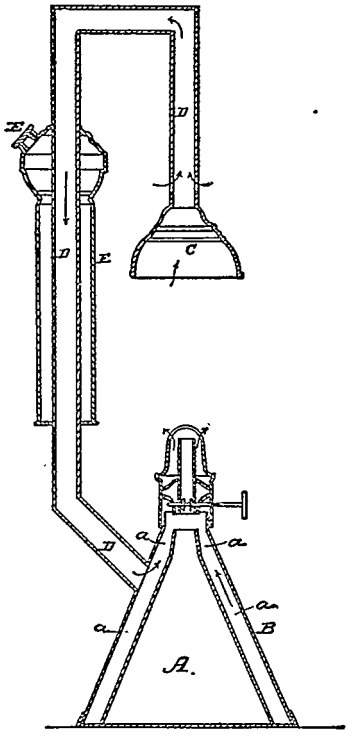



Fig. 2

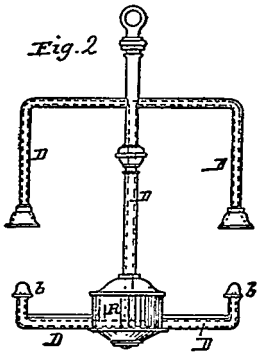
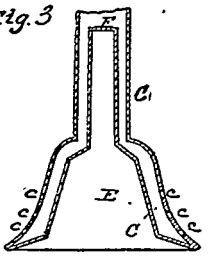



Fig. 3




flame. The proposed result was accomplished by suspending at a proper distance from the flame, to catch the heated air, an inverted bell or funnel, C, from which a curved tube, D, was carried downward to the base of the lamp, where it opened into a close reservoir, surrounding the oil-pot, and communicating directly and freely under the cone of the burner, so as to supply the lamp at the point of combustion with the requisite amount of air to keep up a clear and steady flame. In order to secure the successful operation of this device, it was necessary that the bell or funnel, the tube, and the reservoir, into which the tube entered, should be close, and have no apertures for the escape of the air therefrom, except at the exit into the burner; the object being to create such an arrangement of the parts as that the sole supply of air should be forced through the funnel and pipe into the reservoir, and thence to the burner, as the same was needed to secure combustion. The evidence in regard to the state of the art shows that up to the date of this patent all the practical or successful lamps intended for the burning of the coal or carbon oils, had been fitted with chimneys by which the draft of air necessary to secure combustion, was produced, although of course some attempts had been previously made to dispense with the chimney by the use of the fan-blast, or by inducing a current of air through the burner from below, but those attempts seem to have been barren of successful results. The only claim in the first patent, which is in controversy in this case, is the first claim, which is, "In combination with a lamp and its burner, the tube D or its equivalent, arranged and operating substantially as and for the purpose specified." This tube D is shown and described in the specifications and drawings with the bell or funnel forming a part thereof, and we think the fair construction of the whole patent requires that the bell should be considered as part of the tube. It is not the tube D unless it has an inverted funnel at its upper end. It seems to have been the idea of the patentee of this device to secure a perfect combustion of such oils as require an unusual supply of oxygen, without the use of a chimney, and he accomplished this by a blast driven from the bell and tube down to the burner in the manner which his patent describes. The illustrations and exhibitions of the results produced by this burner, made upon the trial, show that the operation of these tubes, when not disturbed by external currents of air, was perfect, or nearly so, to accomplish the desired result. The flame was brilliant, without smoke or odor.

By his second patent, No. 73,012, Irwin claimed to have made an improvement upon the first device, by adding such parts thereto as made a portable out-of-door lamp or lantern. He accomplished this result mainly by the addition of what he calls a protector,

which is nothing more than an ordinary glass globe which surrounds the flame of the lamp and extends upward nearly to the mouth of the bell or funnel, thereby directing the current of air into the funnel, and preventing it from being diverted therefrom by external currents of air or any other disturbing cause. When the rising column of heated air was once protected from the external currents and disturbances, in its passage upward from the vicinity of the flame into the bell, the subsequent operation of the lamp was precisely the same in the device shown by the second patent, as in the first—that is, the heated air was conducted around from the bell underneath the burner by one or more tubes, so as to supply air to the burner in the same manner as is described in the first patent. The claim in this patent is as follows: "I claim, in combination with the burner of a lamp and the globe, a protector thereof, one or more tubes or passages, D, or their equivalent, arranged to operate substantially as specified and described."

The third device, as shown in patent No. 89,770, is for various improvements which more nearly perfected the invention, and adapted it to use as a portable out-of-door lantern. The theory of Mr. Irwin seems to have been, and is, that the products of combustion, such as carbonic acid gas, steam, and other matters, rise with the current of air to the top of the protector, and are there thrown off from the outside of the rising column, and pass out over the top of the protector, and between it and the bell, while the air which passes into the bell is mostly pure atmospheric air, uncontaminated by, and unmixed to any considerable extent with, the products of combustion. In order to secure the exit of these products of combustion from the top of the lantern, a sufficient space is left between the protector and the bell, which is occupied by the perforated rim, g, and the top of the rim is so curved or deflected in, and upward, as to prevent currents of external air from passing down the globe and extinguishing the flame. The globe also rested upon a perforated plate or disk, E, which formed the bottom of the globe, and which also by its perforations, admitted the air freely, so that the same could become heated, and crowd, so to speak, into the bell, so as to create the blast required for furnishing the air to the burner. On the trial of this case several experiments were performed in the presence of the court, for the purpose of illustrating the operation of the various elements of this Irwin combination, which seemed to demonstrate: First, that it is essential to the operation of this lamp that a space should be left between the globe and bell sufficient to allow the escape of the products of combustion. If this space was wholly closed, so that the products of combustion were driven around into the air chamber and into the flame, the light was nearly extinguished, and the operation of the lamp defeated. Second, that provision must be made for admitting an ample supply of air into the globe at its base, so that it might rise in the globe, become heated, and be driven into the bell and tube. When this supply of air was cut off the flame died down, and the operation of the lamp was suspended. There was also shown in the patent a plate, t, fitting closely upon the top of the wick-tube, intended to prevent the air from coming so directly in contact with the

[Drawings of patent No. 89,770, published from the records of the United States patent office.]

(Third patent.)

Fig. 1.

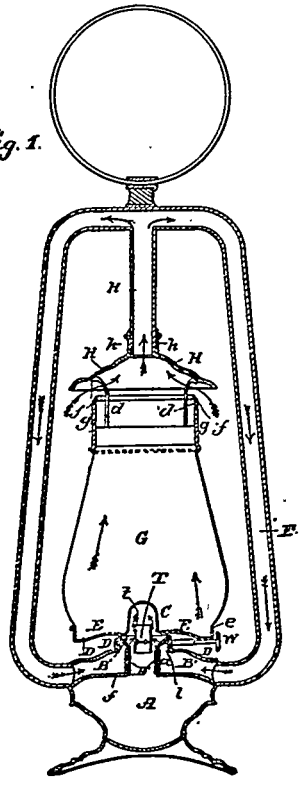


Fig 2.

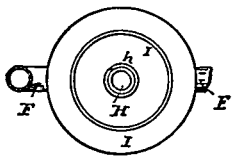
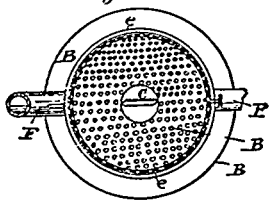


Fig. 3.



[Drawings of patent No. 86,549, published from the records of the United States patent office.]
(Fourth patent.)

Fig. 1.

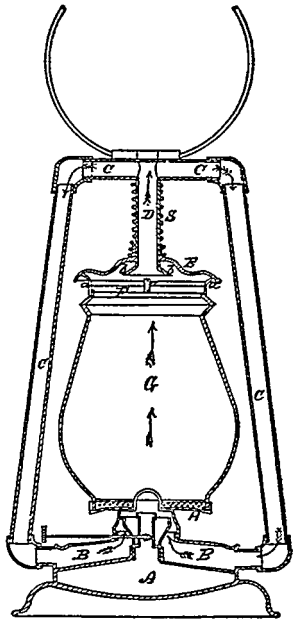


Fig. 2.

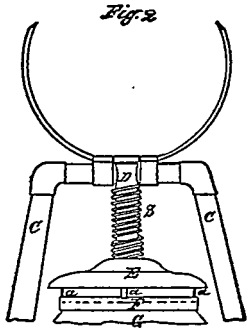
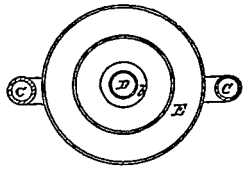


Fig. 3.



[Drawings of patent No. 99,443, published from the records of the United States patent office.]
(Fifth patent.)

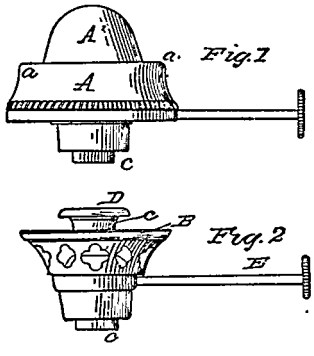
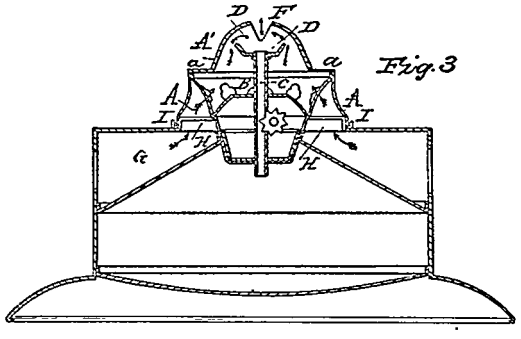


Fig. 3.



flame at its base, or at the mouth of the wick-tube, as to extinguish it by any sudden gust or increase in velocity.

The fourth and fifth patents have reference to minor devices, all intended to perfect and improve the Irwin lantern. By the fourth patent he provided for holding the globe in place, and, in fact, holding the whole lantern together by means of a sleeved tube, fitting on to the tube, D, and held in place by a spring, S. The fifth patent has reference to some improvements in the burner, and the construction of the cone and jacket in one piece.

It will be seen from this brief explanation of each of the five patents, that Irwin claims to have entered a new field of invention, to have devised by his first step a new method by which a sufficient blast of fresh air could be supplied to the burner of a kerosene-lamp, or lantern, without a chimney. For although he doesn't expressly say that his lamps are only for the purpose of burning kerosene, yet it is a matter of common experience and knowledge, that these carbon or earth oils are the only ones now in general use which require any special devices for supplying air, in order to secure their combustion, for illuminating purposes; and by the second step, he protects the flame thus produced from being extinguished by external blasts or air, by surrounding the same with a globe or protector. By the third step, he claims to construct a lantern which will withstand not only the ordinary currents of wind out of doors, but which may be swung or moved rapidly in a lateral or vertical direction without danger of extinguishing the light—an important element of which is the perforated plate or disk E at the bottom of the globe. In other words, he claims to supply a blast by means of the inverted bell and

the tube; and to secure the regularity of the blast by the protector or globe, and the perforated plate E at the bottom of the globe. He claims, broadly, the invention of the bell and tube or tubes for the purpose of producing the results aimed at; and the important question in this case is: Does the evidence shown entitle him to this broad claim? Of course funnels and tubes were old, and we find in the evidence in this case on the state of the art, that an air-chamber at the base of the flame, and through which the air was admitted to the burner was not new to this inventor. Cassel and Crihfield had both conducted the air into an air-chamber through tubes, and drawn the same by means of an induced blast through the burner—the globe acting as a chimney to induce the blast—but it is claimed for Irwin, in this case, that he was the first to conceive the idea, and reduce it to practice, of making an operative lamp, which should dispense with the chimney, and be supplied with fresh air by means of the bell and tube, as shown in his device, and for an operative combination of the globe and perforated bottom to the globe, by which a clear burning lantern was produced, in which carbon oils could be burned without the use of a chimney. All the French and English patents which are shown in this case, were ostensibly devices for burning smoke, or for the condensation of the products of combustion in such a manner, as to prevent their escape into the room, to the discomfort of persons, or the injury of goods or furniture, and none of these inventors, either Tespaz, Orry Nery and De Corneille, Edwin Pape, Martin and Marini, or Braithwaite, claimed that their devices were for supplying air to the flame for the purposes of combustion. On the contrary they all make specific provision for the supply of air from other sources, and nowhere in their devices, either by drawings or specifications, do either of them intimate that the device is intended to do what Irwin seeks to do—that is, to supply the air for the purpose of feeding combustion solely by the bell and tubes. All these various devices show, in some form, bells and tubes by which it was proposed to catch, or, as the witnesses say, "entrap," the products of condensation, as they arise from the flame of the lamp, and carry them either to the flame, where it was claimed they would be burned, or into some bulb or other reservoir, where they would be condensed; and although upon trial of this case we had various exhibitions and experiments, tending to show that by very slight alterations these old smoke-consumers could be made to perform substantially the function of Irwin's device, yet it is most palpably evident that none of the inventors even intended they should perform such functions. They never intended that their bells and pipes should be the sole source for the supply of air to support combustion—which is the leading idea in the Irwin device; but on the contrary, their one leading and only thought seems to have been to carry the products of combustion around to the flame, and deliver them there for reburning, while the flame was supported by air from other sources; and the various devices are contrived apparently with much ingenuity and purpose to that end. There is no such provision for allowing the products of combustion to escape as is shown in the Irwin device. On the contrary, the whole effort seems to have been to drive the products of combustion into the tube, and carry them around to the flame, or to the point of condensation; and the experiments shown upon the trial of the case demonstrated that if the products of combustion are thrown or driven into the tube and brought down to the base of the flame, and no other air is supplied to the flame than what comes with the products of combustion, a flame cannot be supported.

We do not deem it necessary to dwell longer on these devices. They were evidently, as we have already intimated, intended for another purpose. It was not in the mind of any of those who conceived these French or English patents to do what Irwin was seeking to do; but they were seeking another and different end. How successfully they might have attained that end it is not our province here to inquire or determine. Of course, if we could find that these old French and English patents contained the principle of the Irwin patent, they would defeat the broad claim of his patent for the use of the bell and tubes; although the inventors of those old devices may not have understood the principle on which they operated. But it is objected that in the second step in which Irwin has placed the protector or globe around his flame, he is not entitled to a patent, because globes were old, and protectors to the flames of lamps, and especially of lanterns, are as old as lanterns themselves; and this position is undoubtedly sound, unless it appears that the globe in Irwin's lantern performs a different function from that heretofore performed by globes in lamps or lanterns. So far as we have been able to ascertain, the only function performed by globes prior to this device of Irwin's was to act as a shade for the purpose of softening the light, or perhaps in some cases as a protector for the purpose of preventing it from being blown out by drafts of air. Although in all the drawings which were shown in evidence in this case, where globes appear, and also in the drawings of lamps, under the title of lamps, in Appleton's Dictionary of Mechanics, the globe is shown with the chimney inside; the chimney acting substantially as a protector, and not requiring the globe for that purpose. We think, however, that the globe in Irwin's combination, in his second patent, and in all the subsequent patents where the globe is shown, performs a function in addition to that of merely protecting the flame from external currents of air.

It directs the rising current of air into the funnel, and, by keeping the rising column of air surrounded and isolated from the external air, assists in heating it, and thereby causes it to rise more rapidly and freely into the bell, and by its pressure in the tubes produces a stronger and more steady blast. This is a new function performed by this globe, and as such, it seems to us, entitles Irwin to a patent upon the globe, in combination with the bell and tubes, as shown in his second patent; because it not only secures a better operation of the bell and tubes, but it makes the bell and tube operative under circumstances where they would not be operative without the globe. The globe operates not only to do what other globes had done before, but it does more. It creates a current, or assists materially in creating a current, by which the flame is fed, and not in the manner in which a chimney does that, for, if it did, and if the function of this globe was the same as that of the ordinary lamp-chimney, then no patent could be claimed for it; but it does its work differently, and does different work from that which is accomplished by the lamp-chimney. The chimney carries away, almost entirely, the products of combustion—the burned air—which has passed through the burner; but the globe in Irwin's combination carries a supply of fresh air, for the purposes of carrying the same into the bell, and thence down by the tubes into the air-chamber and burner. The same line of remark will apply to the perforated plate E, forming the bottom of the globe. Galleries and other devices for holding the bottom of the globes, and holding the globe in its place, were old; but this perforated plate, while allowing the entrance of an ample supply of air into the globe, at the same time breaks up the currents by the perforations, so as to prevent the rush of an air-current which would extinguish or endanger the flame; and as an element for securing the perfect and complete operation of the Irwin device as a practical operative lantern, we think the plate E may be considered as a patentable device when used in the combination and for the purposes shown. The rim, g, and the spring by which, under the third and fourth patents, the lantern is held together, and the globe secured in place, are obviously mere adaptations by which the leading idea is utilized, and are, as far as we can see in the evidence in this case, valid patents for the purposes to which applied, but do not necessarily cut off other parties from holding their lamps together by different methods; and the device of the defendants for the same purpose does not seem to us to be covered by the patent. So, too, the plate, t, upon the end of the wick-tube, undoubtedly performs an important function in securing a practical out-door lantern, which is not readily extinguished by currents of air, or by the swinging or vertical motion, as it guards the base of the flame from those sudden drafts and blasts of air to which the wind or the motions which we have suggested would otherwise subject it. But it seems to us, from the evidence in the case, that the plate, t, is not new to the art. It seems to have been used in various burners prior to the Irwin invention; and we do not find that it performs any new function in this combination. Unlike the globe or the perforated plate at the base of the globe in this combination, this plate, t, does for Irwin's light just what it did for Adams and Bary, Johnson and Ambrose, and various other inventors who preceded Irwin in this field of invention. So, too, it seems to us, that the cone and jacket A, formed of one piece, with the shoulder, as described in the fifth patent, are old devices applied to Irwin's combination, with no new functions performed by them. True, we do not see in any of the burners which have been exhibited to us the idea of the shoulder, a, and the perforated frame B, for the purpose of supporting the burner and gaging the wick-tube; but the idea of forming the jacket and cone of one piece and causing it to engage with the rim H, so as to form a tight air chamber, was accomplished by Gerstine long before Irwin's fifth patent was applied for; and we do not find in the device used by the defendants in their burner, the frame B described in the Irwin burner, as shown in the patents now under consideration. The defendants' burner shows that the corners of the plate, t, are turned downward so as to form a rest for the cone, and perhaps to guide the adjustment of the wick-tube; but we do not think the evidence shows that Irwin, with reference to this device of merely guiding the adjustment of the wick-tube, stands in any position to invoke the doctrine of equivalents, and although the defendants' device may accomplish the same result, yet as it is accomplished by a substantially different mechanism, there is therefore no infringement.

It was objected that the second patent is void, because it does not give any specific directions for the space to be left between the top of the globe and the bell; but we think that when the drawings and specifications are taken together, they show the relation which the inventor intended the globe should bear to the bell with sufficient clearness to enable any skillful workman to construct an operative lamp, embodying Irwin's principle.

We then come to the conclusion that Irwin was the first inventor of a device for securing a blast of fresh air to the burner of a lamp, by means of an inverted funnel or bell and one or more tubes, by which the air heated by the flame of the lamp is caused to rise into the tube, and be thence conducted into a close reservoir below the flame, and from thence supplied freely to the flame, so as to sustain combustion; in other words, the combination of the bell, tube, air chamber, and

burner, as shown by his first patent, was original with him, and all who use the bell, and tube, or tubes, substantially as and for the purposes Irwin used them, infringe his first patent. So all who use a globe in combination with the bell and tube, infringe the second patent. And all who use the bell, tube, globe, and perforated plate E at the bottom of the globe, infringe the third patent. The plate, t, at the top of the wick-tube, shown in the fourth patent, seems to us to be an old device which performs no new function in Irwin's combination. The method of holding the parts of the lantern together by means of the sleeve and spring, shown in the fourth patent, we do not find in the defendants' lantern, nor do we find in the defendants' lantern the frame B used for the purpose of gaging the wick tube, the defendants' device for that purpose being the prolongation of the corners of the plate, t, from the top of the wick-tube. The combination of the cone and jacket shown in the fifth patent is identical with the Gerstine cone and jacket, which is older than Irwin's cone and jacket. The defendants' lamps—complainants' Exhibits Nos. 11 and 12—contain the Irwin bell and tube, made operative by a close air-chamber communicating with the burner in the same manner as Irwin's bell, tube, and chamber and burner operate. They contain the globe or protector, and the perforated disk or plate at the bottom of the globe, and these parts perform exactly the same office, and no other, that they perform in Irwin's lantern. The defendants then infringe by using in their lantern all the parts covered by Irwin's first three patents, which make his lantern operative, viz.: The bell, tube, globe, and plate E.

[For other cases involving these patents, see Irwin v. Dane, Case No. 7,081; Irwin v. McRoberts, Id. 7,085; Steam-Gauge & Lantern Co. v. Miller, 8 Fed. 314, 11 Fed. 718, 21 Fed. 514.]

## Case No. 7,083.

IRWIN v. DUNLAP.

[1 Cranch, C. C. 552.] [1]

Circuit Court, District of Columbia. July Term, 1809.

DEED—PROOF—SUBSCRIBING WITNESS.

A subscribing witness to the execution of a deed may be compelled to attend court in Alexandria, to prove it.

A deed had been executed by [Thomas] Dunlap and [Thomas] Irwin in presence of C. Lee, R. J. Taylor, and T. Swann. C. Lee and R. J. Taylor had proved the execution of the deed. T. Swann refused to prove. Irwin obtained a subpoena for T. Swann to "testify, and the truth to say on behalf of Thomas Irwin, in relation to the execution of a certain deed by James Dunlap."

The subpoena being served, Mr. Swann stated that the deed was executed upon an understanding between the attorneys for both parties that Irwin should secure the purchase-money by a mortgage, and that the deed was delivered with that understanding; but Irwin now refuses.

THE COURT was of opinion that a subscribing witness may be compelled to attend the court to prove a deed, so that it may be recorded.

[1] [Reported by Hon. William Cranch, Chief Judge.]

## Case No. 7,084.

IRWIN v. HENDERSON et al.

[2 Cranch, C. C. 167.] [1]

Circuit Court, District of Columbia. April Term, 1819.

LIEN OF JUDGMENT—ATTACHMENT—PRACTICE.

1. The act of limitations of Virginia of the 19th of December, 1792 (page 107), is not a bar to a judgment, if execution has been issued thereon, and returned within ten years after the date of the judgment.

2. If the plaintiff demurs to the defendant's plea to a chancery attachment, he thereby waives his right to move to strike out the plea, on the ground that it was pleaded without giving special bail.

This was a chancery attachment, to recover the amount of a judgment at law obtained by the plaintiff [Thomas Irwin] against the defendants in the year 1805, for $901.83, with interest from the 26th of May, 1804 and costs. The present suit was commenced on the 20th of November, 1816. The defendant [Alexander] Henderson was discharged under the insolvent act in 1806. The bill states that he had since acquired property sufficient to pay the debt, which was in the hands of the defendant [James] Sanderson. The defendant Henderson appeared under the rule of this court, without discharging the attached effects, and pleaded that the judgment was rendered in 1805, more than ten years before the commencement of this suit; that in January, 1806, the plaintiff issued a ca. sa. which the marshal returned "countermanded." That, on the 8th of February, 1813, the plaintiff sued out a fi. fa. upon the judgment, which was returned "no effects," and that the defendants did not at any time within ten years before the commencement of this suit ever promise or agree to come to any account for, or to pay, or in any way satisfy the complainant any money or other thing for, or on account of, the said judgment, or any other debt or demand. To this plea, there was a general demurrer and joinder.

Mr. Jones, for plaintiff, moved the court to strike out the plea, because the defendants had not given the security required to dissolve the attachment, contending that the rule of court only allowed the defendants to appear and answer, but not to plead, without dissolving the attachment.

[1] [Reported by Hon. William Cranch, Chief Judge.]

THE COURT, however, (THRUSTON, Circuit Judge, absent,) was of opinion, that by demurring to the plea, the plaintiff had waived his right to move to strike out the plea for that cause; but gave no opinion whether it would have been good cause for striking out the plea if the motion had been made before the demurrer.

THE COURT gave judgment for the plaintiff upon the demurrer, being of opinion that where an execution has been returned, there is no limitation to the revival of the judgment.

## Case No. 7,085.

IRWIN et al. v. McROBERTS et al.

[4 Ban. & A. 411;[1] 16 O. G. 853.]

Circuit Court, N. D. Illinois. July 8, 1879.

PATENTS—INFRINGEMENT — PRELIMINARY INJUNCTION—LIS PENDENS.

Another suit being pending in another circuit, between the complainants and the manufacturers of the articles alleged to infringe the complainants' patent, wherein the questions involved in this suit were being litigated, and the defendants in this suit being merely consignees of such manufacturers, or vendors for them, upon commission, of the articles alleged to infringe, or purchasers in the market, the court denied an application for a preliminary injunction, upon the defendants giving a bond in a penal sum fixed by the court, conditioned for the payment of any damages the complainants may recover.

[Cited in Steam Gauge & Lantern Co. v. Miller, 8 Fed. 319.]

[This was a bill in equity by John H. Irwin and others against Mortimer McRoberts and others, to restrain infringement of various letters patent and their reissues, granted to Irwin, for improvements in lamp-burners.]

Coburn & Thacher, for complainants.

E. S. Jenney, for defendants.

BLODGETT, District Judge. I am very much impressed with a conviction that the defendants' lantern infringes the claim of the complainants' patents as they are reissued. I do not see, necessarily, any infringement of the complainants' original patent, because the patentee did not so broadly claim this bell or deflector, which is one of the important features of the complainants' lantern, in his original patent, as in the reissue. It seems to me that the defendants' device around the top of the lantern and below the chimney, by which the air is protected and directed into position, so that it may be drawn without interference from outside currents into the pipes or tubes, is substantially a use of the original bell that was adopted by Mr. Irwin, and especially that it would be an infringement on Irwin's patent of 1870 [No. 99,443], if that patent is a valid patent. Now, it may be that the Irwin patent of 1870, which to my mind is substantially the defendants' present lantern, would stand on a little different ground. It would at least require a more technical construction to sustain it than did the Irwin tubular lantern proper, because, as was said in the case of the Irwin patent when it was before this court some three years ago,[2] tubes are older than at the time when Mr. Irwin entered the field, and it is possible, when you take the Cochrane device, and the Crichfield device, and the several others which have been referred to in the proofs, in which tubes were used, that you might find in these some suggestion of the Irwin device of 1870. But, certainly, if the Irwin patent of 1870 is valid, I should have no doubt that the defendants' lantern is an infringement on the Irwin patent. There is also a great deal of force in the argument made by the defendants' counsel, that a lantern under the patent of 1870 has never been put on the market as an operative lantern for sale, nor has it passed through the ordeal of litigation or its validity been accepted by the public.

With regard to the broader claims in the other patents of Mr. Irwin, under his reissues, they are to be treated as new patents. They have never, as yet, been accepted by the public in the broad sense in which he now asserts them, nor confirmed or sustained by the courts.

There being litigation now pending, involving, necessarily, the questions involved in this case in another district, and in the district where the manufacturer of this lantern resides, it seems to me that is the better place for the litigation to proceed. I will, however, give the complainant an injunction here, unless the defendant shall enter into a bond in the penal sum of $10,000, conditional for the payment of all damages which the plaintiff may ultimately recover in the case, because that being a case against the original manufacturers, and the original manufacturer having really come here and made himself dominus litis, I think it would be right to condition the bond in that way; or it may be made the other way—a bond may be made to cover such damages as shall be awarded him in this suit.

I have on several occasions expressed myself as indisposed to favor this kind of litigation—that is, suits brought against the mere vendors of patented goods, instead of the manufacturers. I know patentees are much troubled with piracies upon their inventions, and that the law makes the seller liable, as well as the maker of infringing goods. But I think the initial litigation, for the purpose of asserting and sustaining the validity of a patent, should be between the patentee and infringing manufacturers. After a patent has been judicially sustained in such a suit, then the patentee should have the full aid of the courts to suppress sales of infringing goods.

[1] [Reported by Hubert A. Banning, Esq., and Henry Arden, Esq., and here reprinted by permission.]

[2] [See Irwin v. Dane, Case No. 7,082.]

The defendant here, is only an agent, receiving goods on consignment, or on commission, or purchasing in the market, it is not disclosed exactly which, and the complainant in this case claims that his patent covers those goods. The manufacturer of those goods, at the time they were made, may not have had that kind of legal notice which a man ought to have to make him liable as an infringer, because non constat they may not have been made before this reissue. At the time the Rochester company commenced the manufacture of this lantern the plaintiffs' patent was not as broad as it now is under the reissue. The courts may sustain these new claims as broadly as they are now made; but it is not for the court to intimate whether it will or not. That should be left an entirely open question until the court comes to the hearing, either in this or the other district. But the patent office has allowed the patentee to surrender his patent and take the reissue and take these broad claims. That, prima facie, gives the complainant a standing in this court to charge that defendants' lanterns infringe, yet it may appear in the proof that they did not infringe at the time they were actually made and put upon the market, because the patent at that time may not have been so broad as to cover defendants' special device. I think, therefore, while the court has it in its power to allow the defendants to give a bond to protect the rights of the complainants, it is safer to err in that direction than to tie up the defendants by an injunction.

I congratulate myself to some extent upon the fact that these patents are now pending before the circuit court of the Northern district of New York, where, I presume, they will be tried before Judge Blatchford, who stands pre-eminent as an expounder of patent law in this country, and I hope they will be so presented to him that the full merits will be understood and passed upon.

I may be in error about this. I do not feel as clear as I did in reference to the Dane and Westlake Case.[3] I think there are more and new questions to be considered. It is a more difficult question to determine whether Irwin's patent will prevent the defendants from using those open pipes or tubes, even protected as they are, than it was to pass upon the questions raised in the Dane and Westlake Case. The court had better err on the safe side of a case like this, and either refuse the injunction wholly, or else refuse it conditionally. I, therefore, conclude that I will refuse it conditionally, that is, that the defendant shall enter into a bond in the penal sum of $10,000, for the payment of any damages that the complainants may recover. The defendant is only a vendor, and if an injunction was granted, the manufacturer, who is the real defendant, might find another agent here, who would continue to offer their lanterns upon the market, unless restrained by a new suit. If any bond is given it will be given by the manufacturers for the purpose of securing this market for their goods, and they would have no interest in starting another agency, when they had given bond for the protection of this agent; therefore, I think it is more equitable to the rights of all parties, to raise a bond from defendant, than to issue the injunction. If these reissues are sustained, then complainants are safe under a bond. I will give the complainants leave to move at any time for an enlargement of the bond, so as to keep them at all times protected, as has often been done in other cases in this court.

[For other cases involving these patents, see note to Irwin v. Dane, Case No. 7,082.]

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IRWIN (UNITED STATES v.). See Case No. 15,445.

IRWIN (WILLIAR v.). See Case No. 17,761.

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## Case No. 7,086.

In re IRWINE.

[1 Pa. Law J. 291; 1 Pa. Law J. Rep. 82.]

Circuit Court, E. D. Pennsylvania. Oct. 13, 1842.

VOLUNTARY BANKRUPTCY—ACT 1841, § 2—CONSTRUCTION.

The second proviso, in the second section of the bankrupt law [of 1841 (5 Stat. 442)], is to be read as if pointed thus: "In case it shall be made to appear to the court, in the course of the proceedings in bankruptcy, that the bankrupt, his application being voluntary, has, subsequent to the first day of January last, or at any other time, in contemplation of the passage of a bankrupt law, by assignment or otherwise, given or secured any preference," &c., "he shall not receive a discharge," &c.

Irwine having been decreed a bankrupt, his discharge was opposed on the ground that on the 15th June, 1841, he had made a general assignment containing a preference. (The exception, in point of fact, alleged that the preference had been made "in contemplation of the passage of the bankrupt law," but there was no evidence of this beyond the mere assignment, and the question was discussed on general grounds.) The right to the discharge depended upon the construction of the second proviso in the second section of the bankrupt act. This section (the part material unpunctuated), reads thus: "And in case it shall be made to appear to the court, in the course of the proceedings in bankruptcy, that the bankrupt, his application being voluntary, has, *subsequent to the first day of January last or at any other time in contemplation of the passage of a bankrupt law,*" given a preference, &c., he shall not be discharged, except with the assent of a majority in interest of the unpreferred creditors. The question was, whether the part in italics

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[3] [See Irwin v. Dane, Cases Nos. 7,081, 7,082. Also Dane v. Chicago Manuf'g Co., Id. 3,557; Dane v. Illinois Manuf'g Co., Id. 3,558.]

should be pointed thus, has, subsequent to the first day of January last or at any other time, in contemplation; or thus, has, subsequent to the first day of January last, or at any other time in contemplation, &c. If the former way, then, of course, the preference in this case would bar a discharge, though it had not been made in contemplation of the passage of a bankrupt law; while, if the passage were to be read the latter way, it would be no bar, unless the preference had been made in contemplation of the passage of the act. As printed in several copies the pointing was thus, "has, subsequent to the first day of January last, or at any other time, in contemplation," &c., which, of course, did not make the mere assignment a bar. The question was started several weeks ago, when Judge Randall said, that although his first impression had been the same as that imparted by the printed copies, and, accordingly, that a preference subsequent to the 1st of January, 1841, would not be a bar, unless made in contemplation of the passage, &c., yet the more he reflected on the language of the act, the more his doubts increased. He therefore wished to have the point argued. It was accordingly argued, in another case, by St. G. T. Campbell, against the right to a discharge, and by J. A. Phillips, on the other side. The judge gave no opinion, but some time afterward said that he would prefer to have the case spoken to again in the circuit court. He accordingly adjourned it, and it now came on to be argued.

Mr. Meredith.

In construing a statute no regard is to be had to the pointing. Neither as reported, considered, passed, or approved, are legislative bills pointed. Punctuation is a matter done afterwards by the compositor, out of his own head. It is a matter of fancy, and in regard to which the practice of scarcely any two offices agrees. The court must look at the act as it was passed by congress—that is to say, without any punctuation, and give to its language, in that state, a judicial interpretation. The language here is, if the bankrupt has, &c., "subsequent to the first day of January last or at any other time in contemplation of the passage," &c. Now, put a comma after the word "time" only, and the language means, if the bankrupt has, at any time, in contemplation, &c.; a construction which discards as senseless, a great part of the language of the provision. If congress meant "has, at any time," why have they not used that form of expression? It would be shorter, clearer, as comprehensive, and more natural. Congress does not use this language, and it is, therefore, to be inferred does not mean what this language conveys. Point the language differently, and you give effect to every part of the enactment. It then reads, "subsequent to the first day of January last (or at any other time in contemplation of the passage of a bankrupt act), &c. By this mode of punctuation alone can effect be given to the whole passage. It being the duty of the court to interpret the statute from itself, it does not import us to consider whether or not this matter of punctuation will carry out the sense which, in a political view, we may deem to have been that of congress. The court will not speculate on that subject. The court would observe, likewise, that the fact of a preference did not inevitably debar a bankrupt from a discharge, it did so only where his application was voluntary, and where he could not obtain the assent of a majority of his unpreferred creditors to his final certificate. The provision therefore did not destroy the general object of the law. The proceedings in invitum—the only proceedings which had ever existed in any system of bankruptcy but that of our last law —were left undisturbed. The permission to make an application voluntarily was a feature entirely new to bankruptcy; it was a great privilege to a debtor, and there was no reason why it should be granted in every case. It was only where a party came into the court free from any reproach of having made a preference, that he could himself insist on the benefits of a system with whose terms any sort of preference was at war.

Mr. Clarkson, in favor of the discharge.

The first part of section second [of the act of 1841 (5 Stat. 442)] enacts, that preference in contemplation of bankruptcy shall bar a discharge; but as preferences had probably been made in anticipation of the passage of the law, when bankruptcy, in its technical sense, could not exist, it is natural to look for a provision against preferences made in contemplation of the passage of a bankrupt law. This is exactly what we do find in the proviso, if our construction be adopted. The opposite construction forces into this provision an independent and dissimilar enactment, which is this. If the bankrupt, &c., "has, subsequent to the 1st day of January last, * * * * by assignment or otherwise given or secured any preference to one creditor over another," &c., he shall be barred of a discharge. Now this language is general. It extends to every preference made or to be made "subsequent," i. e. any time subsequent, to the 1st day of January last; and this preference, be it observed, is a bar, no matter in what circumstances or with what purpose it has been made. How can such a proviso be reconciled with the main and prior part of the section, which declares, that after the passage of the law, a preference is a bar, only when given "in contemplation of bankruptcy, and for the purpose of giving a preference."

This argument can be eluded but in one way, viz. by saying that the proviso applies to such preferences only as were made between the 1st of January and the 19th of August, the date of the enactment of the

law. It is an answer to this to say that no such restriction as this appears in the expression "subsequent to the 1st day of January last," and that no words restrictive of the expression are used in any other part of the act. But in any event, we still ask, what reason can there be, except the "contemplation of the passage of a bankrupt law," why a preference made between January 1st and August 19th shall be a bar, while a preference before January 1st is no bar? How senseless the enactment is made. Up to January the 1st, a preference is no bar unless made in contemplation of the passage of a bankrupt law. Between January the 1st and August the 19th, it is a bar, though not so made. Then again, after the 19th, the law changes back, and the preference is no bar unless made in contemplation, &c. What reason can be assigned why these seven months and nineteen days should have been thus distinguished from the time anterior and the time subsequent? The court is asked to say that congress supposed that every preference during this time must have been made in contemplation of the passage of the law. But if the words "contemplation of bankruptcy," used in the first part of the section had, before their introduction in the act, acquired a settled construction—one under which "contemplation" is a question of fact—how is it that contemplation of the passage of a bankrupt law is meant to be made an unavoidable conclusion of law. Is it not against sense to say, that after the act has passed, "contemplation of bankruptcy" is a matter of pure fact—while before the act passed—while there was yet the double doubt, 1st, whether a law would pass, and 2nd, whether the party would ever be affected by it—that contemplation then is an unremovable inference of law?

Prior to the passage of the bankrupt law, preferences were lawful, even though made in insolvency, and for the purpose of giving a preference. They were therefore certainly lawful when not so made. Can it be, then, that the act thus punishes the suffering debtor for an act which was lawful when he did it, and which the bankrupt law so far now regards as not to attempt to disturb? The other construction makes the law more severe towards a preference made before the passage, than towards one after the passage; for one of the latter kind is no bar unless made "in contemplation of the bankruptcy, and for the purpose of giving a preference," while one of the former kind (if made between the 1st of January and the passage of the act) is a bar at all events. That is to say, the act affixes a penalty to a preference made during a time when preferences were encouraged; and takes away the penalty the first moment that the only law which discouraged them comes into existence. The construction which we contend for harmonizes the different parts of the act. If the preference has been made after the passage, then as in all cases it must be shown to have been made in contemplation of bankruptcy, so, if made before the passage, it must be equally shown to have been made in contemplation of the passage of a bankrupt law. In point of grammar the language of the clause is simply ambiguous; for from the words alone we should be entirely unable to tell which meaning was the true one. Seeing then, that the language may, grammatically, mean one thing precisely as much as the other, the passage is left to be interpreted exclusively by the reason and sense of the case; and the considerations already presented we think decisive in that respect. The whole argument on the other side is, that congress has not expressed itself with the most energetic brevity of which the English language is capable. But this brevity is not the characteristic of statutory enactments. On the contrary, the expression used, is more according to legal precision than the other way. There is a certain manner of specifying and particularizing adopted so generally in statutes, that every ear recognizes it as the legislative style. Wherever a general notion is to be expressed, it is not done by a single comprehensive expression (for that would be too vague and abstract for the specific character of law), but one particular is first fixed that a definite example may be lodged in the mind, and then that particular is enlarged by generalities. This is a style so usual and so proper in statutes, that every draftsman adopts it. Thus, would the legislature give a preference to the United States, in the case of all persons indebted to it, in any way. The language is, "any revenue officer, or other person hereafter becoming indebted to the United States by bond or otherwise" (Act March 3, 1797 [1 Stat. 515]); not that the legislature meant revenue officers more than any other persons, or bond debts more than simple contract debts; for when this objection was made (U. S. v. Fisher, 2 Cranch [7 U. S.] 358), that if the legislature had meant all persons and all debts, it would have said so, the court, by the chief justice, Marshall, said that the two expressions were equally appropriate, and that "between the two, there is no difference of meaning." Does the legislature of Pennsylvania make an enactment respecting all instruments of writing for the payment of money. The enactment is thus made, "bills, notes, bonds, or other instruments of writing for the payment of money." Act March 28, 1835. So, this very section enacts that nothing in the bankrupt law shall impair "liens, mortgages, or other securities"; and an example is found even in the proviso under consideration: it says, "if the bankrupt, &c., subsequent to the first day of January last, &c., by assignment or otherwise." In fact so usual and so proper is this form, that the other—the naked generality—would have been unusual, and less proper; and we conclude from the general practice in this respect, that if the legislature had intended to say,

"has, at any time," they would have said it in some such form as this. The form adopted is the proper legislative style of saying, "at any time." The first of January, being the beginning of the year, and the time about which the passage of the law became probable, the legislature meant no more than to fix that day as a leading date. The construction contended for on the other side, is not less inelegant than ours; and supposes congress to have used the extremest condensation of diction. Why, for example, did not congress say, if the bankrupt "has, subsequent to the 1st day of January last, or (has) at any other time, in contemplation of the passage of a bankrupt law, by assignment or otherwise," &c., &c. The insertion of the word "has" would have presented the sense contended for by the opposite counsel; and manifold forms exist of presenting the same idea. In placing, in such a place, a provision of so severe effect—one purely arbitrary, and discordant with the analogies of the act, congress would have expressed itself clearly.

On the whole, the passage, under any reading, is inelegant. Our version is inelegant on the side of particularity, the besetting sin of statutes. Theirs is inelegant on the side of extreme costiveness—a rare characteristic of legislative style.

Dillingham on the same side.

The object of the bankrupt law is to relieve honest but unfortunate debtors who make a full surrender of their property. The proviso of the second section is in restraint of the general remedy and in its nature penal. It should, therefore, be construed strictly. The very evil which the law would guard against, is the unwillingness of creditors to assent to the discharge of their debtors: to require that such assent from any portion of them should be procured, prior to a discharge, is to debar petitioners in a measure from the remedy. The law should therefore receive a construction in accordance with its general spirit. It is easy to comprehend why congress should have guarded against preferences given purposely to anticipate and counteract the passage of the law; but that preferences given without such thought or object should be regarded in the same light and visited with the same consequences is quite incomprehensible.

It is submitted, that the words of the proviso do not call for such a construction; that it is opposed to the whole spirit and meaning of the law; and that it is equally opposed by everything in pari materia. The words "if it shall be made to appear to the court," used in connection with "the contemplation of the passage of a bankrupt law," leave no room for argument that the motive of the preference, when it bears at all upon its character, is to be established by proof of some overt act. "Contemplation" being an operation of the mind, could be susceptible of proof only by words or actions, indicating the motive. Wherever the phrase applies, therefore, it is not used as descriptive of the character of these preferences, in and of themselves. In relation to the analogous phrase in the first part of the same section, providing for cases "in contemplation of bankruptcy," the position that this is a fact to be proved affirmatively by the opposing creditor, and not a legal presumption, was fully established in Breneman's Case [Case No. 1,830], and in Ex parte Potts [Id. 11,344]. See also the cases there cited, especially Fidgeon v. Sharpe, 5 Taunt. 539, 1 Marsh. 196, and M'Menomy v. Roosevelt, 3 Johns. Ch. 446. Here we have the precedent words "if it shall be made to appear to the court," which makes an argument a fortiori. There is no pretence of any proof in this case, and I am instructed to say, if proof on the subject be admitted, that the contrary can be clearly established, and that the preference was compulsory.

Again: it having been already shown that the proviso is in the nature of a penal enactment, restraining the remedial character of the law, it is contrary to every principle in the administration of justice, to adopt the construction which presumes a wrong motive while there is room for any other. Fraud is never to be presumed. It cannot be contended but that thousands of cases of preference may have occurred since the 1st of January, 1841, when no thought of the passage of a bankrupt law entered the mind of the unfortunate debtor. The words are so general as to include every possible case of payment of every debt, although contracted for the necessary subsistence of a petitioner and his family. Nay, it is obvious that by far the larger class of preferences must necessarily have been without bad motive; and the construction urged, is in effect to repeal the bankrupt law as to every man who has paid a debt since the 1st January, 1841. Nor is it to be admitted that the passage of the law was to be considered as a matter of course after this date. Its passage was still very uncertain, and so far from the idea being everywhere rife, in the county (where petitioner resides)[1] it was but little thought of. This is proved by the fact that up to this time, from Chester county, with a population of sixty thousand, there are not a dozen applicants.

As a general rule, the grammatical construction is the legal construction. To arrive at the reading contended for the court is asked to change the natural and obvious punctuation as we find it in the printed copy of the law, for a theoretical and artificial punctuation;—to strike out the comma between the phrase "or at any other time" and the phrase "in contemplation of the passage of a bankrupt law,"—and to include both phrases in parentheses; thus absolutely fencing out the qualifying phrase from that which precedes the parenthesis. If it

[1] The petition was from Chester county.

be said that we are to construe the law without reference to punctuation, it is admitted. Still, the obvious, natural, common sense meaning of these words and phrases, without points, is to be found in the punctuation furnished by the printer or the proof reader, whose especial business it is to give the natural meaning. Upon a question of punctuation, the lawyer and legislator may inform himself by consulting a practical printer. Then again, we have the supervision of the department, or committee, or father of the bill under whose care it was printed. That this was the natural reading of the district court is obvious from a passage in the opinion in Breneman's Case, already cited. No one thinks of anything else until the opposite theory is started and that theory rests upon a bare possibility. The authorities say "that we must adhere to the words of a statute, construing them according to their nature and import, in the order in which they stand in the act"—"according to the plan and obvious meaning of the words." "Courts are not to presume the intention of the legislature, but to collect them from the words of the act" by a sound interpretation of its language, "according to reason and sound grammatical construction." Dwar. St. 703. And to come to the case in point, when the qualifying words are at the beginning; or at the end of a sentence, they refer to and govern the whole. Id. 704. This grammatical construction is fortified by everything else in the act. Looking at the provision in pari materia in the former part of this same second section, we find that a naked preference, even after the passage of the law, does not, in and of itself work a penalty, but, that it must be done "in contemplation of bankruptcy." This motive constitutes the all essential vice of the preference. How can it be conceived that congress should have intended to deal more harshly with preferences made prior to the passage of the law? It is contrary to reason. It would be reversing the order of things, and assuming a meritorious character for ex post facto laws, in the very face of our constitutional provision. Both classes of cases are in the same category, in the same section, must have been in view of congress at the same time; and yet the court is called upon by a forced construction to say that congress intended in the one case to declare the preference a wrong in itself, and not in the other. Precisely the same argument arises from the provision respecting preferences before January 1st, 1841. Who can imagine a reason for such a difference, in the character of an act done on the first hour of that day, and an act done on the last hour of the day preceding? But this forced construction works an absolute wrong; because, if the phrase "in contemplation of the passage of a bankrupt law," has no reference to the words "assignment or otherwise," giving preference since January 1st, 1841, then there is no qualification or limitation to such preferences whatever. We are forced to read it, as though congress had said in so many words, "subsequent to the first day of January last, although not in contemplation of the passage of a bankrupt law." Can this be? It leads at once to the result, that however innocent, nay virtuous and meritorious, may have been the preference, and supposing that these good motives could be proved, the court would not be at liberty to hear the proof, or if heard, to regard it. This would, indeed, be to punish virtue; for that there may be cases of preference meritorious and virtuous, is not only recognized in the act, but by the universal sense of the community. We cannot limit this construction to a mere matter of prima facie evidence—or legal inference until the negative be proved.

The opposite argument is that if the legislature had really meant to apply the phrase "in contemplation of," &c. to all cases they would have used one general expression. That they might have done so is admitted—and that the law would have been more precise and clear if they had done so. But this is the extent of the argument. It is a matter of style. One draughtsman of a law is diffuse, another is concise—one is loose, another precise. But more frequently, by far, the most perfectly constructed law in point of style as it comes from the closet, is deformed and put awry and made to appear awkward by afterthoughts and amendments when it comes to be canvassed and criticised in a deliberative assembly. This argument is fully answered by the case of U. S. v. Fisher [2 Cranch (6 U. S.) 358]. Chief Justice Marshall there says in a case nearly analogous, "it is true the mode of expression which has been suggested is at least as appropriate as that which has been used; but between the two there is no difference of meaning, and it cannot be pretended that the natural sense of words is to be disregarded, because that which they import might have been better or more directly expressed." But this form of phrase is not without reason and use. That a particular day should have been named, does not necessarily imply "that within that time contemplation of the passage of a bankrupt law," shall be a matter of legal intendment. It may have been very natural and very well to have called the attention to a particular class of cases as more likely to come within this category. Less proof would perhaps be required by the court to establish the fact of such contemplation, where the preference was given, while the discussion of the law was going on, and its friends were everywhere urging it forward.

Meredith replied.

BALDWIN, Circuit Justice (after stating the facts). We are of opinion that the evident meaning of the law is asserted by the counsel against the discharge. To adopt the

contrary construction would be to strike out the words "subsequent to the 1st day of January last," or leave them utterly useless by making this clause read, or "has at any time in contemplation," &c., which would be contrary to the rule, that if the words admit of it, effect shall be given to them when no repugnancy would arise between the different parts of the clause. If these words indicated that no other cases than preferences given in contemplation of the passage of a bankrupt law were intended to be provided for, there can be no reason assigned for the introduction of a phrase, which can have no effect on a case fully defined without it; provides for a case of a description entirely different, and in no wise governed by the intention of the bankrupt, but dependent on the time when the act of preference is done. That case is definitely described, a preference given "by assignment or otherwise," after "the 1st day of January, 1841," the very case now before the court. In so reading the law (for it can scarcely be called construing), we give effect to the language used as it is clearly intended; there is neither a repugnancy in its provisions, surplusage in its terms, or obscurity in the language throughout. It is not for us to usurp the province of the legislature, by inquiring into, and adjudicating on the expediency or policy of this provision: it was within their constitutional power to act on this subject according to their discretion; and having exercised it, we are bound to carry their enactment into execution.

The argument which has been raised on the punctuation of this clause, tends to make it obscure and without meaning; which would be conclusive against it; but in the construction of laws, punctuation is no criterion of the sense of the legislature, unless it is in conformity with their intention as expressed in the words they use. Punctuation is generally the act of the clerk or printer, which the court will disregard, if taking the instrument by its four corners, and looking at all its provisions, a judicial construction points to an intention different from what the mere punctuation indicates, as is clearly the case here. Vide [Ewing v. Burnet] 11 Pet. [36 U. S.] 54.

In the construction of all laws, the best rule is to gather the intention of the legislature from the words used, rather than to attempt to infuse in their acts a meaning, which will require the omission of words which are used, or the insertion of words omitted, in order to extract the supposed meaning of its provisions. Every legislative body must be supposed competent to express their intention in intelligible language, and to have done so in prescribing a written rule of conduct. "As men whose intentions require no concealment generally employ the words which most directly and aptly express the ideas they intend to convey," legislatures "must be understood to have employed words in their natural sense, and to have intended what they have said." [Gibbons v. Ogden] 9 Wheat. [22 U. S.] 188. And the intention of the lawmaker is the law itself, when it is indicated by the use of plain words.

The present bankrupt law is an anomaly in legislation; the provision for voluntary bankruptcy, is in effect, the adoption of the insolvent laws of the states, but with an entire new and most important feature, the petitioner becomes entitled to a complete discharge from all his debts, whereas an insolvent law only secures his person from arrest. In this particular, congress have exercised power expressly prohibited to the states by the constitution of the United States, and not granted by it to congress, otherwise than by the express power "to establish uniform laws on the subject of bankruptcies throughout the United States." To this power there is no limitation, and consequently it is competent to congress to act on the whole subject of bankruptcy with a plenary discretion. Hence they may give to the discharge what effect they please, and in consequence may not only impair, but extinguish the obligations and the contracts of a bankrupt. Whatever doubts may exist as to the sound policy or justice of doing this on the application of the debtor, the power being the same to provide for one case as another, must be considered to be equally constitutional, whether the proceeding is on behalf of debtor or creditor. Congress have adopted a system which embraces both classes of cases, under the belief that the state of the country required it, and so far as they have authorized the discharge of a debtor on his own petition, the law must be executed by the appropriate court; but inasmuch as this is a principle unknown to the bankrupt law of England, and of these states before the constitution, or the act of 1800 [2 Stat. 19], it ought not to be expanded by construction, so as to interfere with the rights of creditors, further than the law authorizes, or exempt the debtor from any restrictions imposed upon him as requisites to his discharge.

If then, the words of this clause were less explicit than they are, we should endeavor to give them the effect contended for by the creditor in this case, if they would admit of it; a provision for voluntary bankruptcy which gives the same effect to a discharge as an involuntary one, is an experiment in legislation which must have a fair trial, but must not be extended beyond the lines drawn by the law as it now stands. This should be done only by legislating for the future, not by construction of the past; hitherto bankrupt laws have not been favored by congress, and perhaps not in the general opinion of the community; they certainly will not become more so in either, if those points which favor the debtor and bear hard on the creditor, are too benignly viewed by the courts

in their exposition and execution of the present law.

It was certified to the district court that the petitioner in this case is not entitled to a discharge, without the consent of a majority of the creditors in interest who have not been secured.

## Case No. 7,087.

The ISAAC ALLERTON.

[See Case No. 7,088.]

## Case No. 7,088.

The ISAAC ALLERTON.

ALDERSLADE et al. v. The ISAAC ALLERTON.

[5 Adm. Rec. 612.]

District Court, S. D. Florida. Dec. 23, 1856.

SALVAGE—COMPENSATION—DUTY OF MARSHAL.

[1. Four hundred and thirty-four persons and a large number of vessels were engaged off and on for two months in saving cargo of a ship sunk in five fathoms of water, 15 miles from Key West. The cargo was reached by tearing off the deck planks, by explosives, by contrivances for fishing up the packages, and by diving, and the services generally were attended with considerable danger to life and health. The saved property was valued at $96,309. *Held*, that one half the net value should be allowed as compensation.]

[Cited in Baker v. The Slobodna, 35 Fed. 541.]

[2. Where a vessel is lost, the salvage on property saved should be less than where the vessel is saved, although in the former case the value of the property saved may be greater.]

[3. Where a vessel is saved, the salvage should be proportionate to the promptness and skill of the rescue.]

[4. Willful breaking of boxes or packages of cargo by salvors, except in cases of urgent necessity, will forfeit the salvage.]

[5. No urgent necessity arises from the fact that the salvor's boats are not large enough to carry the boxes or packages intact, when there are vessels sufficiently large for the purpose at hand.]

[6. It is the duty of a marshal taking possession of salved property, and in selling the same, to preserve the marks thereon, where obliterated, to take an inventory thereof, to keep accounts of the goods saved by different salvors, to arrange the goods for sale, and to employ assistance, if necessary, and charge for the same as a disbursement in the cause.]

In admiralty.

Winer Bethel, for libelants.

Wm. R. Nackley, for respondent.

MARVIN, District Judge. This is a suit brought by George Alderslade and 433 others to recover salvage for their services in saving portions of the materials and cargo of the ship Isaac Allerton [Baldwin, master], sunk about fifteen miles from this port. The ship was laden with a valuable cargo, consisting of dry goods, groceries, hardware, and a variety of other articles, intended for the Western trade, and was bound from New York to New Orleans. During the night of the 27th of August, while on her voyage, she encountered a hurricane, which drove her onto the reef, where she rolled and thumped very heavily for several hours, the sea breaking over her. The ship's company were in great danger of loss of life, by the ship's breaking up and going to pieces. The master cut away the masts, and the ship drove over the reef, and sunk in five fathoms of water, the master and crew escaping in their boats, as she was going down. They got safely to the shore, and were picked up, the next day, by the wrecking schooner Florida. The wreck was soon visited by nearly or quite all the wrecking vessels and boats on the coast, and the labor of saving the cargo was commenced and carried on by several parties or sets of salvors, each party for itself. The ship lay about five fathoms under water, a little careened, her upper deck being five and eight feet under water. A diver went down and fastened a hook in a plank found started in the deck, and, a purchase being rigged to the mast of a large wrecking vessel, the plank was torn off. Other planks were removed from time to time in like manner, and the light let into the hold, which greatly facilitated the operations of the divers. The goods between decks being saved, and a considerable portion in the lower hold, the planks of the lower deck were somewhat loosened by the explosion of a quantity of gunpowder, and then torn off by purchases. As the deck planks were in this manner removed, the salvors saved as much of the goods as they could by "fishing" or by striking an iron piece, fastened to the end of a long staff, into the boxes and packages, and drawing them to the surface. This mode of saving them met with partial success at first, but as the water deepened it became much more uncertain. Besides, the packages were often jammed and fastened together, so that they could not be detached and recovered in this manner, and diving for each separate package became the means of saving the principal part of the cargo. The divers had no submarine armor or diving bell or other artificial apparatus, but each diver plunged into the hold, having one end of a small line around his waist, the other being held by another diver stationed in a boat, and ready to follow and extricate him in case he should get entangled. When at the bottom the diver fastened a pair of iron hooks or clamps with a rope attached to the box or bale, by means of which it was raised. The salvors were, by no means, all divers. The diving was principally done by some fifteen or twenty persons. Diving in deep water produces a headache; blood frequently runs from the ears and nose. It cannot be continued for several hours, much less days, without in-

tervals of rest. It is attended, too, with considerable danger to life and health, though in the present case no lives were lost, and no very serious accident occurred, except that one man's face got badly cut and injured while diving. The persons who did not dive waited upon the divers, and received and took care of the goods. The labors of the several parties of salvors, or of some of them, were continued, from time to time, through a period of two months, and the total value of the cargo and materials saved by them is $96,309.72.

In relation to the question of the amount of salvage that ought to be allowed the salvors, it may be remarked that the principal circumstances of the case are extraordinary, no instance ever having occurred before upon this coast of saving so large an amount of property by diving, or of saving any amount by diving in so deep water. Small quantities of goods have often been saved by diving into the holds of wrecked ships in eight and ten feet of water, and the court has allowed fifty, sixty and seventy-five per cent. of the value, according to the circumstances,—vide The Cimbus [Case No. 2,718]; The Van Bree [unreported]; and The Telamon [Case No. 13,820],—and in one case, —Lowe v. Some Linens [unreported],—saved by diving into the hold of an abandoned ship on the coast of Yucatan, ninety per cent. was allowed; but in this case no claimant appeared, and it was not supposed any ever would appear, and it is neither precedent nor authority for any other case than one like it, any more than the case of The William Hamilton, 3 Hagg. Adm. 168, in which the English court of admiralty gave the whole of the proceeds of a sale of a derelict, £35, to the salvors, no claimant appearing, is a precedent for a case where a claimant may fairly be expected to appear, or when the amount saved is greater. The case which most resembles the one now under consideration, which I have found anywhere reported, is the case of The Thetis, 3 Hagg. Adm. 14, and an appeal, 2 Knapp, 390. The British frigate Thetis, having on board $810,000 in bullion, belonging to British merchants, struck upon a rock on the coast of Brazil, and drove into a cove about 450 feet wide, surrounded on three sides by nearly perpendicular cliffs of rocks, 150 and 200 feet high, where she sunk, and where the sea in bad weather, or with a southerly wind, would rush in with great force, causing a fearful whirlpool. The hull went to pieces, leaving the treasure upon the bottom, in five and six fathoms of water. The salvors, consisting of the admiral on the Brazil station and the captains and crews of the sloops of war Lightning, the War Spike, the Algerine, and the tender Adelaide, engaged in the enterprise of saving the treasure. They constructed diving bells from the water tanks of their ships, using, in one instance, a fire engine for an air pump, erected a derrick 158 feet in length, constructed of twenty-two separate pieces of spars, stepped in the rocks near the water's edge, and secured by a chain cable to the tops of the cliffs, by which they worked the bells for some time with great success. The sea afterwards broke away the derrick. They then extended suspension cables from cliff to cliff, by which they worked the larger bells. The smaller one they worked from their launches. The bottom was carefully surveyed, and it was found, that the treasure was confined to a space of about thirty-one feet by forty-three, and covered over by heavy boulders of granite, the interstices between which were filled by guns and fragments of the wreck. This whole heap was completely cleared away to the bottom, and the rocks rolled one side. Numerous rocks were removed, varying in weight from five to sixty-three tons. Huts were constructed, and an encampment made for the accommodation of the men. Their services were continued for eighteen months. They suffered much in their health from fatigue and exposure. Four men were drowned. They saved in bullion $750,301, and in ordnance stores £1,206 10s. 8d. Expressing the total value in English money at £157,349 17s, the privy council, on appeal, allowed for salvage £29,000, or a little less than one-fifth of the gross value; charging the expenses, including £13,800 allowed the lords commissioners of the admiralty for the wages of the men, victuals, stores, and wear and tear of the vessels engaged in the service, and about £12,000 for other expenses to the residue, which left for the owners and underwriters a fraction less than two-thirds of the gross value of the treasure saved. This case is remarkable for the mechanical ingenuity displayed by the salvors, their perseverance under great difficulties, their protracted labors, and the very large amount of treasure saved. In the case under consideration, there was no resort to any mechanical inventions or instruments to save the property. The labors of the salvors were not so long protracted, nor the amount saved by them so great, as was saved in the Thetis. The number of salvors in both cases was probably nearly equal. Upon a full view of all the circumstances in the present case, I think, that the one-half of the net value of the property saved is a reasonable salvage, all expenses to be first deducted, and the balance equally divided between the owners and salvors. The amount of salvage, divided among the salvors in the ordinary manner, will make the men's shares about fifty dollars each; but divided, as it must be, in such a manner as to reward the divers with an extra allowance for their superior merit, it will enable the court to reward them handsomely, and pay the other salvors a fair compensation for their work and labor. It is a settled rule of decision in this court, from which it

rarely or never departs, that the amount of salvage, in a case where the vessel is lost, shall be less, although the property may be greater, than in a case where the vessel is saved, ceteris paribus; and in proportion somewhat to the promptness and skill with which a vessel is rescued from peril, is the reward to be increased. The reasons for this rule are obvious. When the vessel is lost, there is usually a great loss of property, and we are not to aggravate this loss by charging the little that may be saved with a greater salvage than the claims of simple justice may demand; and the claims of simple justice to the salvor do not ordinarily extend beyond a fair compensation pro opere et labore. All beyond this is a gratuity given or withheld by the courts upon grounds of public policy. When the vessel and a large amount of property have been lost, and a fragment only saved, there is but little and less means for giving such gratuities. Hand v. The Elvira [Case No. 6,015]. But when the vessel and entire cargo have been rescued from certain peril, a substantial service has been rendered the owners, by preventing a loss; they can afford a more liberal reward; and sound policy dictates such a reward, and the amount of property saved furnishes the means of making it. Hence both the interests of owners and wreckers correspond. This rule applies with more or less force to the case before the court.

It is necessary to advert to another feature in this case. I find that the marshal has returned in his account sales but few or no marks upon the boxes or packages. This omission is unusual. He explains it by saying that, when the sales first commenced, he found the marks much defaced, and in many instances difficult to ascertain, and after a time much of the goods were brought in and landed by the salvors in bulk and without any boxes; the boxes having been broken open in some instances by accident, and in others probably by design. Hence the numerous items of sales of "lots and parcels," without any marks. The loss of these marks is a serious misfortune to the owners of this cargo, as it forces upon them, of necessity and without their consent, a mode of settlement among themselves which may be very unjust, and very different in its result from what it would be if the marks had been preserved, so that the different shipments could be identified and their ownership ascertained. Now, it may be admitted that a large number of these marks were destroyed by the action of the water, yet I cannot but think that, had that care been exercised which the parties concerned were bound to exercise, many more of these marks would have been preserved, perhaps enough to adjust the loss by. The salvors were not justified in breaking open any of the boxes or packages except under circumstances of urgent necessity. They were bound to exercise the same care in saving the property and in preserving the marks which we may reasonably suppose they would wish others to exercise in regard to their property under like circumstances, and I cannot conceive any one of these salvors, if he understood his rights and his interests, would be satisfied to have his boxes broken open, or the marks in any manner defaced by a salvor, except under circumstances of urgent necessity. The Amethyst [Case No. 330]. I do not suppose that any of these boxes were broken open by the salvor with a fraudulent design. If so, a forfeiture of his salvage would inevitably follow. But I do suppose that, in many instances, the salvors did break open boxes, and took out the goods, and stowed them in bulk in their boats, with a view to their own convenience, and the promotion of their own supposed interests, and in disregard of the rights of the owners, and of the express injunctions contained in their wrecking licenses. Now, this was wrong, and I wish it to be understood by the wreckers on this coast that the law will not justify them in breaking open the boxes or packages they may save or pick up, except upon the most urgent necessity; and that the fact that their vessels are not large enough to carry the box or bale does not present such a case of necessity, when there are other vessels at hand, which may be employed for that purpose; and that they are bound by their relation to the property to take some pains to preserve its marks. Besides the inconvenience to the owners which the loss of such marks occasions, there is an additional reason why boxes and packages should not be broken open by the salvors without urgent necessity; and that is, it affords an opportunity to the covetous and avaricious among themselves, and among persons on shore, to embezzle or steal portions of the goods saved, and they are not at liberty, either upon principles of law or morals, to tempt either themselves or others unnecessarily to commit so grave a crime. Believing that the misconduct of the salvors is to be attributed more to ignorance than design, and as no complaint is made against them by the respondent's proctor, I feel at liberty, in the present case, to pass by their conduct with the remarks made, without inflicting upon them any other penalty or forfeiture.

Touching the duties of the marshal, it is to be observed that he had in hands, in this case, from the beginning, an attachment or warrant of arrest, commanding him to attach, seize, and take into his custody the cargo and materials of the ship, "and to keep the same until the further order of the court." It was his duty to have obeyed this mandate literally. He had also a mandate to sell the damaged and perishable portions of the cargo. Under these orders, it was his duty to take, forthwith, the exclusive possession of these goods, to sell those that were

perishable, and to store the residue in some safe place, secured by lock and key, kept by himself. In selling the goods, it was his duty to take the marks, and where they were obliterated to take an inventory, to have kept the account sales of the goods saved by different sets of salvors separate, so as to facilitate a settlement of the salvage, and to have arranged the goods for sale. In short, the whole matter, from the beginning to the end, was committed to him by the authority of law, and neither the salvors nor the master, nor his consignee, nor any other person, had any right to interfere with him in the performance of his duties. His was the responsibility and accountability. If, in the performance of these duties, the services of a clerk or of laborers became necessary, he had authority to employ them, and their reasonable pay would have been allowed him as disbursements in the cause. The principles of law are too well settled to need authority for their support, but the cases of Burke v. Trevitt [Case No. 2,163] and The Phebe [Id. 11,066] may be referred to. The remarks are not made with the view of censuring the marshal as to the manner he has performed his duties in the present case. I can well see that they were difficult and onerous, and no court has a more competent and efficient marshal. But they are made with an intent to indicate, for his future government, more fully than has heretofore been done by the court, what are his privileges, duties, and responsibilities.

It is therefore ordered, adjudged, and decreed that the libellants and petitioners have and recover, in full compensation for their services, fifty per cent. upon the net value of the property saved, or such a per cent. upon the gross value as will be equal to fifty per cent. upon the net value, and that the net value be ascertained by deducting from the gross value the costs and expenses of this suit, the wharfage, storage, and all other charges, to be ascertained and allowed by the court, and that all other questions be reserved.

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ISAAC HAMMETT, The (UNITED STATES v.). See Case No. 15,446.

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## Case No. 7,089.

The ISAAC NEWTON.

[Abb. Adm. 11.] [1]

District Court, S. D. New York. July, 1847.

ADMIRALTY—PLEADING—PREMATURE SUIT—COSTS—CONTRACT FOR WORK AND LABOR—CONDITION PRECEDENT—DELIVERY.

1. To entitle the claimant or respondent, in admiralty, to claim judgment against the libellant preliminarily, on the ground that his right of action did not mature until after the suit was commenced, the objection must be raised by plea in abatement or demurrer.

2. And where such plea has not been interposed, the court will not pronounce against the action merely on the ground that it was prematurely brought, if the right of action is perfected before the final hearing.

[Cited in The Hyperion's Cargo, Case No. 6,987.]

3. In such cases parties will be protected, in the adjustment of costs, from any injustice arising from a too early commencement of the suit.

4. Where the owner of property places it in the hands of another person, solely that the latter may make repairs, improvements, additions, &c., to it, and afterwards demands and receives the redelivery of it, this is not an admission on the part of such owner that the services agreed for have been performed, nor does it estop him from contesting the fact of the fulfilment of the agreement.

5. It seems, however, that such acceptance of the redelivery of the property may be regarded at law as an admission that the owner has received some benefit, and that the other contracting party is entitled to some remuneration for the work done.

6. The libellants, manufacturers of steam-engines, had contracted with the claimants to build for a boat owned by the latter, a steam-engine, with the main cylinder eighty inches diameter of bore, and twelve feet stroke of piston, of the best materials and workmanship, and of sufficient and suitable size and strength in all its parts, and to include all modern improvements; the boilers to be of the best Pennsylvania wrought iron, and of the most approved construction for generating steam with economy of fuel, and of size to supply the cylinder with steam at as many pounds pressure to the square inch on the piston, when working with the throttle wide open, as are used by the fastest steamboats on the Hudson river when going at their greatest speed. *Held*, upon this agreement and upon the evidence in the cause, that the intention of the parties was that the boilers should be so constructed as to furnish the engine with at least forty pounds pressure of steam to the square inch on the piston (or boiler) when working with the throttle valve wide open, using such length of cut-off to the piston as was customary with the class of boats referred to.

7. Where, by the terms of a contract for the construction of a steam-engine, in a boat owned by the employing party, the consideration-money was to be paid by instalments as the work advanced, so that a large portion of it would be payable before the time for the full performance of the contract:—*Held*, that the perfect fulfilment of the agreement by the party employed was not a condition precedent to the obligation of it upon the employer; nor could the latter take possession again of the boat without compensating the former for the benefit actually received, although the work was not done in entire conformity with the specifications.

[Cited in The Richard Busteed, Case No. 11,764.]

[Cited in Fruin v. Crystal Ry. Co., 89 Mo. 401, 14 S. W. 557.]

8. Where, by the terms of a contract for building a steam-engine, the work was to be done under the superintendence of the employers, and to be paid for in instalments as it proceeded, and was to be finished at a specified time; and the work was protracted beyond that time, but the employers continued their superintendence, and made payments on account thereafter:—*Held*, that by so doing they acquiesced in the delay and estopped themselves from claiming damage therefor.

9. Where a contract between the owners of a steamboat and other parties for the erection of a steam-engine in the boat, provided that the

[1] [Reported by Abbott Brothers.]

builders should test and prove the work, when completed, in a certain way; and before they had so tested and proved it, the owners of the boat took possession of her, and commenced running her, and the builders thereupon commenced an action without ever having applied the stipulated tests:—*Held*, that the action was not prematurely brought; as the owners, by taking possession of the boat as their own, must be regarded as having admitted their liability to pay whatever was justly due for the work actually performed.

This was a libel in rem by "The Allaire Works," a corporation created under the laws of the state of New York, against the steamboat Isaac Newton, to recover for an engine, &c., supplied to that boat. The libel, after setting forth the corporate character of the libellant, averred the following facts:—

That on or shortly after November 1, 1845, the libellant, by an instrument in writing, bearing date as of that day, agreed with Daniel Drew, Elijah Peck, and Isaac Newton, of the city of New York, to build for them and to set up, complete and ready for use, in a boat then building by William H. Brown, a shipwright carrying on business in New York, a low-pressure beam steam-engine, with the main cylinder eighty inches diameter of bore and twelve feet stroke of piston, of the best materials and workmanship, and of sufficient and suitable size and strength in all its parts, and to include all modern improvements; the engine to be secured in the boat in the best and strongest manner, and in all respects as an engine of such unusual power required for its firmness, security and permanency; its shafts and cranks to be of the best wrought iron; the steam pipes, copper; copper to be substituted for iron where it could be done to the advantage of the engine in lightness and durability; the general appearance to be improved by as much bright work as good taste might dictate; the whole workmanship to be such as would be creditable to the builders and owners; the boilers to be of the best Pennsylvania wrought iron, and of the most approved construction for generating steam with economy of fuel, and of a size to supply the cylinder with steam at as many pounds pressure to the square inch on the piston, when working with the throttle wide open, as were used by the fastest steamboats on the Hudson river when going at their highest rate of speed, together with blowers and blowing engines complete; the engine to be furnished with all necessary tools, fixtures, and bells, and to be put into successful operation under the superintendence and to the satisfaction of Isaac Newton. And it was further agreed that the libellant should thoroughly try and prove the engine and boilers with as much pressure of steam on each square inch of the piston as was customary in the fastest boats upon the Hudson river when going at their fullest rate of speed; and if any part of the engine or boilers, or their appurtenances, should prove to be weak or defective, they were to substitute for the same, others of more suitable material or construction, so that the whole should be perfect in every part; and the engine, with its boilers and appurtenances, was to be completed and put to trial and proof on or before the fifteenth day of May then next. The libel further alleged that Drew, Peck, and Newton, by the contract above mentioned, agreed on their part to pay to the libellants the sum of forty-six thousand dollars, in four equal payments, as the work progressed; the last payment to be made when the engine, and all things appertaining thereto, were completed, tested, approved, and accepted by Drew, Peck, and Newton. The libel further alleged that the libellants proceeded to build, and made ready for use in the steamboat referred to in the contract, a steam-engine, conforming to the specifications of the agreement. That the engine, with all necessary tools, fixtures, and bells, was completed, and put into successful operation and motion under the superintendence of Isaac Newton; that the engine, with the boilers, blowers, and blowing engines complete, of the description, quality, and particulars mentioned in the agreement aforesaid, had been completed and thoroughly tested, tried, and proved in the manner required by, and according to the terms of the said agreement, and the same, with all their appurtenances, had been accepted by the said Drew, Peck, and Newton, who had commenced running the steamboat as a passage-boat between New York and Albany; and that Isaac Newton had expressed his approval of the engine, boilers, and appurtenances. The libel further averred that the other contracting parties had not paid for the work according to their agreement, but that there remained due to them, including charges for extra work, the sum of $13,636.47; that extra work not required by the agreement had been put upon the boat, which, with materials furnished therefor, amounted to the sum of $6,630.47, which had not been paid to the libellants; and that the steamboat, with all her appurtenances, was now in the possession of the other contracting parties. The libel prayed an attachment against the boat and her appurtenances, and that all claimants might be cited to appear and answer, without oath, and that the court would pronounce for the libellants for the balance claimed, and for such damages as shall be deemed proper, &c.

To the libel was annexed a copy of the contract, from which it appeared that a very similar agreement had previously been made by Drew, Peck, and Newton, with John Taylor and Curtis Peck, in whose place the libellants had been afterwards substituted. There was also annexed a statement of the amount of work done by the libellants, with a bill of particulars of the extra work; the whole of which amounted to $48,630.47. A credit was given upon the account for various payments, amounting to $35,000, leaving

due to the libellants the balance claimed in the libel

The claimants, Drew, Peck, and Newton, filed their claim and answer, November 11, 1846. The answer admitted the contract set forth in the libel, but denied that the libellants performed the contract according to its true intent and meaning, as alleged in the libel, (specifying various particulars in which the libellants had failed to perform, and negativing the fulfilment of the affirmative stipulations on the libellants' part,) and denied, in general, that the engine, with all pumps, tools, fixtures, and bells, were, at the time of filing said libel, completed, and put into successful operation and motion in the manner required by the contract, under the superintendence of Isaac Newton, or to his satisfaction; or that the engine, with its boilers, had been thoroughly tried and proved by libellants, according to the contract. And it was averred that a sufficient time had not been allowed the claimants before filing the libel, to try and prove the engine and boilers, according to the contract; and that such trial could not be made, because of the insufficiency of the boilers to generate the steam requisite thereto. The answer further alleged that the claimants, having been from May 15 to October 8, 1846, delayed by the failure of the libellants to complete the contract, they, on the last-mentioned day, commenced running the boat, as a passage-boat, between New York and Albany, "subject to be completed and furnished and finished by the libellants, in all things according to the contract, and without any waiver of the conditions thereof, or of the damages to which they were entitled;" and it alleged that after the boat commenced running, and two weeks after the libel was filed, a number of men were employed and worked on the boat under the directions of the libellants, completing the same. The answer further alleged that payments had already been made equal to and beyond the full right of the libellants; denied that the claimants ever paid moneys on the charges for extra work, or ever acknowledged that libellants had any claim therefor; and the answer denied their right to the same, and denied that any extra work was performed beyond a small item, amounting to about $200, and denied the right of libellants to charge even for that as an addition to the contract price. The answer further claimed a credit of $667.37, for coal furnished the libellants in July, 1840; and claimed other sums paid by them for fixtures, &c., to the boat, which the libellants ought to have supplied; and denied that $13,630.47, or any part of it, was due the libellants, or that the libellants had any lien on the boat when the libel was filed.

Upon this statement of facts the claimants demanded damages to the sum of $30,000, for being deprived of the boat at the time contracted for, and because of charges and disbursements paid for her safe-keeping in and during the period between May 15 and October 8. The cause now came before the court upon the proofs, the entire hearing occupying seventeen days.

Francis B. Cutting and Daniel Lord, for libellants.

C. Van Santvoordt and Henry E. Dodge, for claimants.

BETTS, District Judge. Before considering the merits of the case between the parties, it is proper to dispose of two preliminary objections interposed; the one by the claimants to the maintenance of the action, the other by the libellants to the right of the claimants to offer the defence raised by them.

The claimants insist that by the contract the last instalment did not become payable until after the engine, boilers, &c., were completed, tried, proved, and accepted; that no acceptance of the work as conforming to the agreement has been made up to this time; and that the suit was instituted two days after the boat was delivered to the claimants, without the preliminary trial and proof stipulated in the contract.

Upon this objection it is first to be remarked, that the facts upon which it rests compose an essential feature in the merits of the case. The libellants ground their action upon the allegation that they have fully performed the contract on their part, and they now insist that they have established the allegation by the proofs. Evidence has been given at great length on both sides upon this point, and the claimants contend that the weight of it maintains their defence in this behalf. The question thus becomes one vital to the case upon the merits, involving the fact of performance as well as the time of performance, and no court will turn one party round on a mere technical point, embraced within the merits, if the essential rights of both can be preserved by retaining the cause to final judgment.

In the second place, it is to be observed, that in courts proceeding according to the course of the civil law, there is less reason for rigor in the rule that the right of action must be complete when the suit is commenced, than in common-law courts; because in the former the matter of costs being wholly in the discretion of the court, it can protect the party prematurely sued, by allowing him costs, without the necessity of dismissing the cause for that purpose, as must be done in common-law actions. If the cause of action is matured when the answer comes in, or even at the time of trial, there is no necessity for ordering the suit to be brought de novo; but the court can retain and proceed with it, adjusting the rights of the parties according to their respective equities. The pleadings in the civil law accordingly give to the objection that the demand sued upon is not due, the effect of a dilatory ex-

ception only (Wood, Civil Law, 386), whilst peremptory exceptions, payment, release, duress, &c., bar and exclude the action forever (Rev. Civ. Code, art. 125).

Such, also, is the function of exceptions in the canon law, from which the admiralty practice was very directly derived. Clarke, Ecc. Prac. § 32; Cockburn's Clerks' Asst. c. 6; Clarke, Adm. Prac. tit. 46. At most, when the exception touches the form of proceeding, (which may, perhaps, include the liability of the defendant to answer the demand eo instanti,) the prosecuting party may at once renew his suit, on rectifying the objectionable act, and paying costs. 13 Poth. 12; Pand. Civ. c. 2, art. 2, § 3.

In this court the answer is permitted to avail as a special plea or exception other than to matters of abatement (Dist. Ct. Rule 76), and both by the rules of this court and the higher authority of the supreme court, amendments are allowed in every stage of the proceedings upon the most liberal terms. Betts, Adm. 57; Sup. Ct. Rule 24; Ben. Adm. Prac. § 483. It is doubtful, under these regulations, whether matter of abatement can be set up at all by answer; but if it can, the court, under the authority of these rules, as well as under the broad provisions of the judiciary act (1 Stat. 91, § 32), may give the party relief at discretion, without compelling him to bring a new action.

To be entitled to claim judgment against the libellants preliminarily, for want of a matured right of action when the suit was commenced, the claimants must have pleaded in abatement or demurred; and by presenting the point on the final hearing upon the merits, it must be regarded as entering into and composing a part of the defence on the merits.

This defence, if formally interposed in equity, would be either a plea in abatement (Beames, Pl. 58, 60), or a plea to the bill. Ib. 61. This subject is largely considered by Judge Story, and he holds that the defence proper to be offered under these pleas is not generally available by way of answer, or at the hearing; and, therefore, the objection ought to be taken ante litem contestatam. Story, Eq. Pl. § 708.

The court will not, accordingly, now pronounce, in exclusion of a consideration of the merits, that the libellant had no existing cause of action when his suit was instituted. Neither, in my judgment, can the objection raised in this stage of the case to the admission of the claimants' defence prevail. The libellants are not entitled to preclude a full investigation of their own demand, or of the merits of the defence.

By taking the boat into their possession on the 8th of October, and appropriating the machinery supplied by the libellants to their own use, the claimants do not adopt the delivery of the boat as a performance of the contract on the part of the libellants, and are in no way estopped from controverting the fact of the fulfilment of the agreement. If the rule be otherwise in respect to articles manufactured by one for another, it cannot govern the case where the work done is applied to property owned by the one obtaining the work, and not by him who does it, and which exceeds in value the alteration or improvement put upon it by the mechanic, nor to contracts executory in their character relating to personal property. Allaire v. Whitney, 1 Hill, 484, 4 Denio, 554; Id., 1 Comst. [1 N. Y.] 305. The claimants in this case being the owners of the body of the boat, of itself of great value; and the undertaking of the libellants being to complete it by adding a steam-engine and machinery of the description specified in the agreement, and the boat never being out of their possession or in that of the libellants, except for that purpose, the claimants had a right to demand and receive the re-delivery of the boat at the time stipulated, or at any time subsequent, without having their acts in so doing operate as an admission that the libellants had fulfilled their contract, or as a discharge of them from its obligation. This may be regarded at law as an admission that they have received some benefit, and that the libellants are entitled to some remuneration for the work done. Lucas v. Godwin, 3 Bing. N. C. 737, 32 E. C. L. 340. But it will not operate as an acknowledgment that the contract has been performed to their satisfaction.

In the present stage of the cause it is intended to discuss two questions only: 1. Whether the agreement has been performed by the libellants according to its true import and meaning? 2. If it has not, what rule of compensation should be adopted towards them, and in protection of the rights of the claimants?

The libellants have received in cash payments made at different periods during the progress of the work, the sum of $35,000. The contract price for which the work specified was to be done, was $46,000, and they claim, in addition, $2,630.47 for work and materials put upon the boat, extra the stipulations of the contract. The claimants claim disbursements and payments in addition to those credited by the libellants, and insist they are entitled to damages to the amount of $30,000, for the delay of the work and detention of the boat from May 15 to October 8, and also because of the imperfect and insufficient performance of the contract in the work done by the libellants.

The first point of difference between the parties, necessary to be disposed of by the court, is the meaning and extent of the contract in respect to the questions in dispute. Although, as might be expected, in a controversy involving so large a demand, the parties have litigated with earnestness every question which the case can fairly raise, yet, in my judgment, the essential matter in dispute relates to the boilers, and whether they fulfil the engagements of the contract re-

specting them. But before taking up this main feature of the case, it will be proper to dispose of one or two other points, upon which a great detail of testimony has been given, not always of the most harmonious character, and which has also been very closely examined and criticized upon the argument.

In respect to the engine and appurtenances, the agreement stipulates various particulars, which the claimants insist the libellants have failed to perform. The libel avers a full performance, except as to time. The deficiencies specified relate to the securing the engine, furnishing the necessary tools, implements and bells, and securing the water-wheels by sufficient iron rims or braces around their circumferences. It is also insisted for the claimants, that various particulars, charged by the libellants in their account as extra work and materials, fall within the meaning of the contract, and are compensated for in the consideration agreed upon for the entire work. Most of these particulars are proper subjects for examination by experts, and under circumstances giving an opportunity for a more thorough understanding of the facts applicable to the subjects than can be possessed by the court itself. They will accordingly be submitted to the consideration of assessors in the reference that will ultimately be directed in the cause.

The evidence in respect to one of these incidental topics is, however, so fully before the court, that it will be disposed of without compelling the parties to go before referees with further testimony on that subject. I refer to the claim of the libellants for extra allowance for fastening the gallows-frame. This is, no doubt, an appurtenance most essential to the well-working and security of the engine, and in that sense might, perhaps, fall within the scope of the agreement. But the preponderance of evidence is clear, that the known usage of steam-engine builders and boat builders, is to regard the frame as a portion of the boat itself, to be fastened when put up by the builder; and if the owner desires to have the skill and experience of the engineer employed, in fastening it more completely, when fitting in the engine, he must secure that service by stipulations in the contract. If this usage is not sufficient of itself to control the construction of the present agreement, the declaration and stand taken by the libellants before the work was put in the boat, evince that it was well understood between the parties that the libellants would not perform that work as part of their contract, and by requesting them to do it after that explicit notification, the claimants must be held to have acquiesced in that interpretation.

This brings us to the great point of controversy between the parties, viz.: whether the boilers put in the boat are of the capacity and construction demanded by the contract? The objection made to them by the claimants is that they are not of the most approved construction for generating steam with economy of fuel, and that they were not so built as to supply to the cylinder the quantity of steam stipulated by the contract. The libellants deny that the claimants have put the true construction upon the agreement, and insist it has been fulfilled according to its import and intent, and that as to the quantity of steam to be supplied, the contract only entitles the claimants to the amount named, when the cut-off is so arranged upon the engine that the boilers will supply it with the piston raised or depressed at a reasonable working distance from the heads of the cylinder; the after action of the piston to be effected by the expansion of the steam so introduced.

The piston has a stroke of twelve feet. It is very clearly proved that if the cut-off is arranged at six feet, or five feet, these boilers cannot be made to supply the engine with steam beyond a pressure of about fifteen pounds to the square inch, when in full action with the throttle-valve wide open. Experienced engineers, on the other hand, state, and this agrees with the theories of books of science, that if the cut-off is protracted so as to diminish sufficiently the aperture between the piston and the heads of the cylinder, the amount of steam generated by boilers of the capacity of these, would furnish forty-pounds pressure to the square inch upon the piston, being the head or force claimed by the claimants. The measure of the stroke of the piston at which the valve should close so as to preserve the head of steam required and the full action of the engine, is not proved. This theory rests upon a reason obvious enough, even to those unskilled in the art. An instantaneous jet, with the throttle-valve to this engine opened wide, would furnish steam enough to fill a narrow vacuum, and yet diminish the force still acting within the boiler so little as to leave the gauge standing at nearly its highest point. In proportion as the quantity is abstracted from the boiler will be the rate of pressure there, unless the apparatus for generating steam is such as to renew the supply with extreme rapidity. It is manifest, therefore, that a steady use of steam from the boiler, through a discharge-valve of the capacity of this throttle, would require, in order to maintain a pressure of forty pounds to the inch, an average pressure at command greatly exceeding that amount, or that steam should be evolved by the boilers as rapidly as it is used by the engine.

There is evidence furnished by the libellants from engineers of learning, and from scientific treatises on the use of steam, conducing to prove that the modern and improved method of working steam-engines is, to fill the cylinder partially with steam from the boilers, depending then on its expansive action, as thus the force it continues to ex-

ert in expansion is so much saved in the consumption of steam. And various experiments with engines, particularly stationary ones, have been referred to as demonstrating that in this mode of employing steam there is not only economy of fuel secured, but an actual increase of power. The argument deduced from this evidence is, that the libellants were bound to construct boilers only with a view to their use in this manner, and not to have them capable of filling one half or more of the engine with steam, at the pressure indicated by the contract. This point, however, must be determined by the meaning of the contract. Should it fail to supply the means of a clear and satisfactory interpretation within itself, then, undoubtedly, extraneous considerations may be brought to bear to point out and determine the true intention of the parties.

The claimants, as appears by the contract, came in as substitutes of parties who had a previous agreement with the libellants to build an engine for this very boat, then in course of construction at William H. Brown's ship-yard. The cylinder, by the first agreement, was to be seventy-two inches in diameter, and the piston to have eleven feet stroke, and the compensation to be paid the libellants was $37,500. That agreement was abrogated by the present one, and an engine of greater force, at an increased rate of compensation, was stipulated to be built. The cylinder was to be "eighty inches diameter of bore and twelve feet stroke of piston, of the best materials and workmanship, and of sufficient and suitable size and strength in all its parts, and to include all modern improvements; the engine to be secured in the boat in the best and strongest manner, and in all respects as an engine of such unusual power and capacity requires, for its firmness, security, and permanency."

It is to be remarked upon these stipulations that the claimants do not exact an agreement to fit up the engine so as to enable them to work it conformably to "all modern improvements," but so to build it as "to include all modern improvements." This phraseology, in its connection as well as natural import, evidently looks to such construction of the cylinder with the apparatus as should be necessary to its operation, and not to the manner by which it was to be operated. The engine to be built was one of power and capacity untried by any river boat. The plain purpose of the agreement, signified in this language, was to have this engine of such strength in itself and its parts, and so stably and firmly secured, that this immense new power which its capacity would furnish, could be safely used in running the boat. The agreement in itself shows that the parties had in view the engines of the fastest boats then running on the North river, and that the dimensions of this cylinder and the other branches of the engine were projected with intent to acquire on this occasion a power to be put in use, surpassing theirs in proportion to the difference of cylinders.

The libellants contend that the agreement required of them no more than to secure to the claimants a command of steam which would enable the engine to be worked at the high power indicated, "according to modern improvements;" that is, by injecting the force or head of steam indicated, and then having the cut-off so arranged as to work the engine by the expansive force of the steam; or at most, that the engine of the Isaac Newton was to be supplied with steam, not to the same actual amount as that used by the fastest river boats, but only proportionately to the relative sizes of the engines; and thus a computation is made by some of the witnesses tending to show that, upon the principles of that proportion, twenty-five inches of steam in the cylinder of the Isaac Newton, with a cut-off at six and a half feet, is equivalent to thirty-seven inches in the cylinder of the Hendrick Hudson, as that boat is usually run with her cut-off at five and a half feet.

The language of the contract is this: "The boilers to be of the best Pennsylvania wrought iron, and of the most approved construction for generating steam with economy of fuel, and of a size to supply the cylinder with steam at as many pounds pressure to the square inch on the piston, when working with the throttle wide open, as are used by the fastest steamboats on the Hudson river when going at their highest rate of speed."

If any implication of a proportion to be maintained between the engine of the Isaac Newton and the Hudson river boats is contained in this stipulation, it clearly is, that the proportion between the cylinder and boilers of the Isaac Newton shall be correspondent to that in the fastest boats, between the same parts of their engines. That proportion is not measured by dimensions, but by the result of the coöperation of the respective parts,—the amount of pressure upon the square inch whilst the boat is at her highest speed, and using a full head of steam up to half the capacity of the cylinder. This, it seems to me, furnishes a plain key to what the parties contemplated in this agreement.

The notion evidently was, that important advantages would be secured by having this cylinder augmented to an extraordinary power and worked at its highest capacity. The parties have fixed with precision its length and diameter,—eighty inches diameter in the bore, and twelve feet stroke of the piston,—and they engage boilers to be furnished of a size to supply the cylinder with as many pounds pressure on the square inch on the piston, when working with the throttle wide open, as are used by the fastest steamboats on the Hudson river, &c., &c. It is to be assumed that the parties well understood between themselves what the facts were in respect to the steamboats to which reference

was made, and that such reference communicated to them a clear and precise idea of the extent of the engagement. This presumption is made indubitably certain by the proofs. The libellants were manufacturers of engines for boats of that description, and the claimants owned boats falling within the class. The purport of the agreement would thus seem scarcely to admit of doubt. It denotes distinctly the intention to give the Isaac Newton the same measure of power upon her engine which these boats have on theirs at their full and greatest speed. The evidence shows that power to be full forty pounds pressure to the square inch, and in some instances exceeding fifty pounds. The boats chiefly referred to as falling, without dispute, within the class of fastest steamboats then running on the Hudson river, are the South America, the Hendrick Hudson, the Mountaineer, (in all which the claimants were part or full owners,) the Niagara, the Thomas Powell and the Oregon; and perhaps the St. Nicholas, the North America, &c., should be ranked amongst them also. With some variety of statements, the witnesses generally agree that the South America used from thirty-three to forty-five pounds steam; the Hendrick Hudson, thirty-eight to forty-five pounds; the Thomas Powell, from forty-five to fifty pounds; the Oregon, from thirty-eight to forty; the Niagara, St. Nicholas, and North America, were also shown to carry about forty pounds of steam, all when running with their throttle-valves wide open.

The boats referred to usually had their cut-off half the length of the piston. The Thomas Powell used hers, at times, at eight feet, carrying fifty pounds steam. The stroke of the piston was eleven feet, and the diameter of the cylinder forty-eight inches. The Hendrick Hudson had also an eleven feet stroke, and her cut-off was arranged at about half way.

Both upon the language of the contract and in view of the concomitant facts embraced within the reference made to the other boats upon the river, it was, in my opinion, the intention of the parties that the boilers should be so constructed as to furnish the engine with at least forty pounds pressure of steam to the square inch on the piston, (or boilers,) with the throttle-valves wide open, using such length of cut-off to the piston as was customary with those other boats.

But the testimony is clear that no such amount of steam could be obtained from these boilers. In truth it was with great difficulty that that head of steam could be raised when the engine was at rest, and when in motion, it could not be maintained above twenty-five inches of pressure, with the throttle-valve only about one quarter open. When open to its full width, the steam, with all the power of the blowers attached to the engine, could not be kept above fifteen to eighteen pounds of pressure.

It is urged for the libellants that blowers of an improved character would have been furnished, but the agent of the claimants preferred those which were put in; when, with the use of such other blowers, the head of steam required could have been readily generated in those boilers. I do not feel competent to decide, to my own satisfaction, to what cause the deficiency of the boilers is to be ascribed. Various defects in their construction have been supposed, particularly in the back connections; so, also, as to the thickness of the iron, the steam chimney and jacket; and it may well be that the blowers contributed in some measure to the general inadequacy of the boilers to accomplish what they were expected to do. I do not undertake to determine, upon the knowledge of the facts communicated by the testimony, whether it is necessary to enlarge the circumference or length of the boilers, or to change their interior construction. There may be other mechanical means adequate, through other alterations of the engine and apparatus, to secure the result called for by the contract. It is plain to my mind, however, that the claimants have not obtained the head and power of steam contracted for, and that they have sustained injury by the failure; and the decree in the cause will adopt proper measures to enable the court to appreciate more satisfactorily the extent of that damage, and probably the causes or deficiencies occasioning it, and the manner by which it may be remedied.

The water-wheels are appurtenances to the engine, and were, as part thereof, to be built and secured in the best manner. On trial they were found insufficient to support the power of the engine, and the clear weight of the evidence is, that the inadequacy arose from the want of iron rims upon the circumferences to support and strengthen the arms in their action. This is, it appears, an improvement of common use, and the claimants were entitled to have it applied to these wheels.

The contract was not completed within the time stipulated. The libellants engaged to deliver the work complete on the 15th of May, and did not offer a delivery of it till the 8th of October thereafter. Had the claimants refused to accept the work at that time, and this action been brought upon the refusal, and to enforce the contract against them, there would be ground for the claim that all reasonable damages incurred by such delay, should be secured to the claimants, before they could be compelled to fulfil the stipulations on their part. It might not stand on the footing of a contract rescinded as to the claimants, by occasion of non-performance on the part of the libellants, as, under the characteristics of this contract, the perfect performance by the latter of their engagement was not a condition precedent to the obligation of the former. The agreements, to a certain extent, were concurrent and independent, so that a very large proportion of the consideration-money, payable

by the claimants, was to have been received by the libellants anterior to the period fixed for the full performance of the terms of the contract.

Besides, the work of the libellants was to be put upon a boat owned by the claimants; and the remedy of the latter would not be by an abrogation of the contract, for that would leave neither themselves nor the other party in the same position as if an entire failure to perform had occurred. The claimants could not repossess themselves of the body of the boat, without compensating the libellants for the work bestowed upon her: nor could the latter retain her, without allowing the former all damages because of the insufficient performance of the agreement. When, therefore, the boat was received by the claimants, such acceptance, in the manner in which it was made, did not admit a performance of the contract by the libellants, nor in any way release or relieve them from their responsibility for an imperfect performance. Still, the claimants, by continuing their superintendence of the work as it progressed, and by paying instalments after the 15th of May, must be regarded as having so far acquiesced in the delay of performance as not to be now able to put forward that delay as a substantive ground of damages. They are justly entitled to remuneration for any expenses or disbursements incurred in consequence of the prolongation of the work by the libellants, and their claim to damages on this head must be limited to these particulars.

In so far as the execution of the contract is short of the agreement, there is no difficulty in giving the claimants a proper indemnity, by subtraction from the balance yet unpaid, or by way of recoupment, upon the amount otherwise recoverable by the libellants. Barber v. Rose, 5 Hill, 76, and cases there cited. Although the engine, at the commencement of this suit, had not been tested and proved according to the provisions of the contract, and had not been then completed and put in successful operation by the libellants to the satisfaction of Isaac Newton, as stipulated in the contract, but various and important particulars still remained to be done; and although the claimants had not accepted the engine and appurtenances as a true performance of the contract on the part of the libellants, yet the claimants having taken the boat with her engine and appurtenances, into their employment, and having since retained it and kept it running upon the North river, they must be held to have thereby admitted their liability to pay the libellants whatever was due them (after reasonable allowances for defective performance of the contract,) for the machinery put into the boat. In that point of view the action is not prematurely brought. If the claimants intended to put themselves upon their strict rights in this respect, it would have been necessary for them to have declined receiving the delivery of the engine until it had been tested and proved by the libellants, according to the agreement. Perkins v. Hart, 11 Wheat. [24 U. S.] 237.

After taking it into their own possession as their property, and continuing to hold and use it as such, they cannot controvert the right of the libellants to be paid the value of the work. Linningdale v. Livingston, 10 Johns. 36. The principle of this decision, as subsequently expounded by the court, supposes a performance of the contract with variations from the agreement, probably with the assent of both parties, or an extension of the time within which the agreement was to be performed, with the like assent. Jackson v. Rosevelt, 13 Johns. 97.

In the delivery and completion of the boat and machinery, both parties manifestly acted under the idea that the contract was to regulate their respective rights; the libellants placing themselves upon the assertion of a complete performance in every thing, except as to time, and the claimants invoking the agreement as ground for the remuneration they demand because of a defective performance.

In this court it matters not whether the remedy be on the agreement, or the agreement be revoked, and the remedy rests on a quantum meruit or quantum valebat. The form of proceeding and pleading is substantially the same, and accordingly the distinction adverted to or marked with strict emphasis in cases at common law, touching the form of action upon rights so circumstanced, has no application or authority in maritime cases prosecuted in admiralty. Jackson v. Rosevelt, 13 Johns. 97; Barber v. Rose. 5 Hill, 76. The libellants may accordingly retain and pursue their action as instituted, and the claimants will be allowed, against any balance established against the boat, a just recompense for imperfect performance, and damages and expenses, to which they have been subjected in consequence of the prolongation of the work.

The question of interest and costs will be reserved until the final hearing upon the report of auditors or assessors, to be provided for by the decree.

The following decree to be entered will point out specifically the method by which the objects which have been specified are to be obtained.

In view of the pleadings and proofs in this cause, it is considered by the court:—

That the defence set up on the part of the claimants that the contract in the pleadings set forth was not performed and fulfilled by the libellants within the time therein stipulated, is no bar to a right of action thereupon.

That the claimants being owners of the said steamboat Isaac Newton, their demand of her delivery from the libellants, and their acceptance of her when delivered, was no ac-

ceptance of the engine and boilers put in the boat by the libellants, as being constructed and completed pursuant to the contract aforesaid; and the claimants are no way thereby precluded from the defence, that the contract has not been performed by the libellants according to its true intent and meaning, or from claiming a just recompense in case a nonperformance or imperfect performance thereof is proved.

And in view of the allegations of the libel, and the proofs of the parties, and the import and effect of the said contract between them, it is found by the court:—

1. That the engine, with its appurtenances, fastenings, and materials, (except the boilers and bracings of the water-wheels to be specially noticed in this decree,) was made and completed by the libellants in every particular, equal to what was stipulated and required in that respect by the said contract.

2. That the boilers built and furnished the said boat by the libellants were not of the most approved construction for generating steam with economy of fuel, according to the engagements of the contract; but on the contrary, did not include all the modern and well-known improvements in that behalf, and were so constructed as to require and consume an amount of fuel much greater than is used in boilers of approved construction, with such modern improvements, to generate an equal amount or proportion of steam.

3. That the said boilers were not so constructed and built as to supply the cylinder with as many pounds pressure of steam to the square inch on the piston, when working with the throttle wide open, as are used by the fastest steamboats on the Hudson river when going at their full and greatest speed, according to the engagement of the said contract; but on the contrary, whilst the boats so referred to, when so running, use forty pounds and upwards of steam to such square inch, the engine of the Isaac Newton is supplied by these boilers, when the throttle is wide open, with not more than a pressure of fifteen pounds of steam to the square inch on the piston.

4. That the engine and boilers of said boat were not tried and proved by the libellants or others previous to the commencement of this action, or afterwards, with as much pressure of steam on each square inch of the piston as is usual or customary on boats on the Hudson river, when going at their greatest, fullest, and highest speed, according to the agreement aforesaid; but on the contrary, whilst the boats so referred to and so going, had and used for their usual and customary pressure of steam, forty pounds and upwards to the square inch on their pistons, the engine and boilers to this boat were not and could not be so tried and proved with a pressure of steam as aforesaid, exceeding twenty-seven, or thirty pounds at the utmost, to the square inch on the piston.

5. That the engine in the said agreement of the libellants engaged to be built, had not, at the commencement of this suit, been completed and put into successful operation and motion, under the superintendence and to the satisfaction of Isaac Newton, as stipulated in said agreement; but on the contrary, the water-wheels built and furnished by the libellants as a material part thereof, had not been and were not secured and supported at the rims or external parts thereof, in such manner as is necessary for their firmness, security, and permanency, when worked under the great power contracted to be given to the engine of this boat; and said wheels have proved inadequate and insufficient in strength for the successful operation and running of said boat.

6. It is further found by the court, that the claimants had not, by themselves or agents, at the time this suit was commenced, accepted and received the said engine and boilers, with their appurtenances, or any part thereof, from the libellants, as a true performance and fulfilment on the part of the libellants of the contract aforesaid; nor had the said engine and boilers been constructed, put up, and completed under the directions and with the assent and approval of the claimants, as to the particulars in this decree before specified, in such manner as to discharge or relieve the libellants from a true performance of the said contract, according to the terms and obligations thereof.

7. It is accordingly considered by the court, that the claimants are entitled to compensation in this suit, by way of abatement or subtraction from any balance remaining due the libellants upon the said contract, because of the defective and insufficient performance thereof by the libellants.

8. It is further found by the court, that by superintending the said work during its whole progress, and urging its completion, up to the time of its delivery, and long after the period fixed in the contract for such completion, and by then permitting the same to be delivered by the libellants as under and in fulfilment of the contract, without notice to them after the time for performance had arrived that damages would be claimed because of the delay, and without notice or intimation when the work was delivered that it would not be accepted under the contract for that cause, the claimants have waived the right to set up the non-execution of the contract by the libellants within the time therein stipulated, as an absolute failure to perform the same, or as thereby being exonerated or discharged from their obligation to make the payments in said contract engaged to be made on their part. But it is considered by the court, that the claimants are entitled to be reimbursed and satisfied for all charges, expenses, and disbursements actually and necessarily incurred by them during the period of such

delay, and in consequence thereof; not, however, including therein any estimated value of said boat for that period, if finished, nor any supposed profits to be derived from her employment or hiring therefor.

9. It is further found by the court, that the libellants were not bound by the said contract to fasten the gallows-frame of said boat with iron work, nor to supply and put up the upper pipes, substituted, at request of the claimants, for the one first prepared to lead the steam from the boilers to the steam-chest, nor to put up and fasten the suspension-frame for the blower engines; and are entitled to a reasonable compensation therefor, over and above the payments stipulated in said contracts.

10. It is further found by the court, that the libellants are not entitled to extra compensation for any work, arrangements, or conveniences, applied to the boilers themselves, it appearing to the court that none have been supplied beyond the modern improvements used in approved boilers on the Hudson river at the time said contract was made. But as to the other particulars claimed in the bill of the libellants attached to their libel as extra and not embraced in the said contract, their allowance or disallowance will be deferred to the coming in of the report on the reference ordered in the cause.

Wherefore it is ordered and decreed by the court, that the libellants recover in this action the arrears and balance of moneys due them, upon the aforesaid contract for building the said engine, boilers and appurtenances thereto, and securing the same in the said steamboat Isaac Newton; and also compensation for the particulars above specified, extra and beyond the amount stipulated to be paid by said contract; and to be ascertained and adjusted as hereinafter directed; subject, however, to an allowance and credit to the claimants, to be ascertained as hereinafter directed, because of the defective and imperfect performance of the said contract in the particulars before specified, and because of their expenses and disbursements in consequence of the delay of the libellants to perform their contract within the time therein stipulated.

It is accordingly ordered and decreed by the court, that it be referred to assessors or commissioners, to be designated as hereinafter directed, to inquire and ascertain the fair and reasonable value and worth of the labor and materials charged by the libellants as extra, beyond the said contract in the account attached to their said libel, and also to inquire and ascertain whether the iron pans to hold cement, the sheet iron flooring laid in the fire-rooms, or any and every other item of said account, are properly and fairly appurtenances to the engine or boilers, as modern improvements to approved boilers and engines, known and used on the Hudson river in the year 1845; and also to inquire and ascertain whether the charges for tools, bells, and fixtures included in said account, embrace any, and what, which are necessary tools, fixtures and bells for this engine.

And it is further ordered and directed, that the said assessors or commissioners inquire and ascertain what would be the reasonable cost and expense of so altering and improving the said boilers, "as that they shall supply the said engine at least forty pounds of pressure of steam to the square inch of the piston of said engine, with the throttle wide open, and also so as to reduce the consumption of fuel proportioned to that consumed by boilers of approved construction, with the modern improvements, employed on the Hudson river, anterior to November 1, 1845;" and also to inquire and ascertain the expense or value of braces or rims to the water wheels, sufficient to render the same secure when the said engine is worked with the power aforesaid; and also to inquire and ascertain the amount of payments and disbursements actually and necessarily made by the claimants between the 15th day of May and the 8th day of October, 1846, for wharfage for said steamboat, for insurance on her, and for keeper's wages on board her; and report to the court upon the particulars aforesaid, with all convenient speed.

And it is ordered, that each of the parties aforesaid nominate to the court in writing, within ten days, three competent and disinterested persons, as assessors or commissioners in this behalf, from whom the court may designate and appoint the assessors or commissioners to whom the matters aforesaid are referred.

The cause came before the court again, December 27, 1850, on exceptions to the report of the commissioners appointed by the above decree. [Case No. 7,090]. The decree upon the merits was affirmed by the circuit court, October 2, 1852. [Case unreported.]

## Case No. 7,090.

The ISAAC NEWTON.

[Abb. Adm. 588.] [1]

District Court, S. D. New York. Dec. 27, 1850.[2]

ADMIRALTY—PRACTICE—REFEREE—CONTRACTS—WORK AND MATERIALS—PAYMENT—INTEREST.

1. Where a cause is referred to experts to ascertain and report upon facts appertaining to their calling or experience, it is the settled rule, both at law and in admiralty, to adopt the decision of the referees, unless there is a manifest preponderance of testimony against it.

2. Where, by the terms of a contract for work and materials, a part of the contract price is to be paid in instalments as the work advances, the employer is not entitled, on the adjustment of a decree for a balance remaining due

[1] [Reported by Abbott Brothers.]

[2] [Affirmed by circuit court. Case unreported.]

on the work, to be credited with interest on the payments made by him while it was advancing.

3. Where a party contracting to furnish labor and materials has completely fulfilled the contract on his part in due time, he is entitled to recover in a suit for the compensation stipulated by the contract, interest on the amount due him, at least, from the commencement of the suit.

4. But where, in such case, the right of the party to recover his compensation under the contract is doubtful and contested on reasonable grounds, and the amount due him requires to be adjusted by the proceedings in the suit, interest is only recoverable after the right of the party to recover, and the amount of his recovery have been determined.

[Applied in Shipman v. State, 44 Wis. 462.]

5. If in such case the report of referees fixing the amount due to libellant is ultimately confirmed, he will be entitled to interest from the filing the report,, although both parties have excepted to the report, and prosecuted their exceptions to a hearing with a view to have it set aside.

[Cited in Young v. The Orpheus, 119 Mass. 186.]

This was a libel in rem by "The Allaire Works," a corporation created under the laws of the state of New York against the steamboat Isaac Newton, to recover for an engine, &c., supplied to that boat. The cause was before the court in July, 1847, when a decree was rendered affirming the right of libellants to recover upon their demand, subject to certain deductions to be made in favor of the claimants. The proceedings had at that time are reported [Case No. 7,089]. By the decree then rendered, a special reference was directed to commissioners, to be selected by the parties and approved by the court, of several particulars embraced in the action. The commissioners were directed to ascertain what extra work was done by the libellants beyond that embraced by the contract, and what was the value thereof; what would be the cost of altering and improving the boilers so as to conform them to certain specifications prescribed in the contract; and also what payments were made by the claimants for wharfage, insurance, &c., on the boat, from May 15th to October 8, 1846. On February 20, 1849, by consent of parties, Hon. R. Hyde Walworth, William Kemble, and S. Bartlett Stone, were designated as such commissioners. The commissioners made up and signed their report May 11, 1849; and on July 3d, thereafter, it was filed in court. The findings of the commissioners were as follows:—That the labor and materials charged by the libellants as extra, beyond the contract in the account attached to their libel, for gallows frames and suspension frames, for additional boiler bearers, iron pans for holding cement, lengthening bolts for king posts, braces, whitewashing, covering shafts, oil cups, passenger bell and fixtures, bands for casing of cylinder, mahogany for box, fixing chandelier, pawl-wrench and drills, and mercury, were not properly and fairly for appurtenances to the engine or boilers as modern improvements to approved boilers and engines known and used on the Hudson river in the year 1845, but were extra work. That the charges for tools, bells and fixtures, above mentioned, do not embrace any which were necessary tools, fixtures and bells for the said engine. That the fair and reasonable value and worth of the labor and materials so charged for, on October 8, 1846, was the sum of one thousand eight hundred and one dollars and sixty-eight cents. That no other of the charges for extra work were for work that was extra. That the reasonable cost and expense on October 8, 1846, of so altering and improving the said boilers, according to the said decree, as that they should supply the said engine at least forty pounds of pressure of steam to the square inch of the piston of said engine, with the throttle wide open, and also so as to reduce the consumption of fuel proportioned to that consumed by boilers of approved construction with the modern improvements employed on the Hudson river anterior to November 1, 1845, is the sum of five thousand dollars. That the expense or value of braces or rims to the water-wheels sufficient to render the same secure when the said engine is worked with the power referred to in said decree, is the sum of seven hundred dollars; estimated at the value on October 8, 1846. And that the payments and disbursements actually and necessarily made or incurred by the claimants between the 15th day of May and the 18th day of October, 1846, for wharfage for said steamboat, for insurance on her, and for keeper's wages on board her, amount to the sum of seven hundred and fifty-four dollars and twenty-eight cents. Both libellants and claimants filed exceptions to the report; and the cause now came before the court upon these exceptions.

Mr. Moore, for libellants.
H. S. Dodge, for claimants.

BETTS, District Judge. The exceptions taken by both parties relate substantially to the allowance of $5,000 made by the commissioners to the claimants, because of the insufficient or defective construction of the boilers by the libellants; the one party contending it is too high, and the other that it is insufficient and short of the injury proved. To this point, it appears, the main attention of the commissioners was directed in taking proofs, and on the argument before them.

The testimony taken in court on the hearing was laid before them, some of the same witnesses were reëxamined by them, and additional ones were produced, to the end that this branch of the case might receive the most searching and detailed consideration.

Much of the evidence upon this point was necessarily hypothetical, and, as might be expected, widely variant in its suggestions and inferences. This difficulty was perceived and felt by the court on the hearing, and the reference in the case was directed chiefly in order to have facts of this character presented to men of practical experi-

ence, who could better appreciate the application and effect of the testimony than the court could hope to do, and whose judgment would be framed with higher advantages for accuracy than the court could expect to command on a hearing in its presence. The commissioners were selected with a view to their qualifications in respect to all matters which were to be brought before them. They have given, it seems, a full and patient hearing to the parties, and the result of their examination of the subjects is expressed in the report signed by them and on file. I do not feel that the argument on the exceptions has brought to my mind any well-grounded cause for disapproving that result.

The commissioners have not particularized the defects they discovered in the construction of the boilers, nor pointed out what changes they regarded as important to be made, nor designated the manner in which the sum of $5,000, allowed by them on account of the deficiency of the boilers, could be applied to their improvement or alteration so as to produce the amount of steam required by the contract. The order of reference did not enjoin upon them the duty of so doing.

Their attention was most carefully called to the point, on the part of the libellants, that the head of steam demanded, according to the decree, could be readily and certainly secured without any alteration of the boilers, and the witnesses gave in full their theories upon that hypothesis. Their estimates brought the expenses, for any useful changes which could be proposed, down as low as three or four hundred dollars for each boiler.

These theories and estimates were combated by testimony on the part of the claimants, who considered it must cost six or seven thousand dollars for each boiler, to place them in a condition to supply the steam demanded by this engine.

The exposition of the reasons upon which the decree was founded, shows that it was not contemplated by the court to adjudicate the point, that an alteration in the shape or size of the boilers must necessarily be made. The decree indicated distinctly the object to be attained, and which this engine and apparatus (including the boilers) have failed to accomplish, and the advice of competent officers or commissioners was invoked to determine what expense would be necessary to effect that object. Two of them are men of extensive experience in these matters, and their opinions, after hearing all the proofs, both as to the necessity of changes in the construction of the boilers, and the cost involved in such changes, must necessarily have great weight in determining the judgment of the court on the subject. The inquiry related solely to matters of fact and mechanical expediencies, and I should distrust any conclusions of my own at variance with the judgment of the commissioners on such particulars.

Had these gentlemen sat with the court in the capacity of auditors, on the hearing, I should have deferred to their judgment on facts of a professional character, as justly entitled to control my own when not palpably in conflict with the testimony. And although in reperusing the proofs taken at the hearing, and reading over carefully that given before the commissioners, I might regard it as tending to prove that a much greater outlay would be required to place this engine in the condition stipulated for in the agreement, yet if I had possessed the advantage of a personal conference with them, their explanations of matters merely mechanical, might well have convinced me that my impression was erroneous, and that their opinion was most to be relied upon.

In cases of reference, out of court, to experts to ascertain and report upon facts appertaining to their calling or experience, it appears to be the settled rule of law to adopt their decision, unless there is a manifest preponderance of testimony against it. Doyle v. St. James' Church, 7 Wend. 178. Such is also the established usage with maritime courts in reviewing the decisions of inferior tribunals upon matters of fact.

There are various ways, in consonance with the evidence, in which material alterations may be made in the apparatus for generating steam, without an expense exceeding $5,000, and the judgment of the commissioners, whether these methods would be efficacious and sufficient, is more satisfactory to the court than its own opinion would be, not so aided, upon subjects so purely mechanical and professional.

The minor exceptions were not pressed on the argument, and I discover no cause for departing from the conclusions adopted by the commissioners in the allowances made by them to the parties respectively in these particulars.

The report is accordingly confirmed in all its parts.

The libellants insist they are entitled to interest upon the balance which the court may decree them, from the delivery of the vessel and engine to the claimants. The question of costs is also involved in the decree to be finally rendered.

On the 8th of October, at which time the libellants claim their contract was fully performed, they had been paid from time to time, as the work progressed, according to the provisions of the agreement, the sum of $35,000. The claimants contended, that if an interest account is raised, they are entitled to receive it on these advances.

This claim manifestly cannot be supported. The advances were to be made before the claimants could have any possession or use of the work, and accordingly interest on those advances, or their present value in relation to the time of the completion of the

contract, must have entered into the contemplation of the parties, and be deemed adequately provided for in the terms or consideration upon which the work was to be done. In effect, the interest on these payments as respectively advanced, in addition to the price named, $46,000, would be the stipulated or contract price for the work and materials.

Had the claimants accepted the work on the 8th of October as a performance of the contract, there could be no question of the legal and equitable rights of the parties in respect to interest. It would become, from such delivery, a portion of the unpaid debt due the libellants, continuing to run with the debt until that was satisfied by the claimants. At least, interest would have run from the time the suit was commenced, which was only two days after, notwithstanding the contract was special. Feester v. Heath, 11 Wend. 478.

This is on the idea that the agreement is entirely fulfilled on the part of the libellants, and that they are justly entitled to the compensation stipulated; for, as a general rule, interest cannot be enforced on uncertain demands, or unliquidated damages, nor on damages demanded for non-performance of a contract. Willings v. Consequa [Case No. 17,766]; Buckmaster v. Grundy, 3 Gilman, 626; Speer v. Van Orden, 2 Penn. [3 N. J. Law] 652. Nor is interest allowed when more is demanded than is due, or upon uncertain demands which are to be settled by process of law. Doyle v. St. James' Church, 7 Wend. 178; Still v. Hall, 20 Wend. 51.

In this case, not only was the balance rightfully belonging to the libellants to be settled by process of law, but also a question vital to the right of recovery at all, was in contestation in the suit, with at least reasonable color of grounds of defence on the part of the claimants. They could not, accordingly, be justly required to recognize the demand or make any tender for its satisfaction until after the decree of the court had fixed the right of recovery, and the report of the commissioners had liquidated the amount.

It is true both parties dissent from the report, and by their exceptions appeal to the court to set it aside;—the libellants, because it awards them greatly less than their just dues, and the claimants, because it undervalues the damages they have sustained, and which were to be deducted from the contract indebtment. Still, according to the ordinary usage of courts, the report of referees must be regarded as liquidating the uncertain damages so far as to afford prima facie evidence that the libellants were entitled to that amount, and to put the claimants to the election of tendering its discharge, or afterwards litigating its recovery at the hazard of interest thereon.

I shall, therefore, allow interest on the balance of $6,347.40 so reported by the commissioners, at the rate of six per cent. per annum, from July 3, 1849, the day the report was filed in court, and thus became legal notice to the claimants. It is not made to appear upon any evidence before the court, that the very unusual delay in closing this case, which has intervened, since the decision upon the merits, is ascribable to any fault of the claimants, and accordingly interest will not be carried back further than the term the report was brought into court.

The libellants, as actors, had the efficient control of the cause, and might have speeded its decision at their option. Had their efforts to do so been thwarted by acts of the claimants, an equity might then have arisen to interest on the balance ultimately adjusted, during the period of such interception or procrastination of their suit. Here the delay was either their own or was acquiesced in by them; and affords no equitable ground for the allowance of interest during its continuance.

I discern in this case no principle distinguishing it from those to which the ordinary rule in respect to costs, applies; which is, that the successful party recovers with the amount in his favor, the costs which have accrued in prosecuting his right.

The case has been litigated in good faith, no doubt, on both sides. Had the demand been defeated in toto, full costs would have been awarded in favor of the claimants, and the converse of the principle is properly applied to them when their adversaries are the successful party.

The defence put in issue the right of the libellants to any compensation, or to maintain a suit upon the contract. They may be fairly held to take the advantages of a defence so comprehensive and entire, together with its hazards. If it succeeds, they stand discharged of the suit with their costs; and if it fails, the balance justly reclaimable from them should be paid with the taxable costs created in enforcing its collection.

Decree accordingly.

[Upon appeal to the circuit court the decree was affirmed upon the merits, October 2, 1852. Case unreported.]

## Case No. 7,091.

### The ISAAC NEWTON.

[4 Blatchf. 21.] [1]

Circuit Court, S. D. New York. April 15, 1857.

COLLISION—REPAIRS TO VESSEL—DETENTION—DAMAGES.

1. Where, in a collision case, a commissioner allowed, as damages, $800, for the difference between the value of the libellant's vessel after she was repaired and her value before the injury, this court, on all the facts, disallowed the

[1] [Reported by Hon. Samuel Blatchford, District Judge, and here reprinted by permission.]

item, holding that she was, after being repaired, in as good a condition as before the injury.

[Cited in The St. John, Case No. 12,224; Petty v. Merrill, Id. 11,050; The Excelsior, 17 Fed. 925.]

2. Where an item of $465, and interest on it, was allowed by the commissioner, for loss of the earnings of the vessel during her detention for repairs, upon the mere opinion of her master and mate, the claimant introducing no testimony on the point: *Held*, that such opinion was incompetent evidence. But, as the expense of sending the report back would probably equal, if not exceed, any abatement in the amount, the court allowed the item to stand, deducting the interest on it.

This case came up on exceptions to the report of a commissioner as to the damages in a case of collision brought into this court by appeal from the district court. [See Case No. 7,092.]

NELSON, Circuit Justice. One of the exceptions is to the allowance of an item of $800, for the difference between the value of the libellants' vessel after she was repaired and her value before the injury. This item is founded on the evidence of the master and the mate, and is a matter of opinion, resting upon no fact stated, except that the vessel leaked more after the repairs than before the damage occurred. The shipmaster who repaired her, states that she was thoroughly repaired, and was put in as good a condition as before the injury. The work was done under the direction of the master of the vessel, and, from the sum expended in making the repairs, at his instance, it would be somewhat strange if the depreciated value should be as large as he states. The whole value of the vessel before the injury, at the highest estimate, was $2,500; the amount of repairs was $1,831.81. After this amount of expenditure, I am inclined to agree with the shipmaster, that she must have been in as good a condition as before the injury, and shall accordingly disallow the claim of $800.

The item of $465 for loss of the earnings of the vessel during her detention, thirty-one days, for the repairs, is also objected to. The evidence of this rests upon the opinion of the master and the mate, which strictly was incompetent to establish the fact. They may have been competent witnesses to prove this item of loss, if they knew what the price at the time was, in the port of New York, for the charter of a vessel of this description; otherwise, not. That was a fact which might have been ascertained on inquiry, as readily as the price of many commodities in the market for sale. The mere opinion or judgment of the witness himself is but conjectural and speculative. I would reject the evidence altogether, and send the report back, if it were not that the expense attending this mode of correcting the error would probably equal, if not exceed, any abatement in the amount. Besides, it was open to the claimants to have corrected the estimate by witnesses on their part, which was omitted. I shall, therefore, allow the item to stand, striking out the interest. The interest to be deducted is $208; the depreciation to be deducted is $800; making a total of $1,008; which, taken from the amount reported, $3,566.06, leaves $2,558.06, for which a decree must be entered.

## Case No. 7,092.

The ISAAC NEWTON.

[12 N. Y. Leg. Obs. 299.]

Circuit Court, S. D. New York. Sept., 1854.[1]

COLLISION—STEAMER AND SAILING VESSEL.

*Held*, that where a steamboat exculpated herself from all fault in a collision with a vessel under canvass, and it appeared that the collision had been caused entirely by a want of prudence and good seamanship on the part of the sailing vessel, the latter had no right to claim damages.

[See note at end of case.]

[Appeal from the district court of the United States for the Southern district of New York.

[This was a libel by Jonathan Crockett, Archibald C. Spaulding, John Gregory, Christopher Dyer, and Nathaniel Dyer, owners of the schooner Hero, against the steamboat Isaac Newton (Isaac Newton, claimant), for damages caused by collision.]

E. C. Benedict and C. Van Santvoord, for libellant.

H. Cowles, for the steamboat.

NELSON, Circuit Justice. This libel was filed to recover the value of a cargo of flour and corn on board the schooner Hero, which was sunk by a collision with the Isaac Newton on the morning of July 17, 1850. The schooner had put out from her wharf early in the morning, but, there being very little wind, had made but very little progress, and was about three-quarters of a mile from the wharf, when the steamer, coming into her berth, struck the schooner, and sunk her. Judge Judson, in the district court, held that the steamer was not in fault, but that the collision was caused by the carelessness of those on board the Hero, in placing the schooner in the way of the steamer, and from that decree [case unreported] the libellants appealed.

1. I am unable to discover from the proofs any want of skill or diligence in the management of the steamboat, nor any ground for imputing fault to her in coming into her berth. I think it would be unjust to charge her with the consequences of the collision.

2. On the other hand, it seems to me there was a want of prudence and good seamanship on the part of the master of the Hero at that hour in the morning, and with the wind as it was, in not looking out sharper for the steamboat, knowing, as he must, that she was expected every moment to arrive

[1] [Reversed in 18 How. (59 U. S.) 581.]

from Albany. It seems to me, with proper caution, the schooner need not have been in a position where a collision was unavoidable. I do not think, under the circumstances, the steamboat was bound to see the Hero, before the former came around the stern of a brig, and was entering between this and other vessels. Decision affirmed.

[NOTE. From this decision the libellants appealed to the supreme court, where the decree of the circuit court was reversed. 18 How. (59 U. S.) 581, opinion by Mr. Justice Curtis. The ground of reversal was that the general rule is for a sailing vessel, meeting a steamer, to keep her course, while the steamer takes the necessary measures to avoid a collision, and that it must be a strong case which puts the sailing vessel in the wrong for obeying the rule. It was held that the facts did not make this such a case. The attempt of the steamer in coming to her berth between certain vessels at anchor, without first ascertaining that the track was clear, was held to be culpable. Mr. Justice Daniel dissented.
[See Case No. 7,091.]

## Case No. 7,093.

In re ISAACS et al.

[3 Sawy. 35;[1] 6 N. B. R. (1873) 92.]

District Court, D. California.

BANKRUPTCY—JOINT CREDITORS.

An agreement between two traders to unite their stocks in trade as the capital of a partnership to be formed between them, and to convert the separate business debts of either into joint debts of the firm, will not entitle a separate creditor who has not acceded in any way to the arrangement before bankruptcy, to prove his claim as a joint creditor of the firm against the partnership estate.

[In the matter of Isaacs & Cohn, bankrupts.]

W. W. Cope, for petitioning creditor.
Joseph Naphtaly, for creditors.

HOFFMAN, District Judge. It appears by the statement of facts reported by the register and admitted by the attorneys for the respective parties, that on the seventh of March, 1871, the above bankrupts, by a writing under seal, entered into a contract of partnership, by which it was agreed that the parties who had previously been doing business on their individual accounts should unite their stocks of goods and uncollected book accounts, to form a joint capital for the partnership, and that the copartnership should assume and become liable for all the separate business debts of either partner, as shown by his books.

The firm having become bankrupt after incurring partnership debts, a creditor of one of the partners (and who appeared by the books of the latter to have been such), for goods sold before the formation of the partnership, offered to prove his debt as a joint debt, with a view of sharing in the distribution of the firm assets.

No evidence was offered to show that the separate creditor acceded to the substitution of the firm liability for that of the partner by whom the debt was contracted. He does not even appear to have been aware of the terms and conditions of the agreement between the partners. The register was of opinion that the proof offered should not be received; and the question having been fully argued, is submitted to the court for its decision.

The question thus presented, viz., whether an agreement between two traders to unite their stocks in trade as the capital of a partnership to be formed between them, and to convert the separate business debts of either into joint debts of the firm, will entitle a separate creditor who has not acceded in any way to the arrangement to prove in bankruptcy as a joint debtor of the firm, is closely analogous to that which arises where, on the dissolution of a firm, the continuing partner takes an assignment of the joint assets, and agrees to be responsible for the firm debts; and after bankruptcy, a joint creditor who has not, before bankruptcy, assented to the conversion of his debt, seeks to prove it against the separate estate of the continuing partner.

Both of these questions have frequently been submitted to the courts, and have received, with one or two exceptions, a uniform answer.

A joint debt may be converted into a separate debt, or a separate debt into a joint debt, either with or without an extinguishment of the original obligation.

In the former case the creditor can only rely on his debt according to its new quality, and is, therefore, entitled to only one mode of proof. In the latter case, as the old debt still subsists, he can take advantage of it in either its old or its new form, and is consequently entitled to an election of proof. Story, Partn. 369; Colly. Partn. 767.

As no arrangement between a debtor or debtors and third person, or between themselves, can impair or destroy the liability of either or all of them to a creditor, without his consent, it is evident that to establish an extinguishment of the old debt, it must appear that he has accepted the new liability as a substitute for and in discharge of the old.

But when a conversion merely is set up, i. e., the creation of a new liability, without an extinguishment of the old, as this is ordinarily beneficial to the creditor, less evidence of an assent by him to the arrangement will be sufficient than in cases where it is sought to substitute a separate for a joint liability. Robs. Bankr. 599, and cases cited.

But even where a mere conversion is set up, as in this case, evidence of the assent of the creditor before bankruptcy seems always to be required.

[1] [Reported by L. S. B. Sawyer, Esq., and here reprinted by permission.]

In the case of Ex parte Williams, 1 Buck, 13, a trader indebted entered into a partnership and brought his stock in trade into the new firm, under articles by which the joint trade was to pay his creditors named in a schedule. It was held that a separate creditor named in the schedule did not by the articles become a joint creditor of the firm.

In this case Lord Eldon says: "If it is meant to be said on the part of the petitioner, that a joint action might have been maintained by the creditors named in the schedule, against the partners immediately on the execution of the deed, and by force of the deed only, independently of an accession to the agreement on the part of the creditors named in the schedule, I cannot assent to the doctrine. * * * But I agree to the proposition that a very little will do to make out an assent to the agreement."

The same point was decided by Sir John Leach in Ex parte Freeman, Id. 471, though the question there arose in a case where a retiring partner had assigned the stock in trade to a continuing partner, who covenanted to pay the joint debts. The partners having become bankrupts, it was held that the joint creditors, not having, previously to the bankruptcy, accepted the continuing partner as their sole debtor, could not prove against the separate estate of the continuing partner.

This case, although it was overruled by Lord Eldon, seems, nevertheless, observes Mr. Collyer, to be consistent with the most of those on the same subject which preceded it, and as the grounds of Lord Eldon's decision do not appear, and as Sir John Leach decided the subsequent case of Ex parte Fry, 1 Glyn & J. 96, in the same manner, there seems just reason to suppose that the case of Ex parte Freeman was rightly decided. Colly. Partn. 774.

In Ex parte Lane, 1 De Gex, 300, it was held that a parol agreement to convert a separate debt into a joint debt is not within the statute of frauds if the former debt is extinguished, but an assent on the part of the creditor must be shown.

The case of Ex parte Appleby, 2 Deac. 482, decided in 1839, was nearly identical with Ex parte Freeman; and it was held that a joint creditor could not prove against the separate estate of a continuing partner who had taken an assignment from the retiring partner of the joint assets, and agreed to indemnify against the partnership debts; there being no satisfactory evidence that there was no joint estate, nor that the joint creditor had accepted the continuing partner as his separate debtor.

So in Kirwan v. Kirwan, 4 Tyrw. 491, it was decided that mere knowledge of the dissolution of a partnership is not sufficient, although an account is continued with the new firm. The creditor must appear to have expressly, or by some act, accepted the substituted credit of the new partnership instead of the retiring partners.

Ex parte Parker, 2 Mont. D. & D. 511, was a case where a trader, indebted to a lunatic in the amount of the purchase-money of a business and the machinery and stock-in-trade, entered into a partnership under an agreement by which the stock-in-trade and property of the business were to belong to the firm, which was to assume the liabilities of the sole business. The firm tendered an annual account in its own name, in respect to the debt, to the committee of the lunatic, who made no objection to this form of account. It was held, on the firm becoming bankrupt, that the committee was not entitled to prove against the joint estate. It was even doubted whether the committee had power, and whether the lord chancellor could have given him control to convert the separate into a joint liability.

It will be observed that this case is much stronger than the case at bar. The debt was for the purchase-money of the property transferred to the firm. The creditor was a lunatic, incapable of personally assenting to the conversion, and there was some evidence tending to show that his committee had assented to it.

Ex parte Whitmore, 3 Mont. & A. 627, was decided expressly on the ground that the creditor had assented to the conversion before the bankruptcy. The court says: "The question is solely of fact. Did the creditor intend to substitute the firm for the separate liability?"

It is unnecessary, however, to multiply citations of cases on this point, for the authorities are, with a single exception, uniform, that in proceedings in bankruptcy, at least the assent of the creditor to a conversion before the bankruptcy must be shown.

Mr. Justice Story (Story, Partn. § 370) states emphatically that "in order to produce any conversion at all, either with or without an extinguishment, there must be a sufficient consideration, and also a deliberate and mutual assent of the creditors and debtors of such conversion;" and for this he cites Collyer, ubi supra; Gow, Partn. 284; Wats. Partn. 274. And the same doctrine is laid down by Robson in his recent treatise on the law of bankruptcy (page 509), where the leading cases above quoted and many others are cited.

I have been referred to but one decision on the point under consideration by the courts of bankruptcy of the United States; but the principles above laid down have been adjudged by the courts of Massachusetts, under the insolvent law of that state, from which, as is well known, the bankrupt act was in great part derived.

In Wild v. Dean, 3 Allen, 579, it was held that a partnership debt is not provable against the separate estate of one of the partners, who has received an assignment of all of the partnership property, and executed a bond to his retiring partner to assume and pay the partnership debts, without evidence

of an express agreement or assent by him to pay the same to the creditor as his private debt, and notice by the creditor of his election to treat it as a private debt is not sufficient.

In Robb v. Mudge, 14 Gray, 534, it was held that a bona fide transfer of partnership property to one partner, in consideration of his assuming the partnership debts, makes it his separate property, and not liable in insolvency to the creditors of the partnership who have not agreed to accept him individually as their debtor, until his separate debts are paid.

The case chiefly relied on as seeming to countenance a different rule is that of Colt v. Wilder, 1 Edw. Ch. 484, decided by Mr. Vice Chancellor McCoun. In that case it was held that a private creditor of a partner whose debt it had been agreed between them at the formation of the partnership to treat as a firm debt, could take dividends under an assignment by the partners of all the partnership property in trust for the benefit of the creditors of the concern.

With regard to this case it is to be observed, that the question was not as to the right of the creditor to prove his debt in bankruptcy as a joint debt, but whether he had, under the circumstances, any right in equity to come in under the assignment.

Secondly. The cases of Ex parte Peele, 6 Ves. 602, and Ex parte Clowes, 8 Ves. 540 [2 Brown, Ch. 595], on which the learned vice chancellor chiefly relies, have received a different interpretation, not only by the text-writers, but by the courts by whom they were decided.

In Ex parte Peele, the contest turned upon whether the partners had agreed between themselves to the conversion of the debt. With respect to this case, Mr. Collyer observes: "On this subject of assent, Lord Eldon's opinion may be gathered from his observations in the cases of Ex parte Peele and Ex parte Williams. In the former of these cases it was scarcely necessary to advert to the question of assent by the creditor to the consolidating of the debts, as it was a disputed point whether the partners themselves had agreed to consolidate them. But in the latter, where a separate creditor sought proof as a joint creditor, by virtue of an arrangement between the two partners, for the conversion of separate into joint debts, Lord Eldon required evidence of assent by the creditor to such arrangement before the proof could be allowed."

With respect to Ex parte Clowes, Mr. Collyer remarks: "It is true that in this case no evidence appears to have been given of express consent by the creditors to the arrangement of the partners. But as some years elapsed between the arrangement and the bankruptcy, and as nothing is said which leads to a contrary supposition, the consent of the creditors to the conversion may, perhaps, be presumed. Lord Eldon, speaking of this case, said it turned on peculiar circumstances." Colly. Partn. 771.

The cases of Ex parte Williams, Ex parte Freeman, and Ex parte Fry are admitted by the learned vice chancellor to be opposed to the view taken by him, and he rests his decision on the supposed authority of Ex parte Clowes and Ex parte Peele. But we have seen that those cases are not regarded as maintaining the doctrine for which the vice chancellor cites them, while the cases of Ex parte Williams and Ex parte Freeman have been followed in a large number of subsequent cases, and are accepted as law by Collyer, Story and the other text-writers.

In the case of In re Downing [Case No. 4,044], also cited by counsel, Mr. Justice Dillon undoubtedly expresses the opinion that the creditors may enforce, by bill in equity, a promise given by a continuing partner to whom all the firm property has been transferred, to pay off and discharge the firm's liabilities, and that they may assent to and claim the benefit of this promise at any time before or after the bankruptcy. For this last position no authorities are cited, and the learned judge seems to have mainly rested his opinion on the second position taken by him, viz., that under the bankrupt act [of 1867 (14 Stat. 517)], where each of the partners has been separately adjudged bankrupt, and there are no firm assets, the joint creditors may prove against the separate estate of either. "This," observes Mr. Justice Dillon, "in effect reaches the result which the English chancellors have felt bound on equitable principles to adopt;" but it may be added that the rule is applied so rigorously that it was held that where a continuing partner received possession of all the partnership property, and continued the business on terms of paying all the firm debts, that the joint creditors could not receive dividends from the separate estate until the separate creditors were paid in full, although the joint estate amounted to only £13. Ex parte Kennedy, De Gex, M. & G. Bankr. 100.

On the whole, I feel bound on the authorities to hold that the separate creditors, not having before the bankruptcy assented to the arrangement between the partners, and not having been, so far as appears, even aware of it, are not entitled to prove their debts against the joint estate. But while so holding, I am obliged to confess my inability to discover the equitable principle upon which the rule rests.

The reason of the rule is stated by Sir John Leach in Ex parte Freeman, as follows: "I have always considered it to be essential that the bankrupt should be indebted to the party proving at and before the bankruptcy. The engagement of one partner with the other to pay the debts of the firm can, as to the creditors of the firm, be considered only as a proposal that he is willing to become their sole debtor. If they accede to this proposal before the bankruptcy they are his sep-

arate creditors. But their acceptance of him as their separate debtor after the bankruptcy, comes too late, for he is then incapable of contract."

That the assent of the creditor is necessary to any assignment by which his rights are impaired, is obvious. And if the conversion is claimed to have operated as an extinguishment, or as the substitution of a separate liability for a joint liability, or vice versa, it is plain that the creditor must be a partner to the arrangement.

But we have seen that there may be a conversion without an extinguishment; "in which case," says Story, "the creditors can take advantage of the debts according either to their new or their old form and quality. In other words, they may treat them as joint as well as separate debts, and have their remedy against the point or separate estate, accordingly, in their election." Story, Partn. § 369.

As, then, this arrangement in no way impairs the rights of the creditors, but is ordinarily greatly for their benefit, I see not why their assent may not be presumed; as in a case where property is conveyed in trust for the benefit of a third person, the assent of the party beneficially interested is presumed. It appears now to be admitted that a third party may maintain an action on a promise, not under seal, made to another for his benefit, though he was not cognizant of it when made. 1 Pars. Cont. 467; 2 Greenl. Ev. § 109.

I am unable to see why a promise made by one partner to another, that he will hold himself jointly liable for the separate debt of the latter, may not, on the same principle, be availed of by the creditor. Why should evidence of the assent of the latter be exacted (and it is admitted that slight evidence will be sufficient, as was the case in Ex parte Kedie, 2 Deac. & C. 321), when that assent would in no case be withheld, as the only effect of the arrangement would be to give to the creditor the security of the firm liability and that of the other partner, in addition to the liability of the partner with whom he had separately contracted. The hardship of the rule is apparent in those cases where the retiring partner transfers the partnership property to the continuing partners, and thus converts it into his separate property. In such cases it is held that after bankruptcy it cannot be treated in marshaling the assets as joint estate or applied to the payment of joint debts. Robb v. Mudge, 14 Gray, 537; Howe v. Lawrence, 9 Cush. 553.

But whatever may be said of the justice of the rule, I consider it too firmly established, for me, at least, to depart from. In the passage already cited, Mr. Justice Story unhesitatingly declares that "to produce any conversion at all, either with or without extinguishment, there must be sufficient consideration, and also a deliberate and mutual assent of the creditors and debtors to such conversion." Story, Partn. § 370.

Of course, after bankruptcy, there can be no mutuality of consent between creditors and debtors, for the latter are incapable of contracting. If I have ventured to doubt the soundness of the rule thus laid down, it is because it has appeared to me that sufficient attention has not been given to the distinction between cases where the creditor is supposed to have relinquished the old liability and accepted a new and substituted liability in its stead, and those where a new and additional liability is created without impairing the old. In the former, his assent is evidently necessary; in the latter, it seems to me it should be presumed, and he should be allowed the advantage of the promise made between third persons for his benefit. And in this view I have at least the countenance of Mr. Justice Dillon.

## Case No. 7,094.

ISAACS v. ABRAHAM.

[6 Reporter, 737.] [1]

Circuit Court, D. Massachusetts. Nov. 9, 1878.

SOLICITOR AND CLIENT—SUBSTITUTION—LIEN—STAY OR DELAY OF PROCEEDINGS.

1. A client can change his solicitor whenever he pleases, subject to the solicitor's lien.

2. The lien does not extend so far as to enable the solicitor to stay or delay the proceedings in the suit.

Bill in equity for the infringement of a patent for improvements in railway track brooms. An opinion was given some time since, upholding the patent and concluding with the usual order for an interlocutory decree for an account [Case No. 7,095]. An appearance was afterwards entered in the clerk's office for the complainant by a solicitor not hitherto employed by him. The original solicitors notified the clerk that they wished to be heard when any action was taken in the cause by any party. The new solicitor now moved to extend the decree, and the original solicitors objected that their fees had not been fully paid and that a substitution of counsel ought not to be permitted, or, if permitted, no further steps taken in the cause until they were paid or secured.

L. M. Child and W. H. H. Richardson, for the motion.

C. Browne and J. S. Holmes, for original solicitors.

LOWELL, District Judge (orally). The substitution of solicitors in equity is made on motion, but the motion is one which is granted as a matter of course, subject to the lien of the former solicitors. That lien, however, does not extend so far as to enable the solicitor to stay or delay the proceedings. Merrywether v. Mellish, 13 Ves. 161; Twort v. Dayrell, Id. 195. In O'Dea v. O'Dea, 1 Schoales & L. 315, Lord Redesdale said: "I

[1] [Reprinted by permission.]

cannot do this. It is not in my power. I never heard of such a practice before. A solicitor has advantages for the recovery of what is due him for costs, which men in other situations have not, by keeping his client's papers, but he has no right to stop the cause from proceeding." And in Commerell v. Poynton, 1 Swanst. 1, Lord Eldon says: "A solicitor cannot by virtue of his lien prevent the king's subject from obtaining justice. In such a case as this there is undoubtedly this hardship on the solicitors that their lien upon the papers and upon the decree may be an inadequate security, because the litigation in patent causes has become very expensive, and the decree often is valuable more from its establishing a title, which may be enforced throughout the country, or, rather, which is likely to be respected throughout the country, than from the damages which can be recovered in the particular case. This may be regretted, but cannot change the rule of law. At one time there appears to have been a distinction taken in England between a case of a client changing his solicitor and that of a solicitor relinquishing the conduct of the cause. The distinction is not now very material, but so far as there is any, the solicitor's rights are somewhat less in the latter case, and it is considered that the solicitor gives up the cause, if he refuses to proceed, even though he would fully be justified in so doing, by the refusal of his client to advance or to pay his proper disbursements and charges, which is the aspect this case presents upon the correspondence between the solicitors and their clients which was read at the hearing. The three cases which were cited at the argument in which courts had refused to allow substitution of attorneys or solicitors without payment of fees are not inconsistent with these views. Sloo v. Law [Case No. 12,958]; Supervisors v. Brodhead, 44 How. Pr. 417, 419; The Oneiza, L. R. 4 Adm. & Ecc. 36. In one of them there was a fund in court, on which the solicitor had a lien, and the order was that he be paid out of that fund simultaneously with his discharge. In another there appears to have been no question about the cause proceeding, but whether the solicitor should be obliged to deliver up the papers in his hands on which he had an undoubted lien. The case from 44 How. Pr. arose under a rule of court which provided that a change of attorneys should not be made without the order of a justice, and the client in that case being a public body which could not be sued by the attorney, the court thought it right, under the circumstances of that case, to order that the fees be paid. In a very similar case in the supreme court of the United States, the state of Texas was the client in which the court ordered such a substitution, and said that a party could change his solicitor whenever he pleased, subject to his lien. Re Paschal, 10 Wall. [77 U. S.] 483. That case seems to be decisive of the present case, and the motion to extend the original interlocutory decree is granted. I do not decide that the new solicitor will have any right to enter any final decree by agreement with the defendants, as it has been intimated he intended to do, by which the costs already accrued or even the damages can be surrendered against the protest of the former solicitors, and I will add that the new solicitor disclaimed any intention of depriving the former solicitors of those costs.

## Case No. 7,095.

### ISAACS v. ABRAMS.

[3 Ban. & A. 616; 14 O. G. 861; Merw. Pat. Inv. 226.] [1]

Circuit Court, D. Massachusetts. Oct. 9, 1878.

PATENTS—WHAT IS PATENTABLE—CHANGE IN FORM—"RAILWAY-TRACK BROOMS."

1. A change in the form of a machine or instrument, though slight, if it works a successful result, not before accomplished in a similar way in the art to which it is applied or in any other, is patentable.

[Cited in Strobridge v. Lindsay, 2 Fed. 695; Washburn & Moen Manuf'g Co. v. Haish, 4 Fed. 908; Asmus v. Alden, 27 Fed. 687.]

2. Letters patent No. 180,717, granted to Marcus C. Isaacs, August 8, 1876, for an improvement in railway-track brooms, *held* valid.

[This was a bill in equity by Marcus C. Isaacs against Addison W. Abrams, to restrain the infringement of complainant's patent.]

Causten Browne and Jabez S. Holmes, for complainant.

John S. Abbott, for defendant.

LOWELL, District Judge. In August, 1876, the complainant obtained a patent, No. 180,717, for an improvement in railway-track brooms. He declares in his specification that, "heretofore, brushes for cleaning railroad-tracks, have been made with a broom of even face—that is, the brush of the broom, of whatever material made, has been of uniform length." He describes his improvement to consist of making the brush of unequal lengths; one part adapted to brushing the surface of the rail, and the other and longer part to clearing either side of the rail, according to its construction. The claim is for: "A railway track broom, constructed with a brush of uneven face—that is, one portion of the brush longer than the other, substantially as and for the purpose set forth."

The defendant has argued that brushes with a uniform surface being well known, no invention was required to construct one with an uneven surface. We cannot take this view of the case. It is not invention to change one well known material for anoth-

[1] [Reported by Hubert A. Banning, Esq., and Henry Arden, Esq., and here reprinted by permission. Merw. Pat. Inv. 226, contains only a partial report.]

er, or to apply a well known process, without some adaptation, more than every skilled mechanic could apply, to a new art or subject; but a change in the form of a machine or instrument, though slight, if it works a successful result, not before accomplished in a similar way in the art to which it is applied, or in any other, is patentable. There is evidence that this improvement did accomplish such a result, and that it was accepted and adopted by the trade, and went into general use.

The question of fact is, whether the patentee was the first inventor of this improvement. He carries his invention back, by a fair preponderance of proof, to October, 1874. The defendant alleges that he had made similar brooms many years before 1874, and that the plaintiff, when he did make the new kind of broom, stole it from one of the witnesses in the case. We have examined the evidence, which it would be unprofitable to recapitulate. We are satisfied, not only that the defendant has failed to rebut the presumption afforded by the patent, but that the plaintiff has proved that he was the first and true inventor of the improvement. Interlocutory decree for the complainant.

## Case No. 7,096.

ISAACS v. COOPER et al.

[4 Wash. C. C. 259;[1] 1 Robb, Pat. Cas. 332.]

Circuit Court, Pennsylvania.[2] Oct. Term, 1821.

PATENTS—IMPROVEMENTS—EQUITY PRACTICE.

1. Rules of the courts of equity, as to granting injunctions in patent cases.

2. A patent for an improvement on a horizontal wheel invented by the patentee, without saying what the original invention was, or referring to any thing for information, makes the patent so defective that the court will not grant an injunction for an alleged invasion of it.

[Cited in Foster v. Moore, Case No. 4,978; Hovey v. Stevens, Id. 6,745; Hogg v. Emerson, 6 How. (47 U. S.) 485; Motte v. Bennett, Case No. 9,884; Buchanan v. Howland, Id. 2,074; Hat-Sweat Manuf'g Co. v. Davis Sewing-Machine Co., 32 Fed. 403; Wirt v. Hicks, 46 Fed. 71.]

In equity.

WASHINGTON, Circuit Justice. This case comes before the court upon a motion for an injunction. The plaintiff, by his bill, claims to be the proprietor of "an improvement on the horizontal circular plane or wheel, invented by him, for the purpose of gaining power by applying animal weight to the propelling of boats on water, or to machinery on land;" which, the bill charges, was secured to him by a patent dated the 17th of November, 1819, and that the specification was filed in the patent-office on the 13th of April, 1818. The specification states, that "the method used in this new invention is to have the animals harnessed to any particular part of the boat, or machinery, and to have them acting, or walking on the deck, or on a movable or fixed platform, square, circular, or of any other shape—the same being fixed to a perpendicular shaft, and connected by cog-wheels, so as to act on the water-wheel. By which new position or place in the boat, on which the animals are kept in action, two or four horses will perform, and save the labor of from twelve to twenty when kept moving in the ordinary method at present used in team-boats." The bill sets forth a certificate of the secretary of state that the specification on which the plaintiff's patent was issued, dated New York, April 9th, 1818, was received and filed in the patent-office, on the 13th of April, 1818.

The bill charges that the defendants have in use team-boats upon the construction stated in his patent, and prays for an injunction against their continuing to use the same. The answer of four of the defendants admits that the defendants use team-boats on the Delaware, under a license from a Mr. Langdon, dated 2d of September, 1820, to use boats constructed according to the plan and improvement secured to the said Langdon by patent dated the 5th of June, 1819, and that they have had the said boats in use since the date of their license. It denies that the plaintiff has used or sold his alleged improvement, or that he, or any other person, has practically tested the use or value of his asserted discovery; that the boats used by the defendants do not interfere with the plaintiff's patent; and finally, that the plaintiff's patent is void, on account of the defective description given of the alleged improvement in the specification. After the coming in of this answer, and an unsuccessful motion for an injunction, because the bill did not state that the plaintiff had ever sold or used his improvement, the plaintiff, having obtained leave for that purpose, amended his bill by stating that the plaintiff was, and is, in the actual and profitable enjoyment of his said improvement, and has constructed, and caused to be constructed, several boats upon the principles of his said improvement, and has sold four of them for valuable consideration. No answer has been put in to the amended bill. The practice of the court of equity, upon motions of this kind, is to grant an injunction upon the filing of the bill, and before a trial at law, if the bill state a clear right, and verify the same by affidavit. If the bill states an exclusive possession of the invention, or discovery for which the plaintiff has obtained a patent, an injunction is granted, although the court may feel doubts as to the validity of the patent. But if the defects in the patent, or specification, are so glaring that the court can entertain no doubt as to that point,

[1] [Originally published from the MSS. of Hon. Bushrod Washington, Associate Justice of the Supreme Court of the United States, under the supervision of Richard Peters, Jr., Esq.]

[2] [District not given.]

it would be most unjust to restrain the defendant from using a machine or other thing which he may have constructed, probably at great expense, until a decision at law can be had. The possession of the patentee against all mankind is stated by Lord Eldon, in Hill v. Thompson, 14 Ves. 132, note, to have been the ground on which the injunction was granted in the disputed patent of Watts. But, says the same judge, where the patent is modern, and an injunction is applied for, and objections are made to the specification, or to the validity of the patent, the court will not, from its own notions respecting the matter in dispute, act on the presumed validity, or invalidity of the patent, without the right having been previously ascertained at law; and will not grant the injunction till the plaintiff has established the validity of his patent at law, which the court will order. 3 Mer. 624, 628; 6 Ves. 707; Coop. Eq. Pl. 158.

The objections to the interposition of the court, by injunction, in this case, are numerous and insurmountable. The following are the most prominent. 1. It appears by the answer, that Langdon's patent was prior in date to the plaintiff's, and that he was in the full enjoyment and possession of it, by the sale of licenses, and the use of boats constructed upon the plan of his patent and specification. It is true that the secretary of the state has certified that the plaintiff's specification was filed in the patent-office in April, 1818. But that specification cannot possibly be the one upon which the patent stated in the bill was granted, because that is without date, and the specification mentioned in the certificate is described as being dated at New York, April 9th, 1818. 2. The bill, even with the amendment, does not state an exclusive possession of the plaintiff's discovery at any time since the emanation of his patent. The amended bill charges that the plaintiff was and is, in the actual enjoyment of his improvement; that he has constructed boats upon the principles of it, and has sold four of them. But when were these acts performed? For aught that appears, they may have been subsequent to the practical employment by the defendants and others of the right acquired under Langdon's patent. 3. The answer positively denies that allegation in the bill which charges that the defendants have in use boats upon the plan of the plaintiff's asserted improvement, and avers that the boats which they have in use do not interfere with the plaintiff's patent. 4. The last, and by no means the least fatal objection, is to the patent and specification, which are so manifestly defective, that the court ought not to interpose until the plaintiff shall have established his right at law, if he can do so. The patent is for an improvement on the horizontal wheel, invented by the plaintiff. But what the nature of the invention was upon which this is alleged to be an improvement, is not stated. Was it patented; and if not, is there any other source of information to which others can resort, in order to find it out, so as to enable them to distinguish the improvement from the original invention, and, in that way, to discover in what the improvement consists? Neither the patent or specification affords the slightest information upon those points. The invention alluded to may, for aught that appears, be known to no other person than the plaintiff. How then can any human being, however skilful in the art, find out, with certainty, or even conjecture, in what the improvement consists, from the patent itself, or from the records in the patent office? If the original invention had been patented, the specification should at least have referred, and plainly described it. If it was not, it should have stated what that invention was, and in what the improvement consists. As the matter stands, the nature of the improvement is altogether unintelligible.

The injunction is denied.

## Case No. 7,097.

ISAACS et al. v. PRICE.

[2 Dill. 347.] [1]

Circuit Court, D. Kansas. 1872.

JURISDICTION—SERVICE OF PROCESS—STATUTE OF LIMITATIONS.

1. There is a well-known distinction between a judgment rendered without any service of process whatever, and one where the service is simply defective or irregular. In the first case the court acquires no jurisdiction, and its judgment is void; in the other, its judgment is valid until set aside or reversed.

[Cited in Hatch v. Ferguson, 57 Fed. 970.]

[Followed in McAlpine v. Sweetser, 76 Ind. 82. Cited in Muncey v. Joest, 74 Ind. 412; Thompson v. Chicago, S. F. & C. R. Co., 110 Mo. 156, 19 S. W. 77; Webster v. Daniel, 47 Ark. 131, 14 S. W. 551; Dorr v. Rohr, 82 Va. 366.]

2. Where the plaintiff brought suit before his demand was barred, and served the defendant with process, and took a judgment by default; and the defendant, after the statute period for the recovery of such claims had elapsed, procured the court to set aside the judgment: *Held* (construing the statutes of Kansas) that the defendant was not entitled to the benefit of the statute of limitations.

3. When an action is deemed to have been commenced, considered.

This cause was tried at the last term, and is now before the court on a motion by the defendant [Nathan Price] for a new trial. The only question in the case is whether the action is barred by the statute of limitations, and the following are the material facts relating to it: On the 2d day of December, 1865, the defendant bought of the plaintiffs [Isaacs & Ash] certain goods and merchandise, to recover the value of which a petition was filed in this court on the 17th day of August, 1867. Summons was duly issued, and the original duly indorsed, and at the

[1] [Reported by Hon. John F. Dillon, Circuit Judge, and here reprinted by permission.]

November term, 1867, judgment by default was entered against the defendant, the record reciting that he had been duly served. The defendant was served, as hereinafter stated, by copy left at his residence, and the marshal so returned; but two years afterwards, to-wit: November 23, 1869, the defendant appeared in court and made application to set aside the judgment entered at the November term, 1867, on the ground that the copy of the summons served or left for him was not indorsed with the sum or amount for which judgment would be taken if the defendant failed to answer; and at that term the marshal was permitted to amend his return by setting forth the copy of the summons produced by the defendant, and which was served on him in 1867. The original summons was regular, and contained all the indorsements; and the copy was exact except that it omitted to have indorsed the amount claimed by the plaintiffs. This was the only defect in the service then or now alleged. The court thereupon, without any other reason, and without requiring the defendant to show a meritorious defence, set aside the judgment on the ground, as the record recites, that no service of the summons had been made upon the defendant, and that he had not appeared; and thereupon, on the same day, the plaintiffs asked leave to amend their petition, and the case was continued. At the next term, May, 1870, the court, after notice and argument, refused to review and set aside the order of the preceding term, vacating the judgment, and ordered, upon plaintiffs' motion, that a new summons issue and the case be continued. On the 6th day of June, 1870, a new summons was duly issued and served, and the defendant appeared at the next term, and subsequently pleaded the statute of limitations. On the trial at the May term, 1872, the defendant was sworn as a witness and admitted the purchase of the goods sued for, and stated that they were bought on thirty, or not more than sixty days time, and relied for defence alone upon the three years statute of limitations of the state.

By the statutes of the state it is provided that "a civil action may be commenced by the filing, in the proper clerk's office, of a petition, and causing a summons to be issued thereon." Rev. St. 1868, p. 640, § 57. And it is also provided that "where the action is on contract for the recovery of money only, there shall be indorsed on the writ the amount for which judgment will be taken, if the defendant fail to answer, and if the defendant fail to appear judgment shall not be rendered for a larger amount." Id. p. 641, § 59. "The service shall be made by delivering a copy of the summons to the defendant personally, or by leaving one at his usual place of residence." Id. p. 641, § 64. And the officer "shall indorse on the original the time and manner of service." Id. p. 641, § 63. The limitation statutes provide that actions must be "commenced within the periods prescribed in this article," and that "an action shall be deemed commenced, within the meaning of this article, at the date of the summons which is served upon the defendant," &c., if served within sixty days. Id. p. 634, § 20. "If any action be commenced within due time, and a judgment thereon for the plaintiff be reversed, or if the plaintiff fail in such action otherwise than upon the merits, and the time limited for the same shall have expired, the plaintiff may commence a new action within one year after the reversal or failure." Id. p. 634, § 23.

The following is the return on the first summons: "Received this summons this 17th day of August, 1867, and executed the same by leaving a certified copy thereof at the usual place of residence of the within named Nathan Price, with all the indorsements thereon." Signed by the marshal.

H. M. Herman, for plaintiffs.

Nathan Price and A. H. Horton, for defendant.

DILLON, Circuit Judge. If this action is to be deemed as having been commenced in August, 1867, when the original petition was filed, and the first summons was served in the manner above stated, it is admitted that the same is not barred. On the other hand, if the suit is to be considered as commenced only when the second summons was served, to-wit, June 6th, 1870, then it is conceded by the plaintiff that this action is within the operation of the limitation statutes of the state. The record shows that on the 17th day of August, 1867, the petition was filed and the summons was issued. The original summons was in due form, and contained all the indorsements. The marshal made service of the summons, and returned that fact to the court, and a judgment by default was entered at the return term, reciting that the defendant had been duly served. Two years afterward the defendant appeared, and the court, on the marshal's amended return, showing that the copy of the summons which had been left at the residence of the defendant did not contain a copy of the indorsement of the amount for which judgment would be taken if the defendant failed to appear, set aside the judgment, on the ground, as the record of its action states, that no service of the summons was ever made, and no appearance to the action had.

The justice of the plaintiffs' demand not being questioned, and there being no claim that the defendant did not receive the copy of the summons before the return term, nor any claim that the judgment was taken for too much, it is plain that the order setting aside the judgment was not well considered; but it was set aside upon the ground, not that no service was ever made, but upon the technical one that the copy of the summons left for the defendant omitted the indorsement of the amount claimed by the

plaintiffs to be due them. When this action of the court was had the plaintiffs issued a new summons, June 6th, 1870, which was served, and the defendant appeared and pleaded the statute of limitations; and as above remarked, his plea is available to him if the suit is to be deemed commenced June 6th, 1870, but not if it is to be regarded as having all the time been pending since its original institution. In my opinion the action is to be regarded as having been pending from the time the petition was originally filed and the summons served in 1867. The judgment rendered upon the first return of service was not void, but in every respect regular upon the face of the record. The defendant afterwards appeared in court and asked to have the judgment set aside, and his demand was granted. This did not defeat the plaintiffs' right, or put an end to their action. After this action on the part of the defendant no new summons was necessary, and the court should only have set aside the judgment on a plea to the merits being filed. The issuing of a new summons on the same petition, or the same as amended, did not make a new suit, nor was it the commencement of a new action. The action which was tried at the last term is the same action which was commenced in August, 1867, and not a new one. For the purpose of preventing the statute of limitation from running the service of the first summons was sufficient. It apprised the defendant that the plaintiffs had brought an action against him, and where it was pending. A distinction is to be made between a case where there is no service whatever, and one which is simply defective or irregular. In the first case the court acquires no jurisdiction and its judgment is void; in the other case if the court to which the process is returnable adjudges the service to be sufficient and renders judgment therein such judgment is not void, but only subject to be set aside by the court which gave it, upon seasonable and proper application, or reversed upon appeal. The error in the argument of the defendant is that it proceeds upon the ground that the judgment rendered upon the service made upon him was wholly void. It is true the record which set it aside recited that no service of summons was made upon the defendant and that it was void, but this action of the court is to be construed with reference to the application upon which it was based, and that showed and admitted that service had been made, but claimed that such service, owing to the absence of the indorsement on the copy, was not sufficient. It is not entirely clear to my mind that the omission to give all the indorsements is such an irregularity as would be ground for reversal on appeal; but if so, the judgment was valid while it remained in force, and when it was set aside the action was still pending, and it remained a pending action until it was tried at the last term.

The defendant's case is not within the purpose of the limitation enactment, which is to protect persons from stale claims. But here the plaintiffs brought suit in time upon a demand confessedly just and unpaid. If the defendant had appeared at the return term he would have had no defense on the merits, and no defense under the statute of limitations. He neglects to appear at court, waits until the statute period for the recovery of such claims has fully elapsed, and then applies to the court and suggests the defective service, made over two years before, and asks to have the judgment set aside. This being done, he asks the benefit of the statute of limitations, which had not elapsed when the suit was commenced. This position overlooks the philosophy or reason on which such legislation rests, which is the neglect or laches of the plaintiff to prosecute his suit. But whatever neglect there is in this case is clearly the defendant's. Besides there never has been any failure of the plaintiffs to recover upon "the merits" of their claim upon which action was brought "within due time," and therefore the plaintiffs are within the equitable or just provision of the legislation made for such cases. Rev. St. 1868, p. 634, § 23, quoted in the statement of the case.

Motion for new trial denied, and judgment for plaintiffs. Judgment accordingly.

As to judgments rendered upon defective service, see Salisbury v. Sands [Case No. 12,251]; Morton v. Smith [Id. 9,867.]

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ISAACSON (GARDNER v.). See Case No. 5,230.

ISAACSON (LEAK v.). See Case No. 8,160.

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## Case No. 7,098.

The ISABEL.

[2 Adm. Rec. 346.]

Superior Court, S. D. Florida. June 10, 1840.

SALVAGE.

[This was a libel in rem by David Cold and others against the brig Isabel and cargo (Thomas Hamilton, respondent), for salvage.]

Adam Gordon, for libellants.

Before MARVIN, Judge.

It was ordered, adjudged and decreed that the marshal sell the cargo of the brig Isabel, and bring the money arising from such sale into the office of the clerk of this court; that the clerk pay to the collector of this port the duties upon said cargo, and to the libellants $890, in compensation for their services in saving said brig and cargo; that he also pay the taxable costs and expenses of the suit, and keep the residue to satisfy such other claims upon it as the court may allow, and for the use and benefit of the owners thereof, until further order of this or an ap-

pellate court; and that the claim of the master of said brig to the said residue be disallowed.

## Case No. 7,099.

The ISABELLA.

SOLARIS v. RAMSAY et al.

[8 Ben. 139.] [1]

District Court, S. D. New York. June, 1875.

COMMON CARRIERS—BILL OF LADING—DAMAGE BY RATS—EXEMPTION FROM DAMAGE BY NEGLIGENCE—NOTICE—COSTS.

1. Bags of coffee were shipped on the steamship I., at Rio de Janeiro, to be brought to New York, under a bill of lading, which contained the exception of perils of the seas, and which also specified that it was subject to "all the conditions of the company," the steamer being owned by a French company. The bill of lading was in English, and the shippers and consignees of the coffee had no other notice than this, as to what were the "conditions of the company," the same being contained in a printed form of a bill of lading in French. One of those conditions was, that the master was not to be responsible for damages caused by rats or vermin. On the voyage the coffee suffered damage by rats. The master of the vessel filed a libel against the consignees to recover freight on the coffee, and they filed a libel against the steamship to recover for the damage to the coffee: *Held*, that damage to cargo by rats is not a peril of the sea, or a danger of navigation, within those terms in a bill of lading, at least, unless it be shown that ordinary care and diligence were used to guard against injury by rats.

2. As no evidence had been offered on the part of the ship to show that any precaution was taken to guard against injury by rats, the fact of the injury was prima facie evidence of negligence on her part.

[Cited in The Timor, 46 Fed. 860; The Italia, 59 Fed. 619.]

3. A carrier of goods cannot lawfully stipulate for exemption from responsibility for his negligence, and therefore the stipulation in this case, if it were an exemption from liability for damage by rats, must be disregarded.

4. Whether the words in the bill of lading were such notice of the conditions of the company as to bind the party who accepted the bill of lading to those conditions, quaere.

5. The owners of the ship were entitled to their freight on the amount of cargo delivered, and the consignees were entitled to a decree for their damages, and each decree should be with costs.

In admiralty.

Beebe, Wilcox & Hobbs, for the vessel.

Foster & Thomson, for C. G. Ramsay & Co.

BLATCHFORD, District Judge. Giovanni Solaris, as master of the steamship Isabella, files a libel against Charles G. Ramsay and Gustav R. Westfeld, composing the firm of C. G. Ramsay & Co., to recover the sum of $270.03, gold, as the freight and primage for the carriage of 1,381 bags of coffee from Rio de Janeiro, in Brazil, to New York, by the said steamship, under a bill of lading. The libel alleges that the coffee was delivered to the respondents at New York "in the like order and condition as received, the exceptions or some of them contained in the said bill of lading alone excepted," and was accepted and received by them.

The answer of C. G. Ramsay & Co. avers that the coffee was delivered on board the vessel at Rio de Janeiro in good order and condition, and, by the terms of the bill of lading therefor, was to be delivered to the respondents in New York in like good order and condition; that, on the arrival of the vessel at New York, only a portion of the coffee was delivered to the respondents; that, owing to the careless, negligent and improper manner in which the coffee was kept on board the vessel, and the want of proper care on the part of the master, his officers and crew, and persons employed by him or them, a number of the coffee bags were gnawed and damaged by rats on the vessel, and a quantity of coffee was lost from such rat-eaten bags, by reason of which the respondents were compelled to supply and refill 363 new bags and suffered a loss in consequence of such rat-eaten bags; that they also suffered a loss on account of the deficient quantity of coffee therein, which deficiency amounted to about 2,762 pounds of coffee, worth 15⅞ cents, gold, per pound; that no part of such damage was occasioned by causes excepted in the bill of lading delivered to the consignors, or otherwise made known to them; and that thereupon the respondents refused to pay a portion of the freight, amounting to $270.03.

C. G. Ramsay & Co. also file a libel against the steamship Isabella, which avers that the 1,381 bags of coffee were shipped on board of the vessel under the bill of lading, to be delivered to them, and then makes the same allegations in respect thereto which are contained in the answer to the libel filed by the master, and seeks to recover the damages sustained.

The answer to this libel, which is put in by the Société Francaise de Navigation à Vâpeur, sets up that the bill of lading contains an exception, that it is subject to "all the conditions of the company," and prays to refer to such conditions; that the coffee was delivered to and accepted and received by the libellants; that some of the bags were damaged by rats to a small amount; that one of the conditions of the company was that its ships were not liable for damages caused to the cargo by rats; and that the vessel is not liable for said damage, as well because of said condition as because it is a damage which no human effort could prevent.

The bill of lading contains the printed words, "Shipped in good order and condition," and "to be delivered in like good order and condition, * * * the dangers and accidents of the seas, rivers and navigation, of

[1] [Reported by Robert D. Benedict, Esq., and Benj. Lincoln Benedict, Esq., and here reprinted by permission.]

whatever nature and kind soever, excepted." In the upper left hand corner of the bill of lading, on a line with the first printed line, and continuous before and with what is printed in such first printed line, are the written words: "Subject to the conditions of the company," so that the entire line written and printed reads: "Subject to the conditions of the company, Shipped in good order and condition," &c. What company is referred to is not stated in the bill of lading, nor is any company named anywhere in the bill of lading, or referred to in any other place therein. The bill of lading states that the shipment is of 1,381 bags of coffee, weighing 82,860 kilos net, made by John Bradshaw & Co., and that the bags are to be delivered to C. G. Ramsay & Co., or to their assigns, he or they paying freight for the said goods, sixty cents, gold, per bag.

By written stipulation between the parties, it is admitted, as evidence in the causes, that the bill of lading, with the memorandum written thereon, "Subject to the conditions of the company," was the only notice received, or information had, by the consignors (Bradshaw & Co.), or the consignees (C. G. Ramsay & Co.) "of the nature or contents of the conditions of the company, so called"; and that a certain exhibit annexed to such written stipulation contains "the conditions of the company," referred to in the bill of lading. The bill of lading is in English. The exhibit is in French, and is a printed form of a bill of lading, which states that the merchandise covered by it is to be transported under the conditions enumerated. Among those conditions is one, that the master is not responsible for damages caused by rats or vermin.

It is further admitted, by written stipulation between the parties, that the damages in question in these causes "arose in consequence of certain bags containing coffee being eaten by rats on the voyage to New York, and loss of coffee from such rat-eaten bags, and, with the exception of such damage to bags, and loss of coffee from bags otherwise whole, through holes eaten in such bags by rats, the cargo mentioned in the bill of lading was delivered in accordance with the requirements of such bill and in like good order as received by the said vessel."

The sole question in these cases is, whether the vessel is responsible for the loss of bags by the eating of holes in them by rats on the voyage, and for the loss of coffee caused by such eating of holes by rats on the voyage, in the bags containing the coffee. Independently of any force to be given to any expressed exception in respect of damage by rats, the carrier is liable for such damage. Damage by rats is not a peril of the sea, or a danger or accident of the sea or of navigation, within those terms in a bill of lading, at least, unless it be shown that ordinary care and diligence were used to guard against injury by rats. Aymar v. Astor, 6 Cow. 266; Laveroni v. Drury, 16 Eng. Law & Eq. 510; Kay v. Wheeler, L. R. 2 C. P. 302; The Miletus [Case No. 9,545]; Kirkland v. The Fame [Id. 7,845], in this court, Dec. 1861.

But no evidence is given on the part of the vessel to show that any care or precaution was taken to guard against damage by rats. Non constat that the vessel was infested by rats and was so known to be by her master, and that nothing was done but to place the bags of coffee where it was known rats would gnaw the bags. The shipper is, in this respect, in the power of the master of the vessel, as to property shipped; and the fact of injury by rats must be regarded as prima facie evidence of negligence, in the absence of any explanation, or proof of care. This being so, the doctrine settled in the case of Railroad Co. v. Lockwood, 17 Wall. [84 U. S.] 357, applies, to the effect that a carrier of goods for hire cannot lawfully stipulate for exemption from responsibility for negligence. In this case the stipulation for exemption from responsibility for damage by rats, is sought to be applied to circumstances where it must be held that the rats did the damage through the negligence of those in charge of the vessel. The stipulation must, therefore, be disregarded.

I have assumed that there was such a stipulation, binding on the shippers and the consignees. But it is not intended to be decided that the appearance on the bill of lading of the written words, "Subject to the conditions of the company," was such notice of the contents of any paper containing so called "conditions of the company," as to bind the party who accepted the bill of lading to a statement in such conditions limiting what would otherwise be the liability of the vessel on the terms of the bill of lading.

The libellants in the first case must, therefore, have a decree for the amount of the damages sustained by them, with costs, and, in the second case, the libellants must have a decree for the freight on the cargo delivered, with costs.

## Case No. 7,100.

The ISABELLA.

[Brown, Adm. 96;[1] 2 West. Law Month. 252.]

District Court, N. D. Ohio. March, 1860.

JURISDICTION—WATER-CRAFT LAWS.

The district courts of the United States having, under the constitution and acts of congress, exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction, the courts of common law are precluded from proceeding in rem to enforce such maritime claims.

This was a proceeding in rem to recover seaman's wages, alleged to have been earned on the brig Isabella, between the 29th day of September and the 7th day of December, 1858. The libel was filed on the 8th of

[1] [Reported by Hon. Henry B. Brown, District Judge, and here reprinted by permission.]

September, and a monition issued on the 6th day of October, 1859. Seth W. Johnson and Erastus Tisdale appeared and interposed their claim as sole owners of the brig. They filed their answer, setting forth (among other things) that they became owners of the brig on the 3d day of October, 1859, by virtue of a purchase made at sheriff's sale, ordered by the court of common pleas of Cuyahoga county, in suits instituted by Valentine Swain and others against the said vessel, under the water-craft law of the state of Ohio. They further alleged that the libellant had full knowledge of the sale, and the other proceedings in the state court, under and by virtue of which it was made. They also alleged that the libellant, on the 8th day of July, 1859, commenced a suit against said brig, in the state court, under the state water-craft law, upon the identical account described in this libel, and that such proceedings were had that upon the 9th day of July, 1859, he recovered judgment against the vessel for the amount of his claim. That the proceeds of the sale of the vessel now remain in the court of common pleas, subject to its order of distribution, according to the priority of liens acquired under the laws of the state of Ohio. And that, inasmuch as the libellant's judgment in the state court will be marshaled among the other liens for the purpose of distributing the fund, he is not entitled to prosecute his suit in admiralty against the brig. To this answer the libellant excepted, on the ground that the facts set forth in the answer are not sufficient to constitute a defense to his claim, or to prevent the prosecution and satisfaction of it in the admiralty.

Willey & Carey and J. C. Vail, for libellant.
Ranney, Backus & Noble, for claimants.

WILLSON, District Judge. "There are some principles of law," said Chief Justice Taney, in the case of The Royal Saxon [Case No. 12,098], "which have been so long and so well established, that it is sufficient to state them without referring to authorities. The lien of seamen for their wages is prior and paramount to all other claims on the vessel, and must be first paid. By the constitution and laws of the United States, the only court that has jurisdiction over this lien, or authorized to enforce it, is the court of admiralty, and it is the duty of that court to do so. The seamen, as a matter of right, are entitled to the process of the court to enforce payment promptly, in order that they may not be left penniless, and without the means of subsistence on shore. And the right to this remedy is as well and as firmly established as the right of the paramount lien. No court of common law can enforce or displace this lien. It has no jurisdiction over, nor any right to obstruct or interfere with the lien, or the remedy which is given, by the constitution and acts of congress, to the courts of admiralty to enforce it." As early as 1792, the district court of Pennsylvania, in the case of Jennings v. Carson [Case No. 7,281], decided that congress, by the act of 1789 [1 Stat. 73], meant to convey to the district courts all the powers appertaining to admiralty and maritime jurisdiction, including that of prize. And whatever doubts then existed as to the real import of the act of 1789, were seemingly dissipated in 1794, by the decision of the supreme court in the case of Glass v. The Betsey, 3 Dall. [3 U. S.] 6, which declared that the district courts possessed all the powers of courts of admiralty, including, as we suppose, all the remedies incident to that jurisdiction.

Chancellor Kent, in his Commentaries, says that "whatever admiralty and maritime jurisdiction the district courts possess, would seem to be exclusive, for the constitution declares that the judicial power of the United States shall extend to all cases of admiralty and maritime jurisdiction; and the act of congress of 1789 provides that the district courts shall have exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction." 3 Kent, Comm. 337. This broad construction of the admiralty power was supposed to be justified on the authority of the case of Martin v. Hunter, 1 Wheat. [14 U. S.] 304, where it is said that "the words 'judicial power shall extend,' &c., were imperative, and that congress could not vest any portion of the judicial power of the United States, except in courts ordained and established by itself." But more recently, this doctrine has been somewhat restricted in its application. Judge Story has given an interpretation to the constitution not precisely in accordance with previous adjudged cases. He says, "The admiralty and maritime jurisdiction was intended by the constitution to be exactly as extensive or exclusive, and no more so, in the national judiciary, than it existed in the jurisdiction of the common law; and that where the cognizance of admiralty and maritime cases was previously concurrent in the courts of common law, it remains so." Story, Const. 535. And this interpretation of the constitution was referred to with approbation by Mr. Justice Campbell, in giving the opinion of a majority of the court in the late case of The Royal Saxon. So that we suppose, the authoritative doctrine, as to the concurrent jurisdiction of the state courts of cases cognizable in the admiralty, is this: The state courts may exercise the jurisdiction in cases of which the cognizance was concurrent in the courts of common law previous to the adoption of the constitution; and this is the full extent of the concurrent authority of the state courts; and further than this those courts have no power to act in such cases.

On a contract for mariner's wages, the seaman, who has rendered the maritime service, may prosecute his suit against the mas-

ter or the owner of the vessel, in the state courts, under the common law forms of process, and in the common law modes of procedure; because in this way a competent remedy is furnished according to the practice and usages of the common law. This is doubtless what was contemplated by congress, in the saving clause inserted in both the acts of 1789 [supra] and 1845 [5 Stat. 726], to wit: "Saving to suitors, in all cases, the right of a common law remedy, where the common law is competent to give it." This is a concurrent remedy with that which the seaman has in a court of admiralty, by process in rem against the vessel in virtue of his maritime lien, or by process in personam against the master upon the maritime contract. But the state legislature cannot confer admiralty jurisdiction upon the state courts, or authorize admiralty proceedings in rem to enforce maritime liens. This power, by the constitution, is given to the general government, and its exercise confined exclusively within the jurisdiction of the federal courts.

It is, however, urged that a quasi admiralty proceeding in rem is authorized, to enforce a maritime lien in the state courts, by virtue of the additional saving clause in the act of congress of 1845, to wit: "And saving any concurrent remedy which may be given by the state laws, where such steamer or other vessel is employed in such business of commerce and navigation."

We had occasion, in the case of Revenue Cutter No. 1 [Case No. 11,713], recently decided, to notice the purpose and effect of this act of 1845, and to trace the authority by which it was passed, to the provision in the constitution which empowers congress "to regulate commerce with foreign nations, and among the several states." The framers of the law evidently proceeded with great caution, and with doubts and misgivings, as to the authority of congress to pass the act under the commercial power in the constitution. And, indeed, it would seem inconsistent with the ordinary meaning of words, to call a law, defining the jurisdiction of the district courts, a regulation of commerce. The jurisdiction of the courts, and the regulation of commerce, are separate and distinct matters, having no necessary connection with, or dependence on each other. And the fixed constitutional limits to the judicial authority of the federal courts would seem to form an insuperable objection to this law, if its validity is made to depend upon the commercial power. It was evidently this apprehension of the want of authority in congress to pass the act, and the consequent difficulties anticipated in the prosecution of suits under it, that induced the insertion of the provisions in relation to the trial of facts by a jury, and the reservation to the state courts of the cognizance of cases that might (in matters of doubt) come under their jurisdiction. It is very clear that this law was not intended to recognize, in the state courts, the right, or to confer upon them the power to exercise admiralty and maritime jurisdiction; and for the simple reason that congress, under the constitution, has no authority to make the grant.

We now proceed to inquire into the effect of the libellant's suit and judgment in the state court. Do those proceedings preclude his right to prosecute his claim and enforce his lien in a court of admiralty? The libellant obtained his judgment in the state court under and by virtue of the act of the general assembly of the state of Ohio of February, 1840, entitled "An act to provide for the collection of claims against steamboats and other water crafts, and authorizing proceedings against the same by name." 38 St. 34. The first section of this law designates for what and whose account steamboats and other water crafts navigating the waters within and bordering upon this state, shall be liable, and as substantially re-enacted by an amendatory act of April 12, 1858, reads as follows: "That steamboats and other water crafts, navigating the waters within, or bordering upon this state, shall be liable, and such liability shall be a lien thereon, for debts contracted on account thereof, by the master, owner, steward, consignee, or other agent for material, supplies or labor in the building, repairing, furnishing, insuring or equipping the same, or due for wharfage, and also for any damages arising out of any contract for the transportation of goods or persons, or for injuries done to persons or property by such craft, or for any damage or injury done by the captain, mate or other officer thereof, or by any person under the order or sanction of either of them to any person who may be a passenger or hand on such steamboat or other water craft at the time of the infliction of such damage or injury; provided, that the lien by this section created shall only attach to vessels of twenty tons burden and upwards, enrolled and licensed for the coasting trade, according to the act of congress." The second section provides, that any person having such demand may proceed against the owner or master, or against the craft itself; and the fourth section provides, that when proceedings are had against the craft itself, the process shall be by warrant of seizure. The act of March, 1848, explanatory of this statute, declares, that it shall be competent for a person holding a claim against any such vessel, to proceed against the vessel by name, "notwithstanding the cause of action may have accrued beyond or out of the territorial limits or jurisdiction of this state, and although such craft may not have been, at the time such cause of action accrued, navigating the waters within or bordering upon this state; provided, that no claim or cause of action arising or accruing beyond or out of the territorial limits or jurisdiction of this state (under the pro-

visions of the acts of which this is explanatory), shall be permitted to attach or operate to the prejudice of any bona fide purchaser of such craft not having notice of the existence of such claim or cause of action." 46 St. 78.

These acts of the general assembly of the state of Ohio are in derogation of the common law. They are without precedent as to forms of process, or in modes of proceeding in any practice or usage known to the common law. They afford remedies, which it is doubtless competent for the state legislature to give upon contracts, and in relation to torts affecting water crafts within the state, and which are not subject to the admiralty jurisdiction. But further than this, they can have no binding effect or legal operation. They can give the state courts no jurisdiction over the mariner's lien for his wages upon vessels engaged in commerce and navigation between different states, or those engaged in the foreign trade. They purport to give the state courts authority to proceed in rem, and to designate the order and priority of maritime liens in direct violation of the well-settled principles of the maritime law. They undertake to afford remedies which it is not competent for the common law to give, and those also which it is not within the province or jurisdiction of the state courts to enforce. Courts of admiralty are careful to see that the mariner's lien is not destroyed by the proverbial improvidence of the sailor. And as this lien is a paramount claim upon the vessel, whoever owns such vessel, or how often soever the ownership may be changed, wherever she may go, and whatever may befall her, so long as a plank remains of her hull, the seamen are the first creditors, and she is privileged to them for their wages. Nor can this lien be affected or destroyed by any proceedings of the common law courts. The purchaser, at a judicial sale under such proceedings, takes the property cum onere.

In the case of Poland v. The Spartan [Case No. 11,246], it was urged (as it has been insisted in this case), that where different creditors are each pressing their own rights against the vessel in different courts, the rule should be, to give precedence to those who first lay their hands on the fund. And this was urged upon the plea of preventing a conflict and collision of judicial authority. The learned judge of the district of Maine, in that case, held that, as the mariner's lien was privileged, its very essence was to give a preference over the general creditors of the debtor. And that if such be the claim of the seamen, the attachment (under the state process) only created a lien on the property subject to such prior incumbrance, and consequently could only create the right to hold the specific property after discharging the lien. So. too, in the case of Certain Logs of Mahogany [Id. 2,559], Mr. Justice Story says, that "a suit in a state court, by an attachment under process of the property, can never be admitted to supersede the rights of a court of admiralty to proceed by a suit in rem to enforce the right against that property, to whomsoever it may belong." "The admiralty suit (he says) does not attempt to enter into any conflict with the state court, as to the just operation of its own process; but it merely asserts a paramount right against all persons whatever, whether claiming above or under that process." This doctrine is not at all contravened by the decisions of the supreme court in the cases of Hagan v. Lucas, 10 Pet. [35 U. S.] 400, and Taylor v. Carryl, 20 How. [61 U. S.] 583. The principle established by these cases is simply this: When property is seized by a sheriff, under process from a state court, so long as it remains in his possession thus acquired and held, it is in the custody of the law, and cannot be again seized when so held, upon process issuing from a court of another jurisdiction.

This is the full extent of the principle maintained by these cases. And in the latter case on the question of the right of the marshal to execute the process of seizure from the admiralty, and take a vessel thus held by the sheriff, the members of the court were very near evenly divided in opinion, four of the judges insisting that the admiralty process was paramount in authority, and should be executed, notwithstanding the vessel was, at the time, thus in the custody of the law. In the case before us, the libellant's claim for wages against the brig was not merged in the judgment obtained in the state court under the Ohio water-craft law. Nor was his lien in any way affected by those proceedings; and for the plain reason that his maritime lien was a right which the state courts had no authority to enforce by a proceeding in rem; nor was the lien itself a matter within the cognizance of those courts. And hence, the judgment was void for the want of jurisdiction in the court which rendered it. The exception to the claimant's answer must, therefore, be sustained. Decree for libellant.

## Case No. 7,101.

The ISABELLA.

[1 Paine, 1.] [1]

Circuit Court, S. D. New York. April Term, 1810.

EMBARGO—COLLECTOR—DISCRETION OF—SEA STORES.

1. The collector having been clothed with a discretion, under the embargo laws, to grant permits to such foreign vessels as were allowed to depart with their cargoes, to take on board necessary sea stores and provisions; the court refused to decide, in a case where a permit had been granted, that the sea stores taken on board were more than were necessary, it not appearing that there was any fraud.

[1] [Reported by Elijah Paine, Jr., Esq.]

2. And where it had been the practice at the custom-house, in such cases, to consider arms and ammunition for the defence of the vessel as sea stores, the court refused to adopt a different construction.

[Appeal from the district court of the United States for the Southern district of New York.]

In admiralty.

N. Pendleton, for appellants.

N. Sanford, Dist. Atty., for respondents.

LIVINGSTON, Circuit Justice. The libels in this cause state—That the brig Isabella being a British vessel, and in the port of New-York on the 1st of May, 1808, and being bound to a foreign port, had then and there notice of the act laying an embargo, and on the 5th of the same month, at the city of New-York, took on board certain goods, wares, and merchandises, to wit: six cannon, two gun-carriages, ten planks, an arm chest filled with small arms, thirteen casks of powder, six barrels of flour, three hundred cannon balls, other than the provisions and sea stores necessary for the said voyage. That she afterwards proceeded with the said goods, &c. from New-York to the British province of New-Brunswick, and thence to St. Croix, in the West Indies. That the said goods, &c. were exported from the said city to the Atlantic Ocean.

Walter Burke in his claim states, that the said brig being in the city of New-York on the said 1st of May, and being notified of the said act, was bound to one or more ports in New-Brunswick, thence to one or more ports in the West Indies; and thence to a port in the United States. After a denial of the several allegations in the libels, the claim further states that the brig Isabella was a private armed brig, having on board when she arrived in New-York, six guns for her defence; and that she had on board when she sailed from the said city, on her said intended voyage, six guns and two gun-carriages for her protection against the enemies of Great Britain—that she also brought with her when she arrived, and had on board when she sailed, an arm chest filled with small arms, which her owner bought in New-York, and she took on board thirteen casks of powder for the same purpose, and also six barrels of flour for provisions for the crew; which articles were the armament, provisions, and sea stores of the said brig for her said voyage—that for the taking and carrying of said six cannon, their implements, and the other several articles, the claimant, who was master of the brig, obtained a regular permit from the collector. That after she had been examined by the officers of the customs, the collector knowing the said articles to be on board, besides all other provisions and stores, did grant him a regular clearance to proceed on the said voyage with the said cannon, provisions, and stores. That the brig on the 15th of May sailed on the said voyage and back to New-York, with the said stores and provisions on board, and which were not taken or intended as goods, wares, and merchandise, nor used as such, but were the armament of the said brig and her stores and provisions for the said voyage, and not otherwise. That she did not take any plank on board. That having a permit to take six cannon and their implements, she took on board in the open day-time sixty cannon ball for the same cannon, and as stores and implements for the same, a part of which were still on board.

On the filing of these libels and claims, several witnesses were examined; and after a hearing of the cause, the district court pronounced its sentence of condemnation, from which there is an appeal to this court.

The facts as well as the law have been much controverted in this cause, and the testimony and construction of the different acts of congress been commented on with great ability. Much was said in the course of the argument by the attorney for the defendant, to induce the court to believe that the sea stores properly so called, and enumerated in the two permits of the 26th April, and 12th May, 1808, were more than necessary for the voyage. This fact does not appear to be put in issue by the pleadings, and the court might therefore decline giving any opinion on it. If it were intended to rely on such excess, probably it ought to have been stated in the libel, and the particular excess been pointed out. This not being done, furnishes evidence that it was not the cause which led to the seizure of this property, and not appearing in the libel, the claimant cannot be supposed to come prepared to show that the sea stores were necessary. But the court having an opinion on the point, has no objection to express it. The first act laying an embargo permitted the departure of foreign vessels with their cargoes on board when notified of the act. Although nothing be said in this act of the provisions and sea stores which might be required for such vessel, it was fairly to be implied that every thing necessary to such departure was within the purview of the law; and we find that the collector of this port accordingly, probably under instructions from the treasury before the passage of the supplementary act, granted permits for what he deemed necessary provisions and sea stores, which were afterwards allowed to be taken by the act which passed on the 9th of January, 1808 [2 Stat. 453]. The discretion of judging not only what were provisions and sea stores, but what were necessary for the voyage, could be exercised by no one so well as by the collector of the customs. By him this discretion was assumed, and into the correctness of his decision, unless in the case of collusion between him and the merchant, this court would very reluctantly inquire. In this case then, so far as it regards the articles in these two permits, this discretion has been

exercised; and the only way in which it is attempted to deprive the claimant of the full benefit of it, is by an allegation that the second permit was obtained by fraud or imposition on the collector. The court does not think that this assertion is supported, or that the true destination of this vessel was concealed, and, therefore, it is under no necessity of deciding what would be the effect of such practices on the officers of the customs. The first permit, it is conceded, was regularly obtained from the deputy collector; but it is said that the collector would not have granted the one of the 7th of May, if he had known what his deputy had done. This may be so, and yet, non sequitur, that a fraud was practised. There is no proof that Mr. Gillespie, the owner's agent, knew of the first permit, or of the usage of the custom house for the deputy collector to grant permits, in the absence of his principal; but suppose both, he had a right to apply for a further supply of provisions and sea stores, even if he thought them extravagant, so long as the collector had an opportunity of determining on the propriety of his request. He could not imagine that the deputy collector would be absent from the custom house, nor does it appear that he was, nor that the other permit which had been executed so many days before, would not be returned, as appears was the practice, nor that the principal would not ask his deputy, whether any other permit had been granted. There was nothing improper therefore, in submitting the second application to the collector, and if he were remiss, which this court does not affirm, so long as neither Mr. Gillespie nor Mr. Burke made use of any misrepresentations to obtain a further supply, other than that of applying for it, the court is of opinion that the second permit was not fraudulently obtained, and that the claimant having acted under it, the vessel is not liable to forfeiture, although these supplies of provisions and sea stores may appear to have been somewhat extravagant.

The court will now proceed to inquire how far such forfeiture may have been incurred, by taking on board the cannon, gun-carriages, an arm chest, thirteen casks of powder, six barrels of flour, and the cannon ball; which are the allegations contained in the different libels, and on which only the parties are properly at issue. The taking on board of these articles with or without a permit, is urged as a ground of condemnation on the part of the United States, under the 5th section of the supplementary embargo law, which passed the 9th January, 1808, which subjects to forfeiture every vessel of this description, with her cargo, that shall take on board any specie, or goods, wares, or merchandise, other than the provisions and sea stores necessary for the voyage. Whether goods, wares, and merchandises, and cargo, as used in this section, be convertible terms, or whether sea stores, according to the general and vulgar acceptation of these terms, do not include guns, ammunition, &c., do not appear questions on which the court is called upon to give an opinion. If the public officer to whom the execution and interpretation of these laws in this respect were necessarily confided, have been in the habit of considering articles when taken on board, either for the consumption of the crew, or for the armament, equipment, and defence of a vessel, as comprehended within this exception; and if the practice of merchants has conformed to this understanding, a court, in case of forfeiture particularly, will look very unwillingly elsewhere for a different meaning. The truth is, all the articles which the libel alleges the Isabella to have had on board, were goods, wares, or merchandise; but if they were taken on board under the inspection of the proper officer, and as sea stores, this court, where the transaction was fair on both sides, would hesitate very much before it pronounced that they were not provisions and sea stores necessary for the voyage.

It being admitted by the claim, that all the articles except the plank were on board, it becomes important, under the view which the court is disposed to take of this subject, to see in what manner they got there. That there was a permit for the six cannon and their implements, is a fact about which there is no dispute. Mr. Leaycraft, one of the inspectors and a witness for the United States, proves it. Taking his testimony in connexion with that of Messrs. Gillespie, Reins, Marselus, and Arthur, the court has no doubt that a permit was also granted for the six barrels of flour. Mr. Gillespie says expressly there were two permits in the hands of Mr. Leaycraft when the lighter was loading, one for the guns and their implements and the arm chest, and the other for the flour and some small stores. That all these articles were put into the lighter under the immediate eye and inspection of Mr. Leaycraft is abundantly proved, who must have been too vigilant an officer not to have seen what was going on, and too faithful, according to his own account, to have consented to it without the sanction of his superiors. Whether the guns were the same which came in the brig from the West Indies, or whether any came in her, has been much agitated. The evidence on this point is not satisfactory, but were it material, the court would require much stronger proof on the part of the United States than has been given, that she arrived without guns. The superficial inspection made by Norwood, proves only that they were not mounted. They may have been in the hold, and yet it might be very difficult for the master after the dispersion of his crew, to prove the fact. In this state of things the captain's claim, where there is no contradictory evidence whatever, deserves some attention. In a doubtful case it must ever be the disposi-

tion of a court, if a leaning in any case be justifiable, to lean against a forfeiture, and to decide questions of fact accordingly. Such then being the state of the testimony respecting this fact, the court thinks it a duty to believe that when the brig arrived she had on board six guns and an arm chest. Whether she took out the same or others of equal size, is not material. There is no evidence of any deception having been practised at the custom-house on this subject, either as to the number or size of the guns, other than what may be inferred from what is said to be contrary to its usage in such cases. Whatever this usage may have been, it is certain that it was not invariable, for in this very case there was a departure from it, according to the relation of one of the witnesses on the part of the United States. The collector should have required further proof at the time, if he thought it necessary, that this vessel was entitled to take out guns. Not having done so, the court will not easily lend its ear to suggestions of fraud and imposition, especially when so feebly supported as in this case, and where they are deduced rather from reference to a general usage of the custom-house than from any positive proof of undue practice or misrepresentation. It will have already been perceived that the court does not consider the taking of the guns, arm chest, or cannon ball on board under these circumstances, a cause of confiscation.

If Mr. Gillespie be credited, there is as little difficulty about the powder; and here the court must depart from all the rules by which testimony is to be weighed, before it can free itself from the influence which this testimony is entitled to. Without any interest in the event of this prosecution—placed in a situation which afforded him an opportunity of knowing every thing that was going on—under the obligations of an agent to act with more than ordinary circumspection—and without any attempt to impeach his character, how can the court refuse its assent to his relation, if not in conflict with that of other witnesses of equal credit. It must be confessed too, that his account of this whole transaction is such as it is natural to have supposed it to have been. Under this view of the testimony of the witness, the court feels itself bound to suppose that a regular permit was obtained for the gunpowder. It is hardly possible to believe that a man of ordinary prudence would have so publicly purchased and sent thirteen casks of powder on board of a vessel which had already incurred some suspicion, and which if discovered, would have inevitably occasioned her forfeiture. Independent then, of his positive asseveration on this subject, I should be disposed to think that a permit had been obtained. If one were had, and such is the belief of the court, the collector must have considered the powder as necessary sea stores for an armed vessel; and whether he judged right or wrong, there being no mala fides on either side, it is not the business of the court to condemn the property of an innocent man for the error of an officer in whom the government had vested a discretion.

Of the plank it cannot be expected that much will be said. It is not believed that great reliance is placed on this article's being on board. The probability is, for much credit is not due to the story of the Silvas, which in this respect is contradictory, that what plank might have been on board when the Isabella proceeded to sea, were the remains of some which had been sent thither by Brown the carpenter, for the purpose of repairs, and that the whole not being used, she carried a few feet in small pieces with her, to be used on her passage, it being usual, as Mr. Brown states, to have some pieces of spare plank on board of vessels in case of accident. This court cannot see in the letter or spirit of the embargo laws, any thing which calls for a condemnation of a vessel for taking away the remnant of a plank or two, which the master may have purchased and paid for to repair his vessel while in port, but all of which may not have been found to be absolutely necessary for that purpose.

Upon the whole, as every thing except the trifling article of one plank, or the part of a plank, was put on board under a license from the custom house, and under the inspection or with the knowledge of its officers, and a clearance granted with the opportunity of a full knowledge of every thing that had been put on board; and as the articles thus permitted to be taken, were, in the judgment of the collector, necessary provisions and sea stores, and were actually used as such; and as there is no evidence of fraud in the obtaining of the permits, or in any part of the transaction, this court thinks that no forfeiture was incurred, and therefore decrees that the judgment of the district court be reversed.

## Case No. 7,102.

The ISABELLA THOMPSON.

[Blatchf. Pr. Cas. 377.] [1]

District Court, S. D. New York. July 31, 1863.[2]

PRIZE—NEUTRAL CONSIGNEE.

1. In this case the neutral consignee, at a neutral port, of a cargo delivered there by a vessel which had brought it from a blockaded port of the enemy, in violation of the blockade, acquired a perfect title to it, as against persons who captured it as prize on its subsequent transportation on a neutral vessel, from such neutral port to another neutral port.

2. Acting on the persuasion that the cargo had been unlawfully brought from a blockaded port, and had been directly laden from the first vessel

[1] [Reported by Samuel Blatchford, Esq.]

[2] [Affirmed in 3 Wall. (70 U. S.) 155.]

into the second vessel, the captors acted properly in bringing in the latter vessel and her cargo for adjudication.

[See note at end of case.]

3. Had any solidarity of interests between the two vessels, in the entire voyage from the enemy port to the last neutral port, been established by the proofs, or any complicity between them in the enterprise, the captors might well invoke the judgment of the court in condemnation of the enterprise.

4. Vessel and cargo released from seizure and restored to the claimants, without damages or costs, with permission to the libellants to move for leave to give further proofs on the above points.

[See note at end of case.]

In admiralty.

BETTS, District Judge. This vessel and cargo were captured, as prize of war, June 19, 1863, on the Atlantic Ocean, by the United States steamer United States, and were sent to this port for adjudication. James McDaniel, of Halifax, Nova Scotia, intervened and claimed as owner of the brig, and Nehemiah K. Clements, for himself and others, appeared and claimed the cargo. As in the preceding case [The Glen, Case No. 5,479], the vessel had a certificate of British registry, given at Halifax, August 5, 1862, as being a British vessel, built in New Brunswick, in 1861, to James McDaniel, of Nova Scotia. She had a certificate of her entry and clearance at Halifax, April 27, 1863, for Nassau, N. P., with a cargo of sundries, and a clearance at Nassau, June 5, 1863, for Halifax, with a cargo of spirits of turpentine and upland cotton, with a letter of instructions, a bill of lading, and an invoice conformable thereto. The cargo was taken on board in the harbor of Nassau. The ship's papers, upon their face, are regular, and in due order. The master and the ship's company are shown, on the preparatory examination, to be British subjects, and to have no interest in the vessel and cargo. The voyage commenced at Halifax, and was to have ended there. The vessel made no port between Halifax and Nassau on the outward voyage, nor between the same ports on her return voyage, and was not near any port when captured, and had not attempted to enter any port on her return voyage. She was captured off St. George's Banks. All the papers on the vessel are regular and apparently fair.

No evidence is given, on the examination in preparatorio, that the cargo of the vessel was procured from a blockaded port by any person on board of or interested in the prize vessel, or that it was the property of such a person; and no reasonable color for doubt or suspicion as to the lawfulness or fairness of the voyage in question is furnished by the evidence in the case, except what arises from the testimony of the cook, Gabriel English. He testifies that the cargo seized was laden into the prize vessel in the harbor of Nassau from the schooner Argyle, which had just run the blockade of Wilmington, bringing that cargo into Nassau; that he understood that the master of the Argyle was part owner of her, and he supposes that he owned part of her cargo also; and that the master was a southern man from Wilmington. This conjecture of the witness cannot affect the ownership of the consignees and shippers of the cargo at Nassau. The neutral consignee at that port acquired a perfect title to the cargo as against the captors, although it was carried to Nassau by runners of the blockade, and the libellants have no legal authority to arrest it on board of a neutral ship while transporting it from a neutral port. But, acting on the persuasion that the cargo had been unlawfully brought from a blockaded port, and had been directly laden from the blockade-running vessel into the Isabella Thompson, the cruiser might, very naturally, believe that she possessed a rightful authority to intercept such transaction as one falling within the just cognizance of a prize court, and bring in the vessel and cargo for adjudication before that tribunal on such suspicion. Had any solidarity of interests between the Argyle and the Isabella Thompson, in the entire voyage from Wilmington to Halifax, been established by the proofs, or any complicity between the two vessels in the enterprise, the captors might well invoke the judgment of the court in condemnation of the enterprise. Although the evidence fails to make a clear case of illicit dealing on the part of the brig, so as to subject her to forfeiture, I think a reasonable cause of suspicion arises out of the testimony, of sufficient force to justify the granting of permission to the libellants to give further proofs to that point. If moved for by them, as the proofs now stand, I shall order the brig and cargo to be released from this seizure, and to be restored to the claimants without damages or costs; but with permission to the libellants, on four days' previous notice to the claimants, to move the court for leave to give further proofs in this suit upon the aforesaid points. Order accordingly.

[NOTE. From this decree the claimants appealed to the supreme court, assigning for error that the district court refused them damages and costs. The decree was affirmed in an opinion by Mr. Justice Davis. 3 Wall. (70 U. S.) 155. It was held that there was probable cause for the capture, as the evidence showed that the voyage from Wilmington to Halifax was a continuous one, with no intention of terminating it at Nassau. "The original guilt continued to the time of the capture, notwithstanding the stoppage at an intermediate port and transshipment."]

## Case No. 7,103.

ISELIN et al. v. BARNEY.

[5 Blatchf. 185.] [1]

Circuit Court, S. D. New York. Nov. 9, 1863.

CUSTOMS DUTIES—EXCESS DUTIES—PROTEST—NOTICE.

Under the fifth section of the act March 3, 1857 (11 Stat. 195), the entry of goods within ten days after which notice of dissatisfaction with the decision of the collector must be given to him by the importer or his agent, in order to authorize a subsequent suit to recover back an excess of duties paid under protest, is, in the case of goods entered for warehousing, the entry for withdrawal of such goods and not the entry for warehousing.

[Cited in Ullman v. Murphy, Case No. 14,325.]

This was an action [by Adrian Iselin and others] against [Hiram Barney] the collector of the port of New York, to recover back an alleged excess of duties, paid under protest, upon worsted goods.

Martin V. B. Wilcoxson, for plaintiffs.

E. Delafield Smith, Dist. Atty., for defendant.

NELSON, Circuit Justice. It is admitted that the duties upon the goods imported by the plaintiffs were charged at too high a rate, but the 5th section of the act of March 3, 1857 (11 Stat. 195), provides, that, on the entry of goods imported after the 1st of July, 1857, the decision of the collector, as to their liability to duty or exemption therefrom, shall be final and conclusive against the importer or agent, unless, within ten days after such entry, he shall give notice to the collector, in writing, of his dissatisfaction with such decision, &c., and shall, within thirty days after the date of such decision, appeal to the secretary of the treasury, whose decision shall be final, unless suit shall be brought within thirty days after such decision, for any duties that may have been paid, or may thereafter be paid.

The goods in this case were entered for warehousing by the plaintiffs, July 18th, 1861, and an estimate of the duties was made at the rate of thirty per cent., amounting to the sum of $788.10. A warehouse bond was given on the same day in the penalty of double the amount, conditioned for the payment of the $788.10, or of the amount of duties to be ascertained as due. The withdrawal entry was made on the 19th of September, 1861, and the duties were paid on that day, under protest. An appeal was taken to the secretary of the treasury on the 1st of October, 1861, and his decision was made and communicated to the collector on the 13th of May, 1862. This suit was commenced on the 13th of June following.

The ground taken by the government is, that the entry of the goods mentioned in the 5th section of the act of 1857, means the warehouse entry, which, in this case, was made on the 18th of July, 1861; and that, as the notice of dissatisfaction was not given till the 19th of September, and the appeal was not taken till the 1st of October following, the ten days had elapsed, and the plaintiff is concluded. On the part of the plaintiff it is insisted, that the entry referred to as the period from which the time is to be estimated, is the entry for withdrawal, when, by the statute, payment of the duties is required.

The 4th section of the act of March 28, 1854 (10 Stat. 271), provides, that all goods, &c., which may be thereafter duly entered for warehousing, &c., may continue in the warehouse, without payment of the duties, for the period of three years (now changed to one year by a recent act) from the date of the original importation, and may be withdrawn for consumption on due entry and payment of the duties. If this entry is the one to which the 5th section of the act of 1857 refers, and I am strongly inclined to think it is, then all difficulties and embarrassments attending these appeals are at once removed. The estimate of the duties, for the purpose of warehousing the goods, is a rough general estimate, in practice at the customs, as appears, usually adopting the highest rate of duty applicable to any of the articles entered, with a view to the taking of the warehouse bond. The bond for the goods in question illustrates this. The penalty is in double the estimated duty, and the condition is to pay that estimated amount, or the amount of duties to be ascertained as due upon the goods; and, in this very case, the duties were not in fact finally liquidated and fixed till more than the ten days had expired from the first entry, so that no notice of dissatisfaction could possibly have been given, or any appeal taken, within the time prescribed, if this entry is the one contemplated by the statute.

A very intelligent witness from the customs, who was a liquidating clerk in the warehouse department, has been examined. He states, that after the warehouse entry is made, the goods, or the portion of them required by law, are sent to the examiners, who examine them and report to the collector, by making notes on the back of the invoice; that upon this report the collector fixes the rate of duty; that, after it is fixed, the papers are sent to the naval officer, to receive his check, and then to the bookkeeper of the warehouse, to be entered; that no notice of the duty, as fixed by the collector, is given to the merchant; and that such time is taken up in the various steps of examining the goods, reporting to the collector, and fixing the rate of duties by him, &c., as the exigency of the business may require in the departments. It is quite apparent, that the time when the collector determines the rate of duty, that is, makes his decision, within the meaning of the statute,

[1] [Reported by Hon. Samuel Blatchford, District Judge, and here reprinted by permission.]

and from which the merchant must appeal, if he is dissatisfied, cannot be the period when it is arrived at at the customs and entered upon the books of the department, in the ordinary course of the business; for, as no notice is given of it, and there is no certainty as to the time it may be made, unless the merchant or his agent were in constant attendance, the time for notice of dissatisfaction and appeal might pass by. But the act of congress itself does not place the rights of the merchant on this ground. The notice of dissatisfaction is to be given within ten days after the entry of the goods. The act contemplates that the decision of the collector shall be made at or before the entry, so that the notice of dissatisfaction may be given within the ten days after it. This surely cannot be the warehouse entry, for the reason that no decision fixing the rate, as we have seen, is then made at all. No notice of dissatisfaction can be given or any appeal taken, as the merchant cannot tell what the rate of duty may be till the goods go to the examiners, and, on their report, the duty is fixed. It appears from the papers, and was affirmed by a witness from the customs in this case, that the duty was not liquidated or fixed till the 1st or 2d of August, and was then reduced $130.10, the duty on nearly a moiety of the goods having been reduced from 30 per cent. to 20 per cent.; and, it may be added, in confirmation, that the condition of the bond given at the time is, the payment of duties "to be ascertained as due." I am satisfied, that, upon a true construction of this 5th section of the act of 1857, the entry referred to, and from which the ten days is to date, is the withdrawal entry, at the time of making which, according to the 4th section of the act of 1854, the duties are to be paid. The appeal and the suit were, therefore, in time, and, as this is the only point made against the recovery, the plaintiff is entitled to judgment for the $151.93, the excess of duty paid.

ISELIN (CLARK v.). See Cases Nos. 2,824 and 2,825.

## Case No. 7,104.

ISH v. MILLS.

[1 Cranch, C. C. 567.] [1]

Circuit Court, District of Columbia. July Term, 1809.

PROMISSORY NOTE—NOTICE OF NON-PAYMENT.

1. Notice to the indorser, of non-payment of a promissory note, not payable to order, is not necessary in Virginia.

[Cited in Offutt v. Hall, Case No. 10,450.]

2. Due diligence is a question for the jury.

Assumpsit against the indorser of Barnes & Holly's promissory note, not payable to order. The note became payable on the 21st of February, 1806 The plaintiff brought his suit against Barnes & Holly, on the 17th of May, 1806. Execution was issued in August, 1807. Barnes took the oath of an insolvent debtor in July, 1806, and Holly in December, 1807. This action was brought against Mills on the 2d of July, 1808.

E. J. Lee, for defendant, relied on the want of diligence in not giving notice to the defendant of the non-payment by Barnes & Holly.

THE COURT was of opinion that notice to the indorser of a promissory note, not negotiable, is not necessary in Virginia. The obligation of the indorser of such a promissory note in Virginia is that if the holder cannot, by using due diligence, obtain payment from the maker, the indorser will pay at all events, whether he had notice or not, and that due diligence is a question for the jury.

The defendant took a bill of exceptions, but did not prosecute a writ of error.

[1] [Reported by Hon. William Cranch, Chief Judge.]

## Case No. 7,105.

In re ISIDOR et al.

[2 Ben. 123; [1] 1 N. B. R. 264 (Quarto, 33).]

District Court, S. D. New York. Jan., 1868.

EXAMINATION OF BANKRUPTS—LACHES.

Where the bankrupts were examined by the assignees, and creditors filed specifications of opposition, which the court held irregular in form, and allowed them time to file new ones, and in the interim they applied for an order that the bankrupts attend and be examined under section twenty-six of the act [of 1867 (14 Stat. 529)] several months having elapsed since the proofs of the creditors' debt, and no reason for requiring a new examination being shown: *Held*, that the application must be denied.

[Cited in Re Frizelle, Case No. 5,132.]

[In the matter of Siegfried Isidor and Jules Blumenthal, bankrupts.]

BLATCHFORD, District Judge. In this case creditors oppose the discharges of the bankrupts, and filed specifications of opposition before the register, which, with all the papers in the case, have been transmitted to the court by the register. The court has held the specifications to be irregular in form, and has allowed ten days' time to the opposing creditors to file new specifications. The creditors now ask for an order that the bankrupts attend and submit to an examination, under section twenty-six of the act. This application is made on behalf of fourteen creditors, who have filed notices of the entry of appearances in opposition. One of such notices is on behalf of William Brunner & Co., who have not proved their debt. As to the other thirteen, the debts of three of them were proved July 22d, 1867; the debts of

[1] [Reported by Robert D. Benedict, Esq., and here reprinted by permission.]

eight of them were proved September 6th, 1867; the debt of one of them was proved September 12th, 1867; and the debt of the remaining one of them was proved November 22d, 1867. The day for showing cause against the discharge of the bankrupts was December 28th, 1867. Abundant opportunity was afforded to these creditors to examine the bankrupts on oath, under section twenty-six, but none of them took any steps for that purpose. The bankrupts were examined at considerable length by one of the assignees, on an order for that purpose obtained by the assignees. Those examinations took place from December 16th to December 27th, 1867, and are on file among the papers. Under these circumstances, I do not think it would be reasonable to require the bankrupts now to submit to a new examination under section twenty-six, especially as no reason for doing so is shown by affidavit.

## Case No. 7,106.

The ISIS.

[Cited in The Blohm, Case No. 1,556. Nowhere reported; opinion not now accessible.]

## Case No. 7,107.

The ISLAND BELLE.

[21 Leg. Int. 60; 26 Law Rep. 263; 5 Phila. 501.]

District Court, E. D. Pennsylvania. Feb. 19, 1864.

PRIZE—CHANGE OF OWNERSHIP.

[1. A master of a vessel captured for violation of blockade, in a bill of sale, as trustee for the owner, gave his residence as Charleston, S. C. *Held*, that this must be deemed his commercial residence (although he averred that he was a British subject), which, in a prize court, defines his personal relations as apparent owner.]

[2. While, in the United States and England, the strictness of the rule that no change of ownership during hostilities can be regarded in a prize court is not observed, yet no change of property is recognized where the disposition and control of a vessel continue in the former agent of her formerly hostile proprietors.]

In admiralty.

CADWALADER, District Judge. This vessel, formerly the General Ripley, was built in 1861, at Charleston, South Carolina. She went to sea on her first voyage, without being coppered, in the latter part of October, 1861, with a cargo of rice; and, having avoided the blockading force, arrived at Nassau, New Providence, early in November. On the 12th November, 1861, she sailed, without having unladen her cargo, for St. Jago de Cuba, which she reached on the 20th. On the 22d she sailed, without having unladen, for Trinidad de Cuba, where, on the 28th, her cargo was discharged. She there took in a cargo of sugar and molasses, with which, on 20th December, 1861, she sailed for Baltimore, where it was intended to copper her. On the 31st December, 1861, she was captured when about twelve miles southeast of Bull's Bay. It has appeared, upon investigation, that, on this voyage, no breach of blockade was intended, but that the destination was really Baltimore. The only questions remaining have been those of ownership of the captured cargo and vessel.

Her master, Thomas Phillips, had commanded her from the time when she was built. He describes himself as a British subject, having no permanent place of residence, and as having never had any interest in either vessel or cargo, otherwise than as master. He states that, at Charleston, the person with whom he transacted all business concerning the vessel, was a Mr. Canalle, a resident of that place, and that her owners were four other residents of Charleston, and this Mr. Canalle. That the ownership of the outward cargo of rice was in the same five persons appears, I think, from the manifest and other papers. The manifest shows that the rice was taken on board in five distinct shipments, marked A, B, C, D, E, corresponding with the number of part owners of the vessel. The consignees of the vessel and cargo at Nassau were Sawyer and Menendez. To these gentlemen Mr. Canalle, who corresponded with them as if he were sole owner of the vessel and cargo, wrote from Charleston on 5th October, 1861, with directions to dispose of the cargo for his account, and afterwards, if they could dispose of the vessel, to do so, and invest the proceeds of both vessel and cargo in English bills of exchange. He wrote, in this letter, that the vessel was new, and too good to be used in running the blockade; and moreover, that when she was loaded, there was difficulty in getting her in and out. He added, "The vessel is held in Captain Phillips' name. This is done to facilitate the disposal of her, and to prevent the necessity of a power of attorney." Capt. Phillips deposes that, when the vessel was built, he gave to the builder, in payment for her, a check for $10,000, which was sent to him (the captain) for that purpose by Mr. Canalle. Mr. Sawyer, of the firm of Sawyer & Menendez, deposes to the arrival at Nassau of the General Ripley, owned by Captain Phillips, in trust for sale for Mr. Canalle, with, as deponent was informed, verbal instructions to Captain Phillips to sell her in case a fair price could be obtained. Mr. Sawyer further deposes that he thereupon himself purchased her, and on the 8th of November received from Captain Phillips a bill of sale, of which a certified copy is produced. In this bill of sale Captain Phillips describes himself as "of Charleston, in the state of South Carolina." This must be deemed his commercial residence, which, in a prize court, defines his personal relation.

The apparent ownership of the vessel, therefore, could not have continued in his name without liability, as the property of a hostile person, to be captured anywhere at sea by cruisers of the United States. He deposes that Mr. Sawyer paid him no money on account of the vessel, and that no consideration passed therefor to his knowledge. This is explained by depositions taken at Nassau, including those of both members of the firm of Sawyer & Menendez. From these depositions it appears that Mr. Sawyer, having funds in bank to his private credit, drew upon them, his own check of 8th November, 1861, for £2083. 6s. 8d., the amount of the consideration expressed in the bill of sale of that date, payable to the order of Sawyer & Menendez, who had their partnership account in the same bank; and that this check was presented by Mr. Menendez, and its amount credited to their firm, and charged to Mr. Sawyer by the bank. These gentlemen depose that the price of the vessel was $10,000, equal, in British sterling money, to the above amount of £2083. 6s. 8d., which was thus paid. Annexed to the deposition of Mr. Sawyer, who states that, at this time, he had no money whatever belonging to Mr. Canalle, is a letter from Mr. Canalle, dated Charleston, S. C., December 12, 1861, to Sawyer & Menendez, containing this passage: "Having received several of your favors, one of which contained account sales of the schooner Gen'l Ripley, also sales of the cargo of rice, have been examined and found correct; also an account current to date, and a bill on England for the amount in full, for which please accept my thanks." No account whatever, or copy of one, and no copy of any letter to Canalle is produced. No correspondence or account between Sawyer & Menendez and the consignees at Trinidad has been produced. The objection to Mr. Sawyer's purchase of the vessel, through a sale effected by his own firm as agents of the seller, loses part of its force when we consider the effect attributable to the presence and concurrence of Captain Phillips. There will be no necessity to consider particularly this objection to the alleged sale.

On the 11th November, 1861, at Nassau, the vessel, under the name of the Island Belle, was registered as Mr. Sawyer's. On the same day that gentleman executed two papers. One of them constituted Captain Phillips the supercargo, with unlimited authority over the employment and management of the vessel in her intended voyage to Cuba, and in her future voyage or voyages from that island to any port or ports. The other paper was a power of attorney, such as, in the late British merchant shipping act [Gen. Stats. 1854, p. 611; 17 & 18 Vict. c. 104], is called "a certificate of sale." The latter paper, which was to remain in force for twelve months, the longest time allowed by that act, authorized Captain Phillips to sell the vessel at any port in the United States or the West Indies, for a sum not less than £2291. 13s. 4d. These papers were unrevoked at the time of capture. Captain Phillips, as the general representative of Mr. Sawyer, is therefore peculiarly accredited by him. This gives unusual force to certain statements of Captain Phillips concerning the vessel. He appears to be an intelligent person, and a good man of business. He deposes that in October, 1861, when he was about to sail from Charleston, he there signed a bill of sale of the vessel, setting forth that he was the owner, and conveying her to Mr. Sawyer; and that on arriving at Nassau, he delivered the bill of sale thus executed by him, to Mr. Sawyer. If this was the same bill of sale of which a copy is annexed to the Nassau depositions, the date may have been in blank, and that of 8th November inserted there. But it is more probable that a new bill of sale, in the usual printed form in use at Nassau, was there prepared, and was substituted for the original one. There is no contradiction between the statement of Capt. Phillips and that of Mr. Sawyer. If there had been, the statement of the captain must, according to the general rule in prize cases, prevail. This rule applies here with peculiar force, inasmuch as he was not the simple navigator of the vessel, but, as has been already explained, the general representative of Mr. Sawyer in respect of her.

The cargo from Trinidad for Baltimore was shipped by two commercial houses. The shippers of one portion of it wrote to their correspondents in Baltimore: "It may be that Captain Phillips may feel disposed to come back with his vessel to our port, and to take half interest in a small cargo as per note we enclose. In that case he will pay to you half the amount of invoice, and the other half you will charge us in account." The shippers of the other portion, in a letter to their Baltimore agents, referring to a signature of Captain Phillips at foot of it, wrote as follows: "Captain Phillips, intending to copper his vessel with you, and for other expenses which he may be obliged to incur, we beg to open herewith, in his favor, a credit to the extent of $4000, of which please to take note and pay to him any amount up to the stated sum, charging the same to our account." Another letter from the same parties indicates the source of this credit. Here they say: "We have still in hand for the disposal of the captain, the total funds for the proceeds of the load of rice brought here by Island Belle from Nassau, and sold by us; and we doubt whether the captain will be in want of the whole $4000 at your place. In case he does, however, and in case our little lading should not be sufficient to reimburse you, we will, upon the receipt of your disbursement, of course, at once, send other ladings for the possible balance." Two open letters from Sawyer & Menendez, both dated at Nassau on the same day as the above men-

tioned power of attorney and certificate of sale to Captain Phillips, introduce Captain Phillips to the respective correspondents of Sawyer & Menendez at Baltimore and New York. In each letter they say, Captain Phillips "visits your port, in his vessel, on business;" and recommend him to local good offices in the usual form of a commercial introduction. The expression "his vessel" is here of no distinct import. It might have been used as to the master of a vessel who had no proprietary interest in her. But the letters do not import that the business on which he was to visit those places was that of the writers, or either of them. Moreover, if Sawyer & Menendez, or either of them, had owned the vessel and cargo, the correspondence from Trinidad with Baltimore as to the funds retained at Trinidad, was, to say the least, extraordinary. On the other hand, there was nothing extraordinary in this part of the business, if Captain Phillips was navigating the vessel for her former owners in Charleston, and the funds retained as the basis of the credit on Baltimore were held in Trinidad for their account. The parties at Trinidad who shipped the cargo for Baltimore were Spaniards. They shipped it professedly for their own account. The captain claimed it for them, and swore that it belonged to them. That they stood in very friendly relations to the owners of the vessel and of her outward cargo of rice, was apparent. But they might, if they saw fit to retain the proceeds of this rice, have done so, and have made the shipments for Baltimore on their own independent account. That these shipments were owned exclusively by these Spanish shippers was attested by every proprietary document that could have been required for the purpose of attesting it in a suspected case, including oaths for entry at the Baltimore custom-house upon the invoices on board. These oaths of ownership were made conformably to the provisions of the act of congress of 1823. Nothing more could have been expected under an order allowing further proof. It was nevertheless contended, with some apparent force, on the part of the United States, that, as the consignment of rice to Trinidad had been the means of transmitting $4000 of its proceeds to Baltimore to be employed by the master as agent of its owners in coppering the vessel, &c., for their account, the contrivance of shipping the cargo for Baltimore as the property of the Spanish agents who effected this arrangement was obviously collusive, and, in its ultimate effect, if no capture had occurred, would have increased the capital invested for hostile account. The argument was, that if such an arrangement covered from capture property which otherwise would never have been shipped, the consequence would be that any hostile person might, in time of war, send his funds to foreigners, who, retaining them in hand as bankers of the remitter, might, for their own ostensible account, thus make shipments of which the ultimate avails would either directly or indirectly accrue to his benefit, while the investments would, in the mean time, traverse the ocean exempt from capture. The answer to the argument was, that the possibility of such evils could not be guarded against in prize courts, and that the only question in such cases was that of proprietorship. The true doctrine is that allegations of such proprietorship must be suspiciously regarded, and the fullest proofs of it required. But when such proofs are adduced by the party on whom the burden of proof rests, there cannot be condemnation upon the former suspicion. The cargo in this case was restored by my decree, without any award of costs or damages against the captors. This decree was, on appeal, affirmed.

The remaining question is whether the vessel should be liberated or condemned. The decision as to the cargo has been explained, because the argument showed that it had not been rightly understood. The judgment was upon the ground that, assuming the ownership of the vessel and of the rice and its proceeds to be hostile, this cargo was not, in fact, an investment of the proceeds of the rice, but was a shipment for the independent account of the Spanish parties for whom the captain claimed it. He never interposed any claim for the vessel. Recurring to his peculiar relations to her which have been twice mentioned, this omission is not to be disregarded. It seems, indeed, to admit of but one explanation. The case has been argued as upon a claim by Mr. Sawyer. That gentleman has been represented by those able to give him the best legal advice. He has filed his own and certain other affidavits, all of which, with all the documents offered on his part, have been read as if taken under an order allowing further proof. These affidavits were taken in April, and filed here in November, 1862. They were allowed to be filed, subject to all legal exceptions. If the substantial requirements of a test oath had been fulfilled, I would not regard the informality of the absence of a claim. But no claim, properly speaking, has been presented. If it had been, the affidavit of Mr. Sawyer would not have served the purposes of a test oath. It does not state, as is usual in such cases, that no person was interested in the vessel at the time of capture, or at any time after the commencement of the voyage in which it occurred, and that if restored, she would belong to himself exclusively. He merely deposes that he bought her from the captain, and paid for her with his own money, by his check, as above; that he received the bill of sale, and had her registered in his name under the provisions of the British merchant shipping act; that she remains registered as his property, and that no person whomsoever in the Southern states of America owns any part, share or interest in her. If such nonfulfilment of the requirements of the test

oath were sanctioned, evasions without limit would ensue. Some of the deficiencies of the case, in the absence of such other documents as would have been expected under an order allowing further proof, have been indicated. Assuming the truth to be that, as between Mr. Sawyer and the former owners, their proprietorship was divested irrevocably and that he was, at the time of capture, the absolute owner of the vessel, as ownership is definable in a court of common law, she would, nevertheless, be liable, in a prize court, to condemnation. The rule of decision in some countries has been that, as to a vessel, no change of ownership during hostilities can be regarded in a prize court. In the United States, as in England, the strictness of this rule is not observed. But no change of property is recognized where the disposition and control of a vessel continue in the former agent of her former hostile proprietors; more especially when, as in this case, he is a person whose relations of residence are hostile. That such were the relations of Captain Phillips is apparent. Maritime hostilities could not be prosecuted with any effect if this rule did not apply in an extreme case like this. A vessel, beneficially owned by hostile persons, navigated by a hostile person who is her nominal owner, is transferred by him to their own commercial agent in a foreign country, who immediately executes powers to the same navigator, enabling him not only to conduct and manage her future employment, but to sell her. If, therefore, the case were, as Mr. Sawyer, or, as his advocate, states it, she should, I think, be condemned. I am not aware that there was ever so thin a veil thrown over trade of a hostile district to protect a vessel from capture. But can this be deemed a true state of the facts? If Capt. Phillips tells the truth, as I must believe that he does, the transaction was not a sale and purchase of the vessel, but a paper transfer of her at Charleston, so far executed there that the legal title was to vest, at all events, in Mr. Sawyer, as a British subject. The captain, though for some purposes, himself a British subject, was a person whose residence would have made her liable to capture if he had continued the nominal owner. In the voyage from Charleston, as she was to run the blockade, this was unimportant. The captain had no interest of his own in her. He was to obey his instructions received at Charleston. Their effect was to make it obligatory on him to divest himself at Nassau of all appearance of ownership. His having been required to execute the bill of sale at Charleston proves this. If so, the agency of Sawyer & Menendez to sell her was a fiction. The general tendency of the other evidence is to the same result. I would enter a decree of condemnation at once if there had, in any prior stage of the cause, been a formal order allowing further proof. But, as no such order has been made, I will make it now, allowing forty-two days. This will put the case in a proper shape for an appeal, and will give to Mr. Sawyer an opportunity to diminish, as far as may be in his power, the difficulties which he may have occasion to meet in the superior tribunal. It is not probable that my own opinion of the case will be changed by any further proof that may be adduced.

## Case No. 7,108.

### The ISLAND CITY.

[5 Blatchf. 264;[1] 2 Int. Rev. Rec. 109.]

Circuit Court, S. D. New York. Sept. 29, 1865.

COLLISION—STEAMER AND SAILING VESSEL—HELL GATE.

Where a steamer going to New York through Hell Gate saw a schooner drifting towards her with the tide, there being no wind, and did not stop, as she might have done, in an eddy, to let the schooner pass, but went on until she was caught in the tide and intercepted the schooner's drift, and a collision ensued: *Held*, that the steamer was in fault.

[Cited in Anderson v. The Edam, 13 Fed. 138.]

[Cited in Parrott v. Knickerbocker & New York Ice Co., 46 N. Y. 368.]

[Appeal from the district court of the United States for the Southern district of New York.]

This was a libel in rem, filed in the district court, by the owner of the schooner Peri, against the steamer Island City, to recover damages for the sinking of the schooner, by a collision which took place between her and the steamer, in Hell Gate, off Hallett's Point, at about half past nine o'clock a. m., on the morning of the 27th of September, 1862, the wind being very light from the north-north-east, and the tide strong flood. The district court dismissed the libel, and the libellant appealed to this court.

Mr. Burr and Robert D. Benedict, for libellant.

James M. Smith, for claimant.

NELSON, Circuit Justice. The schooner was on her passage into the Sound from the city of New York, making her way through Hell Gate. The steamer was coming down from Mamaroneck to the city. The schooner tacked across from Hallett's Cove toward the New York shore, and again came about, when abreast, or nearly so, of Astoria, and made again for the Long Island shore. She had got some slight headway on, on this tack, when the wind entirely failed her, and she was in danger of being swept by the tide on to the shore. Thereupon the master immediately took measures to bring her about, her motion in the water being sufficient to accomplish this manoeuvre; but, from the loss of the wind, she drifted along in the tide to Hallett's Point, when she was struck on her starboard quarter, abaft her

[1] [Reported by Hon. Samuel Blatchford, District Judge, and here reprinted by permission.]

fore-chains, by the steamer. The steamer came down in the eddy to Hallett's Point, the usual track for small steamers, and, having seen the schooner below, endeavored to stop in the eddy, to allow her to pass, but her, the steamer's, bow having caught in the tide, she shot across the schooner's track while drifting, which occasioned the collision.

The learned counsel for the steamer, aware that it was her duty to take care and avoid the schooner, as a general rule, has endeavored to show that the schooner was in fault, and that hence the collision was unavoidable; that, in her tack to the Long Island shore, she approached too near the rocks, and that, on coming about, her stern struck them, which had the effect to carry her head by the tide towards the shore, and brought her against the steamer; and that, if she had tacked about sooner, she would have avoided the rocks, and the drift by the tide would have carried her across the bows of the steamer in safety. But, as respects this charge of fault against the schooner, it must be said, that the failure of the wind left the vessel in a helpless condition, and that everything seems to have been done which was fairly within the means of the master and hands. The real fault, upon the proofs in the case, is rather attributable to the neglect of the steamer in not taking instant measures to stop in the eddy, on first discovering the situation of the schooner, in the midst of these dangerous waters. If she had done so, the latter would have passed the point in safety. There was time enough for the steamer, after the schooner was seen, to have stopped in the eddy, and kept out of the tide till she had passed; but, as the steamer was going at the rate of some fifteen miles the hour, the delay was fatal. Before she could be stopped, she got into the tide, and intercepted the drift of the schooner.

The decree of the court below is reversed.

## Case No. 7,109.

The ISLAND CITY.

[1 Lowell, 375.] [1]

District Court, D. Massachusetts. July, 1869.

MARITIME LIENS—REPAIRS—FOREIGN OWNERSHIP—LIENS CREATED BY STATE—SEAMEN'S WAGES—SHIP-KEEPER.

1. The statute of Massachusetts giving liens on ships for repairs is valid, so far at least as it applies to the refitting and renewing of domestic vessels to adapt them to a new business.

2. If the equitable owner of a ship lives in the port where the repairs are furnished, and the dealings are with him as owner, the ship is domestic so far as liens are concerned, though the legal title be in a foreigner.

[Cited in The George T. Kemp, Case No. 5,341.]

3. By the lien law of Massachusetts (Gen. St. c. 151), the liens created under that law are postponed to mariners' wages. But they take precedence of an earlier mortgage.

[Cited in The Selt, Case No. 12,649; The Hiawatha, Id. 6,453; The Canada, 7 Fed. 735; The J. E. Rumbell, 148 U. S. 1, 13 Sup. Ct. 502.]

4. The admiralty has no jurisdiction to enforce these state liens, but it has power, as have all other courts, to pay out a fund in its registry to the persons who have valid liens upon it.

[Cited in The Templar, 59 Fed. 208.]

5. A mortgagee of a ship stands in this respect like any other lien-holder, and he has a right in the admiralty to the fund arising from a sale of the ship, or to so much of the fund as is not required to pay liens that have priority of his.

[Cited in The Two Marys, 10 Fed. 925.]

6. The ship-keeper of a domestic vessel, which is being repaired for a new use, has not a lien on her for his wages by the general maritime law, as now understood in the United States.

[Cited in The Champion, Case No. 2,584; The Trenton, 4 Fed. 662; The Murphy Tugs, 28 Fed. 432; The America, 56 Fed. 1021; The Hattie Thomas, 59 Fed. 299.]

7. The owner of a vessel incumbered for more than her value and libelled for wages, appointed a master when there was no prospect of his being able to redeem the vessel. *Held*, the master had no lien for his wages, though by the law of the flag he would have had a lien under ordinary circumstances.

[Cited in Whitney v. The Mary Gratwick, Case No. 17,591.]

8. Seamen engaged in good faith to serve on a ship which is intended to make one or more coasting voyages have a lien on the ship for their wages while the ship is getting ready, though she should never leave the port.

This steamer was proceeded against for wages and sold, and about five thousand dollars remained in the registry. Many libels were filed against the vessel after the sale, and warrants and monitions were issued in each case. When the cases were brought on for hearing, the judge said that the warrants were improvident, that petitions were the sufficient and proper remedy, and ordered the several proceedings to be consolidated, and that no costs be taken for the warrants. The former owners of the steamer, who had taken and still held a mortgage for fifteen thousand dollars, the full amount for which they sold her to her present owner, appeared as claimants of the fund in court. The remaining parties were, on the one hand, persons who had furnished materials, labor, and supplies for the refitting and victualling of the vessel while in port, and who claimed liens under the laws of Massachusetts, and, on the other, a ship-keeper and others, who asserted themselves to have maritime liens. It was proved that during the war the Island City was captured and condemned as prize, and was sold to Messrs. Bowker and others, merchants of Boston, now the mortgagees, who chartered her to the government of the United States as a transport. After the peace, a convenient trade had been found for the vessel in the British provinces, and it was thought

[1] [Reported by Hon. John Lowell, LL. D., District Judge, and here reprinted by permission.]

necessary to take out a British register. Afterwards, Colonel Foote, an American citizen then residing in Boston, bought the steamer, and caused her to be transferred to his clerk, who was a British subject, this being requisite with the register that she had. Foote held a patent for the application of petroleum as fuel for steamers, and he undertook to fit up this vessel as a passenger steamer, and to adapt her machinery to his new fuel. It was his intention to take her to New York, Washington, and other ports for exhibition, after she had been successfully adapted and nicely fitted up; and the debts, for which liens were now asserted, were for the repairs, alterations, equipments, &c., which he ordered with this purpose in view. Two or three trial trips were made in the harbor of Boston, which the patentee considered successful; but his money and credit were exhausted, and the steamer was libelled and sold, as above stated. Some of the petitioners had obtained judgment under the lien law of Massachusetts; others had made due record of their liens under that law.

R. H. Dana, Jr., for mortgagees.

C. G. Thomas, N. Morse, G. W. Park, L. S. Danney, M. E. Ingalls, J. B. Richardson, H. E. Morse, W. W. Burrage, and Allen & Long, for the several petitioners.

LOWELL, District Judge. I cannot uphold any of the petitions excepting those for wages, on the footing of maritime liens, though many of them are declared on as such. The equitable owner, with whom most of the contracts for labor and materials were made, lived here, and the courts look to the real facts and the actual credit in a case of this kind. Thus if a ship is held out as foreign, and is with good reason believed to be so by persons dealing with the master, the courts will hold her to have been foreign. The St. Jago de Cuba, 9 Wheat. [22 U. S.] 409. And if the equitable owner is the person dealt with, and he lives in the home port, the vessel is, for the purposes of a lien, treated as domestic. Weaver v. The S. G. Owens [Case No. 17,310]. The latter case is in point here. Colonel Foote engaged these materials and services, and they were not of a nature to be needed by a foreign vessel to enable her to finish a voyage, or to reach her home, but were alterations and reconstructions intended to adapt her to a new use. This being so, those petitioners and those only who come within the benefits of the Massachusetts statute, and who have complied with its terms, have liens upon her, if that law is within the competency of the state to enact. The recent decisions of the supreme court which deny the power of the states to create or enforce liens for collision, &c., are founded on the proposition that by the constitution admiralty jurisdiction is exclusively given to the courts of the United States. The Moses Taylor, 4 Wall. [71 U. S.] 411; The Hine, Id. 555. As the same court has of late refused to admit that contracts for building, repairing, and supplying domestic vessels are maritime contracts, it follows that such matters are not within the prohibition. I speak not now of supplies for a voyage, which are maritime, and might be enforced in the admiralty were it not for a comparatively recent rule of the supreme court, but of repairs and supplies to a vessel while lying in her home port to receive alterations and fit her for a new employment. The state seems to have as much right to impress a lien on such a vessel for such a service as upon a house built within its borders. Rightly construed, the law of the state begins where the maritime law ends, and supplements it for the benefit of the citizens of the state. See The Belfast, 7 Wall. [74 U. S.] 624, 646. I hold, therefore, that those of the petitioners who have judgments of the state court in their favor hold valid liens for the same.

I must apply the same rule to those who had taken all the necessary steps to record and perfect their liens, but who were prevented from enforcing them in the state court by the sale of the ship under the warrant of this court. The sale passed a clear title, but the admiralty court transfers all lawful liens to the proceeds. The state law, which is found in Gen. St. c. 151, §§ 12–20, declares that the lien shall last until the debt is satisfied; and none of those debts have been satisfied.

I cannot give any remedy to the petitioner Clancy. He says he was master of the vessel, as well as clerk and general agent of the owner; but he was appointed after the original libel was filed, and after the owner must have seen that he could not pay his debts and take his vessel to sea again. To call the petitioner master under such circumstances, when his duty was only to look after the suit, is in effect a device for giving him pay out of the property which belonged to the creditors. I am not ready to admit that a lien can be created in that way, pendente lite. See The Gazelle [Case No. 5,289]. I do not reject his petition because he was master, for, by the law of the flag, the master has a lien on the vessel, and seamen have a right to invoke the law of the flag. The Havana [Id. 6,226]. Seamen stand very differently from material-men, and are protected by their flag.

Nor has Holden a lien; he was a shipkeeper, and made himself useful in taking care of the machinery, &c. The contract with such a person has been decided not to be maritime. Phillips v. The Thomas Scattergood [Case No. 11,106]; Weaver v. The S. G. Owens, ubi supra. I do not fully agree with those judgments in their application to a foreign vessel, but in such a case as this they are sound.

Another of the petitioners, Norton, agreed to furnish sails, and made but never delivered them, choosing not to renounce his common-law lien. I do not think he comes within the purview of the statute of the state as one who has "furnished" materials in the repair of the steamer. He agreed to furnish sails, but never furnished them. His suit, if he should bring one, could not be for goods sold and delivered, but only for damages for not accepting, or for goods bargained and sold. It seems to me he must rely on his rights at common law, as the marshal did not take the sails.

Whether the petitioner, Maynard, who is a shipwright, had a lien by the statute, would not be material, because the ship was taken from his yard and dock by the marshal, and he certainly had a lien at common law, which this court is bound to respect. The Gustaf, Lush. 506. No doubt he has a lien by the statute too, and I see no reason for putting him on any different footing from the other material-men. If the law of Massachusetts gave him a priority it would hold good against the proceeds, but none is set up, and I have not examined the question.

The small sums due for mariners' wages are to be paid first, because they take precedence by their nature, and because section 12 of the statute expressly recognizes their priority. That section prefers the statute liens to all others excepting for wages, and it seems to follow that the mortgage must be postponed to those liens which I have found to be valid. It is a hard case for the mortgagees, but I see no help for it.[2]

There remains, however, the point which has been argued with much zeal and learning, that the mortgagees are the only persons who have any standing in court, and that I have no power to do any thing with this fund excepting to order it to be paid over to them. To this argument I cannot yield my assent. It is true that the admiralty has no jurisdiction of any of these liens because they are not maritime. It is equally true that it has none to foreclose or deal in any way with a mortgage. The John Jay, 17 How. [58 U. S.] 401. The mortgagees call themselves claimants; but their rights are not changed by their pleadings. They are no more claimants than the other petitioners are. They all represent the owner, in a sense, because they put forward rights which they have derived from him, but those rights must be satisfied in the order of their priority. None of them appeared until after the vessel was sold, and they are, therefore, technically speaking, petitioners, and not claimants, the mortgagees included. I have no jurisdiction of an original libel by any of the parties now before me except the seamen; but I have jurisdiction to pay a fund in the registry to the person to whom it is pledged, if he makes due demand for it. No court is so humble as to be obliged to take the property of A. and give it to B. And indeed such a transaction would show rather an excess of jurisdiction than the want of it. The argument, as I have said, if sound, would end the case of the mortgagees with the rest, but it is not sound. When a ship has been sold the admiralty court has jurisdiction to distribute the proceeds. The Angelique, 19 How. [60 U. S.] 239. It is not a question of admiralty jurisdiction, but of the power of a court to deal justly with a fund in its registry. On the day this case was argued I ordered the moiety of a fine which had been recovered by indictment in the name of the United States, to be paid to the informer. I had no jurisdiction, nor had any other court, of a suit by the informer against the United States; but I had the jurisdiction which all courts have to deal with a fund in the registry according to the rights of those whose property has been converted into money by the order of the court, or who have, for any other reason, a lawful interest in the fund. I should be glad to save the parties the expense of an assessor by auditing their several demands, did not the pressure of imperative duties make it impossible.

Order: That the seamen's wages be paid in full; that the remaining sum be paid to or divided among the holders of those liens hereinbefore pronounced valid pro rata. If more remains, that it be paid to the mortgagees. An assessor to audit the accounts unless the parties agree.

NOTE 1. The mortgagees appealed from this decision, but the case was afterwards compromised.

NOTE 2. The original proceeding by the men for wages was resisted on the ground that they had rendered no maritime service. It was proved that the owner hoped to have the steamer ready soon after the men were hired, and that they were engaged in good faith to navigate her, and did serve on her trial trips. While waiting, they were lodged on shore and had board wages. Lowell, J.: The service was that of seamen, as much so as if the men had served at sea. Their demand is not in the nature of damages for not being sent to sea, but wages for sea services which they were constantly ready to perform, and did perform, so far as they were needed in port. Even in England, when the admiralty jurisdiction was at its lowest, it is doubtful whether such an action would have been prohibited. Wells v. Osman, 2 Ld. Raym. 1044; The Bulmer, 1 Hagg. Adm. 167; Mills v. Gregory, Sayer, 127. And by our law the men have performed actual maritime service in the trial trips. The Sarah Jane [Case No. 12,349].

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ISLAND CITY, The (ADAMS v.). See Case No. 55.

ISLAND CITY, The (CROMWELL v.). See Case No. 3,410.

ISLAND CITY, The (NORRIS v.). See Case No. 10,306.

[2] So held since this opinion was given in Donnell v. The Starlight, 103 Mass. 227.

## Case No. 7,110.

The ISLAND QUEEN.

[Brown, Adm. 279.] [1]

District Court, E. D. Michigan. Feb., 1871.

SHIPMENT OF GOLD COIN—LIMITED LIABILITY ACT.

Libellant's agent, who was intending to take passage on a steamboat from Detroit to a Canadian port, intrusted a quantity of gold coin to the master before the vessel started, without taking a bill of lading or delivering a note in writing. On returning on board, the coin was missing. *Held*, the vessel was not liable.

Libel for breach of contract of affreightment for transportation of two hundred and seventy dollars ($270) in gold coin, from Detroit, in the state of Michigan, to Texas, in the province of Ontario, Canada. The facts are that one Daniel B. Odette, in the employ of libellants, on the 25th day of September, 1868, had in his possession, at Detroit, a quantity of gold coin of the value of $270, belonging to libellants, and went on board the steamer with the coin in his possession, for the purpose of taking passage to Texas, in Canada, where libellants resided. The steamer not being ready to leave for an hour or more, and Odette being desirous of going on shore in the meanwhile, and not wishing to carry the coin about with him, asked a person on board whom he took to be the master of the vessel, and who was then acting as such, for some safe place to leave the coin on board, and was shown a closet or cupboard in the master's room. Odette placed the coin in the cupboard, and left the vessel. On his return about an hour afterwards, the coin had disappeared, and nothing has been seen or heard of it since.

W. A. Moore, for libellant.

H. B. Brown, for claimant.

There was no delivery that could bind the vessel or its owners. Ang. Carr. § 129; Blanchard v. Isaacs, 3 Barb. 388; Ford v. Mitchell, 21 Ind. 54; Trowbridge v. Chapin, 23 Conn. 595; Grosvenor v. New York Cent. & H. R. Co., 39 N. Y. 34. Section 2 of the limited liability act is a conclusive answer to libellant's claim. Pender v. Robbins, 6 Jones [N. C.] 207; Williams v. African Steamship Co., 1 Hurl. & N. 300; Gibbs v. Potter, 10 Mees. & W. 70. The exception in section 7 does not apply to the lakes and connecting rivers. Moore v. American Transp. Co., 5 Mich. 368; Id., 24 How. [65 U. S.] 1. Nor to steamboats carrying passengers. 1 Abb. (U. S.) 315.

LONGYEAR, District Judge. The liability limitation act of March 3, 1851 (9 Stat. 635), settles this case beyond all question against the libellants. Section 2 of that act provides as follows: "If any shipper or shippers of platina, gold, gold dust, silver, bullion, or other precious metals, coins, jewelry, bills of any bank or public body, diamonds or other precious stones, shall lade the same on board of any ship or vessel without, at the time of such lading, giving to the master, agent, owner or owners of the ship or vessel receiving the same, a note in writing of the true character and value thereof, and have the same entered on the bill of lading therefor, the master and owner or owners of the said vessel shall not be liable, as carriers thereof, in any form or manner. Nor shall any such master or owners be liable for any such valuable goods beyond the value and according to the character thereof, so notified and entered." There is no pretense that this law was in any manner complied with. This point being decisive of the case, it is unnecessary to consider any of the other points raised and discussed on the hearing. Libel dismissed.

[1] [Reported by Hon. Henry B. Brown, District Judge, and here reprinted by permission.]

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ISLE DE CUBA, The (UNITED STATES v.). See Cases Nos. 15,447–15,449.

ISMENARD (UNITED STATES v.). See Case No. 15,450.

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## Case No. 7,111.

In re ISRAEL.

[3 Dill. 511; [1] 12 N. B. R. 204; 2 Cent. Law J. 219.]

Circuit Court, D. Iowa. 1875.

BANKRUPT ACT — NUMBER AND VALUE OF PETITIONING CREDITORS—CREDITORS FRAUDULENTLY PREFERRED.

In estimating the number and value of creditors who must join in the petition in involuntary bankruptcy, under section 39 of the bankrupt act [14 Stat. 536] as amended by section 12 of the act of 1874 [18 Stat. 180], creditors who have been fraudulently preferred by the debtor are not to be counted.

[Cited in Re Currier, Case No. 3,492; Re Hatje, Id. 6,215.]

This case was presented by a petition of M. C. Israel, asking the review and reversal of an order of the district court of Iowa, at Keokuk, made on the 26th day of February, 1875, adjudicating him a bankrupt upon the petition of certain of his creditors. The petition of the creditors in the bankruptcy court, charges that Israel preferred certain creditors contrary to the bankrupt law, by giving them mortgages and assigning accounts to them. Israel answered simply denying that the petitioning creditors constituted one-fourth in number of his creditors, and that the aggregate of their debts provable under the bankrupt act amounted to one-third of the debts so provable, and with his answer filed a list of his creditors. To this

[1] [Reported by Hon. John F. Dillon, Circuit Judge, and here reprinted by permission.]

answer the petitioning creditors filed a replication with a list of creditors, and alleging that the petitioning creditors constituted one-fourth in number of the creditors holding unsecured debts exceeding $250, and further alleging that certain creditors in the list annexed to the debtor's answer were fully secured, and had received preferences contrary to the bankrupt act, knowing that a fraud on the act was intended, and insisting that such creditors should be excluded from that computation in making up the required one-third in amount. The replication, however, does not charge actual fraud. To the replication there was filed by Israel a demurrer raising two questions; first, that secured creditors should not be excluded from the computation; and second, that the preferred creditors should not be excluded from the computation. The debtor, Israel, by agreement, as shown in the order of adjudication, also filed a rejoinder to part of the replication, stating that the secured creditors named in the reply were only secured to the amount of $2,000, and not fully secured. To the rejoinder the petitioning creditors filed a demurrer. The district court overruled the demurrer of Israel to the replication of the petitioning creditors, and sustained the demurrer of the petitioning creditors to the rejoinder of Israel, and adjudged Israel bankrupt. To reverse this order, Israel brings the case here by petition in review, under section 2 of the bankrupt act.

Howell & Anderson, for petitioning creditors.

Gillmore & Anderson and James Hageman, for bankrupt.

DILLON, Circuit Judge. One proposition of law applied to this case, results in affirming the decree, adjudicating the debtor a bankrupt. It was not denied that a sufficient number of the creditors joined in the proceeding. The contest was whether those who united in the petition and promoted the proceeding, represented one-third in value of the debts over $250 provable in bankruptcy. By his answer the debtor alleged that they did not. The replication of the petitioning creditors to this answer alleged:

1. That all of the creditors named in the answer of the debtor, except the petitioning creditors, were fully secured.

2. That all of said creditors, other than the petitioning creditors, had accepted and still held preferences contrary to the bankrupt act, and in fraud of its provisions. The debtor demurred to the whole replication, and the court below overruled it and the defendant stood upon his demurrer, and did not rejoin to the second ground in the replication. The only rejoinder was to the first ground of the replication, and was to the effect that their debts were not fully secured, but secured only to the extent of $2,000. It stands admitted, therefore, on the record, that all of the creditors specified in the list furnished by the debtor, except the petitioning creditors, had received, and still held fraudulent preferences. These represented more than two-thirds in value of the debts; and the question is, shall they be counted in determining whether the requisite number of creditors, as to value, had joined in the proceedings? On this point I have no doubt whatever. Such a construction as the debtor contends for, would be directly in the face of section 23, as well as hostile to the spirit and purpose of the bankrupt act. A leading object of that enactment is to enable the honest creditor, through the assignee, to defeat unlawful preferences.

Shall a debtor, by fraudulently preferring three-fourths and a fraction in number, or two-thirds and a fraction in value of his creditors, put it in their power to make the fraud effectual by refusing to commence bankruptcy proceedings, or what results in the same thing, requiring them to be counted as creditors on the question whether bankruptcy proceedings shall be initiated. If the debtor is not thrown into bankruptcy, their preferences stand, and the law is evaded. If he is thrown into bankruptcy, they lose, or, are liable to lose, their illegal advantage. Such a construction makes the act felo de se. It offers a premium to fraud, and would leave nothing of the bankrupt act worth saving.

The honest creditor who refuses to violate the law and take a preference, would alone suffer, while the unscrupulous creditor would reap the harvest of his unlawful security. It would leave the unsecured creditors wholly at the mercy of those that have obtained illegal preferences. This disposes of the case without determining the other questions, whether creditors, who hold valid securities, shall be counted in whole or for the excess of debt over the security. Without deciding this I may add, that the course of the argument, based upon section 9 of the amended act, sections 19 and 23, of the original act, and forms 21 and 25, and sections 39 and 43, as amended, rather impressed me with the opinion that a secured creditor is prima facie, at least as to the debt secured, not to be counted, but if he comes forward and offers to surrender his security, he is then to be regarded as an unsecured creditor. Possibly, but this is more doubtful, on proper proceedings an inquiry may be had at the instance of a secured creditor, to ascertain the excess of the debt over the security held therefore. But I give no opinion on these questions, and reserve them until a case arises which shall make their determination necessary. Affirmed.

[The decision of the district court on a claim for an allowance was affirmed in Case No. 7,112.]

[The case of In re Price, which is published as a note to this case in 3 Dill. 514, is here published as Case No. 11,408a.]

## Case No. 7,112.

In re ISRAEL.

[4 Dill. 501.] [1]

Circuit Court, D. Iowa. 1876.

BANKRUPT ACT—SURRENDER OF FRAUDULENT PREFERENCE—PROOF OF DEBT.

1. Section 23 of the original bankrupt act (section 5088 of the Revised Statutes), in relation to the surrender of fraudulent preferences, is not repealed by the 12th section of the amended bankrupt act of June 22, 1874 [18 Stat. 180], amending section 39 of the original bankrupt act, nor section 5021 of the Revised Statutes.

2. A creditor who, before presenting his claim for allowance in bankruptcy, and against whom no action has been brought by the assignee to defeat the preference, surrenders his preference under section 23, may prove his whole debt, and not simply a moiety of it.

[Appeal from the district court of the United States for the district of Iowa.]

In bankruptcy. Irwin, Phillips & Co. presented a claim for allowance against the bankrupt's estate. The assignee filed objections, on the ground that they had received and accepted from the bankrupt a chattel mortgage with intent to obtain preference and defeat the operation of the bankrupt act. To these objections the claimants answered to the effect that before they presented their claim for allowance in bankruptcy, they had fully surrendered their preference to the assignee. Demurrer by the assignee, on the ground that the surrender could not entitle the claimants to prove more than a moiety of their debt. Demurrer overruled by the district court, which held that the effect of the surrender was to entitle the claimants to prove their whole debt. [Case unreported.] The assignee appealed from the decision of the district court.

Howell & Anderson, for assignee.
James Hageman, for claimants.

DILLON, Circuit Judge. The question in this case is whether the creditors were entitled to prove the whole or only a moiety of their debt. They had surrendered their preference, without suit, to the assignee, before they presented their claim for allowance in bankruptcy. After a careful consideration of the 23d and 39th sections of the original bankrupt act, in connection with the amendment to the 39th section by the act of June 22, 1874 (section 12), my opinion is that the 23d section remains unrepealed by the amendment, and that if a preference be duly surrendered, as in this case, the surrendering creditor, whether his preference was an actual or only a constructive fraud upon the act, is thereupon entitled to prove his whole debt. It is not necessary to consider, on this appeal, what is a case of "actual fraud" within the meaning of the proviso to the 12th section of the amendment, for the reason that the amendment has no application to any case where the creditor has, before suit brought against him by the assignee, under section 39, made a full surrender of his preference. The opinion of the district judge, sent up with the record, as to the purpose and scope of the amendment of June 22, 1874, and the effect of the 12th section of that amendment on the law as it then stood, is so satisfactory on the question here involved, that it is not deemed necessary further to enlarge upon the subject. Affirmed.

See Same Case [Case No. 7,111].

[1] [Reported by Hon. John F. Dillon, Circuit Judge, and here reprinted by permission.]



ISRAEL (DODGE v.). See Case No. 3,952.

## Case No. 7,113.

The IVANHOE.

The MARTHA M. HEATH.

[7 Ben. 213.] [1]

District Court, S. D. New York. March, 1874.

COLLISION IN EAST RIVER—TUG AND TOW—KEEPING CENTRE OF CHANNEL—OVERTAKING VESSEL.

1. The steamboat I. was going down the East river close in to the piers on the New York side. Ahead of her was the schooner M. M. H., towed by the tug N., on a hawser, astern. Coming up the river, nearly ahead of the N., was the barge P., towed by the tug S., on a hawser, astern. The barge P. and the schooner came in collision nearly abreast of pier 4, as they passed. The owners of the barge P. filed a libel against both the I. and the M. M. H., to recover their damages; and the owners of the M. M. H. filed a libel against the I., to recover their damages. The libellants alleged that, while the P. and the M. M. H. were meeting, the I., which was passing the M. M. H. on her starboard side, between her and the docks, sheered out against the M. M. H. and drove her out against the P., and thus caused the collision. The I., in answer, alleged that, as she was passing the M. M. H., another barge, the B., in tow of the tug L., was brought to the docks so near ahead of the I. that the I. had to stop and lie still, and that then the M. M. H. starboarded her helm to avoid running into the I., and, being caught by the flood tide, was sheered out against the P., without being hit by the I., and without any fault on her part: *Held*, that, as between the I. and the M. M. H., in tow of the N., the tug and tow constituted one vessel, and the I., being the overtaking vessel, was bound to keep clear of them.

2. The I. was in fault in running so near the docks, and must take the consequences of finding her way blocked by the B. and the L.

3. It made no difference whether the M. M. H. was struck by the I. and caused to starboard, or whether she starboarded to avoid being struck.

4. The I. was in fault for the collision, and was responsible to both vessels.

In admiralty.

W. J. Haskett, for the Pilgrim.
W. W. Goodrich, for the Heath.
W. R. Beebe, for the Ivanhoe.

BLATCHFORD, District Judge. These two libels grow out of a collision which took

[1] [Reported by Robert D. Benedict, Esq., and B. Lincoln Benedict, Esq., and here reprinted by permission.]

place in the East river, opposite New York, on the 13th of February, 1872, about ten o'clock a. m. The barge Pilgrim was being towed up the river by the steamboat P. C. Shultz by a hawser astern. The steamboat Ivanhoe was going down the river. The schooner Martha M. Heath was being towed down the river by the steamtug Niagara by a hawser astern. The Pilgrim came into collision with the Martha M. Heath, and both of those vessels were damaged.

The libel in the first case is filed by the owners of the Pilgrim against the Ivanhoe and the Martha M. Heath. It alleges that the tide was flood; that, when the Pilgrim came opposite to pier 4, being towed up, the Niagara, towing the Heath, was coming down, and the Ivanhoe was coming down close to the docks; that the Ivanhoe, when about abreast of the Heath, sheered over towards the Heath, and the person in command of the Ivanhoe ordered the Heath to hard a-starboard her helm, which was done; that, just when the Heath had got a port sheer on her, the Ivanhoe struck the bow of the Heath and increased such sheer, so that the Heath struck the Pilgrim on her port side near the bow, and damaged her; and that the collision was the fault of the Ivanhoe, in running close to the docks, and in not being manageable, and the fault of the Heath in not keeping her course, and in not having a proper lookout.

The answer of the Ivanhoe to the libel in the first case sets forth that, when the Ivanhoe was about opposite pier 4, the barge Bontecou, in tow, by a hawser, of the tug Levy, was being taken into the dock and came opposite the bow of the Ivanhoe, and so near that the Ivanhoe was compelled to stop and lie still; that, just then, the master of the Ivanhoe saw the Heath sheering down on the quarter of the Ivanhoe, and so near as to threaten an almost immediate collision; that the Ivanhoe was not then within 300 feet from the dock, nor in any place in violation of law; that the master of the Ivanhoe asked the master of the Heath if she meant to run into him, but did not order her to hard a-starboard her helm; that the Heath did starboard her helm, and so, being sheered and caught by the tide, collided with the Pilgrim, without any fault in the Ivanhoe; that the Ivanhoe did not strike the Heath; that the Heath ought to have been towed alongside instead of by a hawser; that the accident was occasioned partly by the inability, caused as aforesaid, of the Ivanhoe to pursue her course, in which she was not in fault, partly because the Pilgrim did not sheer away from the Ivanhoe and the Heath, and partly by the force of the tide on the Heath when the Heath made her sheer; and that the Ivanhoe used all possible care to save her from collision with any other vessel, consistent with her situation under the circumstances.

The answer of the Heath to the libel in the first case avers, that the Heath was being towed out from her berth at pier 10, East river, to go to sea; that, after her course was straightened down the river, the Ivanhoe came down the river, passing between the Heath and the New York shore; that, as the Niagara and the Heath were passing pier 4, the Ivanhoe sheered over towards the Heath, and struck her on the starboard bow, breaking the hawser by which she was being towed, and driving her against the Pilgrim; that by means of the two collisions the Heath was damaged; and that the collision was not the fault of the Heath, which had a proper lookout, but was occasioned by the fault of the Ivanhoe or of the Niagara.

The libel in the second case is filed by the owners of the Heath. It was brought against the Ivanhoe and the Niagara, but the Niagara has not been served with process. It contains, in substance, the same allegations as to the collision, that are found in the answer of the Heath to the libel in the first case.

The answer of the Ivanhoe in the second case is in substance the same as her answer in the first case.

It was stipulated between the parties at the trial, that the court might, under the pleadings, find any one or more or all of the seven vessels mentioned in the pleadings to have been in fault as causing or contributing to the collision, notwithstanding the absence, in any one or more of the pleadings, of any allegation of fault, general or specific, in respect to any one or more of said vessels.

There is some conflict of testimony in the case, but I do not deem it necessary to discuss the evidence in detail. It is sufficient to say, that the clear weight of the evidence, under the principles of law properly applicable to this case, throws all the responsibility for the collision upon the Ivanhoe She was the overtaking vessel. As she came down she saw ahead of her the Heath being taken out of her berth by the Niagara. She endeavored to pass by the Heath and the Niagara, going at a greater speed than they were going. As regarded the Ivanhoe, in such attempt of hers, the Heath and the Niagara constituted one vessel. She failed to go by and pass around them, and, in the effort to do so, found the barge towed by the Levy to be an obstruction in the way, which forced her to stop. She deliberately chose to go inside of the Heath and the Niagara, and between them and the piers on the New York side. It was her close proximity to the piers which left her no room to pass between the stern of the barge towed by the Levy and the Niagara followed by the Heath. Therefore she stopped. In doing so, she suffered herself to come into immediate proximity to the Heath. No reason is shown why she did not bear to the right, when she stopped, so as to carry her away from the Heath, which was coming down the river on the left. The Niagara and the

Heath were proceeding on, in the same course they were on when the Ivanhoe had gone by the Heath. The Ivanhoe, when she stopped, sagged towards the Heath. She feared a collision with the Heath. She directed the Heath to starboard. I do not deem it of material importance whether the Ivanhoe, by striking the Heath, shoved the Heath over against the Pilgrim, or by shoving her aided in sending her against the Pilgrim, or whether the Heath went over by starboarding. The Heath did starboard. The weight of the evidence is that the Ivanhoe struck the Heath a severe blow on the starboard side of the Heath. The Heath, in the apprehension of a collision with the Ivanhoe, a larger vessel, and urged, moreover, by the order to starboard coming from the Ivanhoe, might well starboard, in the exigency, to clear the Ivanhoe and let her drop astern. It is exceedingly probable that the starboarding of the Heath against the flood tide, with the headway she had, caused her to sheer more than was intended either by herself or by the Ivanhoe. But, for all this the Ivanhoe is primarily responsible. She ought not to have been passing inside of the Heath and the Niagara, so close to the docks that, on an emergency like that which did happen, she could not, if that were the case, prevent herself from coming in contact with the Heath. The barge which came to obstruct her way was being taken to a slip which barges of that kind frequented, and it was reasonably to be apprehended that such a vessel might come around from the North river and be going in there. The Ivanhoe was on her way from the Wallabout to Jersey City, and there was no good reason for her hugging the New York docks on her way down. The middle of the river, or a position further out than she was, was her place. She was doing what I find constantly vessels navigating the narrow strait of the East river up and down will persist in doing, in order to avoid a head tide. The law requires them to go as nearly as may be in the middle of the river, when navigating up or down through the lengthwise course of the river. The crowded state of the river, the frequent passage in and out of the ferry slips of the numerous ferry-boats, the transit in and out of the slips of other vessels, the convenience of small water craft lying off the ends of piers—these considerations have led to the establishment of the rule for the East river, and it is for the courts to enforce it. This is a most marked case for its application. The violation of the rule was the direct cause of this collision. There was no fault in any of the other vessels. The Levy and her barge had a right to do as they did. The Pilgrim and her tug were going up a proper distance out in the river. The Pilgrim sheered to the starboard by porting as soon as she perceived the sheer of the Heath. The Niagara and the Heath had just started from their pier, and could not well be farther out than they were. They kept their course till the Heath was driven out of it by the Ivanhoe, and the Niagara stoppel as soon as she was required to do so.

The libel in the first case must be dismissed as to the Heath, with costs, and in each case there must be a decree against the Ivanhoe, with costs, with a reference to ascertain the amount of the damages to be recovered by the libellants.

## Case No. 7,114.

Ex parte IVES.

[1 Int. Rev. Rec. 145.]

District Court, D. Connecticut. April 3, 1865.

TAXATION—CORPORATIONS—INCOME—UNDIVIDED EARNINGS.

Undivided earnings of incorporated companies *held* not to be taxable as income in the returns of stockholders.

In the matter of the application of A. C. Crosby, assessor for the First collection district of Connecticut, for an attachment against Lawson C. Ives, as for a contempt.

SHIPMAN, District Judge. The assessor above named having applied to the undersigned for an attachment against Lawson C. Ives, on grounds which appear in said application, and which will be more particularly referred to in this opinion hereafter, a summons was issued in conformity to said application, and the said Ives duly appeared before the undersigned in obedience thereto. In due course, the matters involved in said application, and counsel for the United States and said respondent, were heard. The application to the undersigned to enforce upon the respondent a compliance with the requirements of the assessor in this case, is founded upon the 14th section of the internal revenue act, which provides, among other things, that, in case any person who has been summoned before the assessor to give testimony or answer interrogatories touching his income, shall neglect or refuse to give testimony or answer interrogatories as required, it shall be lawful for the assessor, upon affidavit proving the fact, to apply to the judge of the district court or a commissioner, authorized to perform the duty of such judge at chambers, for an attachment against such person as for a contempt. It shall be the duty of such judge or commissioner to hear such application, and, if satisfactory proof be made, to issue an attachment directed to some proper officer for the arrest of such person; and upon his being brought before him, to proceed to a hearing of the case, and upon such hearing the judge or commissioner shall have power to make such orders as he shall deem necessary to enforce obedience to the requirements of said summons, and punish such person for his default or disobedience.

Passing over the very grave question,

whether congress has the power to confer such an extraordinary authority, not on a court, but on a single magistrate, a power to punish summarily, and with no limit except his discretion, any person who may fail to comply with the requirements of another officer, it is very plain that such a power should not be exercised, except in a case admitting of no doubt.

The case stated by the assessor is, that the respondent is a stockholder in the Willimantic Linen Company, a corporation located in the First collection district of this state. That said corporation, in 1863, "earned a large amount of money, which, although not divided to the stockholders of said company, is in the hands of said company, and no part thereof was returned by said Ives as a part of his income." That said Ives, on being summoned before said assessor, "declined and refused to answer the following interrogatories, to wit—the amount of stock owned by said Ives in said company, the proportion which his said stock bears to the whole stock of said company, and the amount of earnings of said company undivided as aforesaid; which interrogatories were propounded for the purpose and with the intention of adding a like proportion of said earnings to the list of said Ives, as a part of his taxable income for the year 1863, as required by section 117 of the act of June 30, 1864 [13 Stat. 227]." The clause of the act relied on by the assessor, in support of this proceeding, reads as follows: "And the gains and profits of all companies, whether incorporated or partnership, other than companies specified in this section [117], shall be included in estimating the annual gains, profits, or income of any person entitled to the same, whether divided or otherwise." There is no allegation in the papers upon which this motion is founded, that the respondent Ives was entitled to any portion of the gains or profits of the Willimantic Linen Company, but this was doubtless an oversight. He is, however, alleged to be a stockholder in said company, and, for the purposes of this case, I will regard that as equivalent to an allegation that he was entitled to share in the profits of said company. The answer of the respondent admits that said company have earned some money which has never been divided, but avers that neither he nor any other stockholder is entitled to draw or make any use whatever of the same. The answer also avers, that the corporation having the exclusive control of said earnings are using them in enlarging their works, not for the purpose of defrauding the United States of revenue, but in such a manner as will increase such revenue hereafter. The answer further alleges that when such expenditure, now in progress, is completed, a stock dividend is to be declared to the stockholders.

The material question to be determined is whether, under the circumstances, stockholders of the Willimantic Linen Co. are entitled to the undivided earnings referred to, and therefore bound to return, as a part of their private income lists, sums in proportion to the shares of stock they may own. The answer to this question must depend upon a construction of the clause of the act relied on. In fixing this construction, reference must be had to the object congress had in view, and to the settled principles of law applicable to the relations subsisting between corporations and their stockholders. The object of congress, in the 116th to the 123d sections of the act inclusive, was to raise a revenue out of the gains, or profits, exceeding six hundred dollars, coming into the hands of individuals, or to which they might be entitled. Though a portion or all of such profits might be in debts due to the person assessed, or rights of property, yet his title thereto being complete, subject to his own disposal or control, they would be fairly within the meaning of the term "income." The language of the act, although broad, is still generally explicit and guarded. In the very clause of the 117th section relied on by the assessor in this case, no gains or profits of corporations are to be assessed against the stockholders, unless they are entitled to the same. The assessor, however, construes the clause as if it read, that each stockholder should pay an income tax on the gains of the corporation, of which he should be a stockholder, in proportion to the amount of stock he might own. If this had been the intention of congress, nothing would have been more easy and natural than to have said so in so many words, though in that case compliance with the law would have been very embarrassing to the taxpayer, for it would often be very difficult for an individual stockholder to determine what the profits of a corporation for a year just closed had been. But the framers of the law were careful to extend the obligation of persons to add to their income list, only to such gains and profits as they might be entitled to. The inquiry arises, to what gains and profits is an individual stockholder entitled, in any particular year? The settled rules of law answer this question. He is entitled to his proportion of such part of the profits as the directors or the trustees deem it wise and prudent to set apart for the stockholders. The balance, the directors have a right to hold as a part of the corporate fund. In many instances, they would be bound so to hold it. Suppose a person holds stock in a corporation for a series of years, and during the first half of the time the company is losing money, and incurring debts, while during the latter part of the time it is making gains and profits. The obvious duty of the directors is to discharge the debts of the company, incurred during the first half of the time, by the profits accruing during the latter half. These profits belong to the corporation, and through it to the creditors. The latter, and not the stockholders, are "entitled to the

same," both in law and equity. Not only has the stockholder no power to enforce a claim to these profits, but the directors, where the debts exceed the clear value of the corporate funds, have no right to allow the stockholder a dollar from the profits. The very act of incorporation of the Willimantic Linen Company provides that the directors shall be personally liable for the debts of the company, if they declare and pay a dividend under such circumstances. The application of the act must be uniform, and apply as well to the stockholders of insolvent as solvent corporations, to those in debt as well as those with a surplus. It is a perfectly well-known fact in the history of business, that corporations continue to exist for years while they are in point of fact insolvent, notwithstanding they may, during some portion of the time, make large profit. This is one of the vicissitudes of pecuniary transactions. Stockholders may own the stock for a long period of years, and never receive a dollar of income from it. Is it to be supposed that congress intended to compel individuals to pay an income tax upon what they not only never receive, but never can have the power to collect? Surely a man cannot in any legal sense be said to be "entitled" to that which he neither receives nor has a right to receive. As has already been said, the object of the clauses of the law laying income tax was to collect of individuals a portion of their yearly receipts, whether in actual money or debts or rights of property which may be turned into money. The law guards those of small means, by excepting six hundred dollars of income from taxation. But if one of such should happen to hold stock in an embarrassed corporation which was making annual gains and appropriating them to the payment of its own debts, his condition would be dismal, indeed, if he were to be taxed on any considerable amount of such income. Nor is it a valid answer to say that the stock thus held is increasing in value; for, in the first place, the object of congress in laying the income tax was not to raise revenue, by taxing estates according to their value but to appropriate a portion of every one's net annual receipts and gains. In the second place, anyone acquainted with the history of corporations largely indebted is well aware that the market value of the stock often remains for a long time unaffected by a discharge of a portion of its obligations.

It may be said that the answer of the respondent in this case impliedly admits that the earnings of the linen company are surplus earnings over and above all indebtedness. This suggestion cannot vary the case. As already remarked, the application of the act must be uniform as to all corporations, whatever their pecuniary condition. The stockholders of a corporation have no individual control over the surplus corporate funds, beyond the power to prevent, by the aid of the courts, the appropriation of the funds to objects foreign to the charter. They are not, as individuals, in any legal or commercial sense entitled to the surplus funds. No stockholder can, by his individual act, separate his supposed portion of the surplus from his stock, and transfer the title thereof to another, nor sue and recover it from the corporation. This surplus, for reasons of the highest commercial policy is left to the control of the corporation, as administered by its directors for the time being, acting within the bounds of a reasonable discretion subject to the charter of the corporation itself. This rule is of the highest importance to the community, when such vast interests are committed to the control of these artificial persons. The appropriation of a portion or all of the profits of a corporation for a given year to the repair or enlargement of buildings, or to some other purpose strictly within the corporate powers, may be of vital importance to all concerned, and therefore the law commits the care of the corporate funds to the directors or trustees, or to the stockholders exercising their corporate functions, and not to the stockholders, in their individual capacity. The latter cannot therefore be said to be entitled to gains and profits, which the corporation itself has not set apart for division, but has appropriated to other lawful objects. The act of congress in question recognizes the soundness of this well-known law relating to corporations and stockholders, and requires the taxpayer to include no gains or profits of a corporation of which he may be a member, in his income list, unless he is "entitled to the same." In this view of the case it follows that the respondent Ives was not in any sense known to the law entitled to any portion of the undivided earnings of the Willimantic Linen Company, and was not bound to include it in his income return. For these reasons this motion is dismissed.

## Case No. 7,115.

In re IVES et al.

[5 Dill. 146; [1] 19 N. B. R. 97.]

Circuit Court, E. D. Missouri. March, 1879.

BANKRUPT ACT — JURISDICTION OF THE DISTRICT COURT IN BANKRUPTCY— RESIDENCE — CONCLUSIVENESS OF DECREE OF ADJUDICATION OF BANKRUPTCY—DISCHARGE.

1. Where the record of the bankruptcy court on its face shows that the court had jurisdiction to pass a decree adjudicating the debtor to be a bankrupt, and that such a decree was passed, it is conclusive as to the jurisdiction of the bankruptcy court, unless assailed in a direct proceeding to set aside or annul the same.

2. While such a decree remains in force, the bankrupt's discharge cannot be opposed on the ground that the facts stated in the petition of the debtor to be adjudicated a bankrupt, as to the length of his residence within the district, are not true.

[1] [Reported by Hon. John F. Dillon, Circuit Judge, and here reprinted by permission.]

[In review of the action of the district court of the United States for the Eastern district of Missouri.]

Ives & Porter, the bankrupts, filed a voluntary petition in bankruptcy in the district court for this district, on November 1st, 1877, and on the 10th day of the same month were adjudged to be bankrupts. The petition was in due form, and contained all the necessary allegations to show the jurisdiction of the court, and that the petitioners were entitled to be adjudicated bankrupts. An assignee was appointed, and the estate of the bankrupts administered in the usual way. Among the creditors, one Harvey Bates proved a claim in bankruptcy. Everything proceeded in the ordinary course, and on June 25th, 1878, the bankrupts filed their petition to be discharged, and the matter came on for hearing before the register, and, no objection being made, the register reported that they were entitled to their discharge. After the report was made the court allowed Mr. Bates to file his objections to the discharge. On the 2d day of August, 1878, Mr. Bates filed his objections, containing four specifications; the fourth specification being to the effect that the court had no jurisdiction to grant a discharge, because the bankrupts had not resided in the Eastern district of Missouri for six months next preceding November 1st, 1877, nor for the longest period during said six months, but only acquired a residence in said district on September 15th, 1877, prior to which they had resided in Indiana. The bankrupts, reserving objections, answered, denying all of the specifications, and alleging that they were bona fide residents of this district for the six months immediately preceding the filing of the petition in bankruptcy. The matter was heard upon the proofs, and the court, on September 9th, 1878, overruled the first three specifications and sustained the fourth, and thereupon "ordered that the discharge of the bankrupts herein be refused, and that the petition for adjudication heretofore filed by the bankrupts herein, together with all proceedings had thereunder, be and the same are hereby dismissed at the costs of the bankrupts." To review this order the present bill of review is filed.

J. La Due and William R. Walker, for bankrupts.

John D. Davis, for objecting creditor, Harvey Bates.

DILLON, Circuit Judge. The decision made by the district court is supported in two opinions of an able and experienced bankruptcy judge. In re Little [Case No. 8,391], Blatchford, J.; In re Leighton [Id. 8,221], decided by the same judge. A contrary opinion was given by another very learned judge. Re Burke [Id. 2,156], Deady, J.

The question is one of considerable importance, doubtless, and I have considered it with some care; but inasmuch as the bankrupt act is now repealed, I shall dispose of it without extended argument in support of my conclusion.

The district court not only has bankruptcy jurisdiction, but is the only court of original jurisdiction in bankruptcy. The petition filed in that court by the bankrupts was in due form in every respect, and set forth all the facts as to residence and otherwise necessary to state a case within the jurisdiction of the court. An adjudication of bankruptcy on this petition was duly passed and entered. An assignee was appointed, a deed of assignment was executed, debts were proved, meetings of creditors held, and the estate administered. In due course, after the lapse of several months, the bankrupts applied for a discharge, whereupon one of the creditors, who had before proved a claim, appeared and opposed the discharge, on the ground that the court had no jurisdiction to grant it, by reason of the existence of a fact en pais, viz., want of residence in the district for the requisite length of time before the filing of the petition in bankruptcy.

It is my judgment that the effect of a decree of adjudication cannot be thus overcome. This objection is not among those specified in the act as grounds of opposing the discharge. Rev. St. §§ 5110, 5111. The principle decided in Michaels v. Post, 21 Wall. [88 U. S.] 398, and in Sloan v. Lewis, 22 Wall. [89 U. S.] 150, is inconsistent with the right to attack the decree of adjudication in this manner. "Such a decree," says the supreme court in the case first cited, "is in the nature of a decree in rem as respects the status of the party, and in case the court rendering it has jurisdiction (a case within whose jurisdiction was shown by the petition filed therein), it is only assailable by a direct proceeding in a competent court, if due notice was given and the adjudication was correct in form." So in the case of Sloan v. Lewis, where the record of the bankruptcy court showed on its face jurisdiction, it was held that the adjudication of bankruptcy was conclusive in a collateral action. "Where the record (of the bankruptcy court) shows jurisdiction," says the chief justice, "an adjudication of bankruptcy can only be assailed by a direct proceeding in a competent court." 22 Wall. [89 U. S.] 157. An instance of such a direct proceeding is presented in Re Goodfellow [Case No. 5,536], Lowell, J. The decree adjudging the debtors to be bankrupt was never attacked in the district court. No petition or other direct proceeding to set the same aside was ever made. It is not attacked in the objections filed by Mr. Bates to the discharge of the bankrupts. It remains to this present time unassailed and unreversed. The estate of the bankrupts has been administered under it.

It seems to me to be against the general principles of the law relating to the effect of judgments and decrees of courts, and without any support in the special provisions of the

bankrupt act, to allow a judgment, and especially such a judgment as a decree of adjudication in bankruptcy, to be overthrown, and all that has been done under it held to be void, in a proceeding in which the decree is not directly attacked, and where the question only arises incidentally on the application of the bankrupts for their discharge.

The decisions in the district courts referred to, holding a contrary view, were made before the decisions of the supreme court above cited, and are inconsistent with them, unless it can be held that the opposition to a discharge on this ground is a direct attack upon the decree adjudging the debtors to be bankrupt—a position I cannot admit to be sound.

The order of the district court dismissing the petition for adjudication is reversed, and the court ordered to overrule the fourth specification in opposition to the discharge, and to grant the discharge of the bankrupts. Ordered accordingly.

NOTE. Subsequently an application was made by the counsel for the objecting creditor to modify the order directing the district court to grant a discharge, and reserve the right to the objecting creditor to file a petition for a review of the order of the district court overruling the first three specifications in opposition to the discharge. In disposing of this application the circuit judge remarked:

"I have considered the application in this court by Mr. Davis on behalf of Mr. Harvey Bates, a creditor of Ives & Porter, to modify the decree or judgment rendered in this court on the petition for review, on the 27th ultimo. Briefly, the case is this: Ives & Porter filed a petition to be adjudged voluntary bankrupts, and were so adjudged. Mr. Bates, among others, filed a claim against the estate in bankruptcy, and proved the same. The proceedings took the usual course; an assignee was appointed, and the estate was administered in bankruptcy, and in due time the bankrupts filed their application to be discharged. Mr. Bates appeared and contested that application, and filed four specifications in objection thereto. Three of these specifications were among those enumerated in the bankrupt act [of 1867 (14 Stat. 517)] as proper to be filed, and the fourth was that the district court had no jurisdiction to grant a discharge, for the reason that the bankrupts had not resided in this district the longest period of the six months next preceding the filing of their petition in bankruptcy. Issues were made and proofs taken in respect of all the matters—the four specifications in opposition to the discharge—and the matter came on for a hearing on the merits. The district court overruled the first three specifications, but sustained the fourth, and dismissed the proceedings in bankruptcy. The bankrupts filed a petition for review, and on the hearing of that I held that it was not competent, by way of objecting to a discharge, to impeach the judgment of the court under the petition in bankruptcy adjudicating the debtors to be bankrupts; that such a judgment was like any other judgment of a court of competent jurisdiction, and could only be impeached by a direct proceeding, and therefore reversed the order of the district court dismissing the proceedings, and ordered to be entered here a judgment directing the district court to grant the discharge. The record before me shows that the bankrupts took exception to the action of the district court in respect to the fourth specification, and all the testimony relating to that subject, to-wit, their residence, is preserved in the record. The district court denied, on the merits, the three other objections. This record does not disclose that any exception was taken or objection made to the action of the district court in that behalf. In the meanwhile the bankrupt act was repealed; and in the meanwhile several months have elapsed. Now the objecting creditor says: 'I want a modification of the decree of this court by which the district court was ordered to grant the discharge, so as to allow me to file a petition for review of the action of the district court in respect to the three specifications which it denied.'

"It was stated before me on the hearing that the petitioning creditor had no bill of exceptions; but it was expected—if this order was modified—to go into the district court and get a bill, so as to enable the action of the district court to be reviewed on that subject; and, further, that he was willing to submit the matter on the testimony and record as it is, when he had that exception. The whole spirit and tenor of the bankrupt act looks to a speedy closing of estates. If this was an appeal from a judgment or decree for money against the objecting creditor's claim which had been wholly denied by the district court, he could only have that action reviewed if he took an appeal within ten days. Now he comes in where the time is not specifically limited as in appeal—although in many courts they have a rule that it shall be filed within ten days—and wants, after the lapse of several months, the right reserved to file a petition to review the action of the district court as to matters to which he took no exception at the time. I think, under the circumstances, I ought to deny that, as he had a full hearing. Let the order stand as it was made. Ordered accordingly."

## Case No. 7,116.

In re IVES et al.

[18 N. B. R. (1879) 28.][1]

District Court, E. D. Michigan.

BANKRUPTCY—RENT — PAYMENT OF, BY ASSIGNEE —USE OF PREMISES.

1. While an assignee is bound to pay a reasonable compensation for the use of premises occupied by him in winding up the estate, he does not, by accepting the trust, become the assignee of leases belonging to the bankrupt, or bound to pay the rent reserved.

2. To entitle the landlord to rent, the occupation of the assignee must be not merely technical, but substantial and beneficial to the estate.

On petition of Eliza F. Brown for an order that the assignee pay the rent of a certain lot occupied by him. The petition set forth that, at the commencement of the bankruptcy proceedings, the bankrupts [Ives, Green & Co.] were in possession of a certain lot on Atwater street, under a lease expiring March 30, 1879, at a rental of eight hundred dollars per year; that at the time of filing of the creditors' petition, there was standing upon the lot a large smoke-stack and some boilers belonging to the bankrupts, and used by them in connection with their mill, which stood upon an adjoining lot, and until said smoke-stack and boiler were removed, it was impossible for the petitioner to have exclusive use of the premises, or to lease them; that such removal was not effected until about the 1st of October last, and that the petitioner had no notice of said

[1] [Reprinted by permission.]

removal for some time thereafter. Petitioner prayed that the assignee might be directed to pay for the premises, from the 22d day of March to the 22d day of September, at the rent reserved in the lease. The answer admitted that the bankrupts had erected a smoke-stack, about six feet square at the base, and that the boilers were also placed on the lot in question, so as to occupy a strip of about twelve by forty feet on the westerly edge thereof, adjoining the mill upon the lot west of the premises in question; but that the mill had ceased to be used by the bankrupts at the time of the filing of the petition. The answer further averred that the lot was about seventy-five feet front by one hundred and fifty feet deep, extending to the Detroit river; that it had no wharf in front, the water being shallow; that the lot had no valuable use except for storage, and that for such purposes it had been of no value since the commencement of the proceedings in bankruptcy; that there was no demand for unimproved lots in that vicinity, nor had they any rentable value; that petitioner had sustained no loss by the continuance on said premises of the smoke-stack and boilers, and that she had had no opportunity of renting the same. The assignee also averred that he had never accepted the lease, never received notice from the petitioner that he would be deemed to have accepted the same, by allowing the smoke-stack and boilers to remain; that the landlord never applied to this court to have them removed and the premises vacated. It further appeared that soon after the appointment of the assignee, the agent of the petitioner stated to him that the petitioner ought to be allowed rent for the premises in question, while the smoke-stack and boilers remained there; that the agent asked the assignee whether he would let her have the smoke-stack and boilers for the rent, which he declined to do; that there was no serious proposition made on either side, until a short time before they were removed, when the assignee proposed to let the petitioner have the smoke-stack and the brick work about the boilers, if she would take them down, which proposition she declined to accept; whereupon the assignee removed them.

George S. Swift, for petitioner.
Theodore Romeyn, for assignee.

BROWN, District Judge. Doubtless an assignee in bankruptcy is bound to compensate a landlord for the use of premises occupied by him in winding up the estate. In re Hufnagle [Case No. 6,837], and cases cited; In re Hamburger [Id. 5,975]; In re Commercial Bulletin Co. [Id. 3,060]. He does not, however, by accepting the trust, become the assignee of leases belonging to the bankrupt, or become bound by any covenants contained therein. In re Washburn [Id. 17,211]; In re Lucius Hart Manuf'g Co. [Id. 8,592]. Although the rent be reserved in the lease, the assignee does not become liable to pay such rent by continuing to occupy the premises. The petitioner does not proceed upon the theory that the assignee accepted the lease, and thereby became obligated to pay the rent, but upon the theory that it was impossible for her to have exclusive use of the premises, so long as the smoke-stack and boiler remained there. But to make the assignee liable as a tenant it must appear that his occupancy was not merely technical, but substantial and beneficial. In this case, the chimney and boiler covered but a small part of the lot; by far the greater part being vacant. As the mill did not run, the assignee derived no benefit from permitting the chimney to stand there, and the petitioner lost nothing, for she was at liberty to rent the property at any time. While, technically, she could not occupy the entire lot, so long as the chimney stood there, there was no substantial occupation by the assignee, and there was no loss of any valuable right by the petitioner. In re McGrath [Id. 8,808]; In re Washburn [supra]; In re Breck [Case No. 1,822]; In re Hamburger [Id. 5,975]; In re Metz [Id. 9,509]; In re Lynch [Id. 8,634]. If the conversation between the assignee and her agent amounted to an agreement to pay the rent so long as the incumbrance remained upon the lot, it was an agreement to pay only what such occupation was reasonably worth; and as there is no evidence upon this point, and none to show that the assignee agreed to accept the lease, the petition must be dismissed.

IVES, The LUCIA B. See Case No. 8,590.
IVES (BRUFF v.). See Case No. 2,050.

## Case No. 7,117.

IVES v. The BUCKEYE STATE.

[Newb. 69.] [1]

District Court, D. Michigan. 1856.

SHIPPING—LIBEL FOR REPAIRS—WHARVES—DOCKAGE.

1. In the case of a libel for repairs to a vessel, whether an estimate of profits that the vessel might have made had she not been unreasonably detained by the libelant in making the repairs, can be allowed as a set-off to the libelant's bill. Quere?

2. Dockage in a dry dock is in the nature of rent, and subject to the will of the proprietor of the dock.

3. A printed tariff of charges at a dry dock not brought to the notice of the master or owner of a vessel taken into such dock for repairs, is not binding upon such master or owner.

4. Where the proprietor of a dry dock charges twenty shillings per day for the labor of his men in repairing vessels taken into the dock, but only pays them eighteen shillings per day,

[1] [Reported by John S. Newberry, Esq.]

the proprietor having also charged for his own time in superintending the men and their work, at the rate of $4 per day, *held*, that under the proofs of the case the extra two shillings per day on the men's time was an improper charge.

The libel in this case was filed by Lewis Ives, proprietor of a dry dock in the vicinity of Detroit, to recover payment of a bill for docking and repairing the steamer, during the month of October, 1854. The amount claimed by the libelant for the docking of the boat was $955.50. Of this sum $318.50 was for "half dockage," so called, which was sought to be recovered on the ground that the steamer was detained in the dock four days beyond the time that it was understood she was to be kept in. Another item of the libelant's claim was for the work and labor of his men, amounting in all to two hundred and fifteen and a half days, for which he charged at the rate of twenty shillings per day; he also charged for his own time in superintending the men, nine and a half days at $4 per day. Among the charges for materials used in making the repairs were nine bales of oakum at $6.50 per bale, and three barrels pitch at $6.50 per barrel. From the testimony in relation to the charge for half dockage, it appeared that this was not a customary charge at similar docks in Buffalo, Cleveland and other places along the Lakes, and although it appeared, from a printed tariff of the charges at the libelant's dock, that such a charge was usual there, in cases where vessels were detained in the dock beyond four days, yet it was not clear from the evidence that the master or owner of the Buckeye State ever saw this printed tariff before they allowed the steamer to go into the dock. It also appeared from the evidence, that the libelant only paid the men who worked on the repairs of the steamer at the rate of eighteen shillings per day, and for the oakum used at the rate of $6 per bale, and for the pitch at the rate of $5.50 per barrel. The charge for extra dockage, and the amounts charged for labor and materials, above the amounts actually paid by the libelant, were resisted by the claimant of the steamer. It was set up in the answer, and insisted by way of defence to the entire amount of the libelant's demand, that the steamer was detained in the dock an unreasonable length of time: that the libelant did not place the requisite number of men at work on the repairs, and that by reason of his neglect so to do, the steamer was detained in the dock several days longer than she otherwise would have been, and that by reason of the delay in getting the steamer out of the dock, she lost an opportunity of making several trips in the most profitable line of steamers on Lake Erie, from which trips she could have cleared the sum of $1,500, over and above all expenses, and this sum the respondent claimed to set off against the libelant's demand. Upon the question whether the steamer was detained in the dock an unreasonable space of time, or not, there was conflict in the testimony, but the preponderance of evidence on this point, in the judgment of the court, was in favor of the libelant. On the question of profits that might have been made by the steamer had she been released from the dock several days sooner than she was, the evidence fully sustained the allegations of the answer. It was further set up in defence, that the repairs to the steamer for which the libelant sought to recover, were not properly made; but this defence, as will be gathered from the opinion of the court, was not sustained.

G. T. Sheldon and John S. Newberry, for libelant.

Lothrop & Duffield, for claimant.

WILKINS, District Judge. The libel was filed in this case on a bill for dockage and repairs. The court does not deem as tenable, the principal matters set up as defence to the libelant's demand, and for these reasons: 1st, as a question of fact, it does not satisfactorily appear, that the loss sustained by the claimant, if any, was the consequence of the negligence of the libelant. The boat was not detained beyond the time requisite for the repairs ordered: 2dly, as a question of law, the court is not prepared to adopt the rule, to the extent contended for, viz: that an estimate of probable profits for the time lost by the steamer is to be deducted as a set-off, from the bill of the libelant. When such a rule shall be enforced by this court, it will be on the clearest and the most unquestionable testimony. 3d. The other matter of defence, that the work was not performed in a workmanlike manner, is refuted by the preponderance of the evidence. Bloomer, Atkinson and Johnston are conclusive upon this point.

Thus disposing of the defence, the question arises, has the libelant established his account by satisfactory proof? It is not for the court to determine, without proof, whether or not a bill is exorbitant. The first item is for dockage, which being the pecuniary compensation, for the use of a dock, while a vessel is undergoing repairs, is subject solely to the will of the proprietor. It is in the nature of rent, and the owner of a dry dock, has a right to demand from those who seek its use, whatever he considers a fair compensation, uncontrolled by the custom of other docks, in other places. House rent in Buffalo or Cleveland, is not to govern landlords in Detroit; although where there is no special agreement touching the subject, the usual rent of similar buildings in the same locality, would enlighten the judgment of a court as to what such property was worth.

From the testimony of John Ives, it appears there was a special agreement in this case between Mr. Philips (the owner of the Buckeye), and the libelant, when the vessel was brought into dock, as to what the latter

would charge for dockage. He says: "Captain Philips applied for the dockage of the Buckeye State, saying that she would have to be in three or four days. We told him that the dockage was fifty cents per ton. She was taken in on the 20th; my brother and the captain superintended taking her in: she was in dock until the 1st of November." This witness also testified to a printed tariff of charges to be made by the dock of the libelant, in which appears the charge of two shillings a ton, for the four days succeeding the first four days, and that he, as clerk, always made the half dockage charge; but it is not clear, that this tariff was brought to the knowledge of Philips or his captain, so as to bind him to an extra charge over the fifty cents per ton, agreed upon before the steamer was taken in, provided her repairs should occupy a longer time than was then anticipated. The charge for dockage, is $637, and if the item for half dockage be superadded, it would make the rent of the dock, for eleven days, $955.50; a sum so improbable for the mere use of the dock, independent of repairs, that, without more direct proof, I cannot consider the charge for half dockage, as having been contemplated by the parties. This item is, therefore, rejected.

It is in proof, that but eighteen shillings per day was paid to the men hired to do the work, while twenty shillings is charged in the bill. On no principle of justice, can the court sanction this charge. The libelant is responsible for the actual wages of the men employed, but no more. This additional charge, over and above what was paid to each man, cannot be considered in the light of compensation for the libelant's time, for he charges for his own superintendence at the rate of $4 per day, for nine and a half days. The charge, therefore, for 215½ days' work, at twenty shillings, amounting to $538.75, must be reduced by subtracting this extra charge of two shillings per day, which amounts to $52.75, and makes the item properly chargeable, $486. The clerk will revise this calculation, and correct the amount accordingly. On the same principle, the additional four shillings advance on the articles purchased and used in repairing the vessel, cannot be allowed. Why should the libelant be allowed to charge more than the market price for the articles used in the repairs? He paid $6 per bale for oakum, and charges $6.50. He paid $5.50 per barrel for pitch, and charges $6.50. These additional sums must be deducted from the several charges. The deductions thus directed, reduce the libelant's bill to $867.89, for which amount, with interest, let decree be entered. Decree for $940 and costs.

IVES (FULLER v.). See Case No. 5,150.

IVES (HAMILTON v.). See Case No. 5,982.

IVES (LAPHAM v.). See Case No. 8,082.

IVES (McCORMICK v.). See Case No. 8,720.

IVES (MILLER'S FALLS CO. v.). See Case No. 9,599.

IVES (WARREN v.). See Case No. 17,197.

IVY (UNITED STATES v.). See Case No. 15,451.

IZARD (COCKS v.). See Case No. 2,934.

IZARD (WILSON v.). See Case No. 17,810.

# J.

## Case No. 7,118.

The J. A. BROWN.

[2 Lowell, 464.] [1]

District Court, D. Massachusetts. March, 1876.

SEAMEN'S WAGES—SUBROGATION—PART OWNER OF VESSEL.

1. The wages of the last voyage of a vessel have precedence of all earlier charges.

2. A person who pays the wages may be subrogated to the rank of the seamen.

3. A part owner may have such subrogation as against the mortgagee of the share of another part owner.

[Cited in Roberts v. The Huntsville, Case No. 11,904; The H. E. Willard, 53 Fed. 601.]

In admiralty.

LOWELL, District Judge. James Gammons, Jr., owner of ten-sixteenths of the bark J. A. Brown, which has been sold under a decree of this court, represents that he bought nine of his ten shares at an auction sale, made by the owner of the shares a few days before this libel was filed; that at the time of this sale a libel was pending in the court for the mate to recover his wages earned on the last voyage, of which the claimant was not aware; that he afterwards paid the wages and costs, and he asks to be subrogated to the privilege of the mate against the proceeds in the registry. This motion is resisted by the mortgagee of a part of the vessel. I informed counsel at the argument that I had decided some years since, in The Tangier [Case No. 13,744], that subrogation was often administered in the admiralty, and that the limitations attempted to be imposed on that doctrine in The Larch [Id. 8,085], could not be sustained as

[1] [Reported by Hon. John Lowell, LL. D., District Judge, and here reprinted by permission.]

law beyond the exact decision in that case. When a vessel is unfortunately incumbered with liens and hypothecations of various kinds beyond her full value, the wages of the last voyage have precedence over all earlier charges, such as a bottomry bond given at the beginning of that voyage; and in such cases one who pays the wages is often subrogated to the rank of the seamen, on the ground that he has saved expense, and has given the seamen their money promptly, and only arrived at the result which the court would have reached. The owner, or part owner, is not excluded from the right of subrogation, when the justice of the case is with him, as for example, when the wages are not a personal debt of his own, or for any other reason he has equities as against the other parties. It has become the practice in England to require the person intending to pay the wages to apply to the court in the first instance. Besides The Tangier above mentioned, I have allowed subrogation in some cases not strongly contested, I believe, certainly not reported. The following English cases may be referred to: The William F. Safford, Lush. 69; The Kammerhevie Rosenkrants, 1 Hagg. Adm. 62; The John Fehrman, 16 Jur. 1122; The Adolph, 3 Hagg. Adm. 249; The Janet Wilson, Swab. 261. I explained in The Tangier that the modern English practice is to require the person desiring subrogation to apply to the court before making the payment; but this is only a rule of practice, and is not strictly insisted on in all cases: The Cornelia Henrietta, L. R. 1 Adm. & E. 51. It appears to me, on a consideration of the circumstances of this case, that I ought to give to the claimant the subrogation which I should undoubtedly have granted to the mortgagee if he had paid the wages. It may be said that he was paying his own debt; and he might be made liable, no doubt, for the whole wages, if the other owners were insolvent, as I suppose they were; but it appears that the freight was supposed to have been applied to the wages, and that there was enough for that purpose; but it was wrongly used as an agent, and Mr. Gammons was obliged to pay the whole, when in equity he was only liable for one-sixteenth. I do not see that, as between him and the mortgagee, he was bound to guarantee the solvency of his co-owners, or the due application of the freight. The mortgagee might have secured himself by taking possession of the vessel before her last voyage, or at any time before the freight was fully earned; but then he would have been liable for the wages. I find good ground, therefore, to say, that as to fifteen-sixteenths of the wages and taxable costs paid by Mr. Gammons, he ought to be subrogated to the right of the mate. It is understood, of course, that the petitioner is not attempting to compete with his own creditor. The debt secured by mortgage is not his debt. Petition granted.

## Case No. 7,119.

In re JACK.

[1 Woods, 549;[1] 13 N. B. R. 296; 4 Am. Law Rec. 453.]

Circuit Court, N. D. Georgia. March Term, 1873.

INVOLUNTARY BANKRUPTCY—INTERVENTION OF CREDITORS—COLLUSION.

1. Where A., having long since ceased to be a trader, made his note for the payment of an antecedent debt contracted while he was a trader: *Held*, that suspension of payment of the note was not a ground for adjudicating A. a bankrupt.

[Cited in McKenney v. Baker, Case No. 8,853; Re Jonas, Id. 7,442.]

2. Where, by alleged fraudulent collusion between the petitioner and the defendant, proceedings in involuntary bankruptcy are begun to declare the defendant a bankrupt, judgment creditors, who would be damaged by the adjudication, ought to be allowed to intervene and oppose it.

[Cited in Re Scrafford, Case No. 12,557; Re Williams, Id. 17,706; Re Austin, Id. 662.]

This was a petition of review, filed by Hall & Allin and other judgment creditors of the bankrupt, under the second section of the bankrupt act [of 1867 (14 Stat. 517)], to review certain proceedings in the district court sitting in bankruptcy.

L. E. Bleckley, for petitioners.

D. F. Hammond, contra.

WOODS, Circuit Judge. One Er. Lawshé filed a petition in the district court for northern Georgia, praying that Francis M. Jack might be declared a bankrupt, on the sole ground that, being a trader, he had fraudulently stopped payment of his commercial paper, and had not resumed payment of the same within a period of fourteen days. Before the adjudication, Hall & Allin and L. Schiffer & Nephews, judgment creditors of Jack, applied to the bankrupt court for leave to intervene and object to the making of any order adjudicating Jack a bankrupt, and alleged the following grounds against such adjudication: (1) That they had unsatisfied judgments against Jack, and had attached his property by garnishment in the state superior court, and had thereby obtained certain rights under the state laws, which would be lost by the adjudication of bankruptcy, and that the estate of Jack was very small and much less than the amount of judgment debts against him, and the proceeding in bankruptcy would, if allowed, illegally dispose of Jack's estate to the great detriment of his judgment creditors; and (2) said proceedings were void, because they were begun and carried on by collusion between Jack and Lawshé, the petitioning creditor; and (3) because Jack was not a trader at the time of the execution of said note, nor for a long time previous thereto, nor at any subsequent time, but had retired from

[1] [Reported by Hon. William B. Woods, Circuit Judge, and here reprinted by permission.]

business entirely, and was hopelessly insolvent at the time of the execution of the note; and the debt for which the note was given was not in any manner contracted by him in the business of a trader.

The bankrupt court refused to allow the petitioners in review to intervene and object to the adjudication, and proceeded to adjudicate Jack a bankrupt. The petition of review alleges that the overruling of the motion to allow the petitioners to intervene and object to the adjudication of bankruptcy, and the adjudication itself were erroneous. The facts alleged in the petition of review, and in the motion of petitioners before the bankrupt court, are not traversed, and we must take them to be substantially true. If the facts stated in the motion of petitioners had been shown to the bankrupt court, ought that court to have declared Jack a bankrupt? Jack, on the 30th of December, 1872, executed his note of that date, payable ten days after date to the order of Er. Lawshé, for $312.69, at J. H. James' office in Atlanta, Ga. The note was given for an antecedent debt of two years standing; for a debt contracted when Jack was a trader; but at the time when the note was executed, and for a long time previous, Jack had ceased to be a trader.

Under this state of facts, could he have been adjudicated a bankrupt, if resistance had been made to the adjudication? The bankrupt act (section 39) provides: "That any person residing and owing debts as aforesaid (namely, as provided in section 11), who being a trader, has stopped or suspended and not resumed payment of his commercial paper within a period of fourteen days, shall be deemed to have committed an act of bankruptcy." The language of this section clearly indicates that the making of the note must have been done while the party was a trader. A person who having ceased to be a trader, gives a note and suspends payment, does not commit an act of bankruptcy, even though the debt for which the note was given was contracted while he was a trader. The reason of the law does not apply to such a case. When a man enters the commercial community as a trader or merchant, he assumes all the responsibilities which attach to his calling. One of these is the obligation to pay at maturity his commercial paper. But if he has ceased to be a trader, and has no commercial paper outstanding, he resumes his position with the great mass of mankind, and is subject no longer to the liabilities of a trader. When then he gives commercial paper, he does so subject to the same liabilities as the noncommercial public. Upon these facts alone then, Jack could not have been adjudicated a bankrupt, if resistance had been made to the order of adjudication. Should the petitioners, who were judgment creditors, have been admitted to make such resistance? They are conceded to be creditors; it is admitted that they would be subjected to damage by the adjudication; it is admitted that the petition for adjudication was filed by collusion between the bankrupt and the petitioning creditor. We think this makes a strong case for allowing the intervention of these creditors, and they should have been allowed to intervene unless there exists some positive rule either of the statute or general orders in bankruptcy which would prevent. I know of no such rule.

In Case of Boston, H. & E. R. Co. [Case No. 1,677], tried on petition of review before Woodruff, circuit judge, it was held that a petition in involuntary bankruptcy was not a mere suit inter partes, but rather partook of the nature of a proceeding in rem, in which any actual creditor had a direct interest, and that a party claiming to be a creditor and who was able to satisfy the court that he was a creditor and that his purpose was a meritorious one, ought to be allowed to intervene and object to the adjudication of bankruptcy. The petitioning creditor loses no right by this practice, for if a proper case is made, his debtor will be adjudicated a bankrupt. I am satisfied with the reasoning of the judge in that case, and think it is an authority entitled to weight.

I am therefore of opinion that the district court erred in refusing to allow the creditors of Jack to intervene and object to the adjudication in bankruptcy, and that on the facts as disclosed by their petition for leave to intervene, Jack ought not to have been adjudged a bankrupt. The adjudication will therefore be reversed, as well as the order refusing to allow the said creditors of Jack to intervene to object to the adjudication.

## Case No. 7,120.

JACK'S CASE.

[See Case No. 7,119.]

JACK (UNITED STATES v.). See Case No. 15,452.

## Case No. 7,121.

The JACK JEWETT.

[2 Ben. 353.] [1]

District Court, S. D. New York. April, 1868.

POSSESSORY ACTION—DISCONTINUANCE—DELIVERY OF PROPERTY BY THE MARSHAL.

Where a possessory libel was filed by one B., claiming to be the owner of a propeller, and that she had been taken from him by H. and others, and process was issued against the propeller, and against such persons, under which process the marshal, on March 2d, 1868, took possession of the vessel, taking her by force from the representative of H. and the others, who claimed to hold her by bills of sale and mortgages, and, on March 10th, no appearance having been entered in the cause, the libellant discontinued the suit, and the clerk of the court

[1] [Reported by Robert D. Benedict, Esq., and here reprinted by permission.]

notified the marshal to discharge the vessel from custody, whereupon the marshal withdrew from the vessel, and B., who had been allowed by the marshal to come on board the vessel, took possession of her, and took her out of the district, and thereafter H. and the others presented a petition to the court praying that the marshal might be directed to restore the vessel to the petitioners, from whom he had taken her: *Held*, that, the suit having been discontinued, the court had no longer any possession of the vessel, or jurisdiction of the suit, or power to grant the relief prayed for.

[Cited in Bolten v. The James L. Pendergast, 30 Fed. 720.]

The libel in this case was filed on the 2d of March, 1868. The action was one for the possession of the propeller Jack Jewett, the libellant, John M. Burt, claiming to be her owner. The libel set forth that Willet P. Roe, George W. Holman, and Frederick Thompson, with other persons, had deprived the libellant forcibly of the possession of the vessel, and prayed process against the vessel, and that Holman, Thompson, and Roe, and all persons intervening for their interest therein, might be cited to appear and answer the libel, and that the vessel might be delivered to the libellant, and that Holman, Thompson, and Roe, might be condemned to pay the libellant his damages and costs in the premises. On this libel process was issued from this court, on the 2d of March, 1868, as prayed for, returnable on the 24th of March, 1868. When the deputy marshal went to the vessel to execute the process, he found her at the Atlantic Basin, in Brooklyn, in possession of one Strauss, a general deputy of the sheriff of Kings county, who claimed to hold her on behalf of the said Holman, Thompson, and Roe, and of Stephen F. Shortland, Mary Newcomb, Benjamin G. Richardson, and David Waugh, under sundry bills of sale and mortgages. Strauss resisted the deputy marshal, and refused to yield possession of the vessel to him, or to an extra force which the marshal sent to reduce the vessel to custody. Thereupon the marshal obtained a file of marines from the navy yard, and by their aid took possession of the vessel, and removed her from the Atlantic Basin. He detained her in his custody until the 10th day of March, 1868, when the libellant discontinued his suit, and the usual notice was served by the clerk of the court on the marshal, notifying him that the suit had been discontinued, and that the costs of the clerk and marshal had been paid, and directing him to discharge the vessel from his custody as to the suit. Thereupon the deputy marshal withdrew from the vessel, and Burt, the libellant, being in possession of her by agents of his, whom the deputy marshal had suffered to go on board of her, took her away from the port of New York. There was no claim filed, nor any appearance entered in the suit. The parties for whom Strauss acted now presented a petition to the court, praying that the marshal might be directed to deliver the vessel to the petitioners, from whom she was taken by him under said process.

T. C. T. Buckley and J. K. Hill, for petitioners.

T. Scudder, for the marshal.

BLATCHFORD, District Judge. The difficulty in the way of granting to the petitioners the relief asked is, that the suit is discontinued. The vessel has been released from custody. The marshal was authorized to release her. The only complaint is that he gave her up to the wrong person. The court has no longer any possession of the vessel, or any jurisdiction of the suit, either in rem against the vessel, or in personam against such of the petitioners as were parties to it, and has no power to give the relief asked. The marshal has not disobeyed any process or order of court, or been guilty of any contempt of court for which he can be attached, and that is not the relief asked. If the marshal, while the vessel was in his custody, suffered her to be injured, or has been guilty of a breach of duty in permitting the libellant to take possession of her, and in not delivering her back to the custody of those from whose possession he took her, the parties aggrieved have their remedy against him by a proper action in the proper tribunal. This court cannot administer the relief asked in this summary way on this petition. This suit having been discontinued on the 10th of March, 1868, and the vessel discharged from the custody of the marshal by the order of this court, without any special direction to the marshal as to the person to whom he was to deliver the vessel, there is not, even if the marshal was guilty of a breach of duty in delivering her to the libellant, such an irregularity, or mistake, or fraud, as would warrant the court in retaking possession of the vessel, even if it could do so in any case where the suit was regularly discontinued. By the discontinuance of the suit, the lien on the vessel is gone, and for the court now to order the marshal to seize her, when there is no suit pending, and no jurisdiction in the court over any thing or any person in the premises, would seem to be to order the marshal to commit a naked trespass, in respect to which the order of this court would be no protection to him if he were sued therefor. The principle which the circuit court for this district laid down in the cases of The Union [Case No. 14,346] and The White Squall [Id. 17,570], as applicable to the case of a discharge of a vessel on a stipulation for value in a suit in rem, that the court has no power to order back, into the custody of the marshal, a vessel which has, on a stipulation, been fairly discharged from arrest, applies, a fortiori, to a case where she has been properly discharged by the termination of the suit.

The prayer of the petition is denied.

## Case No. 7,122.

The JACK JEWETT.

[2 Ben. 463.] [1]

District Court, S. D. New York. June, 1868.

SALVAGE—FIRE—QUANTUM MERUIT—PARTIES—COSTS.

1. Where a tow-boat, while towing a vessel, saw another vessel on fire at a wharf, and went to her, and, with a steam-pump, helped to put the fire out, being delayed in all from three to four hours, and, about six weeks afterward, without any notice to the owner of the vessel saved, the owner of the tow-boat filed a libel for himself alone, claiming a salvage of seventy-five per cent. of the value of the vessel saved: *Held*, that, as the owner of the tow-boat was not personally present at the service, there could be no award of salvage remuneration to him; but, as owner, he was entitled to an equitable compensation for the use of his vessel.

[Cited in The Arlington, Case No. 534.]

2. As the usual compensation for her services in towing was $10 an hour, and as she gave the use of her steam-pump, the sum of $150 was sufficient compensation.

3. Under the circumstances, the award would be without costs.

In admiralty.

Beebe, Dean & Donohue, for libellant.

J. K. Hill, for claimant.

BLATCHFORD, District Judge. This is a libel for salvage, filed by the owner of the steamboat Gamecock, a vessel engaged in the business of towing, against the steamboat Jack Jewett. The Gamecock, while on a trip from New Haven to New York, between one and two o'clock a. m., on the 14th of October, 1866, towing a vessel, discovered the Jack Jewett on fire, lying at a wharf at Riker's Island. The libel avers that the fire had driven the crew of the Jack Jewett from her; that she was abandoned by her officers and crew; and that, under those circumstances, she was about being destroyed, when the Gamecock, with her crew, went to the assistance of the Jack Jewett, and by the exertions of such crew, and the use of the steamboat and her pump, the fire was put out, and the vessel saved in a damaged state, when otherwise she would have been totally destroyed. The libel claims that the libellant is entitled to salvage to the amount of seventy-five per cent. of the value of the saved property, which is averred to be $4,500. The answer sets up that, at the time of the fire, the Jack Jewett was moored at the wharf at Riker's Island; that, after she had been burning over two hours, and all her joiner-work had been destroyed, and nothing was left of her, except her hull and water tanks, and the flames had so subsided that her crew had been enabled to return to her, and were engaged in extinguishing the fire in her timbers and hull, the Gamecock came up, and, against the will and remonstrance of the master and persons in charge of the Jack Jewett, threw some water, through a small hose, upon the hull and timbers of the Jack Jewett; that such services were of no real benefit to her; that all that was saved of her would have been saved, without the aid or services of the Gamecock; that nothing was saved except the hull, which was in a damaged condition; that all lien for salvage was lost, because the libellant left the Jack Jewett in the possession of the claimant; and that this court has no jurisdiction of this suit, because it is brought for services rendered to a vessel while she was moored at a wharf, and not while she was employed on the high seas.

The libellant is not entitled to recover as a salvor in this case. He was not personally engaged in the service. The libel is not filed on behalf of those who were personally engaged in the service. It is filed solely on behalf of the libellant, as owner of the Gamecock, for salvage compensation to him as such owner. There can, therefore, be no award of salvage remuneration in this case. The Charlotte, 3 W. Rob. Adm. 68, 72. But the libellant, as owner of the vessel which rendered the assistance, and which was diverted for a time from her proper employment, is entitled to an equitable compensation for the use of his vessel. The Charlotte, above cited. The Gamecock was engaged in pumping water on the Jack Jewett for nearly two hours, and was delayed in all not over from three to four hours, when she resumed her voyage. It is shown that the value of her time, in towing, is ten dollars an hour. This rate of compensation, so far as the libellant, as owner of the boat, is concerned, covers the time of the boat, and the value to him of the services of her officers and crew. In addition to the service which the Jack Jewett would have received, if the Gamecock had been towing her, the Jack Jewett had the benefit of the use of the steam-pump of the Gamecock, to throw the water. Something should be allowed for this. I think an aggregate compensation of $150 to the libellant is sufficient.

It is in evidence, that the owner of the Jack Jewett never heard of the claim for salvage, till the libel was filed, which was about six weeks after the fire, and after a settlement had been made by him with the insurance companies who had insurances on the vessel, and after he had commenced to rebuild her. In view of this, and of the unconscionable amount demanded for salvage in the libel, in a case which is not a case of salvage at all, I shall not allow costs to the libellant. A decree will be entered accordingly.

[1] [Reported by Robert D. Benedict, Esq., and here reprinted by permission.]

## Case No. 7,123.

In re JACKSON et al.

[7 Biss. 280; [1] 14 N. B. R. 449.]

District Court, E. D. Wisconsin. Sept. 4, 1876.

BANKRUPTCY—POSTPONEMENT OF PROOF OF DOUBTFUL CLAIMS—PRACTICE—REVIEW—PROOF OF DEBT BY AGENT—IRREGULARITY IN ADMITTING CLAIM—"OPPOSING INTEREST."

1. Where there is a reasonable, substantial doubt in the mind of a register as to the validity of any claim, and as to the right of the alleged creditor to prove it, he can postpone the proof of such claim until after the election of an assignee.

[Cited in Re Wetmore, Case No. 17,466.]

2. Where a review by the district judge of the action of the register in such cases is sought, the better practice on behalf of creditors who object to the postponement of such claims, is to at once have the objection entered, obtain a stay of proceedings, and have the case certified before any further action before the register is taken, for if no objection is made at the time and the assignee is appointed and enters upon his duties the court will not interfere.

3. It is not a sufficient cause for the proof of a debt by the agent that the principal is "traveling and supposed to be in Colorado," as the statute when it mentions absence of the claimant as ground for verification of the claim by an agent, speaks particularly and only of absence from the United States. The words "some other good cause" mean some sufficient cause other than mere absence from the state.

4. Where a claim is irregularly admitted, but the result of an election of assignee would not be changed by its exclusion, the court will not set aside the proceedings on account of irregularity in admitting this claim.

5. Upon failure to elect an assignee by the creditors, the register may appoint one, if specific objections are not made.

6. "Opposing Interest"—in the bankrupt act (section 5034) means an opposition to the exercise of the appointing power by the register—not an opposition to the appointment of any particular person.

In bankruptcy. Motion to set aside appointment of assignee.

On the 5th day of August, 1876, the first meeting of creditors was held for election of an assignee. Among other creditors named in the bankrupts' schedules, were Margaret Crompton, whose claims were therein stated as amounting to $1,890, Elizabeth Crompton, whose claims were stated to be $1,070.64, Anna T. Codman, alleged to be a creditor to the amount of $1,000, Joseph Jackson, whose claim was scheduled at about $700, and Mary Jane Jackson, whose claim was stated to be $1,736. All these demands were described in the schedules as contracted in 1876. At the meeting, these parties presented proofs of debt in due form. There were some discrepancies between the amounts of these claims, as stated in the schedules, and as offered for proof, and all the claims arose upon promissory notes, bearing various dates in 1873, 1875 and 1876.

Before proceeding to vote for assignee, J. V. Farwell & Co., creditors of the bankrupts [George Jackson and others], presented to the register an affidavit or petition, stating that the five claimants before mentioned, were all relatives of the bankrupts; Mary Jane Jackson being the wife of the bankrupt George Jackson, Joseph Jackson being a brother, and Anna T. Codman being a sister of the bankrupts, and Elizabeth and Margaret Crompton being relatives by marriage of George Jackson. The petition also stated that the petitioners believed these claims to be fictitious to a great extent, and to be proved up for the purpose of controlling the election of an assignee in the interest of the bankrupts, and for no other purpose, and that the same should be inquired into. Some testimony was taken to the effect that these alleged demands did not appear on the books of the bankrupts, nor in any bills payable account, and the discrepancies between the amounts of the claims as scheduled and proved were pointed out to the register. Whereupon he postponed the proof of these five claims, and directed the election to proceed. No objection was at the time taken to this postponement, and the remaining creditors proceeded to vote for assignee. There was no choice and the register appointed George Tracy, then provisional assignee, as general assignee. The register certifies that before making the appointment, he announced to creditors that it became the duty of the judge to appoint in case of any opposing interest, and in answer to an inquiry by the attorney for some of the creditors, explained that the terms, "opposing interest," did not mean a contest as to who should be elected assignee, but meant opposition to the exercise of the power of appointment by the register. He certifies further, that no objection was made to an appointment by the register, and no opposing interest was disclosed. Among other creditors participating in the vote for assignee was Elam Beardsley, who appeared by an agent, who made proof of the claim for his principal, and stated in the sworn proof, that he was a duly authorized agent of Beardsley to make and verify the claim; had knowedge and personal possession of the demand; and that his principal was then traveling and supposed to be in Colorado. No objection at the time was made to the proof of this claim. On the 11th day of August, six days subsequent to the meeting and appointment, the creditors whose claims were postponed, and some other creditors who participated in the proceedings of the meeting, excepted in writing, first, to the postponement of the five claims before mentioned, second to the reception of the vote of Elam Beardsley upon his claim as proved, and third, to the action of the register in appointing an assignee. On the same day, a petition to set aside the appointment of the assignee was filed, and the register thereupon certified the proceedings had before him, to the district court.

[1] [Reported by Josiah H. Bissell, Esq., and here reprinted by permission.]

John B. Winslow, for creditors petitioning to set aside appointment of assignee.

Jenkins, Elliott & Winkler, for creditors opposed.

DYER, District Judge. Section 5083 of Revised Statutes provides, that "when a claim is presented for proof before the election of the assignee, and the judge or register entertains doubts of its validity, or of the right of the creditor to prove it, and is of opinion that such validity or right ought to be investigated by the assignee, he may postpone the proof of the claim until the assignee is chosen."

Obviously, under this language of the statute, it is not required, in order to justify the postponement of proof of a claim until after the election of an assignee, that the register should be satisfied, or have before him positive evidence, that the claim is invalid, or that the creditor has no right to prove it. Upon facts or circumstances being laid before him, which create in his mind a substantial doubt upon the question of validity or of the creditor's right, it is his duty to postpone the claim for investigation. The necessity for a prompt election or appointment of an assignee being usually imperative, the theory of the law seems to be, that such election or appointment shall not await an investigation—in many instances necessarily protracted—of all the facts touching the validity of the claim. It therefore not infrequently occurs that a claim is postponed and is not permitted to be represented in the choice of an assignee, which is subsequently admitted to proof upon full showing made.

I. The doubt in the mind of the register should be a reasonable, substantial doubt, resulting from a judicial consideration of the question. Such investigation is therefore required as will influence the mind to a conclusion as to whether there is such doubt of the validity of the claim or of the creditor's right to prove it. The register cannot postpone claims on mere objections. If bare objections are made and the register nevertheless regards the claims as valid and admissible, the court should be at once applied to, if the objections are insisted on, since "the register has not the power to proceed to a choice of assignee without the votes of all the creditors who wish to vote, if their votes can influence the result, unless the register himself considers their claims doubtful." In re Bartusch [Case No. 1,086].

There is no doubt, that where the power of postponement is erroneously exercised by the register, the creditors prejudiced may have the judgment of the court on the question, and it then becomes the duty of the court to consider whether the facts or circumstances laid before the register warranted a judicial determination that the claim in question was of such doubtful validity as to justify an opinion that the claim or the creditor's right should be investigated by an assignee. In re Lake Superior Ship Canal, Railroad & Iron Co. [Case No. 7,997].

The register has certified in this case, that he had such doubts as to the validity of the claims in question, and as to the right of the alleged creditors to prove them, that he was of opinion that such validity or right should be investigated. The fact of relationship of the parties whose claims were postponed, to the bankrupts, would not alone justify the register's action. Nor would the single fact of discrepancies between these claims as scheduled by the bankrupts and as offered for proof, because those discrepancies might arise from computations of interest, but with these circumstances, he had the sworn statement of other creditors, that in their belief, the claims were to some extent fictitious and were proved for the purpose of controlling the election of assignee, in the interest of the bankrupts. And added to these, was the circumstance that these demands did not appear upon the books of the bankrupts, nor in any bills payable account kept by them. This must have been in the mind of the register, and is a material fact; since it is regarded as a matter of high importance, by the terms of the law, that merchants shall keep books of account from which creditors may learn their actual financial condition. I do not mean that the circumstance referred to would necessarily have weight against these claims upon further investigation, because it is a circumstance susceptible of explanation, but, at this stage of the case, the question is, whether it was not a fact, which, in connection with the other circumstances, might not create a reasonable, substantial doubt as the basis for an opinion, that the claims should be investigated by an assignee. I am not prepared to say it was not, or that the register erroneously entertained the doubts upon which he acted in postponing these claims.

Further, I take occasion to suggest where a review by the district judge of the action of the register in such cases is sought, the better practice on the part of creditors who object to the postponement of claims, is, to at once have the objection entered, obtain a stay of proceedings, and have the case certified, before any further action before the register transpires.

Inasmuch as without such objection being thus made in this case, the vote for assignee proceeded as if in submission to the ruling of the register, even creditors who now seek this review joining in the attempted election, I doubt whether the point under consideration could be now available to the contesting creditors. I make these suggestions because of the importance of having the practice in the particular referred to, well settled and understood, as it may not have heretofore been in this court.

The bankrupt law contemplates as little

delay as possible in the choice of an assignee and in his assumption of the care and management of the estate; and in this case after the appointment of the assignee, and after he had given bond and taken an assignment of the estate, and several days before the court was advised of any of the alleged irregularities in the proceedings, license was granted to him to sell property, upon the supposition that he had been regularly chosen, a circumstance which I think illustrates the propriety of the practice I have suggested.

2. The objection to the proof of debt offered at the creditors' meeting in behalf of Elam Beardsley, is, I think, well taken. Section 5078 of the United States Revised Statutes provides that such proof shall be made "by the claimant, testifying of his own knowledge, unless he is absent from the United States, or prevented by some other good cause from testifying, in which case the demand may be verified by the attorney or authorized agent, etc." The proof of this claim stated, as a reason why it was made by an agent, that the principal was traveling and was supposed to be in Colorado; and the register held that under the words "some other good cause," in the section cited, such absence of the claimant as was shown in this proof of his demand, justified proof by an agent. I do not concur in this construction of the law. As the statute when it mentions absence of the claimant as ground for verification of the claim by an agent, speaks particularly, and only, of absence from the United States, it must be held I think, that mere absence from the state or the locality where the proof is made, is not to be regarded as alone cause for proof by an agent. The words "some other good cause," means some sufficient cause other than or in addition to mere absence from the state. I concur in the ruling made in Re Whyte [Case No. 17,606], in which case it was held that the absence of a claimant, which will render a proof of debt by an agent admissible, must be "from the United States." But the objection to this claim is immaterial, since it did not, and could not affect the choice or appointment of an assignee. The disallowance of it by the register would still leave the case, so far as the choice of an assignee by vote of creditors was concerned, as it was, provided his rulings and action on the other points were right.

The result would not be changed by the exclusion of the claim. This being so, the court ought not to set aside proceedings otherwise regular, because of irregularity in admitting this claim. In re Lake Superior Ship Canal, Railroad & Iron Co. [supra].

3. It is claimed that the action of the register in appointing an assignee was irregular, that there was an opposing interest, and therefore that the register could not appoint. Section 5034 of Revised Statutes provides, that at the meeting of creditors for election of an assignee, if no choice be made, the judge, or if there be no opposing interest, the register shall appoint one or more assignees.

By "opposing interest" is meant not merely an interest contending by vote for the election of a particular person, but an interest in opposition to the exercise of the power of appointment by the register. Upon failure to elect an assignee by creditors, it becomes the duty of the register to state that the duty devolves upon the judge to appoint, unless there be no opposing interest. If there be no such interest, then the register may appoint. Some misunderstanding appears to exist between counsel, and between one of the counsel and the register, as to what transpired at the creditors' meeting. In justice to all parties I permitted in addition to the register's certificate, oral statements as to what then transpired to be made at the hearing. The register's certificate states that when the result of the vote showed that there had been no choice of assignee, he so announced to the creditors, and advised them that it became the duty of the judge to appoint the assignee, unless there were no opposing interests, when the register was authorized to make the appointment; that upon inquiry of the attorney for some of the creditors, he stated that the term "opposing interest" meant opposition or objection to an appointment by the register, and that no objection being made, he appointed the assignee. The recollection of counsel for creditors now opposing the register's appointment, differs somewhat from the statements of the register's certificate, but from the statements made by counsel on both sides and by one of the contesting creditors, I must conclude that the controversy before the register, was essentially upon the person to be chosen.

A creditor states that he thinks the register made to the meeting the statement embodied in his certificate, and adds that according to his recollection, the attorney representing himself and other creditors now contesting the appointment made by the register, requested or suggested the appointment of a person voted for by him, though this does not accord with counsel's understanding of what transpired.

From all the statements made, I think it a necessary inference, that specific objection was not made to an appointment by the register. In cases where there is no choice of an assignee by creditors, distinct disclosure should be made of any opposing interest, and the register should not appoint unless it appears beyond doubt that there is no such interest. In view of all the facts, and as no objection is made to the qualifications or integrity of the present assignee, I must confirm his appointment and set aside the stay of proceedings heretofore granted. If there should at any time arise any ground

of complaint against him or his administration of the estate, creditors will have the right and opportunity to be heard.

## Case No. 7,124.

In re JACKSON.

[14 Blatchf. 245.] [1]

Circuit Court, S. D. New York. June 9, 1877.

MAIL—LOTTERIES—PROHIBITION—CONSTITUTIONALITY.

1. The provisions of section 3894 of the Revised Statutes, as amended by section 2 of the act of July 12, 1876, (19 Stat. 90), prohibit the carrying in the mail of letters or circulars concerning lotteries, and punish as a crime the offence of knowingly depositing or sending anything to be conveyed by mail, in violation of said section 3894, and apply to sealed letters, and are not unconstitutional or invalid.

[Cited in United States v. Gaylord, 17 Fed. 443.]

[See note at end of case.]

2. A grant of power in the constitution is to be construed according to the fair and reasonable import of its terms, and its construction is not necessarily to be controlled by a reference to what existed when the constitution was adopted.

3. Although the only punishment prescribed by section 3894 is a fine, a person who violates the statute may be arrested for trial and imprisoned or bailed.

Habeas corpus.

Abram J. Dittenhoefer, for relator.

Benjamin B. Foster, Asst. Dist. Atty., for the United States.

BLATCHFORD, District Judge. On the 8th of March, 1877, a United States commissioner for this district issued a warrant to the marshal, which recited, that complaint on oath had been made to him, charging that A. Orlando Jackson did, on or about the 23d of February, 1877, "at the Southern district of New York, unlawfully, wilfully and knowingly deposit and cause to be deposited, in the post-office and mails of the United States, then and there, for mailing and delivery, certain circulars concerning lotteries," and commanded him to apprehend said Jackson. Jackson was arrested under this warrant, and brought before the commissioner on the 13th of March, and was identified as the party charged, and discharged on bail to await trial. Subsequently he was surrendered by his surety, and he demanded an examination before the commissioner on the charge, and it was had, and the commissioner, on the 2d of May, decided that there was probable cause to believe that Jackson committed the offence charged, and he committed him to the custody of the marshal, to await the action of the grand jury, in default of $500 bail. Thereupon he has been brought before this court on a writ of habeas corpus issued to inquire into the cause of his imprisonment, and the proceedings which took place before the commissioner have been brought before this court by a writ of certiorari. It appeared before the commissioner, that Jackson, on the 23d of February, 1877, deposited in the post-office at New York City, to be conveyed by mail, a sealed letter envelope, addressed as follows: "J. Ketcham, Lock Drawer 164, Gloversville, N. Y.," and which contained circulars concerning a lottery described as "The Kentucky State Lottery, Simmons and Dickinson, Managers," and also circulars concerning Louisiana and Havana lotteries, the postage on which was duly prepaid by stamps, and that the above named lotteries were authorised by the laws of the respective states of Louisiana and Kentucky and of the kingdom of Spain.

The prosecution in this case is founded on section 3894 of the Revised Statutes, which, as amended by section 2 of the act of July 12, 1876 (19 Stat. 90), provides, that "no letter or circular concerning lotteries, so called gift concerts, or other similar enterprises, offering prizes, or concerning schemes devised and intended to deceive and defraud the public, for the purpose of obtaining money under false pretences, shall be carried in the mail;" and that "any person who shall knowingly deposit or send any thing to be conveyed by mail, in violation of this section, shall be punishable by a fine of not more than five hundred dollars, nor less than one hundred dollars, with costs of prosecution." The amendment of 1876, consisted in striking out the word "illegal" before the word "lotteries" from the section as originally enacted in the Revised Statutes. A part of the statutory provision embodied in section 3894 of the Revised Statutes was originally enacted July 27, 1868, as section 13 of the act of that date (15 Stat. 196), in these words: "It shall not be lawful to deposit in a post-office, to be sent by mail, any letters or circulars concerning lotteries, so called gift concerts, or other similar enterprises, offering prizes of any kind, on any pretext whatever." No specific penalty or punishment was imposed for a violation of this provision. On the 8th of June, 1872, it was enacted as follows, by section 179 of the act of that date (17 Stat. 302): "It shall not be lawful to convey by mail, nor to deposit in a post-office to be sent by mail, any letters or circulars concerning illegal lotteries, so called gift concerts, or other similar enterprises, offering prizes, or concerning schemes devised and intended to deceive and defraud the public, for the purpose of obtaining money under false pretences, and a penalty of not more than five hundred dollars, nor less than one hundred dollars, with costs of prosecution, is hereby imposed, upon conviction, in any federal court, of the violation of this section." It is to be noted, that the word "illegal" was not in the act of 1868, but was inserted in the act of 1872,

[1] [Reported by Hon. Samuel Blatchford, Circuit Judge, and here reprinted by permission.]

and continued in the Revised Statutes, and stricken out by the act of 1876.

Congress has, at various times, exercised the power of excluding from the mails various articles, capable of being conveyed in sealed letter envelopes, and of declaring it to be a punishable offence to deposit such articles in the mail. By section 148 of the act of June 8, 1872 (17 Stat. 302), it was enacted, that no obscene book, pamphlet, picture, print, or other publication of a vulgar or indecent character, shall be carried in the mail, and that any person who shall knowingly deposit for mail or for delivery any such obscene publication, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall, for every such offence, be fined not more than $500, or imprisoned not more than one year, or both, according to the circumstances and aggravation of the offence. By section 2 of the act of March 3, 1873 (17 Stat. 599), such inhibition was extended to every "obscene, lewd, or lascivious book, pamphlet, picture, paper, print, or other publication of an indecent character," and to every "article or thing designed or intended for the prevention of conception or procuring of abortion," and to every "article or thing intended or adapted for any indecent or immoral use or nature," and to every "written or printed card, circular, book, pamphlet, advertisement or notice of any kind, giving information, directly or indirectly, where, or how, or of whom, or by what means, either of the things before mentioned may be obtained or made;" and it was enacted, that any person who shall knowingly deposit, or cause to be deposited, for mail or delivery, any of said articles or things, or any notice or paper containing any advertisement relating to said articles or things, and any person who, in pursuance of any plan or scheme for disposing of any of said articles or things, shall take, or cause to be taken, from the mail, any such letter or package, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall, for every offence, be fined not less than $100, nor more than $5,000, or imprisoned at hard labor not less than one year, nor more than ten years, or both, in the discretion of the judge. These provisions were re-enacted in section 3893 of the Revised Statutes, and by section 1 of the act of July 12, 1876 (19 Stat. 90).

It is contended for the relator, that, if section 3894 can be construed to cover sealed letters, it is void, as not within any power conferred on congress by the constitution. The argument is, that, prior to the adoption of the constitution, which conferred on congress (article 1, § 8) the power "to establish post-offices and post-roads," the states and the people had enjoyed for many years the right of having conveyed by post all sealed letters, without reference to their contents, (unless such contents were liable to destroy, deface, or otherwise injure the contents of the mail-bag, or the persons of those engaged in the postal service, such as liquids, poisons, glass or explosive materials); and that such grant of power must be construed as not authorizing congress to exclude from the mail what was legitimate mail matter at the time of the adoption of the constitution. It is further said, that congress is bound to provide for carrying by mail everything which it prohibits from being carried otherwise than by mail; and that it has made it a punishable offence to carry letters for hire outside of the mail. It is further said, that the exercise of a power absolutely to prohibit the carrying in the mail of sealed letters containing information of a certain character, is not the exercise of a power which is either proper or necessary for carrying into execution the power of establishing post-offices and post-roads; that a power of exclusion, based upon the contents of sealed letters, is an arbitrary power, and may be extended to the exclusion of matters which depend on caprice or whim; and that the exclusion, in the present case, extends to matters which are lawful under the laws of some of the states of the Union, and to matters over which the federal government has no jurisdiction.

On the part of the United States it is contended, that it is within the constitutional power of congress to determine what shall be mail matter; and that, in pursuance of such power, it may lawfully exclude certain articles and things from the mail, although such articles and things are contained in sealed envelopes, and may declare it to be an offence to deposit such articles and things in the mail.

The meaning of the clause in the constitution (article 2, § 8), that congress shall have power "to make all laws which shall be necessary and proper to carry into execution the foregoing powers," has been settled by judicial construction. It does not mean that no law is authorized which is not indispensably necessary to give effect to a specified power. Congress possesses the choice of means, and is empowered to use any means which are in fact conducive to the exercise of a power granted by the constitution. U. S. v. Fisher, 2 Cranch [6 U. S.] 358, 396. The necessity spoken of in the clause is not to be understood as an absolute one, but congress is to be allowed that discretion with respect to the means by which the powers conferred on it are to be carried into execution, which will enable it to discharge the high duties assigned to it in the manner most beneficial to the people. If the end is legitimate and within the scope of the constitution, then all means which are appropriate, and are plainly adapted to that end, and are not prohibited, but consist with the letter and spirit of the constitution, are constitutional; and, if a particular law is not prohibited, and is really calculated to effect any of the objects entrusted to the government, an inquiry by

a court into the degree of its necessity, would be to pass the line which circumscribes the judicial department, and to tread on legislative ground. McCulloch v. Maryland, 4 Wheat. [17 U. S.] 421, 423; Legal Tender Cases, 12 Wall. [79 U. S.] 539.

The principal argument on the part of the relator is, that, inasmuch as the exclusive power is given to congress to establish post-offices and post-roads, it is not authorized to refuse to carry in the mail anything which was lawful mail matter at the time the constitution was adopted. This line of reasoning has been sought to be applied to other matters of federal cognizance, but has not met with favor. Thus, congress is authorized to establish uniform laws on the subject of bankruptcies throughout the United States; and it has been contended, in respect to laws on that subject which have been enacted by congress, that the power of congress is limited to the principle on which the English bankruptcy system was founded when the constitution was adopted, and cannot extend to authorizing voluntary bankruptcies, or to putting into involuntary bankruptcy others than traders, or to granting discharges without the consent of creditors, or to authorizing such compositions as are now provided for. But the view has prevailed, that congress, in passing laws on the subject of bankruptcies, is not restricted to laws with such scope only as the English bankruptcy laws had when the constitution was adopted, and that it is sufficient if the statute relates to the subject of bankruptcies. In re Klein, 1 How. [42 U. S.] 278; In re Silverman [Case No. 12,855]; U. S. v. Pusey [Id. 16,098]; In re Reiman [Cases Nos. 11,673, 11,675]. So, also, in respect to admiralty and maritime jurisdiction. The constitution declares (article 3, § 2) that the judicial power of the United States shall extend to all cases of admiralty and maritime jurisdiction. Prior to the decision in the case of The Genesee Chief v. Fitzhugh, 12 How. [53 U. S.] 443, it had always been understood and held, that, under the constitution, such jurisdiction was confined to tide-waters. In that case it was held, that, according to the true construction of the grant in the constitution, the admiralty jurisdiction extended to all public navigable waters, whether influenced by the tide or not. In England, in the text-writers and the decisions, the jurisdiction of the admiralty had always been spoken of as confined to tide-water, tide-water and navigable water being, in England, synonymous terms, and "tide-water" meaning, in England, nothing more than public rivers, as contradistinguished from private ones. At the time the constitution was adopted, and our courts of admiralty went into operation, the English definition of the jurisdiction, that it was confined to the ebb and flow of the tide, was adopted here, by the courts. But it afterwards became evident, that a definition which would limit public rivers in this country to tide-water rivers was utterly inadmissible, and it was held that the lakes and the waters connecting them were public waters and within the grant of admiralty and maritime jurisdiction in the constitution.

These illustrations serve to show, that, in construing a grant of power in the constitution, it is to be construed according to the fair and reasonable import of its terms, and its construction is not necessarily to be controlled by a reference to what existed when the constitution was adopted. A power to establish post-offices and post-roads is executed by the single act of making the establishment; but, under such power, it has always been held to be lawful to carry the mail along the post-road, from one post-office to another, and to punish those who steal letters from the post-office or rob the mail. So, under the power to establish post-offices and post-roads, it must be held, that congress has the right to prescribe what it will carry along the post-road as part of the mail, and what it will not carry, and to render its enactments efficient by punishing as an offence the violation of them. Whether certain things shall be excluded or not is a matter for the sound discretion of congress, and the discretion of a court cannot be substituted for the discretion of congress. The discretion of congress cannot be fettered by the consideration that a given thing was generally or even universally allowed to be carried in the mail when the constitution was adopted. To argue against the existence of such discretion because it is possible for congress to abuse its exercise, by excluding from the mail letters containing matter of a given character, through caprice or from partisan prejudice, is to argue against the existence of all discretion in congress in the exercise of any of the powers conferred on it. All such discretion may be abused, but the correction of the abuse must be left, under our form of government, to the expression of the will of the people by means of the elective franchise. The existence of the abuse is no argument against the existence of the power. Because an individual judge might not, if a legislator, have thought it wise to exclude from the mail a sealed letter containing matter of a given character, it is not for him, in the exercise of his judicial functions, to hold that such exclusion is not within the constitutional authority of congress. Whether the provisions of law which forbid and punish the carrying of letters outside of the mail will be construed as applying to letters which congress forbids to be carried in the mail, is a question which does not arise in this case.

It is, undoubtedly, not indispensably necessary to the exercise of the power of establishing post-offices and post-roads, that letters or circulars concerning lotteries should be excluded from the mails. But congress is not prohibited from excluding them, and, if congress regards it as most beneficial to

the people, and as calculated to effect in the most proper manner the objects of establishing post-offices and of carrying the mail, to exclude from the mail letters concerning lotteries, whether legal ones or illegal ones, it is for congress, and not for a court, to judge of the degree of necessity for such exclusion.

It is also contended, for the relator, that section 3894 of the Revised Statutes does not create any crime or offence against the United States. This is not so. The word "punishable," and the fact that the amount of the fine imposed is discretionary, indicate that a crime is intended and not a pecuniary penalty to be recovered by a civil action.

It is further urged, that, because the only punishment is a fine, and there can be no imprisonment except for the nonpayment of the fine, the relator cannot be arrested and deprived of his liberty in the first instance. But section 1014 of the Revised Statutes provides, that, for any crime or offence against the United States, the offender may be arrested, and imprisoned or bailed, for trial. If there be a crime or offence, an arrest for trial may be made, to be followed by imprisonment if no bail is taken, or by bail, even though the punishment, on conviction, be a fine alone. The arrest is made to secure a trial for the offence.

The writ is dismissed, and the relator is remanded to the custody of the marshal under the process of commitment by which he was held.

[NOTE. The relator was subsequently tried, convicted, and sentenced to pay a fine of $100 and costs, and to be imprisoned until paid. Upon his commitment he presented a petition in the supreme court asking for a writ of habeas corpus. The writ was denied (opinion by Mr. Justice Field). 96 U. S. 727. It was held that the right to designate what was carried through the mails necessarily involves the right to determine what shall be excluded. "The object of congress has not been to interfere with the freedom of the press, or with any other rights of the people, but to refuse its facilities for the distribution of matter deemed injurious to the public morals." While regulations excluding matter from the mail cannot be enforced in a way which permitted an examination into letters, without warrant issued upon oath, in a search for prohibited matter, they may be enforced in other ways.]

## Case No. 7,125.

In re JACKSON.

[2 Flip. 183; [1] 12 Am. Law Rev. 602.]

District Court, W. D. Michigan. May 22, 1878.

PERSON CHARGED WITH CRIME — DEMAND ON EXECUTIVE AUTHORITY OF ANOTHER STATE—WHAT IS REQUIRED TO BE SHOWN UNDER THIS PROVISION—CERTIFICATE OF DEMANDING GOVERNOR —WHAT IS PROOF.

1. The constitution provides that a person charged with crime, who shall flee from justice, and be found in another state, shall, on demand of the executive authority of the state from which he fled, be delivered up.

2. Before the executive of a state is authorized to issue his warrant to cause to be arrested and secured a person charged in another state with crime, it should be shown by evidence, making a prima facie case, that such person has fled from the demanding state—and this must be done by competent evidence. The fact of fleeing lies at the foundation of the right to issue a warrant of extradition.

3. The certificate of the governor, demanding such person upon the ground of his having fled from justice, is no evidence of the fact.

4. To prove that such a person has fled from justice so as to enable the governor to have his demand for extradition complied with, it is necessary to present with such demand a copy of an indictment, or an affidavit made before some magistrate charging the person demanded with having committed a crime, and this should be certified as authentic by the governor demanding such person.

Habeas corpus.

Names of counsel do not appear in the record.

WITHEY, District Judge. The constitutional provision that "a person charged in any state with crime, who shall flee from justice, and be found in another state, shall, on demand of the executive authority of the state from which he fled, be delivered up to be removed to the state having jurisdiction of the crime," is supplemented by an act of congress providing the mode of effecting the extradition. The act of 1793 (Rev. St. § 5278 [1 Stat. 302]), provides that "Whenever the executive authority of any state demands a person as a fugitive from justice, of the executive authority of a state to which such person has fled, and produces a copy of an indictment found, or an affidavit made before a magistrate, charging the person demanded with having committed a crime, certified as authentic by the governer of the state from whence the person so charged has fled, it shall be the duty of the executive of the state, to which such person has fled to cause him to be arrested and secured, and to cause notice of his arrest to be given to the executive authority of the state making such demand, or to the agent of such authority appointed to receive the fugitive, and to cause the fugitive to be delivered to such agent when he shall appear."

1. It must appear and be shown that the person has fled from the demanding state and from justice.

2. The person must be demanded by the governor of such other state, as a fugitive from justice.

3. A copy of indictment found, or affidavit, etc., charging the person with crime must be presented and be certified as authentic.

These things being made to appear to the executive of this state, it becomes his duty to cause the person to be arrested and secured, for the purposes of rendition. What

[1] [Reported by William Searcy Flippin, Esq., and here reprinted by permission.]

was shown to the executive of the state of Michigan upon the application for the warrant of extradition is not before the court.

Jackson has petitioned for a writ of habeas corpus upon the alleged ground that he has been arrested and is held in custody in violation of the constitution and laws of the United States, specifying several causes. Rev. St. § 753.

Every citizen deprived of his liberty is entitled, upon petition setting forth a sufficient showing, to the writ in order that the cause of his arrest and detention may be inquired into. To the writ Hollis C. Pinkham, having said Jackson in custody, has made return that he is the agent of the state of Massachusetts, named in the warrant of the executive of Michigan, and to him directed, a copy of which warrant is made part of the return; that by virtue thereof he, as such agent, has said Jackson in custody, and that the true cause of such imprisonment and detention of Jackson is set forth and fully appears in said warrant.

The right to hold the relator depends wholly upon the sufficiency of the warrant of extradition on its face, and nothing else, and with our present views we should not be disposed to look behind the warrant. The warrant recites proceedings anterior to its issuance, and upon which the executive based his action, with a view to show that prima facie the requirements of the act of congress had been complied with, which made it the duty of the governor to issue his warrant of extradition. Among other things the warrant recites that Pinkham is agent of the state of Massachusetts to receive and remove Jackson, the presentation of an authentic copy of an indictment charging Jackson with crime in that state, and a demand by the governor of that state on the executive of Michigan.

The warrant does not state that it has been satisfactorily shown to the governor of Michigan that Jackson has fled from the state of Massachusetts or from justice. What it recites on that subject is that the executive of Massachusetts "has by letters under his hand and made patent by the great seal of the state, represented to me that one Samuel D. Jackson has fled from justice in said state of Massachusetts." Is this sufficient on the face of the warrant to show prima facie that Jackson has fled from justice or from Massachusetts?

The constitution declares that "a person charged with crime, who shall flee from justice and be found in another state, shall on demand of the executive authority of the state from which he fled, be delivered up." Now it is manifest that before the executive of Michigan is authorized to issue his warrant to cause to be arrested and secured, a person charged in another state with crime, it should be shown by evidence making a prima facie case that such person has fled from the demanding state. This should be shown by competent evidence, as the fact of fleeing lies at the foundation of the right to issue a warrant of extradition. The certificate of the demanding governor is no evidence of the fact. Neither the act of congress nor any rule of evidence makes his certificate evidence of such fact. The act of congress makes it the duty of the executive of the state "to which such person has fled" to cause him to be arrested and secured. The mere fact that a citizen of Michigan has been charged with crime and indicted in another state, is not legally sufficient to authorize the arrest and extradition of such citizen. He may be charged with crime, and indicted in a state into which he has never entered or was never in, and from which, therefore, he never fled. It is as essential to the right of arrest and extradition to prove to the satisfaction of the governor of Michigan that the person charged with crime has fled from justice as to prove that he is charged with a crime in such other state. The latter is sufficiently proved in either of the two methods provided by the law of congress; by copy of an indictment, or by an affidavit made before some magistrate charging the person demanded with having committed a crime, certified as authentic by the demanding governor. No provision is made as to the method of proving that the person demanded as a fugitive has fled from justice. But when the constitution says a person charged with crime "who shall flee from justice" shall be delivered up, the converse is, that a person charged with crime who shall not have fled from justice shall not be delivered up to be removed. Hence it is essential that it be shown that the accused is a fugitive from justice, and when such person represents by petition to a court that he is unlawfully deprived of his liberty, if the court may act at all, it is a material inquiry whether the governor's warrant is prima facie sufficient to justify the arrest and removal.

The evidence that the person has fled from justice must not only be satisfactory to the governor, but must be legally sufficient before the executive authority can be exercised. He cannot act upon rumor nor upon the mere representation of a person, nor upon the demanding governor's certificate. It should be sworn evidence, such as will authorize a warrant of arrest in any other case.

Had the governor of Michigan stated in his warrant of arrest and removal that it has been satisfactorily shown to him that Jackson had fled from justice, or was a fugitive from justice from Massachusetts, such statement would be prima facie sufficient and possibly conclusive. There are judgments which seem well considered, holding the warrant would, if prima facie sufficient, be conclusive, and that courts will not go behind it in such cases. But it is manifest if the warrant fails to recite or state any conclusion of the executive issuing

it, that the person charged has fled, and recites only that the demanding governor has so represented, that the warrant is not legally sufficient to authorize an arrest and extradition. It is a common principle that a process of arrest must be legally sufficient on its face. We are called upon to say whether the warrant of extradition is prima facie sufficient under the constitution and laws of congress, and we are of opinion that it is not. The question is in principle within the case of Ex parte Thornton, 9 Tex. 635. The warrant recited that it had been represented and made known by the demanding governor of Arkansas to the governor of Texas, that Thornton stands charged with the crime of forgery and had fled from justice in the state of Arkansas and taken refuge in the state of Texas; it failed to state that such representation was accompanied by an authenticated copy of an indictment, etc., charging the relator with crime, and for that reason the warrant was held defective and insufficient. That it showed the governor of Texas had acted on the mere representation of the demanding governor. The exact point in the case at bar was not raised, but if such representation by the demanding governor is not sufficient for one purpose it is not as to any other material fact.

State v. Schlemn, 4 Har. [Del.] 577, has been cited. It was ruled in that case that "the warrant of the executive under the great seal of the state, reciting the facts necessary under the act of congress to give him jurisdiction of the case, would, at the hearing of the habeas corpus, be conclusive evidence of the existence of those facts, of his judgment in relation to them, and of a compliance with the constitution of the United States and of the act of congress."

This view has not always been acquiesced in by the courts; but assuming the judgment to be correct, "the facts necessary" to give the executive jurisdiction must be stated or recited in the warrant.

Several cases have been cited as controlling the case at bar, holding certain things only are essential to be shown to render it the duty of the executive on whom the demand is made to remand, and that inasmuch as evidence that the party has fled from justice is not stated to be one of the essential matters, therefore it is claimed not necessary either to show such fact or to recite in the warrant any conclusion by the executive as to the fact. Those cases were decided on the questions raised therein and are authority only as to those questions.

Courts not unfrequently lay down general rules not necessary to the decision of the case being considered, and which therefore often fail to stand the test when a different question, not anticipated or considered, is presented. The relator must be discharged. We do not suppose his discharge will have the necessary effect to defeat his extradition, if in fact he has fled from justice. Doubtless the executive, upon a renewed application, can reconsider the case and issue a second warrant, for which there is precedent. But certainly unless it is shown that the relator was in Massachusetts at or about the time when the offense is charged to have been committed and has since that time departed that state, there would be no just or legal ground for saying he had fled from justice in Massachusetts. The state of Massachusetts enacts that no person should be surrendered to the authority of another state unless there is sworn evidence "that the party charged is a fugitive from justice."

In Pennsylvania it is said the practice is to issue the warrant of surrender whenever a requisition is supported by indictment, etc., "and by an affidavit that the defendant has fled from such state into one where the warrant is demanded." 6 Pa. Law J. 412. See, also, Hurd, Hab. Corp. p. 606, where it is said "there must be an actual fleeing from justice, and of this the governor of the state of whom the demand is made should be satisfied." See, also Ex parte Smith [Case No. 12,968].

The importance of adhering to the views expressed could be made apparent by referring to many cases where indictments have been found in one state upon no evidence or upon wholly insufficient evidence, and where the indictment subserved no end of justice. We have in mind an indictment found in a neighboring state against a citizen of Michigan upon wholly insufficient evidence inspired by revenge and black-mailing purposes. It was said a late governor of Michigan inquired into the facts and refused to issue a warrant. We noticed in the papers of an adjoining state, not long since, that one or more indictments had been found by a grand jury without any evidence whatever, on request of a prosecuting officer.

Such cases, considering the facility with which indictments are sometimes obtained, afford sufficient justification not only to the executive of a state on whom a demand for extradition is made, but to the courts to see that the case falls within the laws.

## Case No. 7,126.

In re JACKSON.

[1 MacA. Pat. Cas. 485.]

Circuit Court, District of Columbia. Feb., 1857.

PATENT OFFICE APPEALS—AFFIDAVITS—PATENTABLE NOVELTY—BURDEN OF PROOF.

[1. Affidavits included among the papers sent up from the office, but which were not taken by authority of the commissioner or acted upon by him in forming his decision, cannot be considered by the judge.]

[2. The question whether changing the form of the glass lenses in vault illuminating sashes or frames from a double convex to an inverted pyramidal shape, for the purpose of a better diffusion of light, accomplishes any beneficial result, cannot be decided by a mere a priori argu-

ment; and, as the burden of proof is on the applicant, if he produces none, the application should be rejected.]

Appeal from the decision of the commissioner of patents refusing a patent to George R. Jackson, for a new and useful improvement on the divided or many-glass vault.

Z. C. Robbins, for appellant.

MORSELL, Circuit Judge. This application appears to have been rejected on the ground of analogous use or want of novelty. The specification as amended is in these words: "I claim nothing new in a divided frame or perforated plate or partitioned plane surface, provided with glasses or lenses to convey the light therethrough, irrespective of the form of glass employed, as such is common to window-sashes or frames, both square and round, and is in use for vault lights, as herein specified; but what I do claim as new and useful herein, and desire to secure by letters-patent, is providing the openings or spaces of the partitioned or perforated frame A, which forms the vault-light sash or cover, with a series of polygonal glasses B, of inverted pyramidal form at their lower ends A', for the purpose of a better lateral and wider or more general diffusion of the light on all sides of the cover within the surrounding closed space or dark body, and on or against the sides of the vault, as shown and described." In a further description of his device or contrivance, he says: "The hole or throat C of the vault has beveled or inclined sides, as clearly shown in Fig. 1, so as to allow the glasses to throw or spread the rays of light within the vault." In further explaining the nature of his invention, he says: "The glasses B, owing to the form of their bases or lower surfaces A', will throw or spread the light laterally, the angle of incidence being equal to the angle of refraction, while the rays of light in passing through the lenses b of the ordinary vault lights will cross at the focal points without being much spread or diffused within the vault, as previously stated." The commissioner supposed that there was nothing substantially new in the principles embraced within this specification, and referred to the patent of Thaddeus Hyatt of November 12th, 1845 [No. 4,266], reissued April 3d, 1855 [No. 303], as covering all that is embraced in the alleged invention. Hyatt's claim, as stated in his patent, appears to be "the combining with the covering-plate B B a series of glasses of any suitable form, or of lenses, such as are shown at A A, said combination being effected substantially in the manner described by the aid of laminal wood or of soft metal, as shown at C C, and the glasses or lenses being defended from injury by knobs or protuberances, as herein set forth." In his application for his reissued patent he very particularly describes his inventions, and of the accidental omission in his first application of several other modes of applying his said invention.

As relates to the particular point now under consideration, he says: "By my invention more light can be admitted, notwithstanding a portion of the area is occupied by the grating, for the reason that much thinner glass can be used, more readily disposed to spread the light to advantage, and, if desired, can be partially protected against scratching." Further on, he says: "In the section Fig. 2 the form which I have given to the glasses is that of lenses, and the manner of setting them in wood is fully represented. C C are two laminae of wood, in the upper of which the lenses are affixed in such manner as that their convex faces shall project above the surface of the iron casting; the lowermost piece bears on the edges of the lenses and keeps them in place," &c. * * * "I prefer to make my illuminating glasses circular and convex on one side, as represented; but they may be made square or in other forms and have their faces flat. I do not intend, therefore, to limit myself to any particular number or form of the glasses." Still further, he says: "I have herein specified three modes in which the principle or character of my invention may be applied; but it will be obvious that other modifications may be made coming within the range or scope of the said principle. What I claim as my invention, and desire to secure by letters-patent in covers for openings to vaults in floors, decks, &c., is making them of a metallic grating or perforated metallic plate with the apertures so small that persons or bodies passing over or falling on them may be entirely sustained by the metal, substantially as described; but this I only claim when the apertures are protected by glass, substantially as and for the purpose specified. And I also claim, in combination with the grating or perforated cover and glass fitted thereto, the knobs or protuberances on the upper surface of the grating or perforated plate for preventing the abrasion or scratching of the glass, substantially as specified."

The commissioner's decision is placed upon two grounds: First. That the application does not sufficiently show the fact that it is at most only an improvement upon an existing patent. Secondly. That the claim now presented seems to be founded on a mere change of form; that no advantage is likely to accrue from the use of this particular shape to the glasses, instead of those which had before been in use. He proceeds: "It is said in behalf of the applicant that his form of the vault glasses causes the rays of light to diverge, whereas the double convex glass causes those rays to converge. Practically, I do not perceive any material difference which this can make. As those glasses are usually constructed, or at least as they may readily be constructed, the point where the converging rays of light

meet will be within half an inch of the under surface of the glass; from that point as a centre they may be made to diverge at any angle that may be necessary. In the case now under consideration the centre of divergence is within the surface of the vault glass. Upon Hyatt's plan that centre is, say, half an inch below the lower surface. Starting from these two points, they may be made to proceed substantially parallel to each other, the one perhaps an inch above the other. I see no special advantage in this."

The reasons of appeal are, in substance—First. That the character of the invention covered by Hyatt's patents has been misrepresented (or misunderstood, I suppose, is meant). Second. That the commissioner erred in deciding that Jackson's specification does not sufficiently show the fact that his application was for an improvement upon an existing patent. Third. That the commissioner erred in suggesting that the glasses in Hyatt's vault covers may be readily constructed in such a manner that the point where the converging rays of light meet will be within half an inch of the under surface of the glass, there being no evidence to show that he ever did originate or use anything of the kind.

The commissioner in his report, among other things, further says: "It is well settled that a mere change of form is not the subject of a patent. I thought the applicant had shown nothing more than a mere change of form of what had been previously used, and decided accordingly." He further says: "Lenses had before been made of various shapes, among which were the plano-convex. It was very clear to my mind that the proposed convexity of the inferior surfaces of these lenses fairly included all the various degrees of convexity, allowing the patentee to fix upon that particular degree which experiment should show best adapted to his purpose. To make these inferior surfaces of a pyramidal form did not seem to me patentable, any more than it would now be patentable to construct them of a conical or any other figure in which they could not be shown to have been made previously. These all seemed to me mere changes of form." As to the argument used by the appellant to show the fact of the superiority of his glasses, founded upon the principle of a well-settled law of the refraction of light, the commissioner says: "That law is, that a ray of light, in passing from a rarer into a denser medium, inclines towards a perpendicular to the surface through which the ray so passes; and in passing from a denser into a rarer medium, always diverges from a perpendicular, not (as the applicant claims) by making the angle of incidence equal to the angle of refraction, but the degree of refraction depends upon the relative density of the two media, and upon other circumstances not necessary to be mentioned in this connection." He says, further, as to the assumption of the applicant that the convex lens causes the rays of light to converge, while the pyramidal form causes them to diverge, if this were true, he does not see how it helps the applicant's case, and shows the fallacy of the argument by diagrams of each of the glasses, showing that there would be no material advantage gained as to scattering the rays of light before they reached the floors of the vault. The commissioner proceeds: "But the applicant is wrong in his science. The pyramidal lens will not cause the refracted rays to diverge. They will converge as well as those which pass through the convex lens. The vertical rays in passing out from the inferior surface will be deflected from a perpendicular and made to take the directions m. p. and m. p. It is, however, well known that when the ray of light, as before said, reaches the inferior surface of the respective lenses it does not entirely pass through the lens, but a portion in each case will be reflected back into the interior of the lens until it strikes another exterior surface, when a portion passes through, being refracted from a perpendicular, and a portion is a second time reflected back, and so on continually. This principle will modify the question to some extent, so that we cannot pronounce a priori as to the final result. Experiment may show conclusions different from argument. In such cases it has always seemed to me that the burden of proof was upon the applicant, and there is not a particle of proof presented by him on that head in this case."

At the time and place appointed for the hearing of this cause, the commissioner laid before me all the original papers in the case, and his written report and the reasons of appeal, and the same was submitted on the written argument of the appellant. The principal question in the case is whether the peculiar device in the construction and form of the appellant's glass, and its operation in connection with the flaring sides of the neck of the vault, supposed to cause the rays of light to diverge at a point within the glass, is not an improved invention in illuminating vault covers. In his argument before me, the counsel for the appellant supposes the commissioner to have been deceived in the essential difference between his glass and that of Hyatt's. He contends that no case can be shown of a glass with a flat outer surface and a pointed, many-faced refracting inner surface, that has been used for any purpose whatever; that an inverted glass pyramid cannot be termed a lens. The rays of light, in passing through an inverted pyramid, (with the exception of the single ray which passes through its centre,) are reflected from the inclined surface against which they first strike to the opposite face of the pyramid, through which they pass obliquely outwards at any desired angle, the angles of said reflection and refraction depending upon the greater or less degree of inclination of

the sides of said inverted pyramid. The argument continues: "Now, a lens must have a curved surface which is the segment of a circle. A hemisphere, therefore, is a lens of the highest power than can be used by Mr. Hyatt. A lens of this proportion will only diverge the rays of light which pass through it near its periphery the distance of eighteen inches from a vertical line passing through its centre in descending the distance of eight feet. Therefore, if Hyatt should use this form of lens in his vault cover, and should taper the opening closed by said cover, you will perceive that the rays of light passing through the same would only be diverged eighteen inches beyond the periphery of the opening in the pavement in descending the distance of eight feet; consequently, the idea that the light can be as perfectly diffused throughout an apartment when it enters through a series of lenses set in a cover which closes an opening in its ceiling as when the light passes through a series of inverted glass pyramids set in said cover, is an egregious fallacy."

In considering this case, it will be important to ascertain whether the modus operandi is substantially the same in this as in Hyatt's glasses, or whether Jackson's device develops some new and useful principle. The object and purpose of both seem to be in the most perfect way to illuminate vaults by transparent glasses. The commissioner says that experiment may show conclusions different from argument. In such cases, the burden of proof is upon the applicant, and there was not a particle of proof presented by him on that head in this case. The commissioner, therefore, decided upon what he thought were the theoretical principles applicable thereto. The very learned views which he has taken on this branch of the subject would make it unnecessary for me to add anything; but it will appear from the part of the argument recited, made before me by the counsel for the appellant, that the position now taken is different, in some respects, from that which was made before the commissioner. He now argues that his glasses, from their peculiar form and shape, reflect all the rays of light except one passing through the centre to the opposite face of the pyramid, through which they pass obliquely outward to any angle, and that such his drawings represent. Whether such is the case or not, is far from appearing to me to be obvious. In opposition to this idea—giving his glass all the inclination he claims for it—I observe that the rays of light will fall at all angles on his glasses, a part of which will pass through by refraction without having been first reflected, and the remaining portion will also pass through after having been reflected. This, if correct, would in a considerable measure effect the consequence which has been deduced. It may also be remarked that this operation, in some, if not in the same, degree would be the case with Hyatt's glasses. It appears, also, from the letter of the appellant that such is the mode of operation claimed by himself. It is, however, certain that the form of the glass, in connection with the flaring sides of the throat of the vault, is new; and if its operation be to effect a divergency of the rays of light from a point within the glass, as appears from the specification and drawings, whether the mode of its passing out be by reflection or refraction, it would be the means, certainly, of causing greater light in the upper part of the vault; and as the many-sided form of the glass, according to the best information I have been able to obtain, is better for spreading the light laterally, the same effect would be produced in the lower part also. Hyatt's glass, where the point of divergency is at some distance below the glass, it would seem would be inferior, of course, and the difference, if very great, would be evidence of an improved invention. The ascertainment of this fact, therefore, is of importance. The rule of law applicable to this point may be found stated in Webst. Pat. subject-matter pp. 29, 30, thus: "Whenever the change and its consequences, taken together and viewed as a sum, are considerable, there must be a sufficiency of invention to support a patent." The commissioner very properly says: "We cannot pronounce a priori as to the final result. Experiment may show conclusions different from argument. In such cases it has always seemed to me that the burden of proof was upon the applicant; and there is not a particle of proof presented by him on that head in this case." I find among the papers sent up from the office a number of affidavits taken by the appellant in New York, made by merchants and mechanics upon the subject in this case of experiments made with the appellant's glass, compared with that of Hyatt's, from which it would appear that the result is much superior to Hyatt's in illuminating the vault. But these affidavits, not having been taken by the authority of the commissioner, and acted upon by him in forming his decision in this case, I can of course take no judicial notice of. In the absence of such experimental evidence, I think the principles stated as the grounds of his judgment on this point are correct. I hope, however, it may not be thought improper respectfully to suggest the propriety of the commissioner's giving his authority to suffer depositions to be regularly taken and laid before him for his further action as to the practical effect of the appellant's glass, and to give him notice to that effect. If this should be done, my opinion on the point first mentioned in the opinion of the commissioner is that the particular invention of the appellant ought to be distinctly stated in his specification, and that he can have a patent only for that; but this, I think, he has already done. I think the decision of the commissioner must be affirmed

## Case No. 7,127.

In re JACKSON et al.

[2 N. B. R. 508 (Quarto, 159).] [1]

District Court, North Carolina. 1869.[2]

BANKRUPTCY—HOMESTEAD—ACCOUNT OF ASSIGNEE.

1. Where bankrupts claimed under the state law, and the assignee attempted to set apart homesteads out of their real estate, and the creditors excepted to the assignee's report in that respect, *held*, that the bankrupts were not so entitled, and a failure or refusal by the assignee to sell the real estate in question for benefit of creditors makes him responsible.

2. Semble, that it was unnecessary to except to the report of the assignee. Exception to his account for omission to charge himself with value of said real estate would suffice. In re Farish [Case No. 4,647], affirmed.

I, W. A. Guthrie, one of the registers of said court of bankruptcy, do hereby certify that in the course of the proceedings in said cause before me, the following questions, pertinent to the same, arose upon exceptions, and were stated and agreed to by Thos. Chatterton & Co., Wesson & Huntling, George A. Davis & Co., and Haviland, Titus & Co., by their attorney, John W. Hinsdale.

First. Whether said bankrupts [Jackson & Pearce], or either of them, are entitled to a homestead under the bankrupt law [of 1867; 14 Stat. 517], they never having complied with any of the requirements of the act of 1858 and 1859, of the general assembly of North Carolina, entitled, "An act to establish a freehold homestead," ratified February 16th, 1859 [Laws N. C. 1858–59, p. 81].

Second. Whether the present is a proper time for creditors to except to the action of the assignee in setting apart, as exempted property, to the bankrupts any real property, the report of the assignee having been filed more than twenty days prior to the taking of exceptions thereto.

The creditors by their attorneys insisted that:

First. This assignment of homestead cannot be made under the head of "necessaries." See decision of Brooks, J., in Re Thornton [Case No. 13,994].

Second. The assignment can only be made under general clause forty-seven, section fourteen of the bankrupt act of 1867, of which the following is an extract: "Provided, however, that there shall be excepted from the operation of the provisions of this section, * * * * * And such other property not included in the foregoing exceptions as is exempted from levy and sale upon execution, or other process, or order of any court by the laws of the state in which the bankrupt has his domicil, at the time of the commencement of the proceedings in bankruptcy, to an amount not exceeding that allowed by such state exemption laws, in force in the year eighteen hundred and sixty-four." The only homestead exemption law of North Carolina in force in 1864 was the act of 1858 and 1859 (chapter 38) ratified 16th day of February, 1859. This act does not exempt a homestead per se, but prescribes certain forms by which a homestead may be exempted, the observances of which are conditions precedent to the exemption, and must be followed strictly. Section third of this act declares that the homestead or house so laid off, shall not be subject to execution, &c., plainly indicating that unless it shall be laid off according to the provisions of said act, it will remain subject to execution.

Third. The first section of the act requires that a petition be filed in the county court for the laying off of a homestead of a certain value, upon which three freeholders are to be appointed to lay off and allot the said homestead by metes and bounds, and return the same to the next term of said court. The second section directs that the return shall be recorded by the register of the county, and that certain public notice of the same shall be given by the clerk. The omission of a single one of the above requirements invalidates the exemption.

Fourth. It is against public policy to exempt a homestead without notice to the public of such exemption. It is also against public policy that a homestead be exempted which has not been ascertained, limited, and set apart beforehand. Creditors have a right to know what property is to be exempted; this cannot be known when it has never been ascertained or limited. Section third expressly provides that the homestead laid off according to the act shall not be subject to execution for any debts contracted or cause of action arising after the same is registered. The necessary inference from which is, that although the land might have been set apart, unless the return of the freeholders shall have been registered, it is still subject to levy and sale. It is not pretended that any one of the requirements of the act has been complied with. In re Farish [Case No. 4,647].

Fifth. The assignments of homesteads to the bankrupts by the assignee is void, ab initio, and may be treated as a nullity by the court. 1st. The assignee derives his title to all the land and other property not excepted by the bankrupt act, by virtue of the act itself—and the assignment made to him by the judge or register pursuant thereto. As to the real estate, the assignee takes an estate to himself and his heirs. 2d. All the real estate of the bankrupts in North Carolina passes to the assignee, except that of one who has had a homestead regularly allotted to him according to the act of '58–59. See In re Farish [supra]. 3d. The assignment of the assignee to the bankrupt of any real estate which had not been previously set apart to him under the act of '58–59 does not in any way divest the assignee of his title

[1] [Reprinted by permission.]

[2] [District not given.]

to the said land, and is a nullity, for—4th. The assignment by assignee to bankrupt is not a deed—being without a seal. 5th. It is without a consideration. 6th. It is fraudulent as to creditors, being a wrongful and unauthorized diminution of the assets in which they were interested.

Sixth. The present is a proper time to bring the matter before the court. If the assignment is void ab initio, the court can set it aside at any time upon proper application. Rule XIX., general orders in bankruptcy, requiring the assignee to make report to the court within twenty days after receiving the deed of assignment of the articles set off to the bankrupt by him according to the fourteenth section of the act, with the estimated value of each article, and giving the right to any creditor to take exceptions to the determination of the assignee within twenty days after the filing of the report, has application only when the property is such as it is within the discretion of the assignee to set apart, as household or kitchen furniture or other articles and necessaries. The twenty days' limitation does not apply where land is set apart. For the assignee cannot set apart land not previously exempted. The assignee is not required by rule XIX. to make a report of land set apart, as real estate is not comprehended under the term "articles" (see decision of Brooks, J., in Re Thornton [supra]), and consequently the creditor need not except to the determination of the assignee, within twenty days, as to land which is property, not included under the head of "Articles." The time in which to except to an exemption of real estate is therefore unlimited.

Seventh. The title to the real property in question having never passed out of the assignee, it is competent for the court to order its sale.

BROOKS, District Judge. The register should have furnished with his certificate a copy of the report of the assignee, making exemption in this case, or stated the substance of the same. He has, however, stated barely enough to enable us to infer that the said report contains anything in relation to a homestead. The register, at least, should have stated that the assignee attempted to exempt a homestead or refused to do so. Both questions propounded in this certificate have been fully answered by me in the opinion filed in the office of Mr. Register Shaffer in Re Farish [supra]. I doubt whether it is necessary to except to the report of an assignee, in which he attempts to exempt land at any time. I rather incline to the opinion that any such attempt is so entirely void, that it would be sufficient to hold the assignee responsible for the value of the land so attempted to be exempted, if creditors should except to his account for the omission to charge himself with such value. The assignee in this case will be held responsible if he refuses or fails to sell the real estate—attempted to be reserved to the bankrupt, or either of them; and accounts for the proceeds, in his general account of assets received.

## Case No. 7,128.

In re JACKSON.

[8 N. B. R. 424.] [1]

District Court, E. D. North Carolina. 1874.

BANKRUPTCY—DISCHARGE—EXAMINATION OF BANKRUPT—COSTS—WHO LIABLE.

1. Where, on the return of an order to show cause why a bankrupt should not be discharged, a creditor appeared and asked leave to examine the bankrupt, *held*, the creditor must pay the register the cost per folio of taking the deposition, but not his per diem, or fees for administering oath, or granting certificate.

2. The creditor must pay for such services performed by the register at his request, as are in addition to those that the register would have been compelled to perform had the creditor not appeared.

3. The bankrupt, or his estate, must pay for such part of the services as would have to be necessarily performed had the creditor not appeared.

4. The party examining has a right to have the examination reduced to writing, and sworn to and subscribed by the witness.

[In bankruptcy. In the matter of Alfred Jackson.]

I, Wm. A. Guthrie, one of the registers of said court in bankruptcy, do hereby certify that, in the course of the proceedings in said cause before me, the following questions, pertinent to the said proceedings, arose, and were stated and agreed to by the opposing parties, to wit: First. Whether the register in bankruptcy is required by law to take down, in writing, the examinations of a bankrupt at the meeting of creditors to show cause, upon being requested to do so by a creditor? Second. Whether, if it is necessary to reduce the examination to writing, the fees for the service should be paid by the bankrupt or the creditor? On the 6th day of February, 1873, before me at a meeting of creditors in the above matter to show cause, personally appeared John W. Hinsdale, Esq., attorney for James M. Gilvany, a creditor, and B. Fuller, Esq., attorney for the bankrupt, and also the bankrupt himself. J. W. Hinsdale then asked leave to examine the bankrupt under oath, which was granted, and the bankrupt duly sworn by the register. Thereupon the above questions were raised as to reducing the examinations to writing, J. W. Hinsdale insisting that it was the duty of the register to take down the examination in writing. The register was of the opinion: 1st. That the examination was not necessarily required to be reduced to writing, as in case of taking testimony. 2d. That if the creditor desired the examination to be taken down in writing he should pay for the serv-

[1] [Reprinted by permission.]

ices. And the said parties requested that the same should be certified to your honor for your opinion thereon. Meeting to show cause was then adjourned until March 14th, 1873.

J. W. Hinsdale, for creditor.
B. Fuller, for bankrupt.

BROOKS, District Judge. When the bankrupt appears before the register to take and subscribe the final oath, he may be examined by any creditor, or by the assignee in the interest of creditors, with the view to show that the requirements of the act, or some one of such requirements, have not been conformed to. To this end any creditor may question him particularly, whether he has done or permitted any of the acts forbidden, or if he has failed or omitted to perform any of the acts specified to be done in the twenty-ninth section of the act [of 1867 (14 Stat. 531)]. If the creditor making such examination desire the questions and answers, or the examination in any form, reduced to writing by the register, such creditor must pay to the register his fees per folio—as for other depositions. This would be a service rendered at such creditor's request, and would come under an express provision of the law.

In conducting such examination the register should use that discretion which a judge is often called upon to exercise. He should not so restrict the inquiries as to keep back any pertinent truth, nor allow a useless consumption of time, or the debtor to be merely harassed. The fees to be paid by the creditor would not embrace the per diem compensation to the register, or his fee for administering the oath, or the certificate referred, as these are required to be performed if no creditor appears.

JACKSON, The HALLIE. See Case No. 6,451.

JACKSON (ANDERSON v.). See Case No. 357.

## Case No. 7,129.

JACKSON v. BAKER.

[1 Wash. C. C. 394.] [1]

Circuit Court, D. Pennsylvania. April Term, 1806.

SIMPLE CONTRACT DEBT—EXTINGUISHMENT BY TAKING A BOND.

Where a commission merchant takes a bond for a simple contract debt due to him for goods sold on commission, and includes in the same instrument a debt due to himself, he makes himself answerable to his principal for the amount of the goods; as he has deprived him of the means of pursuing his claim against his debtor, by extinguishing the debt due by simple contract.

[Cited in Townes v. Birchett, 12 Leigh (Va.) 189; Rogers v. Bradford, 1 Pinney, 432; Goldsmith v. Manheim, 109 Mass. 190.]

The plaintiff consigned a number of boxes of hats, to the defendant, to sell. The only question in dispute was, as to one box, which the defendant sold on credit for 211 dollars; the amount of which, the defendant included in a bond, taken to himself, from the purchaser, for a much larger sum, part of which was due to the defendant personally.

Hallowell, for defendant, insisted, that the plaintiff ought not to recover the above sum of 211 dollars, as the defendant had not yet received it, from the person who purchased that box of hats; and that his taking a bond for the amount, made no difference. Price v. Ralson, 2 Dall. [2 U. S.] 60.

THE COURT stopped Meredith, who was for the plaintiff; and informed the jury, that the defendant ought either to have paid this money to the plaintiff, or enabled him to look to the purchaser. But that he had not done the former, and had disabled himself from doing the latter. That the plaintiff could not have sued the purchaser, because the simple contract debt was extinguished by the bond; and the defendant, having mixed the debt due to himself, and to the plaintiff, in one bond, taken in his own name, that the plaintiff had no remedy in the bond; and it does not appear, that any offer was made to assign the bond. If the plaintiff cannot recover from the defendant now, when can he recover? Sue him when he pleases, the defendant may keep him at arm's length, by saying, "I have not yet collected the money." Whereas, the debt having been originally due to the plaintiff, he might have sued for it at any time, in his own name, if he had not been prevented by the conduct of the defendant; who, if he is the cause why the plaintiff cannot sue the real debtor, makes himself the debtor. The jury found accordingly for the plaintiff.

[See Case No. 7,130, where a rule for a new trial was discharged.]

## Case No. 7,130.

JACKSON v. BAKER.

[1 Wash. C. C. 445.] [1]

Circuit Court, D. Pennsylvania. April Term, 1806.

SALES ON COMMISSION—SIMPLE CONTRACT DEBT—ACCEPTANCE OF BOND — ACTION BY PRINCIPAL FOR PROCEEDS OF SALE OF GOODS — PREVIOUS DEMAND OF BOND.

1. Where an agent, who has sold the goods of his principal, has taken a bond for the amount of the sale, in place of the simple contract debt originally contracted for the goods, and has in-

[1] [Originally published from the MSS. of Hon. Bushrod Washington, Associate Justice of the Supreme Court of the United States, under the supervision of Richard Peters, Jr., Esq.]

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cluded in the bond a debt due to him on his own account, by the debtor for the goods; a demand of the bond, before action brought against him by the principal, for the proceeds of the sale of the goods, is not necessary.

2. Aliter, if the bond had not been taken for any sum but that due for the goods of the principal.

Rule for new trial: 1st. Because the defendant was not answerable, until he should have received the money. [Bond v. Haas] 2 Dall. [2 U. S.] 134. 2d. That indebitatus assumpsit for money had and received, will not lie in this case.

BY THE COURT. On the first point, I repeated what was stated in the charge to the jury.[2] Secondly. That the conduct of the defendant, by extinguishing the original debt, and destroying all privity between the plaintiff, and the person to whom the goods were sold, is to be considered as a receiver of that debt, to the use of the plaintiff, as much so, as if he had released the debt. Rule discharged.

[See Case No. 7,129.]

## Case No. 7,131.

JACKSON v. BANK OF THE UNITED STATES et al.

[5 Cranch, C. C. 1.] [1]

Circuit Court, District of Columbia. Dec. 1, 1836.

JUDGMENT — LIEN ON SUBSEQUENTLY ACQUIRED LAND—REVIVAL—SCIRE FACIAS—NOTICE —RECORD—PURCHASER.

1. A judgment binds lands subsequently acquired.

2. If the judgment be revived between the original parties, it is not necessary to issue a scire facias against the terre-tenants who purchased more than a year after the judgment, and before its revival; nor is it necessary, during the life of the original defendant, to issue any scire facias to his vendees who purchased after the judgment; nor to bring in all the terre-tenants; nor is it material that the debtor was solvent for a long time after the judgment; for purchasers are bound to take notice of judgments on record.

3. It is no objection that the judgment is of twelve years' standing, if it has been revived within the twelve years, and twelve years have not elapsed since its revival.

4. It seems that a purchaser of lands bound by a judgment against the vendor, may move to quash the execution upon its return, or may have an audita querela.

Bill for injunction to stay execution levied upon land sold by the debtor after judgment, and while it was dead or sleeping. There was also a motion at law to quash the return of the fieri facias.

The bill states that the complainant [Rachel Jackson] is owner of lot No. 9, in Threlkeld's addition to Georgetown, on which the marshal recently levied a fieri facias, issued upon a judgment in favor of Jeremiah Bronaugh against John W. Bronaugh and Henry Suttle, rendered in June term, 1811, and recently entered for the use of the Bank of the United States. That on the 18th of September, 1816, the lot was conveyed to John W. Bronaugh. That on the 23d of January, 1819, he conveyed it to Thomas G. Moncure, in trust to pay certain judgments rendered against the said John W. Bronaugh at June term, 1818. That on the 14th of June, 1819, Joseph Jackson, the complainant's husband, purchased the lot at the sale under that deed of trust, and died seized on the 21st of May, 1831. That he purchased it bonâ fide, for valuable consideration, without notice of the judgment of 1811, and in full confidence that it was sold for the satisfaction, as far as it would go, of all the judgments which bound it. That it was devised, in fee, to the complainant, by her husband; that she immediately took possession of it, and has held it ever since. That on the 4th of August, 1831, the execution was levied upon it. That on the 15th of June, 1811, the judgment was rendered upon which the execution was issued for eighty-six dollars, with interest from the 24th of October, 1809, and costs, $18.69. That on the 20th of November, 1820, the said John W. Bronaugh was discharged under the insolvent act; and that Jeremiah Bronaugh, the plaintiff in that judgment, was appointed his trustee, and issued a scire facias against the said John W. Bronaugh and Henry Suttle, returnable to April term, 1821, to revive the judgment, and on the 9th of April, 1821, execution was thereupon awarded against them, but not issued; and no scire facias was issued against the said Joseph Jackson or any other terre-tenant; and the judgment was suffered again to expire; and that it thus remained until the 19th of March, 1829, when the said Jeremiah Bronaugh, having purchased other lots bound by the same judgment, and being indebted to the Bank of the United States, caused the judgment to be entered for the use of that bank, on the docket, but that it still remained dead and barred, and "above 12 years' standing," and no longer "good and pleadable," or capable of being given in evidence, until the 11th of February, 1830, when another scire facias to revive the judgment was issued against the said John W Bronaugh and Henry Suttle only, to show cause why execution should not issue against them, their lands, tenements, goods, and chattels; and neither the said Joseph Jackson, the tenant in possession, nor any other terre-tenant had notice. That

[2] The principal ground used on this argument for a new trial, was, that the plaintiff ought to have demanded the bond, before he brought the suit. The court, in answer to this, observed, that if a bond had been taken for this debt alone, this argument might have weight in it. But, as it was mixed with the defendant's money, such demand was unnecessary; because, the plaintiff could not have compelled the defendant to deliver the evidence of a debt due to the defendant, though in part it contained money due to the plaintiff.

[1] [Reported by Hon. William Cranch, Chief Judge.]

on the 6th of December, 1830, Suttle's death was suggested, and execution was awarded against John W Bronaugh alone, as survivor of the said Henry Suttle, and not of the lands of which he was seized at the time of the judgment, &c. That on the 1st of August, 1831, the first execution was issued on the original judgment commanding the debt and costs to be made "of the goods and chattels, lands and tenements of the said John W. Bronaugh," under which execution the complainant's lot was seized, &c. That Jackson's purchase under the deed of trust from John W. Bronaugh, was known to his brother, the said Jeremiah Bronaugh, at the time; and that he knew of that deed of trust and the sale under it. That it was irregular to issue the scire facias after the judgment had been standing more than eighteen years, without the previous leave of the court, or even after twelve years, without scire facias to the tenant in possession. That the said Jackson had a valid defence at law against the said judgment, which the said parties well knew, but of which he was deprived by their omission to make him a party to the scire facias; namely, the presumption of payment arising from all the circumstances of the case, as well as the statute of limitations. That there are other lands equally bound by the judgment namely, lots 100 and 110 in Threlkeld's addition to Georgetown, now owned by the Bank of the United States, &c., &c., stating many other lots. That the complainant is entitled to call the said Jeremiah Bronaugh to account for the property of John W. Bronaugh, assigned to him as trustee, under the insolvent act, before he can enforce his judgment against John W. Bronaugh, or his property in the hands of the complainant. The bill then prays that the levy of the fieri facias on the complainant's property may be quashed; or that the "fiat" may be opened, and the complainant and other terre-tenants made parties; or a perpetual injunction, that the account of Jeremiah Bronaugh, as trustee of J. W. Bronaugh, may be exhibited and settled; that the terre-tenants named in the bill may be brought in to contribute, and for general relief. An injunction was granted by the chief judge on the 26th of August, 1831. To this bill the Bank of the United States demurred for want of equity, and moved to dissolve the injunction. The cause was set for hearing upon this motion and upon the demurrer, at March term, 1836, and was heard in the absence of THRUSTON, Circuit Judge.

R. S. Coxe, for defendants, contended:

1st. That the judgment bound lands subsequently acquired.

2d. That in no case is it necessary to issue scire facias against terre-tenants in the lifetime of the original debtor. The purchasers whose lands are sold under the fieri facias, must look to the debtor for indemnity, and cannot compel other purchasers to contribute.

3d. That, therefore, it is immaterial whether there were other terre-tenants of other lands bound by the same judgment.

4th. That it was immaterial that the debtor remained solvent for a long time after the judgment. That fact did not invalidate the lien created by the judgment.

5th. That the plea of purchase, without notice of the judgment, cannot be sustained, because every purchaser is bound to take notice of a judgment of record.

6th. That the plea of limitation, as to the judgment being of "12 years' standing," could not be supported, for the judgment was revived before the twelve years had elapsed, and it is to be considered as a new judgment when revived, as this court decided in the case of Digges v. Eliason [Case No. 3,904], at November term, 1835, and twelve years had not elapsed since the revival, before the execution was issued.

Mr. Redin, contrà.

This case differs from that of Digges v. Eliason [supra]. There it was against the original parties; there was no terre-tenant. But here there is a terre-tenant; a bonâ fide purchaser without notice. This point was not decided by the court in that case. If the land be aliened after judgment, there must be a scire facias against the alienee before his land can be seized and sold under a fi. fa. Arnott v. Nicholls, 1 Har. & J. 471, 474. The note to that case, in p. 474, is not true to the extent stated. That case was not overruled by the case of McElderry v. Smith, in 2 Har. & J. 72. This latter case only decided that a scire facias to the terre-tenant is not necessary if the alienation is made pending the scire facias, to revive the judgment against the original debtor. In the present case, the revival in 1821 was a nullity, because not proceeded upon by execution. 6 Bac. Abr. (Wilson Ed.) 114; Vanderheyden v. Gardenier, 9 Johns. 79.

Jeremiah Bronaugh, the plaintiff in the judgment, was trustee of his brother, John W. Bronaugh, under the insolvent act, and had funds applicable to this debt, and there has been no settlement of his trusteeship. This court decided in Law's Case [Case No. 8,128] that the judgment creditor cannot enforce his judgment lien by execution, but may have priority of payment out of the proceeds. Jeremiah Bronaugh purchased some of the other lots equally liable to this judgment. All who purchased lands of the debtor after the judgment are equally liable, and must bear their proportion.

CRANCH, Chief Judge, said: I think the plaintiff at law, Jeremiah Bronaugh, cannot enforce his lien upon the land in the possession and seizin of Mrs. Jackson, by fieri facias, without a previous scire facias against her. The case of Arnott v. Nicholls, 1 Har. & J. 471, is not overruled by that of McElderry v. Smith, 2 Har. & J. 72, so far as the former case establishes the general

rule that the plaintiff shall not charge the lands in the seisin of a bonâ fide alienee, without scire facias. The case of McElderry v. Smith, establishes an exception only where the alienation is made pending the scire facias against the debtor to revive the judgment. In the case of Morton v. Croghan, 20 Johns. 120, it was held, that "where the judgment creditor proceeds to enforce his lien on the realty, and for that purpose it becomes necessary to revive the judgment, he is bound to make every person, having a fee in the land, a party to the proceeding." The equity of the case is, that Mrs. Jackson has no remedy at law; for, not being a party to the original judgment, she cannot have an audita querela, nor a motion to quash the return. I think, therefore, that the demurrer and motion should be overruled, and the injunction should stand until Mr. Bronaugh, or the bank, to whom it is said the judgment is assigned, shall, upon a scire facias against Mrs. Jackson, establish his or their right to levy the fieri facias on her land.

MORSELL, Circuit Judge, did not concur, and THRUSTON, Circuit Judge, not having heard the argument, the case was continued to this term for further argument.

The case was argued again on Tuesday and Wednesday, November 29 and 30, 1836.

R. S. Coxe, for defendant, contended that the only case in which, in England, a scire facias to terre-tenants is necessary, is where an elegit has been issued, and the debtor is returned, "dead;" and that no scire facias can be issued against the terre-tenants in the life of the debtor. Fitzh. Nat. Brev. p. 597, fol. 267, D; also, Id. p. 595, fol. 266, C, note a; 2 W. Saund. 6, note 1; 6 Com. Dig. 519; 2 Tidd, Prac. 1030; Jackson v. Shaffer, 11 Johns. 516; Young v. Taylor, 2 Bin. 218.

Mr. Redin, contrà, contended that the rule is, that where the land of a bonâ fide purchaser is to be charged by a judgment against the vendor, there must be a scire facias to such purchaser as terre-tenant, to come in and show cause why the plaintiff should not have execution of his lands; and he stated that such had always been his practice. In Arnott v. Nicholls, 1 Har. & J. 471, this rule is recognized by the court; and although the reporter has stated that it was overruled in McElderry v. Smith, 2 Har. & J. 72, yet in the latter case, the court only decided that a scire facias is not necessary when the alienation is made pending the scire facias to revive the judgment against the debtor. In Webster v. Saunders, 4 Har. & J. 287, the scire facias was against the terre-tenant, although it does not appear that either party to the original judgment was dead. So in Ridgely v. Gartrell, 3 Har. & McH. 449. In Hammond v. Gaither's Heir, 3 Har. & McH. 218, the devisee had aliened the land before the suit was brought, for valuable consideration, and that fact was pleaded; to which the plaintiff demurred. A doubt was suggested, whether the plaintiff could have execution against the land without a scire facias to the vendee; but the answer was, that the devise itself was void by the statute of devises, 3 & 4 W. & M. c. 14, as to creditors, so that there was no alienation of the land, but it descended to the heir. In 2 Harris' Entries, 763, is the form of a scire facias against the original defendant and his terre-tenants, in the lifetime of the original parties, and, in a note, he says, the scire facias ought to issue against the original defendant and terre-tenants jointly; and he cites Carth. 107, and 3 Coke, 11. So in Tully v. Marwood, Comb. 318, the court refused to render judgment against the conusees of a fine without scire facias to the terre-tenants. So also in Pembroke's Case, Skin. 273, 274. In Morton v. Croghan, 20 Johns. 106, Judge Spencer, in delivering the opinion of the court, after saying that the law applicable to the case was laid down with entire precision by Sergeant Williams in his 4th note to 2 Saund. 51, a, and referring to Harbert's Case, 3 Coke, 11, and several other cases, says: "I apprehend the law to be well settled, that since the statute of 2 Westm., where a judgment creditor proceeds to enforce his lien on the realty, and for that purpose it becomes necessary to revive the judgment, he is bound to make every person having a fee in the land a party to the proceeding." It is true that in a preceding case, Jackson v. Shaffer, 11 Johns. 516, cited by Mr. Coxe, Mr. Justice Van Ness, in delivering the opinion of the court, said, "It is in the case of the death of the original defendant that the terre-tenants are to be made parties, and not where the original defendant is living;" but he is not supported by the authorities which he cited, namely, Tidd, Prac. 1021, 1023; 2 Saund. 7, note 4. The case of Young v. Taylor, cited by Mr. Coxe from 2 Bin. 228, is not applicable to the present case, for the decision was upon the peculiar statute of Pennsylvania of 1705, making lands liable to be sold under a fieri facias.

Mr. Redin also contended that the decision of this court in Digges v. Eliason [supra], that a revival by scire facias makes it a new judgment, cannot apply to the case of a purchaser without notice; or if it can, the new judgment is subsequent to the purchase, and therefore cannot bind the land. That under the circumstances of the case there was a strong presumption that the judgment had been satisfied (Mayor of Kingston v. Horner, Cowp. 109; Phil. Ev. 114), and that Mrs. Jackson ought to have a day in court, either at law or in equity, to show it. She has a right to call upon the other terre-tenants for contribution. At the time of Jackson's purchase in 1819, there were lots in Georgetown unincumbered, and in possession of the debtor, and equity will restrain the plaintiff to unincumbered prop-

erty. Clowes v. Dickenson, 5 Johns. Ch. 236; Shepard v. Shepard, 7 Johns. Ch. 62.

R. S. Coxe, in reply, contended that, if the court should decide that a scire facias to the terre-tenant is necessary in the lifetime of the original debtor, it would disturb many titles in this county. If the proceeding is erroneous at law, the remedy is not in equity; but the party grieved by an execution may have an audita querela, although he was no party to the judgment. Michel v. Croft, Cro. Jac. 506. Harris, in a note to the precedent of a scire facias, vol. 2, p. 763, refers to Panton v. Terre-Tenants of Hall, in Carth. 107, and to Pembroke's Case, in Skin. 273, which was a scire facias to hear errors upon a common recovery, and therefore not applicable to the present case. In the case of Ridgely v. Gartrell, 3 Har. & J. 449, it does not appear that Burgess was alive at the time of the scire facias. The case of Arnott v. Nicholls, was upon a motion to quash, not a bill in equity, but it was reversed by the case of McElderry v. Smith. In the case of Tayloe v. Thompson's Lessee, 5 Pet. [30 U. S.] 358, the execution against Glover was levied on land sold by him after the judgment without making the terre-tenant a party by scire facias.

(Mr. Redin, there no scire facias had been necessary to revive the judgment.)

THE COURT dissolved the injunction for want of equity in the bill, saying that the complainant might move to quash the return of the fieri facias, or might have an audita querela. CRANCH, Chief Judge, gave no opinion, not having had time to consider the case since this argument, and not being satisfied that his former opinion was not correct.

In 2 Saund. 6, note 1, in the case of Jeffreson v. Morton, Sergeant Williams says, "Though the plaintiff should die within the year after judgment, his personal representative cannot have execution against the defendant without scire facias. Fitz. Ex'n, 243; 15 Hen. VII. 16b; 1 Rolle, Abr. 900, P, pl. 1, 2. Nor, in case of the death of the defendant, within that period, can the plaintiff have an elegit under the statute of 2 Westm. c. 18, against his lands in the hands of his heir or terre-tenants; or generally any other execution, without a scire facias against his heir and terre-tenants, or personal representatives"—"the rule being that where a new person, who was not party to a judgment or recognizance, derives a benefit by, or becomes chargeable to, the execution, there must be a scire facias to make him party to the judgment or recognizance. Penoyer v. Brace, 1 Ld. Raym. 245, 1 Salk. 319, 320; Reg. v. Ford, 2 Ld. Raym. 768; 2 Inst. 471." In Isams's Case, Moore, 367, it is said, "If two recover and one die, a scire facias shall issue against the defendant before execution shall issue, because he may have a release of the dead one to plead. Quod fuit concessum."

In Fitzh. Nat. Brev. p. 597, fol. 267, D, he says, "If a man be bound in a recognizance in chancery, or other court of record, and afterwards the recognizee dieth, his executors may sue forth an elegit to have execution of the lands of the recognizor; and if the sheriff return that the recognizor is dead, then the executors shall have a special scire facias against the heir of the recognizor, and against those who are tenants of the lands which he had at the day of the recognizance made;" and after giving the form of the writ, he says, "and thereby appeareth that if a man be bounden in a recognizance, &c., although the recognizee dieth, yet his executors cannot sue forth an elegit to have execution of the recognizance, within a year after the day of payment, without suing forth a scire facias against the recognizor, &c. But against the heir of the recognizor, or the terre-tenants, the recognizee or his executors ought to sue forth a scire facias &c., otherwise, if they be ousted, &c., by such execution of their lands, they shall have an assize of novel disseisin," &c. And in page 595, fol. 266, C, Fitzherbert says, "And after the year and day of payment passed of the recognizance, the recognizee ought for to sue a scire facias against the recognizor to show what he can say why the recognizee should not have execution; and if he be returned upon that writ warned by the sheriff, if he do not appear, or if he do appear and cannot say anything wherefore he should not have execution, then the recognizee may sue forth the writ of elegit to have execution of all his goods, and of the moiety of his lands; and if the sheriff return the elegit, that the recognizor hath made a feoffment in fee of part of the lands, to divers tenants, &c., and that he hath enfeoffed the king of the residue; then, upon that return, the lands, whereof the king is seized by that feoffment, are discharged. But he may sue a scire facias to warn the other tenants to appear at a certain day to show cause wherefore the said lands should not be delivered in execution; and if they be warned and do not appear, or if they come and cannot say any thing, &c., to bar the execution, then the recognizee shall have execution against them of those lands, by writ of elegit, &c. But he shall have the elegit before that he sueth the scire facias against those tenants." That is, as I understand him, the recognizee shall first have an elegit against the recognizor, and if the sheriff returns that the recognizor has aliened his lands to divers tenants, the recognizee may then have his scire facias against those tenants. Here, then, it appears that if the recognizor aliens his lands, the recognizee may have a scire facias against the terre-tenants of the recognizor in his lifetime. The rule to be derived from these two passages of Fitzherbert, is, that if the sheriff return upon the elegit or the levari facias, (which were the only writs of execu-

tion which could affect the lands in England,) that the debtor is dead, or has aliened his lands to divers tenants, the plaintiff must sue a scire facias to the terre-tenants before he can take their lands in execution; and there is as much reason for a scire facias against the terre-tenants in case of alienation, as there is in case of the death of the debtor. They are "not parties to the judgment;" they are "new persons," (according to the rule laid down by Sergeant Williams in his note to Saunders,) "chargeable to the execution," and, therefore, must have a day in court to show cause why their lands should not be liable to the execution. There are many things which may be pleaded in bar of the execution, such as satisfaction; or a release; or that the debtor was not seized on the day of the judgment, nor at any time since; or that there are other tenants not named; or non-tenure of the freehold, &c. Nothing can be more just than that they should have an opportunity to show these things, which they cannot do without a scire facias. Being no parties to the record, they have no standing in court; nor can they, of right, make any motion in the cause. A fieri facias is said to be not a returnable writ; it gives no day in court, even to the parties.

Lord Coke, in 2 Inst. 471, says, "One that is not a party to the record, recognizance, fine, or judgment, as the heir, executor, or administrator, though they be privy, and though it be within the year, shall have no writ of execution, but are to have a scire facias to enable themselves to the suit; and so likewise of the tenant's or defendant's part, for the alteration of the person altereth the process; otherwise it is of a statute staple or merchant, &c., because the process is given by other acts of parliament." By the statutes which gave the statute merchant, the statute staple, and the recognizance in the nature of a statute staple, the creditor may, at any time after forfeiture, without scire facias, have execution of the lands which his debtor had at the time of the recognizance acknowledged, in whose hands soever they may have come, either by feoffment or otherwise; but the provisions of those statutes do not apply to recognizances and judgments at law, taken or rendered in the court of chancery or in the courts of common law. See 11 Eliz. I. St. De Mercatoribus; 13 Eliz. I. St. 3; 27 Eliz. III. St. 2, c. 9, and 23 Hen. VIII. c. 6. In 4 Inst. 396, Lord Coke says, "Upon the equal construction of these words" (medietatem terrae suae) "if the conusor be seized of black-acre, white-acre, and green-acre, and after judgment given or recognizance knowledged, enfeoffeth A. of white-acre, and B. of black-acre, and retains green-acre to himself; in this case he" (the conusee) "may have the moiety of green-acre, and never intermeddle with the rest; but he cannot extend the moiety of the acre in the hand of any purchaser, except he extend also a moiety of all the land subject to the judgment or recognizance; and if he omit any, the extent shall be avoided in an audita querela; for where it is said in books that each purchaser shall have contribution in that case, the meaning is that such extent of part shall be avoided, and all the land extended and equally charged." "So likewise, if there be two or more conusors, the lands of them all must be extended; and hereof you may read at large in Harbert's Case; all which are just and righteous expositions." In Harbert's Case, 3 Coke, 12, b, he says, the heir, in general, shall not have contribution against the terre-tenants, because he is "pars patris," "alter ipse;" but if the land descend to two parceners, "who make partition in this case, if one only be charged, she shall have contribution; for as one purchaser shall have contribution against another, and against the heir of the conusor also, so one heir shall have contribution against another, for they are "in aequali jure." And in folio 14, a, he says, "For in executions which concern the realty, and charge the lands, the sheriff cannot do execution on the land of one only." And again in folio 14, b, he says, "So it appears by these cases, that when land shall be charged by any lien, the charge ought to be equal, and one alone shall not bear all the burden; and the law, in this point, is founded on great equity. But in all the cases at the common law, if the party who should be charged (as the heir, &c.,) had aliened the land bonâ fide, before any action brought, the land, in the hands of the purchaser, was not subject to any charge or execution, and this was the reason why the judges and sages of the law, in the construction of the said statutes, although the lands of purchasers, after the judgment recognizance or statute were subject to execution, yet gave greater privileges to them than to the conusor himself, or to his heir. And the reason why the conusor himself, at the will of the conusee may be only charged, is because he himself is the person who was the debtor, and who was bound, and therefore he is subject to execution; and it is but reasonable that he may be only charged; the same law for his heir, for the reasons before rehearsed. Note, reader; when it is said before, and often in our books, that if one purchaser be only extended for the whole debt, that he shall have contribution; it is not thereby intended that the others shall give or allow to him any thing by way of contribution; but it ought to be intended that the party who is only extended for the whole, may, by audita querela, or scire facias, as the case requires, defeat the execution, and thereby he shall be restored to all the mean profits, and compel the conusee to sue execution of the whole land; so in this manner every one shall be contributory—hoc est, the land of every terre-tenant

shall be equally extended." So also in the case of Mallory v. Jennings, 2 And. 160, Case No. 88, "it was said by all the judges in bank, that the execution did not bind the vendee, because the writ is not brought against the tenant of the land; and always, if the inheritance or freehold is to be charged by any suit, or by reason of any writ, the tenant of the freehold ought to be the party against whom the writ should be brought; which is not so in this case; for the vendee upon the matter, is tenant of the freehold, and not Sewster," who was the debtor, and who sold and conveyed the land after the recognizance acknowledged. Tidd, Prac. 1021, says, "it being a maxim, that a person not a party to the record, cannot be benefited or charged with the process without a scire facias." So in Penoyer v. Brace, 1 Salk. 319, 320, it is said, "where any new person is either to be better or worse by the execution, there must be a scire facias, (because he is a stranger,) to make him party to the judgment." Id. 1 Ld. Raym. 244. And in Morton v. Croghan, Mr. Justice Spencer, in delivering the opinion of the court, said: "I apprehend the law to be well settled, since the statute of 2 Westm. that where a judgment creditor proceeds to enforce his lien on the realty, and for that purpose it becomes necessary to revive the judgment, he is bound to make every person having a fee in the land, a party to the proceeding; and in this case the judgment against Croghan being a lien on the real estate in the hands of the terre-tenants, the plaintiffs are required by law to make all the terre-tenants parties to the scire facias, to the end that they may be jointly contributory to the satisfaction and payment of the judgment. This has been shown to be the established principle under the statute of 2 Westm., which gave the creditor his remedy by the execution of elegit, under which he held a moiety of the debtor's lands, until he was satisfied his debt and damages. At common law the fieri facias went merely against the goods and chattels of the debtor; such an execution, therefore, related merely to the personalty; but under our statute, which subjects the lands and tenements of the debtor to be sold absolutely, for the satisfaction of the debt, it is ordinarily an execution partly in the personalty and partly in the realty; and in the present instance is entirely in the realty; for the goods and chattels of the terre-tenants cannot be affected by the judgment, or any execution under it. The same principle which required the elegit to issue against all who ought to bear the burden, applies with much more force to the fieri facias against the lands; for in the former case they were not to be sold; but a moiety only held until the debt was paid; whereas in the latter case they are liable to be taken away forever from the debtor. Besides, the principle is most just and equitable. If the creditor, having the lien, can select a few, as in this case, to bear the whole burden, they may probably be crushed by its weight; but if he must render them all contributory, the individual burden may be borne without ruin." In Webster v. Saunders, 4 Har. & J. 287, and in Ridgely v. Gartrell, it does not appear that the original parties, or any of them, were dead. This shows what the practice has been in Maryland; and in Arnott v. Nicholls, 1 Har. & J. 471, 473, the court said, "The terre-tenant should have an opportunity to relieve himself, and to bring in the other terre-tenants. Hence the necessity of a scire facias, that all the terre-tenants may be warned." But that case, it is contended, was overruled by McElderry v. Smith, 2 Har. & J. 72. The latter case, however, does not profess to overrule the former, and it only decides that a scire facias to the vendee is not necessary where the alienation is made pending the scire facias against the vendor to revive the judgment. In the case of Jackson v. Shaffer, 11 Johns. 516, Mr. Justice Van Ness, who delivered the opinion of the court, said: "It was not necessary to make the terre-tenants parties. Here the plaintiff, having laid by for more than a year and a day after he had obtained judgment, it became necessary to revive it against the original defendants, which, when revived, was of the same force and effect, and, of course, liable to be proceeded upon, in the same manner as if the time within which an execution might have been legally issued, had not been suffered to elapse. It is in the case of the death of the original defendant, that the terre-tenants are to be made parties; and not where the original defendant is living. Tidd, Prac. 1021, 1023; 2 Saund. 7, note 4." This is the only case in which it has been said that the terre-tenants are not to be cited in the lifetime of the debtor; and the authorities cited (Tidd and Williams' Saunders) do not support the decision. They only say that, in case of the death of the debtor, the terre-tenants may, and must, be cited before the plaintiff can have execution of their lands. But according to the law as laid down in the authorities before cited, namely, Fitzh. Nat. Brev. p. 595, fol. 266, E; 2 Saund. 6, note 1; 2 Inst. 471, 4 Inst. 396; Harbert's Case, 3 Coke, 12, b, and 14, a and b; Mallory v. Jennings, 2 And. 160; Tidd, Prac. 1021; Penoyer v. Brace, 1 Salk. 319, 320; Morton v. Croghan, 20 Johns. 121; Webster v. Saunders, 4 Har. & J. 287; Ridgely v. Gartrell, 3 Har. & McH. 449; Arnott v. Nicholls, 1 Har. & J. 471; 2 Har. Ent. 763; it seems to me that the doctrine so distinctly laid down by Mr. Justice Spencer in Morton v. Croghan, cannot be now controverted, that "where a judgment creditor proceeds to enforce his lien on the realty, and for that purpose it becomes necessary to revive the judgment, he is bound to make every person, having a fee in the land, a party to the proceeding." See, also, Co. Ent. fol. 623a; Dyer, 331, b, pl. 23.

and Id. 332a, pl. 24. I think the complainant was entitled to relief, but whether by bill in equity I doubt.

No relief, however, appears to have been given.

JACKSON (BARKER v.). See Case No. 989.

## Case No. 7,132.

JACKSON et al. v. BRECK et al.

[11 O. G. 112.]

Circuit Court, D. Massachusetts. Nov. 29, 1876.

PATENTS—IMPROVEMENT IN MOWING MACHINES.

[Reissued letters patent No. 3,460, granted unto Silas E. and Morgan P. Jackson for "improvement in mowing machines," is a valid patent, and said persons were the first inventors of such improvement.]

[This was a bill in equity by Silas E. Jackson and others against Charles H. B. Breck and others, for the infringement of reissued letters patent No. 3,460, granted to Silas E. and M. P. Jackson, May 25, 1869, the original letters patent No. 18,975 having been granted December 29, 1857.]

SHEPLEY, Circuit Judge. This cause came on to be heard at the October term of this court, A. D. 1875, upon the pleadings and proofs, and was argued by counsel for the respective parties, and was continued under advisement from term to term to this present term, and now, upon consideration thereof, to wit, November 29, 1876, it is ordered, adjudged, and decreed as follows, viz., that the letters patent referred to in the complainants' bill, being reissued letters patent of the United States, No. 3,460, granted unto Silas E. and Morgan P. Jackson, May 25, 1869, for "improvement in mowing-machines," and extended seven years from December 29, 1871, is a good and valid patent; and that the said Silas E. and Morgan P. Jackson were the original and first inventors of the improvement described and claimed therein; and that the said defendants have infringed the second and fourth claims of the said patent, and upon the exclusive rights of the complainants under the same. And it is further ordered, adjudged, and decreed that the complainants recover of the defendants the profits which they have received or made, or which have accrued to them from said infringement by the manufacture, use, or sale of the improvement described, and secured by said letters patent, at any and all times since May 25, 1869, and also, in addition thereto, the damages which the complainants have sustained thereby. And it is further ordered, adjudged, and decreed that it be referred to John G. Stetson, a master of this court, to take and report to the court an account of the profits which the said defendants have received, or which have arisen or accrued to them from the manufacture, use, or sale of said improvement, or from said infringement, and to ascertain and report the damages which the complainants have sustained thereby since the said 25th day of May, 1869. And it is further ordered, adjudged, and decreed that a perpetual injunction be issued against the defendants according to the prayer of the bill. And it is further ordered, adjudged, and decreed that the complainants recover of the defendants their costs of suit.

Two suits brought in the Rhode Island district by same complainant, one against Sprague Mowing Machine Co. et al., the other against William E. Barrett et al. [unreported], were decided in the same way as the above case.

JACKSON (BROWN v.). See Cases Nos. 2,015 and 2,016.

JACKSON (BUCKINGHAM v.). See Case No. 2,090.

## Case No. 7,133.

JACKSON v. BURKE.

[1 Dill. 311.] [1]

Circuit Court, D. Nebraska. 1871.

STATUTE OF LIMITATIONS.

As to the right of creditor to apply payments so as to prevent the bar of the statute of limitations.

Action brought in 1870, on eleven promissory notes, made in Illinois, by the defendant to plaintiff. These notes became due in 1857. Each of the notes contains an indorsement of a partial payment under the date of April 1, 1866, a date within five years of the time when the suit was commenced. Plea: statute of limitations. The statute of Nebraska provides that actions on notes shall be barred in five years, but adds, that "when any part of the principal or interest shall have been paid * * an action may be brought in such case within five years after such payment." On the trial the evidence tended to show that the notes in suit were made for the same consideration, and at the same time. In 1866, it appeared that the defendant went to Illinois, and left with the plaintiff, a resident of that state, a draft on St. Louis for $475; with directions to pay $240 to two other persons, and to apply the balance on the debt or notes due the plaintiff. The plaintiff paid those two persons as directed, and then indorsed the balance in equal amounts upon the eleven notes in suit, and these are the endorsements now appearing thereon. The defendant then lived in a different state from the plaintiff, and there was no evidence that the endorsements he thus made were communicated to the defendant. At the time of such payment all the notes were due and drew interest alike, and none were barred by

[1] [Reported by Hon. John F. Dillon, Circuit Judge, and here reprinted by permission.]

the laws of Illinois. On these facts, the plaintiff contended that he was authorized to make the application of the payment to all the different notes; while the defendant maintained that it was the duty of the plaintiff, or of the court, to make the application so as to pay as far as it would do so, certain notes in full (which would fully pay two of them), and leave the others wholly unpaid, and therefore barred.

Baldwin & O'Brien, for plaintiff.
Mr. Redick, for defendant.

Before DILLON, Circuit Judge, and DUNDY, District Judge.

DILLON, Circuit Judge. The notes in suit are not barred. The evidence tends to show that the defendant, the debtor, expressly directed the payment to be applied and indorsed on all the notes equally, without discrimination. But if this was not his direction, there was no restriction shown on the creditor's right to make the application, and under the circumstances and in the absence of such restriction, the creditor had the right to make the application in the manner he did, namely, equally to all the notes, and thus protect all from the bar of the statute. Judgment for plaintiff.

JACKSON (CROCKER v.). See Case No. 3,398.

## Case No. 7,134.

JACKSON v. EASTON et al.

[7 Ben. 191.] [1]

District Court, S. D. New York. March, 1874.

LIABILITY OF CHARTERER FOR LOSS OF VESSEL—TUG AND TOW—AGENT.

1. E. & M. hired a canal-boat for $5 a day, they to pay for the towing of the boat. They employed a tug, which was apparently a proper one, to tow the canal-boat, and while she was being so towed, the boiler of the tug exploded, and the canal-boat was so injured that she sank. Her owner, J., filed a libel against E. & M. to recover the damages: *Held*, that, under the contract between J. and E. & M., the latter did not become insurers of the canal-boat.

2. E. & M. were no more than agents of J. to hire an apparently proper tug, and having done so, they were not liable for the damages in question.

[Cited in The Doris Eckhoff, 1 C. C. A. 494, 50 Fed. 138.]

[This was a libel in admiralty by John Jackson against James T. Easton and James McMahon to recover damages for injuries to libellant's canal boat.]

W. R. Beebe, for libellant.
W. W. Goodrich, for respondents.

BLATCHFORD, District Judge. The libel alleges that the libellant, owning a canal boat, let her to the respondents for a voyage from New York to Baltimore and back, they to pay him for her use five dollars per day for every day she should be so employed, and to furnish, at their own expense, the necessary and proper steam or motive power to tow the boat safely and properly during the voyage; that the respondents sent a tug then owned or employed by them to take the boat in tow; that the tug did so; that, while the boat was in tow of the tug, the boiler of the tug exploded, and caused the boat to sink; and that the explosion and consequent damage were the result of the negligence of the servants of the respondents on board of, or belonging to, the tug, or of the defective character of the boiler. The libellant claims to recover from the respondents the damages he has sustained.

The answer admits that the respondents chartered the boat for the voyage, and were to pay for her use five dollars per day, and were also to pay for towing, but denies that they agreed, or were bound, to obtain any steam or motive power, or to tow the boat safely and properly. It admits that they sent the tug to tow the boat, but denies that the tug was owned by them, or was employed by them, except in the ordinary method of employing a steamtug for that purpose, for compensation, and alleges that the persons on board of the tug, and having charge thereof, were not under the control of, or in the employment of, the respondents, and that they did not interfere with the tug or her master or crew in the discharge of the service of towing the boat, and had no right to do so.

The foregoing allegations of the answer are fully established by the evidence. There is no evidence of any contract by the respondents to tow the boat safely, or even to return her in safety. The contract was to pay the libellant five dollars a day for the use of his boat, and to pay for the towing of her. She could not move without being towed. The respondents were to pay the expense of towing, so that the libellant should have his five dollars per day clear, as they were also to pay tolls, and the expense of wharfage and of loading and unloading cargo. The respondents did not become insurers of the vessel. Grant, even, that they would be liable to the libellant for the negligence of the agents and servants of the respondents in dealing with the boat, it is not shown that the respondents owned or controlled the tug, or her movements, or had any control over the officers and crew of the tug in their management of the tug. They merely hired the tug to tow the boat. The tug was apparently a proper vessel, one usually employed for such service, and her owners, officers and crew cannot be regarded as the servants or employees of the respondents, in any sense which can make the respondents liable to the libellant for the negligence of such owners, officers or crew. On the

[1] [Reported by Robert D. Benedict, Esq., and B. Lincoln Benedict, Esq., and here reprinted by permission.]

facts of the case, the respondents were no more than agents of the libellant to hire an apparently proper tug to tow the boat. If the tug towing this boat in the employment of the respondents, or even of the libellant himself, had negligently caused the boat to collide with another vessel, certainly the tug and her owners, and not either the respondents or the libellant, would be liable for the damage to the other vessel. Story, Ag. § 453a; Sproul v. Hemmingway, 14 Pick. 1; Sturgis v. Boyer, 24 How. [65 U. S.] 110, 124. No contract, either express or implied, of the respondents with the libellant has been broken by the former, and the libel must be dismissed, with costs.

JACKSON (ETHRIDGE v.). See Case No. 4,541.

## Case No. 7,135.

JACKSON v. The FLETA.

[1 La. Law J. 173.]

Circuit Court, D. Louisiana. May, 1876.

SEAMEN — COMPENSATION FOR INJURIES — RIGHT TO, IN ABSENCE OF NEGLIGENCE OF OWNER OR MASTER.

Compensation allowed the steward of a boat for injuries received, not caused by negligence on the part of the masters or owners.

[Appeal from the district court of the United States for the district of Louisiana.]

[This was a libel for wages by Peter Jackson against the steamboat Fleta.]

Richard De Gray, for libellant.

Singleton & Browne and John P. Smith, for claimant.

BRADLEY, Circuit Justice. The libellant in this case was steward on board the Fleta, at the wages, as he says, and as I think was the fact, of sixty dollars a month. He was injured on the 15th of February, 1875, while at work on the boat, in pursuance of his duty, by the fall of a boat which was swung on a pair of derricks, and was being hoisted to the hurricane roof. The boat fell in consequence of one of the derricks breaking, Jackson was considerably injured; his arm was badly broken; and he was bruised on the head, and struck senseless for the moment. He received temporary medical care, under the direction of the master of the boat, until she returned to New Orleans, a few days afterwards. He then went to the hospital, where he remained a little over two months. On the 24th of April he was so far recovered as to take his place again on the boat, carrying his arm in a sling. He remained on the Fleta till she lay up for repairs in July, when he was discharged. His arm remained useless for some time afterwards, though he was able to attend to the ordinary duties of his employment when not requiring the use of both his hands.

Several questions are raised in the case, by the master and claimants of the vessel, which it is necessary to dispose of.

First, it is alleged that Jackson had no business where he was at the time, having been ordered to do the work he was at before, which was the taking up of canvass off of the quarter-guards, to enable the carpenter to repair the deck. This objection has no merit whatever. The work was to be done; he was in the line of his duty at the time; and the captain made no objection to the time of doing the work. It was work that he had ordered Jackson to do; and the latter fully explains the cause of its having been delayed.

Secondly, it is alleged that the mate called out to him and warned him and two boys near him to get away from under the boat. There is conflicting evidence on this subject, The cook, who stood within three feet of Jackson, says he heard no such warning, but would have done so had it been given; and Jackson himself says he heard none, and, if any had been given, he could not have heard it from the noise of the machinery immediately under him, he being bent down to the deck, resting on one knee, prying up the tacks which held the canvass. I do not think he would have been so utterly foolish as to have remained in the danger had he been warned of it. He says he did not known that they were hoisting in the boat. I think there is nothing in this objection.

The next question is whether the accident was occasioned by any negligence on the part of the master or owners of the vessel. The libellant alleges that the derrick which gave way was rotten, and several witnesses say it was rotten; but the captain, mate, and others deny this, and say that it was sound. To explain how it was that a sound derrick over four inches in diameter could have broken into three pieces whilst hoisting a small skiff not over twelve or thirteen feet long, the mate and others say that the steamer struck the bank accidentally just at that time, and the blow caused the skiff to swing violently, and thus to break the derrick by the suddenness of the jerk. As there is so much conflict of evidence on this subject, I do not know that I can hold the master or owners of the steamer liable on the ground of negligence. But there is a rule of maritime law which entitles a seaman, who has received injuries, or has become sick in the course of his employment, to be allowed wages and to be taken care of until he is cured. The limits of this right have not been clearly defined in respect to internal navigation. But I think the libellant is clearly entitled to the benefit of this rule for the time that he was in the hospital and until he was re-employed on the steamer.

I have read with care the opinion of Judge Durell in the case of Jones v. The Tidal

Wave [unreported], and two other cases, in which he discusses this subject; and I am inclined to adopt his views in relation thereto. A decree will be entered that the libellant recover his wages at the rate of sixty dollars per month from the time when he was taken to the hospital after his injury until his re-engagement as steward on the Fleta, the 24th of April, 1875, and also a reasonable sum for board and medical attendance during that time; and it will be referred to Mr. M. M. Cohen, a commissioner, to ascertain the amount due libellant for such wages, board, and medical attendance.

JACKSON (HOPKINS v.). See Case No. 6,687.

JACKSON (HUNT v.). See Case No. 6,893.

## Case No. 7,136.

JACKSON v. The JULIA SMITH.

[Newb. 61;[1] 6 McLean, 484.]

District Court, D. Michigan. June, 1855.

POSSESSION OF VESSEL UNDER CONTRACT TO PURCHASE — REFUSAL TO FULFILL — WHETHER POSSESSION IS TORTIOUS—CONTRACT OF AFFREIGHTMENT MADE BY SUCH PERSON — WHO CAN BIND SHIP — LIABILITY OF CARRIER FOR LOSS OF GOODS—MEASURE OF DAMAGES.

1. Where a person in possession of a vessel under a contract for the purchase, refuses to fulfill his contract, it does not render his possession tortious, especially as to third parties.

[Cited in The John Farron, Case No. 7,341.]

2. A contract of affreightment, made by the person in possession, or his agent, under such circumstances, is binding upon the vessel. Ostensible ownership and present possession and authority are sufficient to give one a right to bind the ship.

[Cited in The James H. Prentice, 36 Fed. 781.]

3. Where goods regularly shipped are not delivered according to the contract, the carrier is bound to make good to the shipper the actual loss he has sustained. The measure of damages here, is the value of the cargo when shipped, with interest.

4. The court refuse to give the libelant his expenses coming to Detroit to hunt up the property, or expenses incurred in defending the suit in court.

The cases were heard upon the following agreement as to the facts:

"For the purposes of the trial of the above entitled causes, the following facts are hereby admitted: 1st. On and previous to the 9th of September, 1853, Geo. S. Lester was the owner of said schooner, and on said day entered into the contract in writing, mentioned in the fourth article of the answer, with James Reeve, for the sale and purchase of said vessel. 2d. Upon the execution of said contract Reeve took the exclusive possession of the schooner, and from that time until the 11th of June, 1854, continued in the possession of said schooner, and used and employed her in the carrying trade between different ports in the province of Canada: 3d. On or about the 8th of June, 1854, said schooner was at the port of Chatham, in Canada, and John Bruce was acting and in control of her as captain, under appointment of Reeve. On said day the libelants [Henry C. Jackson, Henry Waters intervening], being then and there the owners of the property mentioned respectively in their libels, under a contract of affreightment entered into with said Reeve & Bruce, shipped on board of said schooner in good order, the said property, to be by said schooner carried to and delivered at the port of Garden Island, for a certain hire and compensation then agreed on. 4th. On said last day, the schooner with said property on board, sailed from Chatham for Garden Island, and on the 11th of June, while passing through Detroit river, said George S. Lester claiming to be her owner, and entitled to possession, caused her to be taken by force, and against the will of said Bruce and his crew, and caused her to be carried into Detroit. On the 12th of June, said Lester caused the sheriff of Wayne county to take said schooner upon a writ of replevin, issued out of the circuit court, in favor of said Lester vs. said Reeve, after which said Lester gave bond, pursuant to the statute, and received from the sheriff possession of said schooner, and retained the same until he sold and delivered it to the respondents, as stated in the answer. 5th. On the —— day of ——, 1854, a libel was filed against said property on behalf of the United States, in this court. The libelants in this cause appeared and defended. All the papers filed in, and the records of which libel suit, are hereby admitted, so far as competent, to be in evidence in these causes. 6th. Pending the said libel suit on behalf of the United States, Waters bonded his staves, but the tobacco of Jackson was sold, and bid in by Lester, for the sum of $——, of which amount $53.41 was paid over to said Jackson. 7th. That directly after Lester had received possession of the vessel from the sheriff, the captain abandoned the vessel and cargo, and the libelants having no agent in Detroit, Lester caused said cargo to be unloaded and the tobacco and oats to be placed in warehouse for the owners: that on said sale of said tobacco, Lester bid it in for the owners, but not at their request, and has held the same subject to the order of Jackson, after he shall repay said Lester the sum paid by him at said sale.

"Lothrop & Duffield, for Lester.

"Wilcox & Gray, for libelants."

"It is further admitted for the purposes of the argument in this case, that before the said contract of affreightment was made, the said Lester offered to execute to Reeve a bill of sale of the vessel, if Reeve would execute the mortgage on the same, for the balance of the purchase money, as stipulated in the said contract of sale, or if Reeve would pay the

[1] [Reported by John S. Newberry, Esq.]

balance of the purchase money of the vessel; but Reeve refused to do either of said things: that Lester then demanded possession of the vessel, which Reeve refused to give.

"Wilcox & Gray, proctors for libelants."

The 4th article of answers is as follows: "That on the 9th of September, 1853, G. S. Lester, the owner of said schooner entered into a contract with James Reeve, for the sale of said schooner, at $2,500: that R. was to have immediate possession: that L. was to execute to R. on the 14th of September, a bill of sale, and on same day R. was to execute to L. a mortgage to secure the balance unpaid."

Wilcox & Gray, for libelants.
Lothrop & Duffield, for respondents.

WILKINS, District Judge. The libel and evidence in this case exhibit a contract of affreightment, entered into at Chatham, Canada West, between the libelant and the vessel, on the 8th of June, 1854, for the transportation and delivery of a quantity of tobacco at Garden Island, near the port of Kingston. It is further shown that the tobacco was received, and the vessel departed upon her voyage, but that the tobacco was not transported and delivered according to contract, having been intercepted at Detroit, in consequence of the same having been landed at that place, in supposed violation of the revenue laws of the United States. Damages are claimed for the breach of the contract. It is in proof that on the 9th day of September, 1853, one George S. Lester was the owner of the vessel, and under a contract of sale with James Reeve, then gave him the exclusive possession of the same, and that this exclusive possession continued in the said Reeve up to the 11th of June, 1854, three days subsequent to the contract of affreightment made in the libelant. It is also in proof, that while this possession continued, the vessel was employed by the said Reeve, in the coasting trade between different ports in the province of Canada, and that at the time the contract of affreightment was entered into, she was under the command and control of one John Bruce, as master, holding his appointment from the said Reeve: that the said tobacco was then shipped at the port of Chatham, the said Bruce as master, contracting for a stipulated compensation to deliver the same in good order at her port of destination.

It is conceded that the contract of sale between Lester & Reeve, was broken by the latter, in his not making the payments promised [that in order to avoid being seized by Lester under process, the vessel kept in foreign waters],[2] and that, on the 11th of June, 1854, the former sued out from the appropriate court of the state of Michigan, a writ of replevin, by which the vessel [with her cargo, while lying at anchor in the British channel of the Detroit river],[2] was seized by the sheriff of Wayne county, and forcibly, and against the will of her master, brought into the port of Detroit; and as averred in the answer, was sold and delivered to the respondent: that on receiving possession of the said vessel from the sheriff, her cargo was discharged by Lester, and the tobacco being seized by the revenue officers, was deposited in a warehouse for, and afterwards sold and bought in by Lester, subject to the order of the owners: that the libelant had no agent in Detroit, and Lester now holds the same for the libelant, to be delivered on being reimbursed his expenses. There is no proof that any public notice was given by Lester, of his claim to the vessel, or that Reeve had not kept his engagement, from September, 1853, till June, 1854, or that the libelant was made aware of the true character of the vessel, when he shipped his property at Chatham. Before and at the time of the contract of sale, she was called the Julia Smith; when in the possession of Reeve, she was called the Mazeppa.

Under the circumstances disclosed, the possession of Reeve was not tortious. His refusal to carry out his contract, did not affect the character of his possession, especially as to third parties. He took possession with Lester's consent, and was, therefore, clothed with power to use her as long as that possession continued. Bruce was her master, and at the time of the contract of affreightment rightfully represented and could bind the vessel. It is not the case of a vessel stolen, or where possession has been fraudulently obtained. The vessel was delivered to Reeve at the time of the contract by Lester, and the former's failure to fulfill his engagement, did not make his possession unlawful ab initio, or vitiate the contracts of the vessel while this possession continued. Such a rule would be destructive of maritime confidence, and place the shipper in a foreign port on inquiry as to title, which is not necessary, and would in most cases be impracticable. Ostensible ownership, and present possession and authority, are sufficient to bind the vessel. The rights of seamen and shippers cannot be affected by the unknown private contracts of other parties claiming interest in, or controverting her title.

The contract being binding on the vessel, and the goods never having been delivered, the only question remaining is, as to the measure of damages. When goods regularly shipped, are not delivered according to contract, the carrier is bound to make good to the shipper the actual loss which he has sustained; or, in other words, to place him in as good a position as he was when the contract was made. In determining this question, the court has nothing to do with the antecedent or subsequent relation which Lester

[2] [From 6 McLean, 484.]

[2] [From 6 McLean, 484.]

bore to the vessel. The contract was with the Julia Smith, then known as the Mazeppa. Whether or not Lester had a right to retake the vessel, and that the damages accrued in the exercise of his legal right, is not the question before the court. The vessel being held responsible, must make good to the libelant his loss, consequent on the failure to perform the contract. This clearly embraces the value of the tobacco shipped at the port of Chatham at the time of the contract; crediting the vessel with the amount received, as the proceeds of sale. Lester is not entitled to be reimbursed for his expenses by the libelant. The captain of the vessel was the agent of the shipper, and the property having passed from his custody, his agency ceased, but that of Lester was not created. I cannot assent to go beyond this principle, in the assessment of damages. Having determined that the vessel is responsible for the contract, and consequently responsible for its non-fulfillment, and, therefore, bound to make good the loss, I am not satisfied that the expenses of the libelant in visiting Detroit in search of his property, and defending the same in court, can be properly embraced within the measure of damages. The market value of the tobacco at Chatham, when shipped, with interest on such value, is making good the loss on the contract, and as against the vessel. The landing of the goods without manifest, was not the act of the vessel, and if it was, it should not enhance the damages in this suit. The leading question here is, the injury consequent on the non-delivery at Garden Island; and as there is no proof that libelants have suffered in that regard, the measure must be the value irrespective of incidents independent of the contract. The tobacco has not been delivered, has not been received, neither is there proof that in consequence of its non-arrival the libelant has been put to other loss. Decree therefore for the value of the tobacco at Chatham, on the 8th of June, 1854, interest on such value, and the clerk to take the necessary proof, crediting the respondent with any money paid on account.

As to Waters, the intervening libelant, decree for the value of the staves, with interest from the same date. His bonding the articles after seizure and defending the same in court, does not come within my view of the vessel's making the shipper good, under the contract of affreightment. Either the present owner or Reeve, may be answerable in another form of action for this claim; but as it was not necessary for Waters either to bond or to prosecute, in order to secure his rights under the contract, I cannot decree his expenses as a legitimate part of the damages in this case.

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JACKSON (KEENE v.). See Case No. 7,643.

JACKSON (KELLEY v.). See Case No. 7,659.

## Case No. 7,137.

JACKSON et al. v. The KINNIE.

[8 Am. Law Reg. (N. S.) 470.]

District Court, D. New Jersey. 1869.

ACTIONS IN REM AGAINST VESSELS — STATE STATUTES—CONSTITUTIONALITY.

1. State statutes authorizing actions in rem against vessels for causes cognizable in admiralty are statutes conferring admiralty jurisdiction, and are therefore unconstitutional.

2. A lien created by a state law against a domestic vessel for supplies furnished in a home port cannot be recognized or enforced in a court of admiralty.

This was a libel [by Alonzo Jackson and others against the steam propeller Kinnie] for seamen's wages. The Hoboken Coal Company, intervening for their own interest, contested the libellants' demands, and claimed to have a lien upon the vessel for supplies furnished. A reference was made to a commissioner to hear the proofs and allegations of the parties.

Hamilton and Wallis, for libellants.
Jonathan Dixon, Jr., for intervenors.

FIELD, District Judge. It is insisted by the libellants that the Hoboken Coal Company have no standing in court, that they have no lien upon this vessel which a court of admiralty will recognise or enforce, and that consequently they have no right to intervene for their own interest, or to contest the claims of the libellants. It is admitted that the propeller was owned in this state, that the intervenors were a corporation organized and carrying on business in this state, and that the supplies were furnished in this state. It is a case then of a domestic vessel, and supplies furnished in a home port. By the maritime law of continental Europe, no distinction is made between the cases of domestic and foreign ships, nor between supplies furnished in a home port and abroad. But by the maritime law of England and of this country, supplies furnished to a domestic vessel, in a home port, are presumed to be furnished on the personal credit of the owner or master, and do not create a lien, which can be enforced in a court of admiralty by proceedings in rem. But the intervenors claim to have a lien upon this vessel, in virtue of an act of the legislature of New Jersey, approved March 20th, 1857. The title of the act is, "An act for the collection of demands against ships, steamboats, and other vessels" [Laws N. J. 1857, p. 382]. 4 Nixon's Dig. 576. The act, with the supplement thereto, approved March 18th, 1858 [Laws N. J. 1858, p. 464], provides that, "Whenever a debt amounting to $50 or upwards shall be contracted by the master, owner, agent, or consignees of any ship or vessel within this state, for either of the following purposes, namely, on account of any work done, or materials or articles furnished in this state, for or towards the build-

ing, repairing, fitting, furnishing, or equipping such ship or vessel, or for wharfage and the expenses of keeping such vessel in port, including the expense incurred in employing persons to watch her, such debt shall be a lien upon such ship or vessel, her tackle, apparel, and furniture, and shall be preferred to all other liens thereon, except mariners' wages." The act then proceeds to make provision for enforcing this lien. Application may be made to a supreme court commissioner for a warrant, to be directed to the sheriff, or a constable, or in their absence, to any coroner of the county, commanding him to attach, seize, and safely keep said ship or vessel to answer such lien. Notice of the issuing of the warrant is to be published in a newspaper printed in the county, and unless the lien is satisfied, or the warrant discharged, the ship or vessel is to be sold, and the proceeds to be distributed in the manner directed by the act. Is this act of the legislature of New Jersey, so far as it authorizes proceedings in rem against a ship or vessel, in violation of the constitution of the United States; and is the lien thereby attempted to be created one which a court of admiralty will recognise or enforce? The constitution declares, in the 2d section of the 3d article, among other things, that the judicial power of the United States shall extend "to all cases of admiralty and maritime jurisdiction." And the 9th section of the judiciary act of 1789 [1 Stat. 76] provides that the district courts of the United States shall have exclusive original jurisdiction of all civil causes of admiralty and maritime jurisdiction; saving to suitors, in all cases, the right of a common-law remedy, where the common law is competent to give it. It will be seen, therefore, that the jurisdiction of the district courts of the United States, over all admiralty and maritime causes, is exclusive, with the exception of such concurrent remedy as is given by the common law. There is eminent wisdom and propriety in giving to the courts of the United States exclusive jurisdiction in such cases. "The most bigoted idolizers of state authority," said the Federalist, "have not thus far shown a disposition to deny the national judiciary the cognisance of maritime causes. These so generally depend on the law of nations, and so commonly affect the rights of foreigners, that they fall within the considerations which are relative to the public peace." The Federalist, No. 80, p. 591.

"The admiralty jurisdiction," says Judge Story, "naturally connects itself, on the one hand, with our diplomatic relations and duties to foreign nations and their subjects; and, on the other hand, with the great interests of navigation and commerce, foreign and domestic. There is, then, a peculiar wisdom in giving to the national government a jurisdiction of this sort, which cannot be wielded except for the general good, and which multiplies the securities for the public peace abroad, and gives to commerce and navigation the most encouraging support at home." 3 Story, Comm. 533. That these cases, intended to be provided for by the act under consideration, are maritime contracts, and therefore "civil causes of admiralty and maritime jurisdiction," there can be no doubt. De Lovio v. Boit [Case No. 3,776]; Dunl. Adm. Prac. 43. They are therefore within the exclusive jurisdiction of the district courts of the United States. This question has been repeatedly decided by the supreme court of the United States. Statutes, similar in every respect to that of New Jersey, have been enacted in most of the states; and whenever they have come under the consideration of the supreme court they have been held to be unconstitutional and void, so far at least as they authorize proceedings in rem. Thus, in the case of The Moses Taylor, 4 Wall. [71 U. S.] 411, it was held that a statute of California, which authorizes actions in rem against vessels for causes of action cognizable in admiralty, to that extent attempts to invest her courts with admiralty jurisdiction, and is therefore unconstitutional. "The action against the steamer by name," say the court, "authorized by the statute of California, is a proceeding in the nature and with the incidents of a suit in admiralty. The distinguishing and characteristic feature of such suit is that the vessel or thing proceeded against is itself seized and impleaded as the defendant, and is judged and sentenced accordingly. It is this dominion of the suit in admiralty over the vessel or thing itself which gives to the title made under its decrees validity against all the world." And in the case of The Hine v. Trevor, 4 Wall. [71 U. S.] 555, where a similar statute of Iowa was under consideration, the court held that state statutes, which attempt to confer upon state courts a remedy for marine torts and marine contracts by proceedings strictly in rem, are void. In this case it was contended that the statute of Iowa might fairly be construed as coming within the clause of the 9th section of the judiciary act, which "saves to suitors, in all cases, the right of a common-law remedy, where the common law is competent to give it." But the court say the remedy prescribed by the statute is in no sense a common-law remedy. It is a remedy partaking of all the essential features of an admiralty proceeding in rem. The statute provides that the vessel may be sued and made defendant without any proceeding against the owners, or even mentioning their names. And while the proceeding differs thus from a common-law remedy, it is also essentially different from what are called suits by attachment. In these cases there is a suit against a personal defendant by name, but because of inability to serve process on him, on account of nonresidence or some other reason, the suit is

commenced by a writ, directing the proper officer to attach sufficient property of the defendant to answer any judgment which may be rendered against him. But, besides these decisions of the supreme court of the United States, we have a recent decision of the court of appeals of New York, in a case involving the constitutionality of a statute of that state, precisely similar to our own, from which in fact our statute was copied. It is the case of Bird v. The Josephine [39 N. Y. 19]. The court decided that the proceeding authorized by their statute against a vessel by name was a proceeding in the nature, and with all the incidents, of a suit in admiralty; that such a proceeding could not be sustained; and that the statute itself was unconstitutional. It is pleasant to find this concert and harmony of opinion between the court of appeals of the state of New York and the supreme court of the United States, upon a question of conflicting jurisdiction between state and federal courts. But it is insisted, that although the statute of New Jersey may be unconstitutional, so far as it authorizes proceedings in rem against a ship or vessel for a breach of maritime contract, yet it nevertheless creates a lien upon such vessel, which a court of admiralty will recognise and enforce. There was a time when such an argument might have been successfully urged. The effect of such statutes undoubtedly is, to assimilate our law to that of continental Europe, or, in the language of Chief Justice Watkins, in Merrick v. Avery, 14 Ark. 378, "to extend the privilege of the maritime lien upon sea-going vessels for their building or equipment in domestic ports, just as that lien existed in Europe, and would have prevailed in England, and so descended to this country, but for the jealousy of the common law." And it is undoubtedly true, that, for many years, the supreme court of the United States, by repeated decisions, held, that these liens thus created by local law might be enforced by proceedings in rem in the district court; and that in 1844 they adopted a rule, expressly authorizing the process in rem where the party was entitled to a lien under the local or state law. But it is equally true that this rule has since been abrogated, and that such liens can no longer be enforced by proceedings in rem in the district court.

Chief Justice Taney, in delivering the opinion of the supreme court in the case of The St. Lawrence, 1 Black [66 U. S.] 522, gave a brief but lucid history of the legislation of congress upon this subject, of the course of decisions by the supreme court, and of the reasons which led to the adoption of the 12th rule, in the first instance, and its subsequent repeal. After the passage of the judiciary act of 1789 [1 Stat. 93], congress passed the act prescribing the process to be used in the different courts it had established; and by that act directed that, in the courts of admiralty and maritime jurisdiction, the forms and modes of proceedings should be according to the course of the civil law. This act left no discretionary power in the admiralty courts, or in the supreme court, in relation to the modes and forms of proceeding. But this difficulty was soon seen and removed, and by the act of May 8th, 1792 [1 Stat. 275], these forms and modes of proceeding are to be according to the principles, rules, and usages which belong to courts of admiralty, as contradistinguished from courts of common law; and are made subject to such alterations and additions as the respective courts might deem expedient, "or to such regulations as the supreme court of the United States shall think proper from time to time by rule to prescribe to any circuit or district court concerning the same." And the power here conferred upon the supreme court was afterwards enlarged by the act of August 23d, 1842 [5 Stat. 516]. It was under the authority of these two acts that the 12th rule, to which we have referred, was made in 1844, and afterwards altered by the rule adopted in December, 1858. In the meantime, by a series of decisions in the supreme court, it had been held, that where liens had been given by the local law, the party was entitled to proceed in rem in the admiralty court to enforce it. The General Smith, 4 Wheat. [17 U. S.] 438; Peyrouse v. Howard, 7 Pet. [32 U. S.] 324; The New Orleans v. Phoebus, 11 Pet. [36 U. S.] 175. When the rules, then, were framed in 1844, in conformity to the practice thus adopted, it was provided by the 12th rule, that: "In all suits by material-men for supplies or repairs or other necessaries for a foreign ship, or for a ship in a foreign port, the libellant may proceed against the ship and freight in rem, or against the master, or the owner alone, in personam; and the like proceedings in rem shall apply to cases of domestic ships, where, by the local law, a lien is given to material-men for supplies, repairs, or other necessaries." Now, there would have been no embarrassing difficulties in thus using the ordinary process, in rem, of the civil law, if the state law had given the lien in general terms, without specific conditions or limitations inconsistent with the rules and principles which governed implied maritime liens. On the contrary, such process would have promoted the convenience and facilities of trade and navigation by the promptness of its proceedings, and would have disposed at once of the whole controversy, without subjecting the party to the costs and delay of a proceeding in the chancery or common-law courts of the state to obtain the benefit of his lien. In many of the states, however, it was soon discovered that these laws, by which liens were thus created, did not harmonize with the principles and rules of the maritime code. Certain conditions and limitations were annexed to them; and these conditions and limitations differed in different states; and it became manifest

that if the process in rem was to be used wherever the local law gave the lien, it would subject the admiralty court to the necessity of examining and expounding the varying laws of every state, and of carrying them into execution, and that, too, in controversies where the existence of the lien was denied, and the right depended altogether on a disputed construction of a state statute, or, indeed, in some cases of conflicting claims, under statutes of different states, when the vessel had formerly belonged to the port of another state, and had become subject to a lien by the state law. Such duties and powers are appropriate to the courts of the state which created the lien, but are entirely alien to the purposes for which the admiralty power was created, and form no part of the code of laws which it was designed to administer. The proceeding, therefore, in rem, upon the ground that the local law gave the lien where none was given by the maritime code, was found upon experience to be inapplicable to our own mixed form of government. It was found to be inconvenient in most cases and absolutely impracticable in others; and the rule which sanctioned it was therefore repealed. The repealing rule provides that, "In all suits by material-men for supplies or repairs or other necessaries for a foreign ship, or for a ship in a foreign port, the libellant may proceed against the ship and freight in rem, or against the master or owner alone in personam. And the like proceedings in personam, but not in rem, shall apply to cases of domestic ships for supplies, repairs, or other necessaries." The consequence is, that in cases of domestic ships, for supplies furnished at a home port, a lien created by a state law is one which a court of admiralty can neither recognize nor enforce. Hence it follows, that in this case, the Hoboken Coal Company have no standing in court, have no right to intervene, either for their own interest or to contest the claims of the libellants, and that the testimony taken on their behalf must be stricken out. Let judgment be entered in favor of the libellants, with costs as against the intervenors.

## Case No. 7,138.

JACKSON v. KIP.

[2 Paine, 366.] [1]

Circuit Court, S. D. New York.[2]

WILLS—HOW CONSTRUED — INTENTION OF TESTATOR—HOW COLLECTED—TECHNICAL WORDS—LAPSED DEVISE—EXECUTORY DEVISE.

1. In the construction of a will, the intention of the testator, when it can be satisfactorily discovered, is to be carried into effect when it can be done consistently with the rules of law.

2. The intention of the testator is to be collected from the whole will and not from detached parts; and effect must be given to all the words in the will without rejecting or controlling any of them, if it can be done by a reasonable construction not inconsistent with the manifest intent of the testator.

3. When any technical words are used in a will, the meaning of which has been settled by usage and sanctioned by judicial decisions, they are presumed to be used in the sense the law has appropriated to them, and must have their technical effect, unless a contrary intention is manifest. When, however, such intention is plain, it will control the legal operation of words, however technical.

4. When there is a lapsed devise, for the want of a devisee answering the description in the will, or when there is an irreconcilable repugnancy or uncertainty in the disposition made by the testator, so that his real intention cannot be ascertained, the estate will descend to the heir-at-law.

5. But a devise is never construed absolutely void for uncertainty, except from necessity. If there is a possibility to reduce it to certainty, the devise is held good, so that the intention of the testator may be carried into effect.

6. The word "or" may be read "and" when it becomes necessary for the purpose of carrying into effect the clear and obvious intention of the testator.

7. The testator devised his estate, real and personal, to his two sons and three daughters, their heirs and assigns forever, share and share alike, as tenants in common, and in case any of his daughters died without leaving lawful issue of their bodies, the share of such daughter was to belong to his surviving children in fee simple. One of the daughters having died in the lifetime of the testator, he made a codicil to his will by which he devised in fee to his grand-daughter, the only child of his deceased daughter, the part, share and proportion of his estate which he had devised to her mother, and then added: "But in case my said grand-daughter should die without lawful issue of her body then living, then and in such case I give, devise and bequeath the part, share and proportion of my estate hereinbefore devised to her, to and among my surviving children or their lawful representatives, share and share alike." *Held*, that this was a good executory devise, depending upon the contingency of the grand-daughter dying without lawful issue at the time of her death, and that this event having occurred, the executory devise took effect; that the executory devisees named and intended, were such of his children as should be then living, and the children of such as should be dead; and that all the children of the testator having died without leaving issue, except the oldest son, the children of the latter became the executory devisees, share and share alike as tenants in common.

In equity.

THOMPSON, Circuit Justice. The question in this case arises under the will of Jacobus Kip, dated 30th August, 1770, and a codicil thereto, dated 15th of January, 1772. The testator, when his will was made, had five children, Samuel, John, Catharine, Mary and Margaret; and by his will he devised a specific part of his farm at Kip's Bay, to each of his sons; and to his three daughters he devised another specific part, to them, their heirs and assigns forever, share and share alike as tenants in common. And then adds this clause: "Then I give, devise, and bequeath, all the rest, residue and remainder of my estate, real and personal, unto my said two sons, Samuel and John, and to my

[1] [Reported by Elijah Paine, Jr., Esq.]

[2] [The date is not given. 2 Paine includes cases decided from 1827 to 1840.

said daughters, Catharine, Mary and Margaret, to have and to hold the same to them, their heirs and assigns forever, share and share alike as tenants in common, and not as joint tenants." And after charging the said residue of his estate with the maintenance of his sister, he adds: "It is my will that in case either or any of my said daughters shall die without leaving lawful issue of their bodies, that then and in such case the part, share and proportion of my estate hereinbefore devised to such daughter or daughters so dying, shall belong to, and be enjoyed, by my surviving children in fee simple." The premises in question are about eight acres of the residuary part of the estate. Catharine Teller, one of the daughters, died in the year 1771, in the lifetime of the testator; who thereupon added a codicil to his will, by which he devised in fee to his grand-daughter, Catharine Teller, the only child of his deceased daughter Catharine, that part, share and proportion of his estate which had been by his will devised to her mother, and then adds: "But in case my said grand-daughter, Catharine, should die without lawful issue of her body then living, then and in such case I give, devise and bequeath the part, share and proportion of my estate hereinbefore devised to her, to and among my surviving children or their lawful representatives, share and share alike." The testator died in October, 1777, leaving his two sons and two daughters, Mary and Margaret, and grand-daughter alive. Catharine Teller, the grand-daughter, died in July, 1824, intestate, and without ever having been married. John died in 1777, after the testator, and without issue. Mary Kip died in the year 1780, intestate and without issue. Samuel was the eldest son, and died intestate in the year 1804, leaving eight children, of whom the lessor of the plaintiff was the eldest son, and the defendant one of his brothers. Margaret survived all her brothers and sisters, and died intestate and without issue, in the year 1809.

Upon this statement of facts it is contended, on the part of the plaintiff, that if the executory devise in the codicil is valid and effectual, that James S. Kip, the lessor of the plaintiff, is entitled to the whole portion of the estate devised over, upon the death of the grand-daughter, Catharine Teller, without lawful issue of her body then living. But if the executory devise does not vest exclusively in James S. Kip, it is void for uncertainty, and that he is entitled to the whole of this portion of the estate as heir to Jacobus Kip, he being, as is contended, the person last seized. On the part of the defendant it is contended, either that the estate devised by the codicil to Catharine Teller, the grand-daughter, was a fee-simple absolute, and passed by her deed to Samuel Jones, junior, and Nicholas W. Stuyvesant, (found in the special verdict,) or that if she did not take an estate in fee-simple absolute, then upon her decease it vested in the children of Samuel; and if so, according to the facts found in the special verdict, the plaintiff cannot recover, the premises in question having been on the partition set off to Samuel Jones, junior, and N. W. Stuyvesant, as trustees, as in the partition mentioned for all the children of Samuel Kip; and the lessor of the plaintiff having already in possession one-eighth, as found by the special verdict. That the intention of the testator, where it can be satisfactorily discovered, is to be carried into effect, when it can be done consistently with the rules of law, has been so often laid down as a governing rule in the construction of wills, that a reference to authorities to establish it is entirely unnecessary.[3] And in applying this rule, the intention is to be collected from the whole will, and not from detached parts; and effect must be given to all the words in the will without rejecting or controlling any of them, if it can be done by a reasonable construction not inconsistent with the manifest intent of the testator. When any technical words are used, the meaning of which has been settled by usage, and sanctioned by judicial decisions, they are presumed to be used in the sense the law has appropriated to them, and must have their technical effect, unless a contrary intention is manifest; but when such intention is plain, it will control the legal operation of words, however technical. These are some of the rules which have been adopted and sanctioned by courts in the construction of wills, and in the application of the cardinal rule to seek for the intention, and which may have a bearing on the construction of the will in question.

The premises in question falling within that portion of the estate which is embraced by the residuary clause in the will, and which in the codicil is devised to the grand-daughter, Catharine Teller, the first inquiry is, what estate she took under this devise. If, as contended on the part of the defendant in one branch of the argument, she took a fee-simple absolute, her estate passed by the deed to Jones and Stuyvesant, and the plaintiff can have no right to recover. If this construction of the devise is to prevail, it must be either because the executory devise over has failed for want of an executory devisee answering the description in the codicil, and resting on the construction that the executory devisees were the children of the testator who survived his grand-daughter, Catharine, and they all having died before the grand-daughter, there was no executory devisee, and the fee became absolute in her; or that Margaret, as the survivor of the children, took the estate as executory devisee, and which passed under her deed to Jones and Stuyvesant. But this construction necessarily involves a rejection of the words, "or their lawful representatives share and share

[3] [See note at end of case.]

alike," which is inadmissible unless there is an irreconcilable uncertainty or repugnancy in the disposition made of the property. And there is no such uncertainty, in my opinion, as to warrant a rejection of these words; nor can the devise over be considered as vesting the estate in fee-simple absolute, in Margaret the survivor of the four children, for this would require the rejection of the tenancy in common, created by the words share and share alike. There can be no doubt but that where there is a lapsed devise, for the want of a devisee answering the description in the will, or where there is an irreconcilable repugnancy or uncertainty in the disposition made by the testator, so that his real intention cannot be ascertained, the estate will descend to the heir-at-law (Penn. Dec. 411); but a devise is never construed absolutely void for uncertainty, but from necessity. If there is a possibility to reduce it to certainty, the devise is held good; so that the intention of the testator may be carried into effect ut res magis valeat. This rule prevails both in courts of law and equity. Pyot v. Pyot, 1 Ves. Sr. 336. And I cannot think there is such uncertainty in this devise as to warrant the conclusion that it must be set aside as void, and the heir-at-law let in, on that ground, to take the estate. It is, I think, a valid executory devise. It has all the requisites to constitute such a devise, and which was to take effect upon the contingency of Catharine Teller, the grand-daughter, dying without issue living at the time of her death. Upon that event, which has occurred, the devise over is to the surviving children of the testator, or their lawful representatives, share and share alike; and, according to my view of the case, the question must turn upon the construction to be given to the words "lawful representatives," as here used.

On the part of the plaintiff it is contended, that the term "representatives" is to be construed "heirs," and its application to be governed by the rule of law existing at the date of the will (1770); and according to this construction, the estate will vest in J. S. Kip, the lessor of the plaintiff. On the other side it is contended, that these are words of purchase, and merely descriptive of the persons who were to take the estate; and that this designation must be applied to persons answering that description when the contingency happened, which was on the death of the grand-daughter Catharine, in the year 1824, at which time all the children of Samuel Kip were his lawful representatives, within the sense and meaning of the devise.

The term "representative," when applied in the way here used, has not acquired any fixed technical meaning, nor have any judicial decisions been referred to which have given to it a settled and definite interpretation. It can, therefore, be considered only a word of description, and to be so construed as will best comport with the fair and reasonable intention of the testator. Any words of description, by which the devisee may be known and ascertained, are sufficient. 6 Term R. 679. In the case of Counden v. Clerke, Hob. 33, a devise to the stock, family, or house of A., held good, and the heir was considered the person intended, in order to effectuate the intention of the testator. So a devise to A.'s oldest son is good, though called William, when his name was Andrew. 7 East, 799. So grandchildren may take under the description of "children," when it is clear, from the whole clause in the will, that the intention was to include the issue of those who should be dead. Royle v. Hamilton, 4 Ves. 437. So in the case of Goodright v. White, 2 W. Bl. 1010 (4 Dana, 516; 6 Cruise, Dig. 186; 4 Ed. 481), the devise was to the heirs of Margaret White, jointly and severally, and their heirs and assigns forever; the court held the devise good; and that Margaret's son took as a purchaser in her lifetime, although it was objected that nemo est heres viventis; that this was a good description of the person intended, to make the son of Margaret take, as her heir, living the mother; and the court observed, that this, though bad two centuries ago, had been good for a century past; that latterly, words had been taken in their popular sense; that the testator noticed that Margaret was alive, and meant a present interest should vest in her heir—that is, her heir apparent—during her life. 4 Dana, 598, § 29. These are some few among the numerous cases in the books, to show how far the court will go to effectuate the intention of the testator.

Devises are held void for want of certain description of the devisee, only in very strong cases, as in Doe v. Joinville, 3 East, 172 (4 Dana, 597), where the testator devised the half of certain lands to his wife's family, and the other half to his brother's and sister's family, and the testator had two sisters' families, and it was altogether uncertain which was intended. A devise will generally be held void for the uncertainty of the devisee, when the description cannot come within the rule of certum est quod potest reddi certum.

It is not necessary, in this case, to say at what point of time you are to look for the interpretation of words, whether the date of the will, the death of the testator, or when the estate devised vests. If the words used have a fixed technical meaning, or the devise is in terms immediate, so that the testator may be presumed to have had in view particular persons, the date of the will, or the death of the testator, may, perhaps, be the proper time to look, in giving a construction of the will. But it is by no means certain that such should be the rule, where the estate is to vest upon some future unknown and uncertain contingency; if in such case the description of the persons who are to take is general, it may be quite as likely to carry into effect the intention of the testator, to

apply that description to persons coming within it at the time the contingency happens. 1 Ball & B. 449; Hom. Dig. 705. But to whatever period we look, in construing this devise, it must, in my judgment, receive the same interpretation as if the testator had used the word "children" instead of "representatives." The codicil, upon its face, and the occurrence which called for the making of it, show very satisfactorily that it was the intention of the testator to provide for his grandchildren as well as his children. The codicil he declares to be made for the purpose of making his intention, in his will, more manifest with respect to the devise to his daughter Catharine, and thereby to secure it to his grand-daughters, if she should die leaving lawful issue. When, therefore, he provides for the contingency of the grand-daughter dying without issue, and on that event devises it to his surviving children, or "their lawful representatives," it is reasonable to conclude he intended, as to this part of his estate, to substitute, in place of their parent, the children of any other of his sons or daughters who should die leaving any such children; and if such was his object, the term "representatives" is very appropriately used for the purpose of substituting the children in the place of their deceased parent; and this word being used in the plural number, and the creation of a tenancy in common by the words "share and share alike," show that more than one was intended to be embraced within it, and, of course, that no reference could have been had to the heir-at-law, to the exclusion of others falling within the description of "representatives," although the word "or" may be read "and" when it becomes necessary, for the purpose of carrying into effect the clear and obvious intention of the testator. But this does not appear to me to be such a case, but that the substitution of "and" for "or" would tend rather to obscure than elucidate: and, indeed, the change of "or" into "and" would involve an obvious incongruity in the reading, "Among my surviving children and their lawful representatives." But if the word "representatives" means "children," as I think it does, it is immaterial to what period the word "surviving" refers; for whether to the date of the will, the death of the testator, or the happening of the contingency, the estate would go either to the surviving children, if all were living, or to such as were living, and the representatives of such as were dead. And such, I think, is the construction to be given to this codicil. It is very clear, from the general scope of the will and codicil, that the testator intended to dispose of his whole estate under the various provisions of his will, and not leave any part of it to vest under the general rules of descent.

It seemed to be admitted at the bar, and indeed could not be questioned, that if this had been a bequest of personal property, the word "representatives" would have embraced all the children of Samuel Kip, and go according to the statute of distribution; and the residuary clause to which the codicil refers, embraces both real and personal estate, and the testator used the words "give, devise and bequeath," which properly apply to both real and personal property, which affords a pretty fair inference that the word, "representatives" was used in reference to both species of property indiscriminately, in its general and popular sense, without any technical application to real property.

Much stress was laid, in the argument, upon the word "lawful," as indicating an intention to qualify the term "representatives," and affix to it the interpretation of "heir-at-law." This, however, does not appear to me to be a fair and reasonable construction. If such had been the intention of the testator, it would have been a much more natural and easy form of expression to have said "heir-at-law." But it is, I think, very evident that the term "lawful" is here intended to be used in the same sense as "legitimate." Upon the whole, then, I have arrived at the conclusion that this is a good executory devise, depending on the contingency of Catharine, the grand-daughter, dying without lawful issue living at the time of her death; that this event having occurred, the executory devise took effect; and that the executory devisees named and intended were such of his children as should be then living, and the children of such as should be dead. And all his children having died without leaving children, except Samuel, all his children became the executory devisees, share and share alike as tenants in common, which, according to the finding of the jury in the special verdict, will require judgment to be entered for the defendant.

NOTE. In construing wills, technical words are to be taken in their technical sense, unless a plain intention appear to the contrary. Kean v. Hoffecker, 2 Har. [Del.] 103; vide 3 Term R. 493; Doug. 341; 1 Yates, 343; 5 Ves. 401, 402; 2 Ball & B. 204; 11 Wend. 279, 293. Whenever the devise is to children and grandchildren, or to brothers and sisters, and nephews and nieces, to be equally divided between them, and the devisees are individually named, they take per capita and not per stirpes. Id. The words "equally to be divided," when used in a will, mean a division per capita, and not per stirpes, whether the devisees be children and grandchildren, brothers or sisters, and nephews and nieces, or strangers in blood to the testator. Id. The general rule is, that a will, as to the land, speaks at the date of it; and as to personal estate at the time of testator's death. Smith v. Edrington, 8 Cranch [12 U. S.] 66; Allen v. Harrison, 3 Call, 289. In the construction of wills, the first object is to gather the intention of the testator from the whole will; and this intention must prevail unless it violate some rule of law. Land v. Otley, 4 Rand. [Va.] 213; Calloway v. Langhorne, Id. 181; Berry v. Headington, 3 J. J. Marsh. 321; Covenhoven v. Shuler, 2 Paige, 122; Reno's Ex'rs v. Davis, 4 Hen. & M. 283. Where there are repugnant clauses in a will, the latter shall prevail. But repugnance in different clauses of the will shall

not be made out by the technical meaning of terms. For where a consistent intention appears in the context, it must prevail; and it shall be supposed the testator employed the words whose strict signification would make a repugnance, in an improper sense. Adie v. Cornwell, 3 T. B. Mon. 279. In the construction of wills, ambiguities are latent or patent. The former exists when the intention of the testator is dubious; the latter exists where the intention is certain, but the object on which the intention is to act is uncertain. In explaining a patent ambiguity, the will alone is to be resorted to; while in the latent class, evidence dehors the will may be called in aid of the will. Breckenridge v. Duncan, 2 A. K. Marsh. 51. Terms usual in a will drawn evidently by an unskilful man, shall be scanned by their popular, not their technical meaning. Harper v. Wilson, Id. 466. If two parts of a will are irreconcilable with each other, the last part is generally to be taken as evidence of the latest intention of the testator. But this rule is only applied to those cases where the two provisions are totally inconsistent with each other, and where the real intention of the testator cannot be ascertained. Covenhoven v. Shuler, 2 Paige, 122. Where the intention of the testator is incorrectly expressed, the court will carry it into effect by supplying the proper words. Id. The words of a will may be transposed in order to make a limitation sensible, or to effectuate the general intent of the testator. Id. Devises by implication are sustainable only upon the principle of carrying into effect the intention of the testator; and unless it appear upon an examination of the whole will, that such must have been his intention, there is no devise by implication. Rathbone v. Dyckman, 3 Paige, 9. An implication may be rebutted by a contrary implication which is equally as strong. Id. The clear literal interpretation of words in a will may be departed from if they will bear another construction, where other parts of the will manifest a different intention. Id. The strict grammatical sense of words in a will may be rejected to carry into effect the intent of the testator. Id. One name may be substituted for another in the construction of a will where it is manifest not only that the name used was not intended, but that a certain other name was necessarily intended. Connolly v. Pardon, 1 Paige, 291. Where it is clear, from the intention of the testator, that the word "or" is used instead of "and," and e converso, the court interposes to change the word. O'Brien v. Heeney, 2 Edw. Ch. 242. Where there is a plain and positive devise, the court will not raise an implied trust in executors, to favor a particular devisee. Hart v. Hart's Ex'rs, 2 Desaus. Eq. 57. The court construed "her," into "their," to give effect to the intent of the testator. Keith v. Perry, 1 Desaus. Eq. 353. In Brailsford v. Heyward, 2 Desaus. Eq. 18, the word "heirs" was construed children, to effect the testator's obvious intention. Grandchildren may claim a devise under the description of children, where there are no children. Ewing's Heirs v. Handley's Ex'rs, 4 Litt. [Ky.] 349. Where a testator having both freehold and leasehold lands in a particular place, a devise by him of all the lands in that place, only the freehold lands pass. Aylett's Ex'rs v. Aylett, 1 Wash. [Va.] 300. Where words in a will which would give an estate tail in real property, would carry the absolute interest in personal property. Cudworth v. Hall's Adm'x, 3 Desaus. Eq. 259; Bailey v. Davis, 2 Hawks, 108. The term "children" is usually taken as a word of purchase, unless there be expressions in the will to show the testator intended to use the word as a word of limitation. In re Sanders, 4 Paige, 293. The disjunctive word "or" construed "and." Turner v. Whitted, 2 Hawks, 613; Britton v. Johnson, 2 Hill, Eq. 430. Construction of the word "appurtenances" in a will. Helme v. Guy, 2 Murph. 341. In construing a will, the court will look to the state of the testator's family, and to the kind and extent of property he owned at the time of making the will. Edens v. Williams' Ex'r, 3 Murph. 27. Construction of the term "dying without issue." Brashear v. Macey, 3 J. J. Marsh. 91. The court will correct a mistake in a will describing a line bounding the estate devised. Kenny v. Kenny, 3 Litt. [Ky.] 302. Surplus land devised in the original will, held not to be included in the expressions "all other lands," and "estate not particularly pointed out," used in the codicil. Hickman v. Holliday, 6 T. B. Mon. 586. Wills must be construed liberally, so that the intention of the testator may take effect. Sams v. Mathews, 1 Desaus. Eq. 131. And the whole will must be taken together. Id. So, a will and codicil are to be taken and construed together as parts of one and the same instrument. Westcott v. Cady, 5 Johns. Ch. 343. And where there are two inconsistent bequests of the same property in the same will, the second revokes the first. Fraser v. Boone, 1 Hill, Eq. 367. Crops growing at the time of the testator's death, do not pass under the word "appurtenances." Shelton v. Shelton, 1 Wash. [Va.] 53. The term "land" in a bequest will be considered as synonymous with "give," unless it is manifest that the testator did not intend the legal estate to pass to the legatee. Hinson v. Pickett, 1 Hill, Eq. 38. Construction of the term "dying without issue." Brown v. Brown, 1 Dana, 41. And of the term "residue" in a will. Brailsford v. Heyward, 2 Desaus. Eq. 32. Construction of the term "families" in a will. Pringle v. McPherson, 2 Desaus. Eq. 524. Plate used in a family passes under a devise or conveyance of "household goods and furniture." Bunn v. Winthrop, 1 Johns. Ch. 339. Construction of the term "all his estate" in a devise. Cruger v. Heyward, 2 Desaus. Eq. 422. The word "increase" in a bequest of a female slave, is ambiguous. Reno's Ex'rs v. Davis, 4 Hen. & M. 283. See Bryson v. Nickols, 2 Hill, Eq. 114. Construction of the term "without issue" in a will. Newton v. Griffith, 1 Har. & G. 111. It is a general rule in the construction of wills, that the testator must be presumed to have used words in their ordinary and primary sense, unless it appears from the context that he probably used them in some other sense. Mowatt v. Carow, 7 Paige, 328. The word "children," in its ordinary sense, does not include grandchildren, but it may include them when it appears there were no persons who would answer to the description of "children" in the primary sense of the term. Id. When heirs take by purchase, they do not take as heirs, but as a class of persons to whom, by that means, the testator has selected to devise his property; and as they take in their own right, the distribution is to be made per capita, and not per stirpes. Campbell v. Wiggins, Rice, Eq. 10. The testator devised as follows: "I lend to my daughter Nancy Gray, and Robert Gray, her husband, for their lives, one negro man named Peter, and one negro called Little Frank, and one negro woman called Sary, with all her increase, and one feather-bed and furniture, for their lives, and then be equally divided among their children; held, that the children of Robert and Nancy Gray took under the will a vested interest transmissible to their legal representatives. Donald v. M'Cord, Rice, Eq. 330. Under a bequest of a particular female slave by name, with all her increase, the children of the slave born before the making of the will do not pass. Seibels v. Whatley, 2 Hill, Eq. 605; Donald v. M'Cord, Rice, Eq. 330. Construction of the word "plantation" in a devise. Nash v. Savage, 2 Hill, Eq. 50. Construction of the terms "residue of all my estate." Williams v. Williams, 10 Yerg. 20.

In the construction of a will, the court, in endeavoring to arrive at a knowledge of the testator's intention, must take into consideration the circumstances as they existed at the time the will was made. Hoover's Lessee v. Gregory,

10 Yerg. 444. When a bequest in a will is not clothed in language having a particular technical meaning affixed thereto, so as to control the intention in its construction, the intention shall prevail. Loving et al. v. Hunter, 8 Yerg. 4. Every will shall be so construed that it shall rather stand than fall if such construction can reasonably be put upon it. Davis' Heirs v. Taul, 6 Dana, 53. Bequests of personalty are generally construed according to the principles of the civil law. Wood's Adm'x v. George's Adm'r, 6 Dana, 343. The words "movable property" in a will have no technical import; they mean in a will as in ordinary use, something substantive which has locality, and may move or be moved; they embrace money and bonds for money, but not a debt merely as such. Id. A bequest by an officer in these words, "all my stock and movable property," does not embrace his claim for half-pay. Id. A latent ambiguity, as to the subject-matter of a will, may be explained by extraneous evidence. Overton's Heirs v. Woolfolk, 6 Dana, 376. Construction of "vested remainders." Bowling's Heirs v. Dobyns' Adm'rs, 5 Dana, 434. The heir being favored in law, there should be no strained construction to work a disherison where the words are ambiguous. Deakins v. Hollis, 7 Gill & J. 311. Where the intention of the testator is ascertained, a word manifestly omitted by mistake may be inserted, but no word may be added to defeat the apparent intention of the testator. Id. The terms used in a will are in general to be understood according to their popular import, but where it appears from the will itself that the testator understood the technical import of the terms he employed, and evidently used them in some parts of the will in their technical sense, they should be so understood wherever occurring in the same clause. Hazlerig v. Hazlerig's Ex'rs, 3 Dana, 48. It is a general rule in giving effect to wills, that general legacies must yield to specified bequests, but the rule that the will must be so construed as to give effect to every part of it, and carry the intention of the testator into effect, is paramount and universal. Cameron v. Boyd's Adm'r, 4 Dana, 549. Where a testator directed all his property to remain on his plantation under the care of his wife until the youngest son should attain full age, and then gave the plantation to that son and another, the wife takes by implication a term in the plantation during that period. Bradshaw v. Ellis, 2 Dev. & B. Eq. 22. Parol evidence is not admissible to affect the construction of a will, but it is admissible when its introduction is required by considerations extrinsic of the will, and which necessarily depend upon such evidence. Gallego v. Chevalle [Case No. 5,200]. The construction of devises of legal interests in land is a legal question, and belongs to the tribunals of the law, and not to those of equity; and the obscurity of the will furnishes no sufficient reason for applying to equity; for, if the obscurity be not so great as to render the disposition altogether unintelligible, the devise will be valid at law, so far as it can be understood; and, if it be so vague and uncertain as not to amount to a designation of any corpus, it necessarily follows that no court can help it, but that it must be ineffectual. Hough v. Martin, 2 Dev. & B. Eq. 379. Two different tracts of land half a mile apart, which were cultivated by a testator together as one farm, will both pass by his will under the description of "my plantation." Bradshaw v. Ellis, 2 Dev. & B. Eq. 20. In a devise of a certain farm, and "all stock on the the same," the words "all stock" will comprehend only the animals used with, supported by, or reared upon the farm, and will not include the plantation tools and the gathered crop that may be on it. Graham v. Davidson, 2 Dev. & B. Eq. 155. The expression, "if he shall get married and have a family," in its ordinary sense in a will or settlement, means to get married and have issue of such marriage, and not merely to get married and have a family by becoming a housekeeper. Spencer v. Spencer, 11 Paige, 159. A will provided that the female children of E., which she then had, or might thereafter have, at the age of twenty-three, should be free. Held, that the grandchildren of E., born before their mothers arrived at twenty-three, were slaves; the rule "Partus sequitur ventrem" applying. Esther v. Akin's Heirs, 3 B. Mon. 60.

In the construction of wills, it is not proper to interpolate or supply an ellipsis unless it be rendered necessary in consequence of an apparent inconsistency in the context, or unless there be something in the sentence to show that there is an ellipsis which may be supplied by the insertion of words found elsewhere in the sentence. Barclay v. Dupuy, 6 B. Mon. 92. A clause added to a devise of a fractional part of certain land, that it is to be taken by the devisee "where he shall choose or select, at its just or proportionable value," does not constitute a condition precedent to the vesting of the estate devised; but the devisee, on the death of the devisor, becomes tenant in common, with a right of selection or not, at his will. Brown v. Bailey, 1 Metc. [Mass.] 254. Cases of construction of wills depending merely upon their phraseology, and not deemed necessary to be noticed in full. Lane v. Vick, 3 How. [44 U. S.] 464. The term "lands," in a will, is synonymous with "real estate"; and, unless restrained by something else, embraces future and contingent, as well as present freehold estates in land. Pond v. Bergh, 10 Paige, 140. In the state of New York, where a will was made before the Revised Statutes went into operation, but the testator died afterward, the validity of the trusts and provisions of his will must be determined by the law, as it existed at the time of his death. De Peyster v. Clendining, 8 Paige, 295. A testator having a son and five daughters, all infants, gave the residue of his estate to trustees, with directions to pay the annual income to his six children, in equal proportions during their lives, at the death of either of them without lawful issue, his or her share to continue as a part of the residue, the income of which was to be equally divided among the surviving children; and, if either of his children should die leaving issue, his or her share should be equally divided among his or her children. One daughter died without issue; then another died, leaving one child, a son; and then two other daughters died without issue. Held, that the words "surviving children," were to be construed other children, and that the son of the deceased daughter was equally entitled to share with the testator's surviving children, the proportions of the daughters who died after the decease of his mother. Carter v. Bloodgood's Ex'rs, 3 Sandf. Ch. 293. The word "survivors" may be construed "others," upon the context, and the other clauses of the will, showing the intent of the testator. Id. And the court will supply words to support the intent, when that is apparent upon the whole of the will taken together. Id. In the principal case, the bequest over to the grandchildren, in the shares of the children who died without issue, whether before or after the death of the parents of such grandchildren, is raised by implication, from the testator's general intention. Id. A granddaughter was married at the time a testator made his will; and he had, as to a full share of his estate, placed her on a footing with his children. He also bequeathed a legacy of $6,000 to each of his grandchildren as were under age and unmarried, and living at the time of payment. There were other grandchildren, and who were under age. Held, that this grandchild, (thus of age,) did not take such legacy. Hone v. Van Schaick, 3 Edw. Ch. 474. Great grandchildren do not take under the designation of grandchildren, unless where it plainly appears that such was the intention. Id. Where land was devised by the testator to his two sons, with a limitation over to the survivor, if either of

them should die without issue; and both joined in a conveyance to a purchaser, for a valuable consideration, and one of them afterward died, without issue, in the lifetime of the other; held, that the purchaser was entitled in equity to the land devised to the brother who died first, and which afterward came to the survivor, under the executory limitation over to him. Varick v. Edwards, 11 Paige, 289. A will directed that if trustees should be reduced by "death, or removal from the United States, or otherwise," to the number of two or one, then the parties in interest were authorized to nominate three or more freeholders, out of which the remaining trustees were to accept one or more, to be joined with them; and failing such nomination, the remaining trustees were authorized to nominate respectable freeholders to be joined with them; and then the securities were to be assigned by the remaining trustees to themselves, and such additional trustees, upon the same trusts, &c. Held, that a refusal to act authorized the appointment of another person under the words "or otherwise,"—in fact, that these words were broad enough to authorize an appointment after removal from office for cause, resignation or refusal to serve. Cruger v. Halliday, 3 Edw. Ch. 565. Although the intention of a testator is the governing principle with the court when looking at his will, yet the court is bound by precedents and authority, and will not proceed on arbitrary conjecture in settling its construction. Kingsland v. Rapelye, 3 Edw. Ch. 1.

## Case No. 7,139.

JACKSON v. LUDELING et al.

[2 Woods, 254.] [1]

Circuit Court, D. Louisiana. April Term, 1876.

REAL PROPERTY—IMPROVEMENTS BY POSSESSOR IN BAD FAITH—COMPENSATION—RULE IN LOUISIANA—INTEREST AND RENTS.

Under the jurisprudence of Louisiana, a possessor in bad faith is entitled to compensation for improvements and betterments put upon the land by him which have been accepted by the owner, together with interest on the amount expended therefor, and is chargeable with the rents and profits with interest.

[See note at end of case.]

[This was a bill in equity by Henry R. Jackson against John T. Ludeling and others.] Heard upon exceptions to the master's report.

A decree was made in the case by the supreme court of the United States, at its October term, 1874. The case is reported in 21 Wall. [88 U. S.] 616, and the decree of the supreme court is found on pages 634, 635. The decree reverses the decree of the United States circuit court for the district of Louisiana, by which the bill was dismissed, and reinstates the case, recognizes the mortgage executed by the railroad company to John Ray to secure its first mortgage bonds as a valid lien upon the property of the railroad company, and maintains the rights of the bona fide bondholders; it declares the title under which the defendant Ludeling and his associates claimed the property of the railroad company to be fraudulent and void, enjoins them from setting up any claim under their pretended title to the said property, or in any manner disposing of the same, and remits the cause to this court with instructions to direct an account to be taken of all the property of the railroad company, and to appoint a receiver thereof, and to order the property covered by the mortgage to be sold for the benefit, first, of all the bona fide bondholders secured by the mortgage, and secondly, for the benefit of other creditors of said company, and of its stockholders. The fifth and last clause of the decree is in these words: "And it is further ordered and decreed that the defendants do account for all money and property received by them out of the property so sold to them or any of them, or from its profits or income, receiving in their account such credits as under the circumstances of the case by the law of Louisiana they are entitled to, and that they pay and deliver to the receiver whatever on such accounting may be found due from them." Under this clause of the decree an order of reference was made to F. A. Woolfley, Esq., as master commissioner, who on January 17, 1876, filed his report. According to the report the gross earnings of the railroad, received by the defendants Ludeling and his associates, and the proceeds of the sale of lands the property of the railroad company, also received by the defendants, amounted to $939,124.41, and the master finds that Ludeling and his associates were properly chargeable with that sum. On the other hand the master reports that said Ludeling and his associates have produced an account showing that they have expended in construction and repairs for the purpose of putting the railroad in such condition that it could be operated, the sum of $748,154.88, and for maintenance and running expenses the additional sum of $777,647.72. These two last mentioned sums amount to $1,525,802.60. The master further reports that Ludeling and his associates exhibit an interest account upon the excess of their expenditures over their receipts made up at the rate of eight per cent. per annum, amounting to $361,531.38. From this it appears that they claim a balance due them, over and above all receipts from the railroad property of $948,209.57. Although it does not appear by the master's report, the fact is that Ludeling and his associates claim the further sum of $136,206.28 for interest paid by them on money borrowed to put the railroad in running condition. The report says: "The excess of actual expenditures over actual receipts is $586,677.99, disregarding the interest account. I have not examined these accounts and vouchers with a view to pass upon their absolute validity, or whether they are claims to be recognized for any other purpose than to answer the matter referred. The fifth paragraph of the decree directs the said defendants to show what money has come into their hands as income and profits, and to account for such part of it to the mortgagees as they are

[1] [Reported by Hon. William B. Woods, Circuit Judge, and here reprinted by permission.]

entitled to. The testimony shows sufficiently that the railroad was not in a condition to yield income or profit, without large expenditures, and that the expenses of management to earn income and profits were nearly equal to the receipts. The evidence shows satisfactorily that there was no income or profits from the road which equalled the necessary outlays for construction, management and maintenance, and I therefore think the complainants are not entitled to claim remuneration under that paragraph of the decree." This suit was commenced in 1866, and most of the improvements upon the road, made by defendants, have been made since that date.

Exceptions were filed to the report by both the complainants and the defendants. The main questions raised by these exceptions were the following:

1. It having been decided by the supreme court of the United States that Ludeling and his associates were possessors in bad faith, whether they, under the jurisprudence of Louisiana, are entitled to payment for the improvements and repairs by them placed upon the property, accounting at the same time for income and profits derived from the property.

2. Whether, having accounted for the income and profits of the property while in their hands, the defendants are entitled to interest on the money expended by them in improvements and repairs.

These questions, mainly the first, were argued by counsel of the parties both orally and by brief.

J. A. Campbell and H. M. Spofford, for complainant.

I. Generally the doctrine of the courts of this country is, that neither at law nor in equity is the owner of a valid and legal title to lands to be subjected to a demand for ameliorations or improvements made without his consent by an occupant without title, and in bad faith. Green v. Biddle, 8 Wheat. [21 U. S.] 1; Carver v. Jackson, 4 Pet. [29 U. S.] 1; Kenney v. Browne, 3 Ridg. App. 462–531; Gillespie v. Moon, 2 Johns. Ch. 602; Bump, Fraud. Conv. 573; Morris v. Terrell, 2 Rand. [Va.] 6; Gunn v. Brantley, 21 Ala. 633; Story, Eq. Jur. § 799 and note; Will. Eq. Jur. 311.

II. The rule of cases decided in Louisiana is, that the bona fide possessor alone is the object of the protection of the courts in respect to the rents and profits, and the reclamation of the value of improvements. Civ. Code, arts. 503, 508; Gibson v. Hutchins, 12 La. Ann. 545; Boatner v. Ventriss, 2 La. 173, 8 Mart. [N. S.] 657; Roberts v. Brown, 15 La. Ann. 698; Herriot v. Broussard, 4 Mart. [N. S.] 260; Thompson v. Kilcrease, 14 La. Ann. 340, 342; Roberts v. Brown, 15 La. Ann. 698; Williams v. Booker, 12 Rob. [La.] 253; French v. Bach, 26 La. Ann. 731; Beard v. Morancy, 2 La. Ann. 347; Anselm v. Brashear, Id. 403; Hollon v. Sapp, 4 La. Ann. 519; Jones v. Wheelis, Id. 541; Brugere v. Slidell, 27 La. Ann. 70; Gaines v. New Orleans [Case No. 5,177]; Same Case, 15 Wall. [82 U. S.] 624. See, also, Pothier du Droit de Proprieté, No. 350, Denisart, 1, 3, p. 700, § 21; 38 Dalloz, Jur. Gen. t. 38, p. 242 et seq., Nos. 428, 444.

III. The defendants are not third possessors under article 3407 of the Civil Code. 3 Trop. Priv. et Hyp. No. 784; 25 Merten, tit. "Privèlége de Creance," § 5, pov. 2.

IV. Under article 508 of the Civil Code, the possessor is only entitled to the value of the materials which remain upon the land, together with the cost of the workmanship. Cannon v. White, 16 La. Ann. 85, 91.

The result of the comparison of the several articles of the Code, and the decisions upon them by the supreme court of Louisiana, show that the possessor in bad faith, whose title and possession are fraudulent, and whose improvements were made after suit brought, is not entitled to claim for improvements against the injured owner.

John Ray, for defendants, cited article 12, Code 1808; article 500, Code 1825; and article 508, Rev. Code 1870; Labrie v. Filiol, 4 Mart. [La.] 557; Pearce v. Frantum, 16 La. 414; Lowry v. Erwin, 6 Rob. [La.] 192; Kellam v. Rippey, 3 Rob. [La.] 138; Wilson v. Benjamin, 26 La. Ann. 587; Williams v. Booker, 12 Rob. [La.] 253; Piron v. Bach, 10 La. Ann. 13; Heirs of Slidell v. Gonthier, and Heirs of Slidell v. Vanderstacken. The last two cases not published. Op. Book 44, La. Sup. Ct. pp. 653, 654; Stanbrough v. Wilson, 13 La. Ann. 494.

W. H. Hunt on the same side.

I. It is a principle of the Civil Code that "no man should enrich himself at the expense of another." Civ. Code, arts. 508, 2299, 2301, 2314, 3124, 3125, 3407.

II. The decisions of the supreme court of Louisiana with reference to the rights of possessors in bad faith, with few exceptions, have concurred in the enforcement of this principle. See cases cited by Mr. Ray. Also, Hill v. Bowden, 3 La. Ann. 258; Eastman v. Harris, 4 La. Ann. 194; Rhodes v. Hooper, 6 La. Ann. 355; Doles v. Cockrell, 10 La. Ann. 541; Haynes v. Harbour, 14 La. Ann. 239; D'Armond v. Pullen, 13 La. Ann. 137. Upon a review of all the decisions of the court upon this subject, it will appear that they uphold with a steadiness, only once and for a brief period shaken, the doctrines laid down in the Code and derived from the civil law, that all possessors of property who have incurred useful and necessary expenses in its preservation and improvement are entitled to reimbursement.

III. The Spanish law on this subject is identical with that of Louisiana. 44th law, 28th title, 3d partidas.

IV. The law of France recognizes to the fullest extent the claims urged in behalf of

defendants. 2 Marcadé, p. 114; Id. p. 412, V; 2 Boil. p. 672, Com. sur. art. 555, Code Nap. Demolombe, Com. sur. art. 555, 9 Code Nap. p. 629, § 679, and No. 695, p. 666; Merlin, 1 Repertoire de Juris, verbo "Amélioration"; 5 Pothier (par Jupin; Bruss. Ed.) Nos. 344, 345; 5 Larombiére, Obl. 676, 677; 1 Fr. Mourlon, 698, No. 1463; Robert v. Courtin, Sirey (1840) 66; Godard v. Valette, Journal de Palais, I, 1844, p. 399.

V. The claims of complainants as mortgage creditors are subjected to the same equitable right of reimbursement to the third possessor. Rev. Civ. Code, art. 3370, which is identical with article 2173, Code Nap.; 3 Trop. Priv. et Hyp. No. 835, 1836; Rev. Civ. Code, 3399; Code Prac. arts. 62, 68, 74; Walker v. Dunbar, 9 Mart. [La.] 682; Moore v. Allain, 10 La. 495; Rev. Civ. Code, art. 3408.

VI. But whether the right to reimbursement be measured according to the law that defines the rights of third possessors against mortgage creditors in a hypothecary action, or according to the law that defines the rights of third persons against the owners in a petitory, or any other action, is of little practical importance. The right of reimbursement is substantially the same under the law of Louisiana. Voet, cited in 1 Trop. Priv. et Hyp. § 264.

WOODS, Circuit Judge. There seems to have been on the part of counsel no attempt to reconcile the conflicting decisions of the supreme court of this state upon the questions at issue. I am relieved from the task of attempting to reconcile these decisions. The question, what is the jurisprudence of this state upon the points in controversy, has been before this court, and has been passed upon by it. In the case of Gaines v. New Orleans [Case No. 5,177], it was held by Mr. Circuit Justice Bradley, after a careful and laborious examination of the decisons of the supreme court of Louisiana, that under the laws of this state, possessors in bad faith are entitled to compensation for improvements which they have erected, if accepted by the owner. And in that case, the court confirmed the report of Master Weller, which charged the city of New Orleans, which had been held to be a possessor in bad faith, with the value of the rents of the property in controversy, with interest on the rents from the date of their receipt, and credited the city with the expenditures made by it for repairs, both before and after suit brought, and with interest on the cost of the repairs, thus holding that when a possessor in bad faith had enjoyed the property, receiving its profits, and had made improvements and repairs, he must account for the reasonable rent with interest, but was entitled to have his expenditures refunded with interest. In his opinion, the circuit justice said: "I have come to the conclusion that it would be equitable and just to set off the profits derived by the city from the draining machine for the past thirty-five years, against the cost of constructions and repairs, and to charge the city with the rents of the buildings and land, less the ordinary repairs of the buildings, amounting, as shown by the report, to the sum of $125,266.79." The decree of this court just referred to was taken to the supreme court of the United States by appeal, and the case is reported in 15 Wall. [82 U. S.] 624.

From the statement of the case as made by the reporter, I take this extract (page 627): "The city, it was estimated, had received from increased taxation of other property during the term embraced by the order (including interest) $208,825. Now this particular lot of land, it was testified, was originally worth $200. The buildings erected by the city, independent of the machinery, cost $18,000. The putting up of the machinery was finished July 1, 1835 or 1836 (some witnesses testifying to one year and some to another), and it was testified that a fair rental of the land and building was $2,400 a year; the expense of repairs, $500 per annum. The master accordingly charged the city on this basis:

| | | |
|---|---|---|
| Rental value from July 1, 1835, to November 1, 1870 | | $84,800 00 |
| Interest on the rents at 5 per cent... | | 72,800 00 |
| | | $157,600 00 |
| And allowed the city expenses of repairs | $17,166 66 | |
| Interest on repairs | 15,166 55 | |
| | | 32,333 21 |
| And thus made the city chargeable with the difference | | $125,266 79" |

Mr. Justice Hunt, in delivering the opinion of the supreme court, after quoting articles 500, 501, 3414 and 3415 of the Civil Code, proceeds to say: "The case of the present defendant is an instance where the works were done by one who was sentenced to make restitution, and who was expressly adjudged to possess mala fide. Mrs. Gaines therefore had the right to keep the improvements upon reimbursing their value and the price of the workmanship, or to compel the city to demolish and remove them. In the opinion of the judge upon the circuit, he uses this language: 'Whilst the profits and advantages of the draining machine are uncertain and indefinite in amount, there is no doubt of their reality, nor, if we place any reliance upon the estimates, is there any doubt of their being amply sufficient to reimburse the city for all its expenditures, including even the rent with which it is charged.' It is evident," says the supreme court, "from this statement that there has already been allowed to the city a sum not only equal to the value of the improvements if they were demolished, but of their actual cost. The city has therefore no cause of complaint, and the point under consideration must be held against it." An examination of the report made in the case by Master Weller, and which was confirmed by the supreme court

of the United States, shows that the city of New Orleans, a possessor in bad faith, was allowed the amount expended in permanent improvements and interest thereon, and for necessary repairs and interest thereon, and was charged with the value of the rents, and interest on the same.

I shall follow in the case on trial, this decision of the supreme court of the United States so far as it is applicable. The defendants claim interest at the rate of eight per cent. per annum. No reason is shown why interest should be computed at a higher rate than five per cent. per annum, the legal rate in Louisiana, when there is no contract fixing a different rate. It appears from the report of Master Woolfley, that the gross receipts of Ludeling and his associates from the earnings of the road and the sale of lands, exceeded the amount expended by them for maintenance and repairs by the sum of $161,476.69. The complainants are entitled to be allowed this sum in their accounts with Ludeling and his associates, with interest to be calculated at five per cent. upon an average sum for an average length of time; and there should be allowed Ludeling and his associates their necessary expenses in improvements and betterments put upon and still remaining upon the road, with interest upon such expenses from the date when the expenditures were respectively made, at the rate of five per cent. per annum. Without passing, therefore, in detail, upon the exceptions of the parties to the master's report, it will be recommitted to the master, with instructions to ascertain and report to the next term of this court the amount of the necessary expenses incurred by the defendants Ludeling and his associates, in the improvements and betterments put upon said railroad, and still remaining thereon, allowing interest at the rate of five per cent. per annum on such expenses, from the date they were incurred up to the date of filing the report; and he will report what sum ought to be added for interest to the said balance of $161,476.69, the amount by which the gross receipts exceed the expenditures, for maintenance and running expenses.

[NOTE. It appears that upon the second report of the master a decree was entered that the defendants are entitled to the sum $488,-103.54 on account of betterments and improvements and for interest, and that they are chargeable with certain other sums. From this decree both parties appeal, the complainants insisting, among other things, that no allowance should be made to defendants for improvements, that the allowances were too large, etc. Defendants, on the other hand, insist that the allowances are insufficient, that certain accounts are incorrectly stated.

[Upon consideration of the case by the supreme court, Mr. Justice Bradley delivered an opinion sustaining the decree of the circuit court upon the main proposition,—i. e. the right of a possessor in bad faith to improvements in the state of Louisiana. He draws the distinction very clearly between the civil and the common law upon this point, showing that by the civil law, and following the same into the decisions of the Louisiana supreme court, a possessor in bad faith is entitled to the value of his improvements, provided the owner accepts or uses them. If he does not, then the possessor in bad faith must have a reasonable time within which to remove his improvements, if the same is possible. The decree of the circuit court is reversed upon the amount of the award, the learned justice holding that the same should have been only $347,361.61. In this case Mr. Justice Field dissents, holding that a possessor in bad faith is not entitled to any compensation at all for improvements. Says the learned justice: "I know of no law and no principle of justice which would allow them anything for expenditures upon property they wrongfully obtained, and wrongfully withheld from the owners, who were constantly calling for its restitution." 99 U. S. 513.]

## Case No. 7,140.

JACKSON v. McCULLOCH et al.

[1 Woods, 433; 13 N. B. R. 283; 1 N. Y. Wkly. Dig. 534.] [1]

Circuit Court, W. D. Texas. Jan. Term, 1871.

BANKRUPTCY—WHEN TRADER IS INSOLVENT—ASSIGNMENT FOR BENEFIT OF CREDITORS.

1. Under the bankrupt act [of 1867 (14 Stat. 517)], a trader is insolvent when he cannot pay his debts in the ordinary course of business, although he may not be compelled to stop business on account of such inability, and although on a settlement of his affairs he may have sufficient to pay in full.

2. An assignment to a trustee by a trader of all his property, in trust for the benefit of his creditors, which necessarily puts an end to the business of the trader, and which gives a preference to some creditors over others, is made out of the usual and ordinary course of business, and if made in contemplation of insolvency, is not only prima facie but conclusive evidence of an intent on the part of the trader to defeat the operation of the bankrupt act; it is therefore void.

3. The trustee is charged with notice of the insolvency of the debtor, and his intent to evade the provisions of the bankrupt act, by the very tenor of such an assignment, and so are all persons claiming the benefit of the assignment.

In equity. Appeal from the district court, submitted for final decree on pleadings and evidence.

A. M. Jackson, in pro. per.

C. S. West, for defendants.

WOODS, Circuit Judge. This is a bill in equity filed by A. M. Jackson, as assignee in bankruptcy of George B. Hollaman, to set aside a deed of assignment made by Hollaman to H. E. McCulloch, one of the defendants, for a decree, that the defendants, Frazer and wife, Leroy M. Roberts and John P. Erskine, pay to the complainant the amounts respectively received by them from McCulloch, by virtue of the deed of assignment, on the debts due to them from the bankrupt, and that McCulloch be compelled to account for and pay over the proceeds of

[1] [Reported by Hon. William B. Woods, Circuit Judge, and here reprinted by permission. 1 N. Y. Wkly. Dig. 534, contains only a partial report.]

the property sold by him under and by virtue of the deed of assignment, subject to such equitable deductions as he may show himself entitled to. The ground of this claim is because the deed of assignment was made within six months before the filing of his petition in bankruptcy by Hollaman, and was made to McCulloch, who, at the time, had reasonable cause to believe that Hollaman was insolvent or was acting in contemplation of insolvency, and that the deed of assignment was made by Hollaman with a view to prevent his property from coming to his assignee in bankruptcy, or to prevent the same from being distributed under the bankrupt act of congress, or to defeat the object of said act, or to impair, hinder or delay the operation of said act, or to evade the provisions thereof.

I hold the following propositions to be established law: 1. Insolvency, within the meaning of the bankrupt act, means inability to pay debts in the ordinary course of business, as persons carrying on trade usually do. A trader is insolvent when he cannot pay his debts in the ordinary course of business, although he may not be compelled to stop business from his inability; and, although, on a settlement of his affairs, he may have sufficient to pay in full. 2. An assignment to a trustee of all a trader's property in trust for the benefit of his creditors, which necessarily puts an end to the business of the debtor, and which gives a preference to some creditors over others, is made out of the usual ordinary course of business, and, if made in contemplation of insolvency, is not only prima facie but conclusive evidence of an intent on the part of the debtor to defeat the operation of the bankrupt act, and is therefore void. 3. The trustee is charged with notice of the insolvency of the debtor, and his intent to evade the provisions of the bankrupt act by the very terms of such an assignment. All persons claiming the benefit of such an assignment are chargeable with knowledge of the terms thereof, and consequently with knowledge of the insolvency of the debtor and his purpose to evade the operation of the bankrupt law.

The bare enunciation of these principles disposes of this case. At the date of the deed of assignment, Hollaman was insolvent, and he knew it. It was his duty to go into bankruptcy, but instead of this, he chose to make an assignment, giving preference to certain of his creditors. He, therefore, intended to defeat the operation of the bankrupt act, which requires equal distribution among the creditors of the bankrupt's assets. The deed to McCulloch was notice to him and to all claiming the benefit of the deed, of the insolvency of Hollaman, and of his purpose to evade the operation of the bankrupt act.

The conclusion is inevitable, that the deed of assignment must be declared null and void; that Fraser and wife, Erskine and Roberts must pay to the assignee the amounts received by them respectively from McCulloch, and where such amounts were paid in coin, must repay the same in coin or its equivalent in currency; that McCulloch must account for the proceeds of the property received and disposed of by him under the deed of trust, and not already turned over to the assignee in bankruptcy, allowing him credit for his reasonable services and expenses in selling the property, and for whatever may be collected from his codefendants, Fraser and wife, Roberts and Erskine. Decree accordingly.

## Case No. 7,141.

JACKSON v. MUTUAL LIFE INS CO.

[3 Woods, 413.] [1]

Circuit Court, S. D. Georgia. April Term, 1878.

REMOVAL OF CAUSES — FAILURE TO FILE COPY OF RECORD—CITIZENSHIP AT TIME OF REMOVAL AS TEST.

1. Under section three of the act of March 3, 1875, for the removal of causes (18 Stat. 470), the failure of the party seeking the removal to file in the circuit court, on or before the first day of its session next after the filing of the petition for removal, a copy of the record from the state court, does not deprive the circuit court of jurisdiction of the case.

[Cited in Woolridge v. McKenna, 8 Fed. 667; Glover v. Shepperd, 15 Fed. 834.]

2. In such a case the circuit court has discretion to remand the cause or not, as to it shall seem most conducive to the ends of justice.

[Cited in Curtin v. Decker, 5 Fed. 387.]

3. Under said act the petition for removal need not aver that the parties were citizens of different states at the time the suit was brought. If they are citizens of different states when the petition for removal is filed, it is sufficient.

[Cited in Glover v. Shepperd, 15 Fed. 835; Bruce v. Gibson, 9 Fed. 541; Carrick v. Landman, 20 Fed. 211.]

On motion to remand.

Frank H. Miller, for the motion.

G. T. Barnes and J. B. Cumming, contra.

WOODS, Circuit Judge. The action was commenced in the superior court of Richmond county, Georgia, on May 11, 1877, against the defendant, which was, as averred in the complaint, a citizen of the state of New York. On the 16th of October following, at the appearance term of the state court, and before the cause could be tried, the defendant company filed its petition in that court for the removal of the cause to the United States circuit court for the Southern district of Georgia. This petition alleged the pendency of the suit, that the same was brought for the recovery of the principal sum of five thousand dollars, and that the said William E. Jackson, Jr., administrator, was a citizen of the state of Georgia, and the petitioner, a corporation

[1] [Reported by Hon. William B. Woods, Circuit Judge, and here reprinted by permission.]

created by the laws of the state of New York, resident in said state of New York, and a citizen thereof. On the same day a bond, conditioned according to the act of congress of March 3, 1875 (18 Stat. 470, § 3), with penalty fixed and sureties approved by the state court, was filed by the petitioner. The term of the United States circuit court, for the Southern district of Georgia, next after the filing of petition and bond for removal, began on Thursday, the 8th day of November. A copy of the record of the cause in the state court was not filed in the United States circuit court until the 22d day of November following.

The plaintiff has filed a motion to remove the cause to the state court upon the following, among other grounds: (1) Because the copy of the record was not filed in the circuit court on or before the first day of its then next session after the filing of the petition and bond for removal; and (2) because the petition for removal does not aver that the parties were citizens of different states at the time of the commencement of the action. Of these grounds in their order:

The act of congress under which this removal appears to have been sought (18 Stat. 470, § 3), does not declare in terms that the copy of the record must be filed in the United States court on the first day of its next succeeding session. The law only declares that the petitioner shall give bond conditioned that he will file such copy by the time mentioned. The filing of the record at the time prescribed does not seem to be a jurisdictional fact. If it were, the jurisdiction of the United States court might be defeated by the refusal of the clerk of the state court to present a copy of the record in time to be filed in the federal court. The act of March 3, 1875, provides for the case where the party is not able to file a copy of the record by the time prescribed, by reason of the refusal of the clerk of the state court to furnish a copy thereof, and declares that "the circuit court to which any cause shall be removable under this act, shall have power to issue the writ of certiorari to said state court, commanding said court to make return of the record in any such cause removed as aforesaid;" and the act then proceeds to provide for the case when it shall be impossible for the parties removing the cause under this act, or complying with its provisions for the removal thereof, to obtain such copy of the record, by declaring that the court may order that the prosecutor in the action, etc., shall file a copy of the paper or proceeding by which suit was commenced, and that the other party shall plead thereto. All this seems entirely inconsistent with the idea that unless the copy of the record is filed on the first day of the next succeeding term of the federal court, that court is without jurisdiction of the cause. The filing of the record on the precise day prescribed cannot therefore be a matter of jurisdiction, but the failure to file is one of damages to be recovered on the bond given for the removal; and although the circuit court may well remand for failure of the party seeking the removal to comply with his bond, yet if the delay has caused no prejudice, and the party wishes the case to go on in the circuit court, and complies with all the requisites for removal at a day subsequent, it is in the discretion of the court to grant him the indulgence.

In the case of Hyde v. Phoenix Ins. Co. [Case No. 6,973], on the failure of the party by whom the petition and bond were filed to deposit a copy of the record in the federal court on the first day of its next term, the court allowed the opposite party to file the record and docket the cause, declaring that it was at his option to go on in the circuit court or move to remand the cause. This implies that the circuit court had jurisdiction of the case. I am, therefore, of opinion that the failure of the defendant in this case to file a copy of the record by the first day of the term, did not defeat the jurisdiction of the court, and as it is not suggested that the plaintiff has suffered any damage by the fact that the record was not filed until fourteen days after the beginning of the term, the first ground upon which the motion to remand is based is not well taken.

2. It is said that the petition for removal is fatally defective in not stating that the parties were citizens of different states at the time of the commencement of this action. It has been held by some of the state courts, that the petition for removal must aver that the parties were citizens of different states at the time the suit was commenced: Pechner v. Phoenix Ins. Co. [65 N. Y. 195], and other cases cited in Dill. Rem. Causes, p. 23. The supreme court of the United States, in the case of Insurance Co. v. Pechner, 95 U. S. 183, has taken the same view. These decisions, however, were made under the act of 1789 (1 Stat. 79, § 12). The decision of the supreme court seems to be based on the peculiar language of this section, "that if a suit be commenced in any state court, * * * by a citizen of the state in which the suit is brought, against a citizen of another state," and the matter in dispute exceeds the aforesaid sum, or value of five hundred dollars, etc., the suit may be removed to the United States court.

It has been held by Mr. Justice Miller, that the act of 1867, for the removal of causes (14 Stat. 558) "does not, in terms, prescribe the time at which the citizenship of the moving party must be acquired. Nor is there anything from which to imply that a time was intended to be limited in that regard. Had congress intended to confine the privileges of the act to parties who were citizens of different states at the commencement of the suit, it would have been very easy so to have provided. It did not see fit to do so. On the other hand, in express

terms, or at least by the strongest implication, it provided otherwise. The language is, where a suit is now pending, or may hereafter be brought, in any such court in which there is a controversy between a citizen, etc., which is as much as to say, whenever a controversy shall arise in a suit pending in a state court, the parties to which shall at any time be citizens of different states, the cause may be removed. No time at which the citizenship should be acquired is limited. So the inference is, that it may be acquired at any time:" Johnson v. Monell [Case No. 7,399]. See, also, McGinnity v. White [id. 8,802]. The language of the act of March 3, 1875, under which the removal was sought to be made, in this case, is almost identical with that of the act of 1867, above quoted by Mr. Justice Miller: "That any suit of a civil nature at law, or in equity, now pending or hereafter brought in any state court when the matter in dispute exceeds, exclusive of costs, the sum or value of five hundred dollars, * * * and in which there shall be a controversy between citizens of different states, * * * either party may remove such suit," etc. The act of 1789 did not give to the United States courts all the jurisdiction, authorized by the constitution, either in causes originally commenced in, or cases removed to, these courts. The clear purpose of the act of 1875, is to extend the jurisdiction of the United States courts to the full limits warranted by the constitution. The language used in describing the causes that may be removed, is much broader than that used in the act of 1789. Under the act of 1875, wherever there is a controversy between citizens of different states, in any suit pending in a United States court, the cause may be removed. Under the act of 1789, the cause could not be removed unless the suit was commenced by a citizen of the state in which the suit was brought against a citizen of another state. The distinction in the language and meaning of the two acts is clear and palpable. The view above expressed of this act of 1875, has been taken by the supreme court of Georgia in the case now under consideration: Jackson v. Mut. Life Ins. Co., 60 Ga. 423.

The authorities cited, and a comparison of the acts of 1789 and 1875, show that it is immaterial, under the latter act, whether or not the parties were citizens of different states at the time the suit was commenced, provided they are citizens of different states at the time of filing the petition for removal. I am of opinion, therefore, that the second ground for remanding the cause is not well taken.

Several other reasons for remanding the cause are stated in the petition for removal. But as they have been often passed on already by the courts, we have not thought necessary to give them particular notice. We do not consider any of them well taken. The motion to remand the cause must be overruled.

## Case No. 7,142.

JACKSON v. NORTHERN CENT. RY.

[Chase, 268;[1] 2 Int. Rev. Rec. 174.]

Circuit Court, D. Maryland. Nov. 24, 1865.[2]

INCOME TAX — BONDS HELD BY SUBJECT OF FOREIGN POWER—DEDUCTION BY CORPORATION.

1. No British subject resident in Great Britain is liable to the income tax provided for by section 122 of the internal revenue act of June 30, 1864 [13 Stat. 284].

[Cited in Barnes v. Railroad Co., 17 Wall. (84 U. S.) 304.]

[See note at end of case.]

2. Neither the general tax law of Pennsylvania (Brightly's Dig. Ed. 1858), nor the act of assembly of April 30, 1864, contemplate taxing the interest coupons of railroad bonds.

[See note at end of case.]

3. Semble: There is nothing in the statutes of Pennsylvania which would authorize the assumption that the legislature of Pennsylvania ever intended to tax bonds, or interest on bonds held by citizens of other states, or the subjects of foreign powers.

4. Also semble: That a tax on the interest accruing on the loans or stocks issued by corporations, and guaranteed by the state, may be properly collected by deduction and retention by the officers of the corporation.

The laws of the United States and of the state of Pennsylvania directing the collection of a tax on incomes, levied the tax, and then when the income was derived in whole or in part from dividends from stock or interest on bonds of incorporated companies, directed such companies to retain the amount of such tax and pay it to the United States and the state of Pennsylvania respectively, thus creating such corporations collectors of taxes to that extent. Under these laws, the Northern Central Railway Company—a corporation created by the laws of Pennsylvania and Maryland, and owning and operating a railroad from Harrisburg, in the former, to Baltimore, in the latter state—retained the amount of these two taxes from all coupons of all bonds issued by it and paid to the bondholders, the amount due on these coupons, less the said taxes. No distinction was made as to where the bondholder resided, nor of what country he was citizen or subject. All alike were thus subjected to the taxing power of the United States and of the state of Pennsylvania, and all alike thus forced to contribute to the support of these two governments. Under these circumstances, [John G.] Jackson, the plaintiff in this suit, a British subject resident in Ireland, declined to receive the money for his coupons, less these taxes, and claimed that the company should pay him the whole amount due on the face of them. His demand being refused, he brought this suit in this court.

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[1] [Reported by Bradley T. Johnson, Esq., and here reprinted by permission.]

[2] [Affirmed in 7 Wall. (74 U. S.) 262.]

CHASE, Circuit Justice. The court has considered the questions argued yesterday upon the prayer of the counsel for the defendant in the case of John G. Jackson v. The Northern Central Railway Company, and I will now state our conclusions.

It is admitted that Jackson is a British subject resident in Ireland. He has brought suit against the Northern Central Railway Company, a corporation organized under the laws of Maryland and Pennsylvania, to recover the sum due on certain interest coupons, amounting to two thousand six hundred and fifty dollars, now due on the bonds of the company and belonging to him.

The company does not deny the plaintiff's title to the coupons or its own obligation to pay them, but claims that it is bound to deduct and withhold from him certain percentage to be paid into the treasury of the United States and Pennsylvania respectively, and that he can recover, therefore, only the amount of the coupons less these deductions. The counsel for the company prays the court to so instruct the jury. The plaintiff denies the right of the defendant to have these deductions made.

The deductions claimed are two: five per cent. on the amount of the coupons for the United States, and three mills on each dollar of the principal of the bonds for Pennsylvania.

The internal revenue act of congress, approved June 30, 1864 (section 116, 13 Stat. 281)[3], imposes on the income of every person residing in the United States, and of every citizen of the United States residing abroad, whether derived from interests, dividends, or other sources, a duty of five per cent. on the excess over six hundred dollars and not exceeding five thousand dollars; of seven and a half per cent. on the excess over five thousand and not exceeding ten thousand dollars; and ten per cent. on the excess over ten thousand dollars.

In the next section it is provided that in ascertaining the income of any person liable to an income tax, the amount received as dividends or interest from institutions whose officers, as required by law, withhold a percentage of their dividends on shares or interest on bonds, and pay the same over to an authorized officer of the government, as required by section 122, shall be included, and the amount so withheld shall be deducted from the tax assessed.

This section, it is clear, imposes no income tax whether derived from interest on bonds or from dividends on shares, or from any other source, except on citizens of or residents in the United States. It imposes, therefore, no income tax on the plaintiff, Jackson, who is neither such citizen nor resident.

It is clear also that congress regarded the duty on dividends directed to be withheld by the officers of the companies paying them, and to be paid over by them to the proper officers of the government, as an income tax to be paid only by citizens or residents of the United States.

The fact that congress regarded the duty on dividends in this light, materially aids in the construction of the 122nd section of the internal revenue act, which is mainly relied upon by the defendant. This section subjects all railroad, canal, turnpike, canal navigation or slack water companies, to a duty of five per cent. on all interests and dividends derived from their bonds or shares, and authorizes them to withhold that amount from the bondholders or shareholders, and makes payment to the government a discharge to that extent from payment to them. The language is general, and if the section stood alone an argument of some force might be drawn from it, that congress intended to impose an income tax on interest and dividends from such bonds and shares, without reference to the residence or citizenship of the holders. But the section does not stand alone. It must be considered in connection with other parts of the act; and the 116th section, as we have already observed, regards dividends and interests, subject to deduction by the officers of the companies paying them, as an income not taxable except when payable to citizens or residents.

It is impossible to ascribe to congress the intention of taxing citizens or subjects of foreign states in this indirect way. Sound principles of construction require us to regard this section as simply providing for the cheap and efficient collection of the tax on incomes derived from the bonds and shares of the companies described, and not at all as touching the number or classes of income tax payers. The interest and dividends on which the duty is thus collected must be regarded as the same interest and dividends on which a duty is imposed by the 116th section, and as subject to duty only when held by citizens or residents of the United States.

The defendant's prayer for instructions, therefore, must be denied so far as it asserts a right on the part of the railroad company to deduct five per cent. from the amount of interest coupons held by plaintiff for the purpose of paying the same into the treasury of the United States.

The defendant also claims by his prayer a right to deduct from amount of the coupons sued on three mills per dollar on the principal of each bond to which the coupons are annexed. Three mills per dollar on each bond is three dollars on each thousand dollar bond. The semi-annual interest due on each thousand dollar bond is thirty dollars. The claim, therefore, is to deduct three dollars from each thirty dollars of interest; or in other words ten per cent. of the whole amount of the interest coupons, to be paid into the treasury of Pennsylvania.

[3] [Amended March 3, 1865 (13 Stat. 479).]

For support of this claim we have been referred to the 98th and 101st sections of the general tax law of Pennsylvania, as printed in Brightly's Digest (edition of 1858), and to the third section of a statute of the same state imposing additional taxes, approved April 30, 1864. We have had time for very little further search, and are not aware of any other statute which can be regarded as supporting the claim. We shall consider it, therefore, almost exclusively with reference to the provisions to which we have been referred.

The first of these, in section 98, p. 787, of Brightly, is a mere enumeration of the subjects of taxation in Pennsylvania. Among these are included "mortgages," "money owing by solvent debtors, whether by promissory note, penal or single bill, bond or judgment," and also "all public loans or stocks whatsoever, except those issued by the commonwealth." It is not easy to imagine that interest coupons are intended by either of these descriptions. They are certainly not "mortgages," nor "public loans," nor "stocks;" if they come under either description, it must be under that of "money owing by solvent debtors," and that they do not come under this is almost conclusively proved by its remaining words, namely, "by promissory note, penal or single bill, bond or judgment." These words irresistibly suggest the inference that it was the principal of the "money owing," and not the interest payable and paid from time to time, which was regarded as the subject of taxation.

And this inference is strengthened by the language of the second provision cited from the 101st section of the same law. The section specifies certain property to be assessed at certain rates for state purposes, and then adds the clause for the defendant, namely: "And on all other property taxable for state purposes three mills on every dollar of the value thereof." We think there is no reference here to the taxation of interest. Interest taxed as income is not aptly described as property taxed on the value thereof. Nor is it likely that so trifling a tax as three mills on the dollar, three tenths of one per cent. less than eight dollars on the amount of the interest coupons sued on, would be imposed as tax on interest considered as income. [And it was quite impossible, that any such tax should have been imposed on the principal of the debt of which twenty-six hundred and fifty dollars is a half year's interest, and directed to be collected by deduction from the interest. Such a tax would be as enormous as the tax on interest would be trifling, and would be unprecedented in the history of taxation.] [4]

The third provision cited for the defendant is from the third section of the act of 1864. It provides that the officers of incorporated companies paying interest on which, by the laws of Pennsylvania, a tax is imposed, shall retain the amount of the tax and pay it over to the state treasurer.

We do not regard the two first provisions, cited by the defendant's counsel, as imposing a tax on the interest on the bonds issued by any company, and, therefore, are obliged to regard the citation from the act of 1864 as inapplicable. If no tax is imposed by the laws of Pennsylvania, on the interest due from a company, none can be retained. It was doubtless intended by the legislature that money due from solvent debtors and other property, should be entered upon the general list of property for taxation, and that the amount of the tax assessed should be ascertained and collected in the usual manner without the intervention or agency of the debtors.

There is indeed a statutory provision to which the act of 1864 is applicable, and to which doubtless it was intended to apply. The 105th section of the general tax law, found on page 780 of Brightly, imposes a tax on the interest accruing on the loans or stocks issued by corporations and guaranteed by the state; and this is a tax which might be properly enough collected by deduction and retention by the officers of the corporation; but it does not apply to the bonds of the defendant, for it is not claimed that they are guaranteed by the state.

It follows that we must overrule the prayer of the defendant. It is proper to add that we have seen nothing in the statutes of Pennsylvania which warrants the supposition that its legislature ever intended to tax bonds or the interest on bonds held by citizens of other states or the subjects of foreign powers.

These views relieve us from the necessity of considering the grave, if not difficult question, whether any one state can tax the interest on the whole bonds of a railroad company whose road lies in several states, and whose franchises are conferred by the acts of several states, and whose means to pay interest must be derived from the operation of its road in every state where it lies. It is certain that if one state can impose such a tax, and enforce its collection by deduction from interest, every other state in which the road is operated may do the same, and so the whole road may be taxed in every state where a part of it lies. We leave this question to be decided when it may become necessary.

The prayer of the defendant is overruled, and the following instruction is given to the jury: "If the jury shall find from the evidence that at the commencement of this suit, the plaintiff was the lawful holder of the coupons representing interest due on bonds of the defendant, held by him, and that the plaintiff when he purchased such bonds was a British subject and resident in Ireland, and that he now resides there, the plaintiff is entitled to receive the amount of such coupons without deduction."

[4] [From 2 Int. Rev. Rec. 174.]

The jury then rendered a verdict for the plaintiff for two thousand six hundred and fifty dollars, the amount claimed, he waiving his right of interest.

[NOTE. Upon a writ of error sued out by the company, the supreme court affirmed the judgment, in an opinion by Mr. Justice Nelson, who said that the act of congress of June 30, 1864, was not intended to include nonresident aliens. They are not mentioned in the act, and are impliedly excluded by confining the tax to residents of the United States and citizens living abroad. It was also held that the statute of Pennsylvania authorized the deduction, but that the state had no right to tax the interest of bonds given by a railroad corporation and secured by a mortgage binding the whole road, when such road is also chartered by and lies partially in another state. This is an attempt to tax property and interests lying beyond her jurisdiction. Mr. Justice Clifford and Mr. Justice Swayne dissented. 7 Wall. (74 U. S.) 262.]

## Case No. 7,143.

### JACKSON v. PORTER.

[1 Paine, 457.] [1]

Circuit Court, N. D. New York. Sept. Term, 1825.

EJECTMENT—EVIDENCE OF TITLE — EXISTENCE OF DEED — LANDS OF INDIAN TRIBES — ENTRY — FORCE—TREATY OF 1794 WITH ENGLAND — PRECINCTS OF A MILITARY POST.

1. In ejectment, possession accompanied with a claim of ownership in fee, is prima facie evidence of such an estate. In such case it is not the possession alone, but that it is accompanied with the claim of the fee which gives this effect, by construction of law, to the acts of the party.

[Cited in Strother v. Lucas, 12 Pet. (37 U. S.) 438.]

[Cited in Davis v. Easley, 13 Ill. 198; Link v. Doerfer, 42 Wis. 395.]

2. But such effect is limited to the claim actually made, and a claim of a different kind cannot afterwards be set up for the purpose of aiding the first.

3. As where one claimed title by an Indian deed, confirmed by an agent of the British government, who could not lawfully have confirmed it; it was held, that no other kind of confirmation and no other deed could be set up to help the possession; and that any presumption of the existence of a deed was to be confined to such an one as was originally asserted.

[Cited in Mitchel v. U. S., 9 Pet. (34 U. S.) 760.]

4. Whether a deed is to be presumed from a long possession, is a mixed question of law and fact, and in most, if not all cases, to be submitted to the jury, under the advice of the court. The existence of the deed is a fact for the jury, but its legal effect and operation a question of law for the court.

[Cited in Alexander v. Walter, 8 Gill, 257; Blake v. Davis, 20 Ohio, 249.]

5. The seisin of lands belonging to the Indian tribes is in the sovereign, and the Indians are mere occupants. A purchaser from them can acquire only the Indian title, and they may resume it, and make a different disposition of it.

6. Where proclamation had been made by the governor of the colony of New-York, under orders from the king, that no purchases of land should be made of the Indians, it was *held*, that a purchaser could not acquire even the Indian title of occupancy.

7. An occupant under an Indian grant, the Indians having afterwards resumed the title, and granted it to the crown, was held to be a tenant at will of the king, whose occupancy no length of time could ripen into a title, by adverse possession.

8. Where one enters into land having title, his seisin is not bounded by his actual possession, but is co-extensive with his title. But where he enters without title, his seisin is confined to his possession by metes and bounds.

9. The circumstances that one took possession of unoccupied land, as contractor, to transport for the government to and from a fort on the frontiers, and that his claim comprehended the fort itself, as well as the land around it, and that his improvements were necessary in the performance of his contract, considered evidence that he did not hold in hostility, but in subordination to the rights of the crown.

[Cited in State v. Railway Co., 54 Ark. 608, 16 S. W. 657.]

10. How far a party who gains possession by force, can, in an action of ejectment, protect himself by setting up a title to the land? Quere.

11. Under the second article of the treaty with Great Britain of 1794, the precincts and jurisdiction of a post are not to be considered as extending three miles in every direction by analogy to the jurisdiction of a country over that distance of the sea surrounding its coasts, but they must be made out by proof.

[Cited in De Lancey v. Piepgras, 138 N. Y. 36, 33 N. E. 822.]

12. This clause in the second article of the treaty, providing that settlers within such precincts shall be protected in the enjoyment of their property, as well as the 9th article, were intended to protect legal and equitable interests in land, and not trespassers and intruders without right.

Error to the district court of the United States for the Northern district of New-York.

This was an action of ejectment brought to recover the possession of certain lands near Niagara Falls, which the lessors of the plaintiff claimed under an Indian grant, but which the defendant [Augustus Porter] held from the state. At the trial in the court below a nonsuit was granted, to which the plaintiff excepted, and the bill of exceptions was now argued in this court.

The lessors of the plaintiff, John Sparkman and Susannah his wife, who were British subjects, claimed the premises in question in right of the wife, as heir to her uncle, Philip Stedman, who died in 1822. He was the brother and heir of John Stedman, who died in 1808. It appeared, from the testimony of the plaintiff's witnesses, that John Stedman, as early as the year 1764, resided at Fort Schlosser, where there was a portage on the east side of Niagara Falls, being engaged in transportation along the river to Lewiston for the British government, to which he had an exclusive right by contract. The premises about which testimony was offered form a triangle, the base of which is opposite the acute angle formed at

[1] [Reported by Elijah Paine, Jr., Esq.]

the falls by the river, and strikes the river a mile above, and several miles below the falls, the river forming the other two sides, and the whole tract containing about 5000 acres. The lessors of the plaintiff attempted to support their right, both on the ground of the lost Indian deed and of adverse possession. The evidence was much more clear as to the extent of the land claimed by virtue of the deed, which appeared to be the whole tract, than as to that part of it which had been in the actual possession of John Stedman and those holding under him. A part of this tract was called by some of the witnesses the Stedman farm; but the testimony about its extent was very various, some witnesses calling the whole tract by that name, and others reducing it to about 600 acres, situated about the fort and above the falls. The defendant was clearly in possession of 100 acres claimed by virtue of the deed, but how far his possession was within that part to which the plaintiff endeavoured to make out a possessory title, was extremely uncertain. Fort Schlosser was situated on the river a mile above the falls, and Stedman's house in 1764 was near the fort. In 1769 he had about 40 acres improved, and a house, store, and stables. In 1772 he had 100 acres cleared, 40 acres of which were near the falls, where the defendant's saw-mill now is. He then lived in a large house, 30 rods below the fort, which he had built the year previous. He had also a saw-mill near where defendant's now is. He soon after cleared up all the land along the river, from the falls to the fort. In 1777 he built a log-fence from his house across to the river below the falls, two miles and one half long, enclosing between the fence and river 2000 acres for an ox range. In 1783 it appeared that he resided on lands now possessed by the defendant. All the premises he had latterly claimed to be his, by virtue of a deed from the Seneca Tribe of Indians, given to him by way of compensation for damages they had done him in 1763, and confirmed by Sir William Johnson as superintendent of Indian affairs. Evidence was offered by the plaintiff to prove that there was a tradition among the Seneca Indians that such a deed had been given, and of the circumstances which led to the giving of it; but this evidence was rejected by the court. An instrument dated 1805, purporting to be a solemn acknowledgment and declaration by the Seneca Nation, that such a deed had been given, was also offered in evidence, and rejected.

In 1786, Philip Stedman, the brother of John, was in possession, claiming under him. There were then 150 or 200 acres cleared. In 1788 Philip Stedman, Jun., the brother of Mrs. Sparkman and nephew of the elder Philip, was in possession, and continued in possession for some years, but how long did not exactly appear. He then left the premises and died, while travelling in Connecticut for his health, in 1798. In 1792 the improved lands extended from above the house down the river, below where the defendant's present saw-mill is, and back from the river 50 to 100 rods. There was also a saw-mill out of repair 10 rods above where the defendant's grist-mill now is. When Philip Stedman, Jun., left the premises, he rented them to a tenant, who was succeeded by Ware, who is still in possession. The two Philips continued to transport for the British government until 1792, when the portage was removed to the other side of the river. On the death of his nephew, Philip Stedman, the elder, came over from England to see the property, which was rented by the present tenant, Ware, and in 1800 returned to England, leaving Ware in possession. The premises, together with Fort Schlosser, where there had been constantly a garrison of twenty men, remained in the possession of the British government until 1796, when they were, agreeably to treaty stipulations, surrendered to the United States. Sir William Johnson was from 1755 to 1774 superintendent of Indian affairs, and it was his duty to hold treaties with them, and superintend purchases of land from them. In 1762 he received instructions from the lieutenant-governor of New-York, that the king had forbid that any land should be purchased of the Indians, either by the governor or any other person, and that all applications to purchase should be sent home to the king. In 1764 the Indians ceded the whole of the premises in question to the king. The tenant Ware continued in possession, holding under the Stedmans, and for the purpose of protecting the possession until 1806, when the sheriff in his absence removed his furniture from his house, and piled it about ten rods distant. His wife and children went to a tavern across the road, and defendant took possession of the house. It appeared that several persons were residing at this time on the premises claimed by the plaintiff, some of whom were pretty large farmers.

The plaintiff gave in evidence the admissions of the defendant, that in 1805 the defendant and one Barton had petitioned the legislature and got a patent, covering a part of the Stedmans' cleared fields, and also got a lease under the authority of the state, of the farm where Ware lived, and tried to compromise with him and get him off, but as they could not succeed, they got an act passed to turn him off. During the late war Ware regained the possession of the premises, and still continues in possession. A map of the premises came up with the bill of exceptions as referred to on the trial, but was left entirely unexplained or verified by testimony. A lot of 581 acres extending above Fort Schlosser to a stream called Gill creek, and thence down about half way to the falls, was marked on the map as "the present farm." Next below this was laid down Porter and Barton's lot of 100 acres, extend-

ing about one third the remaining distance to the falls.

Samuel M. Hopkins and R. Beach, for plaintiff, contended:

1. That the possession of John Stedman and those under him, with continual acts and constant claim of ownership from 1764 until 1806 were sufficient to raise the presumption of a grant in fee from the government, or a confirmation of the Indian deed (2 Phil. Ch. 187; 11 Johns. 509; 10 Johns. 377, 380; 3 Johns. Cas. 109, 128, 28; Cowp. 217, 102; Selwyn, 1089; 2 Saund. 175, 176, note 2; 3 Johns. 270; 2 Johns. Cas. 324; 7 Johns. 63; 12 Johns. 245, 488; [Ricard v. Williams] 7 Wheat. [20 U. S.] 105, 109; 13 Johns. 513, 376, 503; 1 Caines, 358; 4 Johns. Ch. 1, 298; 5 Johns. Ch. 545; [Johnson v. McIntosh] 8 Wheat. [21 U. S.] 598, 603; 4 Johns. 211; 11 East, 493, 280, 56; 12 Coke, 4, 5; Buller, 74; 3 Term R. 157; 9 Johns. 170), and that this should have been left to the jury.

2. That if the Indian grant was never ratified by government, it was sufficient to give colour of title, so as to create an adverse possession in those claiming to hold under it, which was a subject for the jury. 8 Johns. 388; 7 Johns. 505; 3 Johns. Cas. 118; Adams, Ej. 48; 9 Johns. 102; 11 East, 488, 493; 8 Johns. 388; 17 Johns. 217; 20 Johns. 183; 18 Johns. 355; 13 Johns. 318, 406, 313; 1 Caines, 358; 2 Caines, 183; 2 Rolle, 152.

3. That the possession of Ware having been wrested from him forcibly by the defendant, without any proof of title, the defendant cannot now be allowed to show title, but must first restore the possession, and then resort to his right. That the act of the state of New-York did not justify the dispossession: (1) Because it does not relate to this property; (2) because no connexion is shown between the defendant and the act; and (3) because the act is unconstitutional and void. 3 Laws N. Y. April 6, 1803 (26th Sess.; W. & S. Ed. p. 365) c. 106, § 17; Act 1804 (27th Sess.) c. 111, § 6; Act 1806 (29th Sess.) c. 110, § 4; 11 Johns. 504; 12 Johns. 488, 365; 2 Johns. Cas. 324, 422; 3 Johns. Ch. 129; 18 Johns. 45; [Ricard v. Williams] 7 Wheat. [20 U. S.] 118, 59; 3 Johns. Cas. 118, 128; 2 Johns. 22; 9 Coke, 96, 214, 218; Co. Litt. 277a; 10 Coke, 48a; 2 Rolle, Abr. 164; Sav. 7; 3 Johns. 386; 13 Johns. 291; 16 Johns. 142; 2 Johns. Ch. 162; 4 Johns. 150; 2 Johns. 24; 4 Johns. 211; 11 Johns. 504; 13 Johns. 335.

4. That Ware having remained on part of the property, or returned to it after he was dispossessed of the house, was evidence to be left to the jury, of a virtual continued possession to the present time. 3 Bl. Comm. 9, 169, 171, 175; Co. Litt. 277; Id. 417; [Green v. Siter] 8 Cranch [12 U. S.] 250.

5. That the ancestor John Stedman, was a settler within the precincts and jurisdiction of Fort Schlosser, and as such his title and possession was protected and confirmed by the second article of the treaty with Great Britain of the 19th of November, 1794, and that the treaty ought to be construed to confirm such an estate as Stedman then claimed, viz. a fee. 1 Bior. & D. Laws, 212 [8 Stat. 116]; 4 Johns. 80; [Matthews v. Zane] 7 Wheat. [20 U. S.] 206, note a; Co. Litt. 243; 3 Will. 516.

6. That it should have been left to the jury to say, whether the defendant was not without any title, and a naked trespasser, the evidence of his having a patent and lease being very unsatisfactory; and if so, the prior possession of the plaintiff would have entitled him to a recovery. Cro. Eliz. 437; 2 Saund. 111; 9 Johns. 174; 10 Johns. 338; 2 Johns. 22; 3 Johns. 388; 4 Johns. 202; 3 Johns. Cas. 128; 20 Johns. 183; 4 Johns. Ch. 53.

S. Jones and S. A. Talcott, for defendant, controverted these points, and contended:

1. That the plaintiff could not recover upon the prior possession of Stedman or Ware; and under the proof in the case, that it ought not to have been left to the jury to make any inference or presumption in favour of the plaintiff. 1 Johns. 44; 4 Johns. 150; 13 Johns. 235; 11 Johns. 504, 509; 11 East, 488; 5 Munf. 374; 3 Munf. 345; Cowp. 595, 597; 1 Johns. Cas. 123; that a forcible dispossession is not enough of itself to recover in ejectment.

2. The plaintiff himself, showed on his own evidence, that his lessors had no title which a court could recognise under the laws and public treaties, of which they are bound officially to take notice; and there was nothing sufficient under the circumstances to be left to the jury, to warrant a presumption of title in them, better than the original deed under which they claimed, and which was itself illegal and a nullity; and if not a nullity at first, has been subsequently avoided by the cession of the territory comprising the premises. 2 Conn. 607, 614, 423; 11 East, 56, 279, 488; 8 East, 248; 1 Bos. & P. 400; 12 Ves. 239, 266, 269, 270; [Dunlop v. Ball] 2 Cranch [6 U. S.] 180; 6 Bin. 416, 419; 10 Johns. 417; [Ricard v. Williams] 7 Wheat. [20 U. S.] 107; 1 Caines, 90, 91; 5 Taunt. 170; Cowp. 595; 1 Term R. 428, 431; that presumption of a deed is matter of law; 1 Har. & McH. 432, 433; 3 East, 294, 302; 8 East, 249, 264, 266, as to presumption.

3. That the title of the Stedmans was never such as to come under the protection of the treaty of 1794, and Susannah Sparkman, being an alien, could not take. [Johnson v. McIntosh] 8 Wheat. [21 U. S.] 543, 592; 4 Johns. 165; 12 Johns. 365, as to the effect of an Indian grant.

4. That the premises were ceded to the crown of Great Britain, and the state of New-York succeeded to their ownership. 4 Bin. 218; 5 Serg. & R. 266; 4 Yeates, 537.

5. That there had been no lapse of time sufficient to bar the right of the state, and this right Porter acquired, as proved by his

own declarations, called for by the plaintiff. And if that were not sufficient proof, still title in the state, when shown, must be officially noticed and acted upon by the court, although the contest is between third persons; and such title may be set up by the defendant to protect his possession, notwithstanding the prior possession of the Stedmans. 10 Johns. 417; 11 Johns. 376; 16 Johns. 214; [Dunlop v. Ball] 2 Cranch [6 U. S.] 184; 5 Munf. 374; Runn. Ej. 14; Dunlop v. Ball [supra], as to the statute of limitations against state or individuals.

THOMPSON, Circuit Justice. This case comes up on a writ of error to the district court of the Northern district of this state. And the errors complained of arise upon a bill of exceptions taken to the opinion of the court, ordering the plaintiff to be nonsuited. The range of argument taken at the bar, has led to the discussion of some questions which, according to my view of the case, do not necessarily arise, and which in the course of this opinion will be only cursorily noticed. The right or title upon which the lessors of the plaintiff rely is derived from John Stedman. And if he had any estate which could descend to his heirs, it is not to be denied but that Susannah Sparkman is entitled to it. The first inquiry then which seems naturally to arise is, what was the interest of John Stedman in the premises in question? The bill of exceptions is extremely lame and uncertain as to the location of the premises in question. It is, however, very certain, that the defendant is in possession of some land, embraced within the claim of John Stedman, and if that claim has been established as a legal, valid, and subsisting right, the plaintiff was entitled to a verdict, and was improperly nonsuited.

The claim of Stedman covered about five thousand acres of land, comprised within the following bounds: Beginning at a place called Devil's Hole, some distance below the Falls of Niagara, and running from thence to Gill creek, then down the creek to the Niagara river, then down the river to the place of beginning. It is not very satisfactorily ascertained when Stedman went into possession of any part of the land comprised within his claim. One of the witnesses (Humphrey) says, that he was there in the year 1769, had a house, stores, and stables, and about thirty or forty acres of land improved. But he did not at this time claim the whole tract above-mentioned, nor did that possession and improvement extend to any part of the land now occupied by the defendant. This possession was near Fort Schlosser, and Stedman was there having the charge of, and contract for the portage both of the king's stores and private property, from Fort Schlosser to the place where Lewiston is now situated. There is no evidence that at this time Stedman claimed any title to the land. He had a mere naked possession; and the ground on which he afterwards rested his claim, shows that he could not then have pretended to claim any title. The testimony, as to the actual possession of John Stedman, is extremely loose and unsatisfactory. It is however, pretty evident, that most of his improvements were upon what is now called, (and laid down upon the diagram accompanying the bill of exceptions,) the Stedman farm, containing five hundred and eighty-one acres; and which is now in the possession of Ware, as the tenant of the lessor of the plaintiff. The house which Stedman built in the year 1771, was upon this farm, about one hundred and fifty yards below Fort Schlosser, and about one mile from the falls where the defendant lives. In 1772 the improvements were small, only about one hundred acres cleared; which clearings were from time to time enlarged, but how far they touched the land now occupied by the defendant, is left very much in doubt.

It is unnecessary however to pursue this inquiry; for if the right to recover was placed upon possession alone, the nature and extent of that possession, and whether adverse or not, ought to have been submitted to the jury. But John Stedman did not put his claim upon possession, but upon title derived from the Indians. Possession accompanied with a claim of ownership in fee, may be deemed prima facie evidence of such an estate. In such case it is not the possession alone, but that it is accompanied with the claim of the fee, which gives this effect by construction of law to the acts of the party. Possession per se is evidence of no more than the mere fact of present occupation by right. Hence the declarations of a party in possession are always admitted to show the extent and nature of the interest he claimed in the land; and from the very nature of the case, it must depend on these collateral circumstances to ascertain the extent of his interest. If the occupant of land avows his interest to be that of a term of years, it would be absurd to consider his possession evidence of a fee; and it is certainly granting all that can reasonably be asked, to allow the occupant an interest as large as he claimed; and it cannot be permitted to him to abandon such claim and set up a different interest, unless he can show his title, and that he was under some mistake of law in relation to it. These are rules founded on the plainest principles of reason and justice, and fully recognised by the supreme court of the United States in the case of Ricard v. Williams, 7 Wheat. [20 U. S.] 105. The interest of John Stedman, therefore, to the land in question, must be tried by, and limited to that which he declared it to be. And the testimony upon that point is from the plaintiff's witnesses alone, and is full and conclusive to show, that the claim in its broadest extent was no more than the Indian title, confirmed by Sir William Johnson. And the answer of the witnesses on this point did

not fall from them casually, and without being expressly called for. It was made a question by direct application to the court, whether it was competent to inquire into the declarations of Stedman as to his claim of title. And it is fair to presume the inquiry was as broad as the fact would warrant, or the answer expected. The bill of exceptions states that the counsel for the plaintiff proposed to inquire of the witness, Prout, whether or not John Stedman, while in possession, claimed to hold the land by virtue of a deed from the Indians, confirmed by Sir William Johnson as superintendent of Indian affairs. This was objected to unless the deed was produced. The objection was overruled; and the witness stated, that he had many times heard Stedman claim the lands to be his by virtue of a deed from the Indians, confirmed as aforesaid—that it was given to him by the Indians, by way of compensation for the damages they had done him in the year 1763—that Stedman had no other title as the witness knew of, and that he had heard Stedman say he had not. Here then is a disclosure, not only affirmatively what Stedman did claim, but an express negation of any other title. And all the other witnesses who speak of Stedman's declarations respecting his title, either expressly or by necessary implication, refer to the Indian deed. We may therefore safely conclude, that Stedman neither had nor pretended to have any other title. This deed is claimed to have been given by the Seneca Indians, and confirmed by Sir William Johnson some time in the year 1764. This deed was not produced upon the trial; and it was made one of the principal objections to the nonsuit, that it ought to have been submitted to the jury to presume the existence of the deed.

Many cases were cited and much time taken up, in the discussion of the rules and principles which govern the doctrine of presumption of grants and deeds. On the one side it was contended, that this was a question exclusively for the jury, and that the court below erred in taking it from them. On the other side it was very strenuously urged, that this presumption was an inference of law and for the court to decide. I do not deem it necessary to enter at large into an examination of this point, or to express any decided opinion upon it. I have looked into most of the cases cited, and they certainly afford some colour for the argument on both sides. And the correct view of the subject, perhaps, is to consider it a mixed question of law and fact; and in most, if not in all cases, to be submitted to the jury under the advice of the court. The law has not defined any precise circumstances, or fixed the time, which shall necessarily raise the presumption of a deed or grant. In general, it is the policy of the law to limit this presumption to periods analogous to those of the statute of limitations. But this is not an invariable rule. Presumptions of this nature are adopted from the general infirmity of human nature; the difficulty of preserving manuscripts of title, and the public policy of supporting long and uninterrupted possessions; and are founded upon the consideration, that the facts and circumstances are such as could not, according to the ordinary course of human affairs, occur, without presuming a transfer of title, or an admission of an existing adverse title in the party in possession. When the title deeds are not produced, their existence is the fact to be established; and the circumstances from which this is to be inferred, would seem to me very clearly to be matter for the consideration of a jury. They may be rebutted by contrary presumptions. And the existence of such title deeds can never be fairly presumed, when all the circumstances are perfectly consistent with the non-existence of such deeds. If it was now to be made a question, whether John Stedman had once an Indian deed, confirmed by Sir William Johnson, I should think it a question which ought to be submitted to a jury. But if the existence of the deed is admitted, the legal effect and operation of such deed is a question of law for the court. And even admitting that the court below erred in taking this question from the jury, it would be useless to send the cause to another trial on this ground, if the existence of such a deed would not vary the rights of the lessors of the plaintiff. I shall therefore assume, that John Stedman had an Indian deed, confirmed by Sir William Johnson, according to his claim, and give to it the same force and effect as if produced upon the trial.

A question here arises, whether, from the evidence as it stood when the nonsuit was granted, the jury would have been authorized to enter into the inquiry, and presume the existence of any other title than that which was claimed by John Stedman; and I think they would not. This principle is fully recognised in the case already referred to of Ricard v. Williams, and is certainly allowing to the occupant of land all that he could reasonably ask; unless he could show some other title, and make it appear he was under some mistake as to the claim he had set up. The title which John Stedman uniformly claimed was that derived from the Indian deed confirmed by Sir William Johnson, and a disclaimer of having any other title. Under such circumstances, and in the absence of all proof to support any other claim of title, with what pretence could the jury be called upon to presume a grant from the crown, or a title from any other quarter? Had the possession of Stedman been accompanied by a claim of title generally, without designating what, the question would then have been at large, and open to the presumption of any title consistent with the facts and circumstances in evidence. But when the possessor of land discloses what interest he claims in it, and his title being evidenced

only by his possession and claim, it must be limited to that which he has asserted. Cases have been referred to containing very strong expressions of judges, how far courts and juries should go in presuming grants and deeds, to protect and quiet long and uninterrupted possessions. But it will be found in those cases, that the possession was accompanied by a claim of title generally, and not the designation of any particular interest. A jury could not certainly be called upon to presume more than the party claimed. If the claim was simply an estate for life or years, no judge I presume would tell a jury they were at liberty to presume an estate in fee simple.

The next question that seems naturally to arise, is, the legal effect and operation of an Indian deed, and in what light such conveyances are viewed in courts of justice. This subject has recently received a very full examination of the supreme court of the United States in the case of Johnson v. M'Intosh, 8 Wheat. [21 U. S.] 571. The point of inquiry there was simply, as to the power of the Indians to give, and of private individuals to receive, a title, which could be sustained by the court. There were no objections to the grants themselves, or that the Indians were not in the rightful possession of the land they undertook to sell. So that the broad inquiry was, their right to sell, and of the grantee to purchase. The chief justice, in delivering the opinion of the court, went into a very particular examination of the principles and policy which had governed all the European nations which had made discoveries and settlements in this country, touching the rights of the natives. The title of the government to the country was placed on the ground of discovery, which title was to be consummated by possession, and which gave to the government the exclusive right of acquiring the soil from the natives, and of regulating the relations that were to exist between such government and the natives. The Indians were considered as being the rightful occupants of the soil, with a legal as well as just claim to retain possession of it, and to use it according to their own discretion. But their rights to complete sovereignty as independent nations, were necessarily diminished. And their power to dispose of the soil at their own will to whomsoever they pleased, was denied. The European nations, by whose subjects the discoveries were made, respected the rights of the natives as occupants, but asserted the ultimate dominion to be in themselves; and as a necessary consequence thereof, claimed and exercised the power of granting the soil while yet in the possession of the Indians. And such grants have been universally understood to convey a title to the grantees, subject only to the Indian right of occupancy. The United States have adopted and acted upon the same principles. By the revolution, the power of government and right of soil which had been previously in Great Britain, passed definitively to these states. And it has never been doubted but that either the United States or the several states had a clear title to all the lands within the boundary lines described in the treaty of peace, subject only to the Indian right of occupancy; and that the exclusive power to extinguish that right was vested in that government, which might constitutionally exercise it. And the practical assertion of this right is seen in the policy which has governed the United States and the individual states, in prohibiting all purchases of the Indians by individuals in their own right. And the Indians being mere occupants, are deemed incapable of transferring an absolute title to others. This occupancy is not incompatible with a seisin in fee in the state. A purchaser, from the natives, at all events, could acquire only the Indian title, and must hold under them and according to their laws. The grant must derive its efficacy from their will, and if they choose to resume it and make a different disposition of it, courts cannot protect the right before granted. The purchaser incorporates himself with the Indians, and the purchase is to be considered in the same light as if the grant had been made to an Indian; and might be resumed by the tribe, and granted over again at their pleasure.

If this be the view which we are to take of the Indian right of occupancy, the claim of John Stedman considered in the most favourable manner, could never have been any thing more than a mere right of possession, subject to be reclaimed, and extinguished at the will of the Indians, and which has been done, as will be seen hereafter. But it may very well be questioned, whether this claim is entitled even to so favourable a consideration. As the claim of Stedman rests upon an Indian deed, confirmed by Sir William Johnson, it may be proper to inquire into the power of Sir William Johnson on this subject, in order to ascertain what is to be understood by his confirmation. The deed is not before us, and as the cause was taken from the jury, it must now be admitted, that it was unexceptionable in point of form. And as Stedman disclaimed having any other title than that which was derived from the Indian deed, and Sir William Johnson's confirmation, unless he had authority to pass the title, none could have been vested in Stedman. The pretended confirmation of Sir William Johnson is as follows: "Fort Niagara, September 20th, 1763. I William Johnson, commander-in-chief of the army, at and about Fort Niagara, and superintendent of Indian affairs, do certify and approve the within deed, given by the chiefs and warriors of the Seneca Nation of Indians to John Stedman." There must be some mistake with respect to dates. The deed is said to have been given in the year 1764, and the confirmation, as it is called, bears date the preceding year. But the en-

dorsement does not purport to be any thing more than a certificate, approving of the purchase; and does not profess to be an act which shall complete, or transfer any title: and if Sir William Johnson had no such power, a construction ought not to be given to his acts, which involves a violation of his duty. Let us then briefly inquire what were his powers in this respect. Sir John Johnson in his testimony says, that from the year 1755, to the year 1774, Sir William held the offices of superintendent of Indian affairs, and colonel of the Six United Nations of Indians, and was one of the council of the governor of the colony of New-York. That his duty as superintendent of Indian affairs, required him to hold treaties with the Six Nations of Indians, and all the Indians of the Northern district, and to superintend all purchases of land, from them or either of them. Here is certainly no power to transfer any title. A grant from the crown, or from the colonial governor, was necessary for this purpose. But whatever authority Sir William Johnson might have had in this respect previous to the year 1762, it must have ceased after that time. Early in that year (according to the testimony of Sir John Johnson,) he received from the lieut. governor of the province of New-York, instructions in relation to the purchase of land from the Indians, a copy of which is given as one of the exhibits in the cause. There is a mistake in the reference; but the identity of the document was admitted on the argument, and this was the plaintiff's evidence, and no objection taken to its admissibility. They purported to be additional instructions, and although addressed to the governor of the province, must have been sent to the superintendent of Indian affairs, to regulate and govern his conduct. These instructions were directed to be made public by proclamation, which was accordingly issued by Lieut. Governor Colden, in February, 1762, in which the instructions were set out at large. This was offered on the part of the defendant, and objected to, but admitted to be read to the court, on the argument of the motion for a nonsuit. It is not very important to inquire into the regularity of this course, for the proclamation contains nothing more than the instructions at large, the material parts of which had been given in evidence on the part of the plaintiff; and are substantially reiterated in the proclamation of the king, of the 7th of October, 1763; which has been published under the sanction and authority of the United States. 1 [Bior. & D.] Laws, 443.

These instructions and proclamations, recite the evils and abuses that had arisen, by reason of purchases made of the Indians, and the passing of grants by the colonial governors; and strictly enjoins and commands the governor, lieut. governor, president of the council, or commander-in-chief of the province of New-York, upon any pretence whatever, and upon pain of forfeiting their office, not to pass any grant to any person whatever, of any land within, or adjacent to, the territories possessed or occupied by the Indians, or the property or possession of which has at any time been reserved to, or claimed by them: And also prohibiting the granting of any license to purchase land of the Indians, but to send all applications made for that purpose, home to the king, and forbidding any private person making any purchase of the Indians: But that if at any time they should be inclined to dispose of their land, the same should be purchased for the crown, at some public meeting of the Indians, to be held for that purpose by the governor, or commander-in-chief of the colony where the land shall lie: and requiring all persons who had wilfully or inadvertently seated themselves upon any lands, which had not been ceded to, or purchased by the crown, forthwith to remove therefrom. After these instructions were made known here, it is very evident that no power existed in this country, so to authorize and confirm any purchase from the Indians, as to transfer the title to the land. Nor could it be permitted, to ask a jury to presume any such attempt to transfer the title, when it would imply a breach of trust, and a violation of duty in the officer who should thus act. The pretended confirmation therefore of Sir William Johnson, cannot be considered any thing more than an approval of the application for the purchase, to be sent home for the sanction and ratification of the king; and coming within what is stated by Sir John Johnson as having been a part of his duty, to superintend purchases made of the Indians. The authority of the king to regulate and control purchases from the Indians within his colonies, was not questioned on the argument, and cannot be denied. Any purchase made by Stedman in violation of such regulations, must of course be void, and he could acquire no right whatever thereby; not even the Indian right of occupancy; and he must have been an intruder, by any entry made under such purchase.

But admitting him to have obtained a rightful possession under such purchase, it must be restricted to his actual occupation, and can be of no avail, at all events in this suit. His first possession was near Fort Schlosser, which is, according to the testimony, about one mile from the defendant's possession. And as late as the year 1771, according to the testimony of one of the witnesses, he had only cleared and improved about four acres; and long before his improvements extended to any of the land in possession of the defendant, the Indians had resumed their right of occupancy, and ceded it by treaty to the crown. That such is the light in which Stedman's possession is to be viewed, necessarily results from the well settled rule, that where a man enters into land, having title, his seisin is not bounded by his actual possessions, but is held to be co-ex-

tensive with his title. But where he enters without title, his seisin is confined to his possessions by metes and bounds.

It has already been shown, that admitting a purchaser from the Indians acquires their right of occupancy, the Indians may whenever they choose, resume it, and make a different disposition of the land, which in the present case has been done by the 3d article of a treaty between his Britannic majesty and the Seneca Nation of Indians, dated the 3d of April, 1764. By this article, they cede to his majesty and his successors for ever, in full right, the lands from the Fort Niagara, extending easterly along Lake Ontario about four miles, comprehending the Petit Marias or landing place, and running from thence southerly about fourteen miles to the creek above Fort Schlosser or Little Niagara, and down the same to the river or strait; thence down the river or strait, and across the same at the great cataract; thence northerly to the banks of Lake Ontario, at a creek or small lake about two miles west of the fort; thence easterly along the banks of Lake Ontario, and across the river or strait to Niagara, comprehending the whole carrying place, &c. That all the land embraced in Stedman's claim falls within these bounds, has not been questioned. This is one of the documents read by the defendant's counsel on the motion for a nonsuit. I do not however see from the bill of exceptions, that any objection was made to it. And it is recognised as a valid cession, and excepted out of a treaty made between the United States and the Six Nations of Indians, on the 11th of November, in the year 1794. 1 [Bior. & D.] Laws, 311 [7 Stat. 44]. There can therefore be no doubt, but that the Indian right to the land in question was ceded to the king by the treaty of 1764; and all Stedman's right of occupancy must then have ceased, and been extinguished; and he stood upon his mere naked possesssion, without title, and without the right of possession. According to the theory of the British constitution, the title to this land was at that time vested in the king; and Stedman, under the circumstances in which he was placed, could not be considered in any better light than a mere tenant at will. He did not pretend to have any grant from the crown, and must be deemed to have held in subordination to the right and title of the king. It could not be considered an adverse holding, and no length of possession would ripen it into a title.

But if he is to be considered as holding in hostility to the real owner, he must be held to strict proof of actual and continued possession, and must not have voluntarily abandoned it. The proof on this subject is extremely vague and unsatisfactory. Some of the witnesses do speak of improvements made in the year '90 or '92 along the river, above and below the falls, which must have embraced some of the land now occupied by the defendant; but the evidence does not warrant the conclusion that the possession was kept up. And most of the witnesses refer to improvements made on the farm of 582 acres, now in the possession of Ware, under the Stedman claim. And it ought to be borne in mind as explanatory of the acts of Stedman, that he was then under a contract for the portage, and which gave employment for a great number of horses and oxen, and many of his clearings and improvements were probably made for procuring subsistence for them. I do not mean however to enter into a critical examination of the testimony on the question of possession.

I think this was a subject which in strictness belonged to the jury, and I should have been better satisfied if it had been submitted to them. But as I do not think a verdict against the defendant on this ground could have been sustained, I am not inclined to reverse the judgment of nonsuit for this cause. The acts of Stedman are to be viewed with reference to the character and employment in which he was engaged. He was there before and during the revolution, in the enjoyment of an important and profitable trust under his contract for the portage. This was his original and primary object. He no doubt afterwards wished, and probably entertained hopes and expectations of obtaining a title for the land. But this only shows that he was there, not in hostility to the rightful owner, but under, and in subordination to the rights of the crown. And this view of Stedman's situation is very much strengthened by the consideration, that here was a military post, and an important portage, which it is very improbable the government would have disposed of. And besides, the Stedmans continued to hold this portage under contract with the government, until it was removed on the other side the Niagara river, about the year 1792. And according to the testimony of one of the witnesses, the contract for this portage was open to public competition once in every three years; which is utterly incompatible with the supposition, that Stedman could have claimed any exclusive right; and no exception was made by him in his claim, either of the military post or the portage. They stood on the same footing with the residue of the five thousand acres embraced within his claim. And Sir William Johnson, permitting Stedman to continue in possession, after the rigid instructions he had received in relation to Indian lands, can be accounted for on no other ground, than that he was there by permission of the government, under the contract for the portage, and not as claiming under an Indian purchase. And besides, his improvements, if at all extending beyond the limits of the farm now held by Ware, were very unimportant at the commencement of the revolution; and the extension of them during that period, or even down to the year 1796, when the post was surrendered by the

British government, cannot be construed into an acquiescence in any claim of right in Stedman.

It is said, however, that Ware, who was the tenant of Mrs. Sparkman, was forcibly dispossessed, and that the possession must be restored before the question of title can be inquired into. Admitting this to be a sound and salutary rule, it does not apply to the facts in this case. There is no evidence of any forcible dispossession of any of the land now in the occupation of the defendant. It was in proof on the part of the plaintiff, derived from the confessions of the defendant, that he and Barton had in the year 1805, obtained a patent from the state of New-York for some of the land, and which covered a part of Stedman's cleared fields; and that they had a lease under the authority of the state for the farm where Ware lived, but he would make no compromise with them, and that they had procured an act of the legislature to turn him off. The patent was not in evidence, and what land it covered does not appear. It is evident, however, that it did not cover the farm in possession of Ware, because Porter and Barton had only a lease for that from the state. There is no evidence that Porter exercised any acts of ownership over any part of this land, previous to the year 1805; and it is reasonable therefore to presume, in the absence of all proof to the contrary, that whatever possession he took out of the bounds of what is called the Stedman farm, was taken under the title derived from his patent. But it is objected, that this patent could pass no title by reason of the adverse possession held under the Stedman claim. This objection, however, is not tenable. In the first place, there is no evidence that there was any adverse possession, or any possession at all of the land covered by the patent. But admitting a possession in Ware under the Stedmans, of all the Indian right of occupancy, which is the utmost extent that could be claimed, it would form no objection to the operation of the patent. This point is fully settled by the case of Johnson v. McIntosh before referred to.

The only forcible dispossession of which there is any proof, is what was done by the sheriff, under the act of 1806. But this must at all events be confined to what is now called, and laid down on the diagram as the Stedman farm. The evidence on this subject is, that the sheriff went to the house occupied by Ware, he being from home, and removed his furniture from the house and piled it up about ten rods distant, and Mrs. Ware and her children went to a tavern across the road; and the defendant's workmen went immediately into the house, and in May or June of the same year, the defendant himself moved into the house. This act, admitting it to have been forcible, might in strictness be confined to the house only. But the defendant declared, that he and Barton had got a lease of the farm, and that the act of the legislature was procured to turn Ware off; which may be considered an admission that he was turned off the whole farm. But it shows at the same time, that the force, if construed to extend to the whole farm, must at all events be limited to that, and cannot in any manner affect the defendant's present possession. And Ware has regained the possession of this farm. It being left vacant during the late war, he re-entered, and still continues to occupy it. This state of facts supersedes the necessity of inquiring into the validity of the law, under which Ware was turned out of possession; or examining how far a party who gains possession by force, may in an action of ejectment protect himself by setting up a title to the land.

The only remaining inquiry is, whether the treaty of 1794,—1 [Bior. & D.] Laws, 206 [8 Stat. 116],—between the United States and Great Britain, will in any way aid the claim of the lessors of the plaintiff; and if the view which I have taken of this claim be correct, little doubt can exist on this question. The 2d and 9th articles have been referred to. The 2d article declares, "that all settlers and traders within the precincts, or jurisdiction of the said posts, shall continue to enjoy unmolested, all their property of every kind, and shall be protected therein. They shall be at full liberty to remain there, or to remove, with all or any part of their effects: and it shall also be free to them, to sell their lands, houses, or effects, or to retain the property thereof at their discretion." Although the meaning of the term "settler," as here used, is not very obvious, yet as the object of the article was to protect any interest that might have been acquired in property, it is perhaps reasonable to consider him a settler who had such interest in land, within the precincts or jurisdiction of the post. But another question arises, as to what are the limits or jurisdiction of the post at Fort Schlosser. It was suggested, but no authority cited to support the position, that it extended to the distance of three miles in every direction from the fort, in analogy to the rule of the law of nations, which gives to a country bordering on the sea coast, jurisdiction thereon to the extent of three miles. I cannot accede to this rule; but am inclined to think, it is to be proved as matter of fact, to what extent jurisdiction was exercised. There was no proof on that subject before the court.

But there is another and more conclusive reason for considering this article inapplicable to the case. It was obviously intended to protect some legal or equitable interest which the settler had acquired in land. And Stedman, as has already been shown, had no such interest which a court of law or equity could recognise, or which the British government was under any obligations to sanction and protect. The article never could have been intended to ratify and confirm

the possession of trespassers or intruders, who might be there without right. And the same remarks will apply to the 9th article, that secures to British subjects, who then held lands in the United States, the right of continuing to hold them, according to the nature and tenure of their estates, and titles therein, or to sell and dispose of the same at pleasure. But a mere naked or wrongful possession which the law would not protect, does not fall within the provisions of this article. The treaty applies to the title, whatever it is, and gives it the same legal validity as if the parties were citizens, and no more. The title however which it sanctions, is that which existed at the date of the treaty; and not any after acquired right, by length of possession or otherwise.

I am accordingly of opinion, that the judgment of the district court must be affirmed, and in this opinion the district judge concurs.

## Case No. 7,144.

JACKSON v. ROBINSON et al.

[3 Mason, 138.] [1]

Circuit Court, D. Rhode Island. June Term, 1822.

CARGO OF SHIP—TENANTS IN COMMON — SET-OFF —JOINT DEBTS AGAINST SEPARATE DEBTS.

1. A and B were tenants in common with C and D of a ship in certain proportions, and purchased a cargo, by an agreement, on their account in the like proportions for a voyage, and consigned the same to the master for sale and returns; it was held, that they were tenants in common of the cargo and not partners.

[Cited in De Wolf v. Howland, Case No. 3,852.]

[Cited in Putman v. Wise, 1 Hill, 239.]

2. In such case each owner is to be considered as making a separate consignment of his share, although the instructions to the master are joint; and the master has no authority by such consignment of the outward cargo to consign the return cargo to C and D only.

3. If in such case the master without authority consigns the whole cargo to C and D, the latter have no lien on it for any separate and distinct demands against A and B, nor against any firm in which A and B are partners with a third person, nor can C and D set off such debts in a suit brought against them by A and B, or by their assignee, in equity to account for A and B's share of the property.

[Cited in Reed v. Whitney, 7 Gray, 535.]

4. In general, the doctrine of set-off is the same in equity as at law.

[Cited in Howe v. Sheppard, Case No. 6,773.]

5. Joint debts cannot be set-off in equity any more than at law against separate debts, unless there be some other equitable circumstances.

[Cited in Greene v. Darling, Case No. 5,765; Gordon v. Lewis, Id. 5,613; Id., 5,614.]

[Cited in Milburn v. Guyther, 8 Gill, 96.]

Bill in equity. In May, 1819, Messrs. Burrill & Cahoone were owners of one fourth part of the ship Aristomenes, and the defendants, Robert Robinson and R. Potter, were the owners of the other three fourths, viz. Robinson of one fourth and Potter of one moiety. About this period Burrill & Cahoone formed a new partnership, taking in one R. C. Croade, under the firm of Burrill, Cahoone, & Company; but the ship and its concerns formed no part of the fund of the new partnership. The ship owners fitted out the ship, with a cargo owned in the same proportions as the ship, for a voyage from New York to Stockholm and back to New York. The cargo was purchased, and other business for the ship transacted by Burrill, Cahoone, & Company, as agents for all the owners. The ship sailed on the voyage under the command of a Capt. Barker. The bill of lading purported to be a shipment by Burrill, Cahoone, & Company, "on account and risk of Messrs. R. Potter & R. Robinson, merchants of Newport, and E. Burrill & N. Cahoone, merchants of New York," &c. to be delivered at Stockholm, &c. to J. Barker, the master on board, or to his assignees, paying &c. no freight, being the property of the owners of the ship. The instructions for the voyage, dated on the 6th of June, 1819, were signed by all the ship owners, and directed the master to sell the cargo, to purchase a return cargo of iron, and remit the balance, if any, to London in the proportions owned by the parties on their several accounts, and to return to New York, &c. On or about the day of the ship's sailing a private letter, dated 9th of June, signed by R. Potter and R. Robinson, was handed to the master, with a request of secresy, directing him on his return to stop at Newport, alleging as a reason that they wished to land there their own part of the cargo, and if they could do as well with the other cargo there, end the voyage; but at the same time directing him to clear out at Stockholm for New York. The ship duly arrived at Stockholm and sold her cargo; but the sales falling short of purchasing the full amount of the return cargo, a bill of exchange was drawn by the master upon Messrs. Robinson & Potter for the deficiency, viz, £383 10s. sterling; and the whole of the return cargo was shipped and consigned to Messrs. R. Potter & R. Robinson by the master. The ship arrived at Newport early in November, 1819, and the cargo was there duly entered and landed by Messrs. Potter & Robinson, the consignees, and the moiety belonging to Potter was taken to his own use. The residue was received by Robinson, and the principal part was sold by him. Messrs. Burrill & Cahoone, having failed on the 8th of October, 1819, assigned their interest in the ship and cargo to the plaintiff [Amasa Jackson] by indenture, in trust, to sell the same, and out of the proceeds to pay certain scheduled debts, among which were some custom-house bonds and notes, and as to the residue, to distribute it among their creditors generally. The scheduled debts (as finally

[1] [Reported by William P. Mason, Esq.]

appeared upon the proceedings) amounted to more than the proceeds. Due notice was given of this assignment to Messrs. Potter & Robinson, before the arrival of the ship, and to the master after her arrival at Newport. The plaintiff demanded the possession of the one fourth part of the cargo from the defendants; but they refused to deliver any thing except the balance, after settling all the demands which they claimed upon the fund, including debts due from Messrs. Burrill, Cahoone, & Company. The bill alleged most of the foregoing facts, and charged the consignment by the master to Messrs. Potter & Robinson, to have been by collusion and fraud, and prayed an account, and an injunction against a farther sale of the cargo, and general relief. The answers all denied the collusion. They admitted most of the other facts. The master asserted the consignment to have been in consequence of a verbal communication to him by Burrill on the morning of his departure on the voyage. The other defendants insisted upon their right to retain for balances due to them, or one of them, First, for debts due from Burrill, Cahoone, & Company, asserting the change of the firm to be merely nominal to prevent a set-off; secondly, for the debts due for the purchase of the original cargo, which they alleged had never been paid, and for which they had been sued, but at the same time denying their liability therefor; thirdly, for money paid on some of the custom house bonds and notes scheduled in the assignment to the plaintiff. They further insisted that the plaintiff had no interest in the return cargo beyond what the share of Burrill & Cahoone in the outward cargo had purchased; and that what was purchased by the proceeds of the bill of £383 10s. was exclusively for the benefit of Potter & Robinson. The general replication was filed, and the cause came on for a hearing at this term on the merits.

Mr. Searle, for plaintiff.
Mr. Hazard, for defendants.

STORY, Circuit Justice. The first question presented for consideration in this case is, whether the ship-owners are to be deemed partners as to the cargo, or tenants in common only in the same proportions which they held in the ship. It does not by any means follow because the purchase was made for the account of all, or the shipment was made in the names of all, that this constituted them partners in the sense of a joint interest. They might authorize a common agent to purchase or ship goods for them according to their several and separate interests, without involving themselves in a joint partnership responsibility. In my judgment there was no community of interest in the cargo, as partners. It appears from the admission of the parties, as well as the proofs, that they never were, nor designed to be partners; and that they held their titles to undivided portions of the cargo, not as a common, but as a separate interest. They were, therefore, tenants in common of the cargo, having no general community of the profit and loss, but only a proportion according to their separate interests. If either had died, his share would not have survived to the others. To say that a case like the present constitutes in law a partnership in the adventure for the voyage, would be to say that every tenancy in common of a cargo for such a voyage, consigned to the master, would turn the case into a partnership, and enable any one tenant in common to dispose of the whole. In point of law such a position cannot be maintained. See Hoare v. Dawes, Doug. 371; Coope v. Eyre, 1 H. Bl. 37; Rice v. Austin, 17 Mass. 197; Ex parte Hamper, 17 Ves. 403.

If no consignment had been made of the cargo in this case, each owner must have been considered as authorized to act in respect to his own share, and as having no authority over that of the others. The consignment made to the master of the whole did not vary their rights in this respect. He knew they were not partners, but tenants in common; and though his instructions were signed by all, it was not an act which was intended to confound their rights; but merely to enable him to act upon the same orders for the benefit of all the owners. The instructions show, that the parties always contemplated their interests in their own shares as distinct and separate; and the master is expressly directed, in case the sales exceed the cost of the contemplated cargo, to remit the respective proportions of the owners in the cargo, on their separate accounts, to London. The master had clearly no authority to consign the whole of the cargo to Messrs. R. Potter & R. Robinson, in virtue of these instructions. He does not pretend that he had. He asserts a distinct verbal authority from Burrill on the day of his sailing, authorizing him to consign the share of Burrill & Cahoone to them. But this statement is incumbered with no small difficulty from the nature of the proofs. It is directly denied by Burrill, who says, that he only authorized the ship to be reported to Messrs. Potter & Robinson at New York, and that he never contemplated her going at all to Newport. Indeed the other defendants do not assert any right as consignees derived under any general authority from Burrill & Cahoone. Their own private letter directing a stop at Newport was kept concealed from them; and in that very letter they speak only of their right to have their own shares of the cargo landed at Newport. I cannot, therefore, say that the master's conduct in his general consignment of the whole cargo to Messrs. Potter & Robinson, and in proceeding to Newport with it and delivering it to them there, was justified by any authority to be found in the proofs. He was himself the general consignee; and upon the homeward voyage he ought to have made the

consignment general to himself for the use of the owners, or to them directly according to their respective shares.

The consignment then must be taken to be an unauthorized act of the master; and Messrs. Potter & Robinson could not, under such an act, legally acquire any lien to retain the same for any balance due to them even from Burrill & Cahoone, much less from Burrill, Cahoone, & Company. In respect to the facts, it is most manifest, that there was a real change, and not a mere nominal change in the partnership. Croade became a bonâ fide partner, and brought several thousand dollars of funds into the partnership; and all the accounts between Burrill & Cahoone and Messrs. Potter & Robinson were, with their perfect acquiescence and consent, transferred from the old to the new firm. The cargo was purchased by the new firm as agents for all the ship-owners, and their own notes given for the payment; and they received the funds belonging to the parties and arising from the cargo of a former voyage for the purpose of reimbursing themselves. The debts now set up as due to Messrs. Potter & Robinson, or either of them, are in no just sense the debts of Burrill & Cahoone, but of the new firm of Burrill, Cahoone, & Company. But assuming the posture of the facts to be somewhat different, and the consignment of the master to Messrs. Potter & Robinson to be a justifiable act within the scope of his authority, it will not materially vary the rights of the parties. The consignment would then be countermandable by Burrill & Cahoone, subject to any existing lien of the consignees. There is no ground to assert, that these gentlemen have, by any express or implied agreement, acquired a lien on the cargo for any debts due to them or either of them, by the firm of Burrill, Cahoone, & Company. The whole evidence negatives such a supposition. The assignment then must be deemed to operate as a legal transfer of the interest of Burrill & Cahoone to the plaintiff, while it was yet in transitu; and the defendants could not, after notice of such assignment, acquire any title to a subsequent lien in virtue of their possession. They took the property, clothed with all its legal and equitable qualities in favour of the plaintiff.

What ground then is there to permit them to set up against the plaintiff any lien, or any set-off for debts not originally, and before the assignment, attached to the property? Upon the principles of equity none. All that can be reasonably required is that they should be paid for their disbursements and expenses in respect to the property, and any other charges, that fairly belong to them for payments made on account of the bonds or notes secured by the assignment. Whether the latter ought to be allowed, I do not now absolutely decide; though the present inclination of my opinion is in favour of the allowance.

But it is supposed that the defendant, R. Robinson, is entitled to set off against the plaintiff the debts due him from the firm of Burrill, Cahoone, & Company, because it is suggested he would be entitled to set off any debts due him from Burrill & Cahoone. I am by no means prepared to admit that he would, under the circumstances of the present case, have a right to set off against the plaintiff any such debt of Burrill & Cahoone. But it is not necessary to decide that point. The question here is much narrower, whether in a suit brought by A and B against him, he would have a right in equity to set off a debt due him from A, B, and C.; and if he could enforce that against A and B, whether he could, under circumstances like the present, enforce it against their assignee for a valuable consideration. I take the general doctrine as to set-off to be the same in equity as at law, though it was administered in equity long before the statutes of set-off. Joint debts cannot be set off in equity, any more than at law, against separate debts, unless there be some other circumstances calling for the equitable interference of the court. See Lord Lanesborough v. Jones, 1 P. Wms. 325; Ex parte Twogood, 11 Ves. 517; Ex parte Christie, 10 Ves. 105; Ex parte Stephens, 11 Ves. 24; Taylor v. Okey, 13 Ves. 180; Addis v. Knight, 2 Mer. 117; Ex parte Hanson, 18 Ves. 232; Ex parte Ross, 1 Buck, 125; Ex parte Blagden, 19 Ves. 465. In other words, there must be some equitable circumstances to entitle a party to a set-off, which cannot be reached at law.

1. As to the claim set up by the defendants, Potter & Robinson, for that portion of the cargo which was purchased with the money for which the bill of £383 10s. was drawn, it appears to me to be unfounded. The evidence does not establish it to have been purchased or shipped on their sole account; but it was shipped on account of all the ship-owners in the same manner as the rest of the cargo. The bill being drawn on Messrs. Potter & Robinson does not vary the case, any more than the whole shipment of the cargo being consigned to them, gave them an exclusive proprietory interest. The master admits that his reason for drawing the bill on Messrs. Potter & Robinson only, was because he had made the general consignment of the cargo to them.—2. I think, however, that they have a lien upon the cargo to the extent of that bill, if it has been paid by them, or if they have accepted it and shall hereafter pay it.

As the parties desire it, I will direct inquiries to be made as to the scheduled debts provided for, and the funds secured and received under the assignment.

These are all the observations which I think it necessary to make upon this case; and shall decree the defendants, Messrs. Potter & Robinson, to account before a master, making all proper allowances, &c. &c. The bill is to stand dismissed as against the

master, but without costs to him. Decree accordingly.

At November term, 1822, the master made his report, to which no exception was taken by the parties, and it was confirmed, and a final decree passed in favour of the plaintiff for the balance found due on the share of Burrill & Cahoone in the cargo.

## Case No. 7,145.

### JACKSON v. RUNDLET.

[1 Woodb. & M. 381.] [1]

Circuit Court, D. New Hampshire. Oct. Term, 1846.

PLEADING—DEFECTS—SPECIAL DEMURRER — PROCEDURE—DUPLICITY—DOUBLE BREACHES.

1. Duplicity and all defects in form in pleading, can be taken advantage of only by special demurrer. A special demurrer is distinguished from a general one by pointing out specifically the causes for it.

2. After a demurrer, though it is a general rule, that judgment must be rendered against him who commits the first fault in the pleadings in the whole case; yet the fault must be one that is bad on general demurrer, and one not cured by a verdict, and one not discovered by the court and desired to be amended so as to present the merits properly. In these last cases, judgment will be to reverse the decision below, and remand the case for amendment and a new trial, instead of rendering judgment for the opposite side.

[Cited in Townsend v. Jemison, 7 How. (48 U. S.) 724.]

3. Where a suit is on a bond to secure a faithful performance of various duties in a secretary and treasurer to a private association, and the defendant who is surety, the principal being dead, craves oyer of the bond and conditions, and pleads general performance, it is sufficient in his situation and in the first instance.

4. A replication to such a plea, assigning as a breach, that the principal in the bond received a sum of money of the association, and did not use it, or account for, or pay it over to, the association, as was his duty, is not double. The various facts introduced relate to one breach as to the money, and constitute together but one charge, for which the principal is held responsible and his sureties, and are not separate and independent matters.

5. Double breaches cannot be assigned in New Hampshire, as in some other places, but on a recovery for one, the bond is forfeited and judgment rendered from time to time for such amounts as are proved to be proper on scire facias in chancery.

6. Duplicity is the union of more than one cause of action in one count in a writ, or more than one defence in one plea, or more than a single breach in a replication, and not the union of several facts, constituting together but one cause of action, or one defence, or one breach.

[Cited in Hough v. Hough (Or.) 35 Pac. 249.]

This was an action of debt on a bond for $50,000, dated October 17, 1835, and alleged to have been made by defendant [James Rundlet] and one John S. Rundlet, since deceased, to the plaintiff [Daniel Jackson] and J. S. Crary, or the survivor of them, Crary being since dead. The defendant craved oyer of the conditions of the bond, which being set out as hereafter described, pleaded non est factum, and in a second plea a general performance. The plaintiff took issue on the first plea, and replied to the second, that the principal in the bond received a certain sum of money belonging to the corporation, which he did not use for it, or account for, or pay over according to his duty. To this last the defendant demurred, and assigned for causes, that the replication was double, as setting out two distinct and independent breaches, and was in other respects informal.

James Bell, for plaintiff.
I. Bartlett, for defendant.

WOODBURY, Circuit Justice. It is well settled, that an objection founded on duplicity in pleading can be taken advantage of only by a special demurrer. Otis v. Blake, 6 Mass. 336. Because the defect is in form rather than substance, tending to prolixity, unnecessary expense in recording and copying, and confusion with courts and juries by multifarious and mixed issues. 1 Chit. Pl. 513. The duplicity must also be specially pointed out. 1 Saund. 337b; 10 East, 73; Currie v. Henry, 2 Johns. 433. In this case, the designation of the duplicity is imperfect, but the demurrer may be regarded as special, rather than general, since the breaches are alleged to be two in number, and independent of each other. It runs, however, very near the brink; and hence the plaintiff objects, that the demurrer is in form a general rather than special one. The distinctions between these demurrers are modern, there being none at common law, and now the only established difference is that just alluded to, in respect to the pointing out of the duplicity, viz.: That a special demurrer assigns some specific cause, and a general demurrer does not, and either refers to no causes whatever, or only to general ones. 1 Inst. 72; 4 Bl. Comm. 132; 1 Chit. Pl. 646. Since 27 Eliz. all matters of form can be reached only by special demurrer. 1 Saund. 337b; Tidd, Prac. 648; Com. Dig. "Pleader," 27. A special one, therefore, is always safest. And this must be considered such a demurrer, as one cause is assigned specifically to a certain extent, though the rest are like a general demurrer. 1 Mass. 500, arguendo.

But it is contended by the plaintiff, that whether his replication be double or not is immaterial, and need not be examined even on a special demurrer, as the plea is bad, and the judgment must be on the first fault in the record. Such is doubtless the general doctrine on this subject, when a plea is bad in substance. 1 Chit. Pl. 647; [U. S. v. Arthur] 5 Cranch [9 U. S.] 257; U. S. v. Sawyer [Case No. 16,227]; 2 Johns. 465; 3 Johns. 366; 11 Johns. 482.

But there are several exceptions to this

[1] [Reported by Charles L. Woodbury, Esq., and George Minot, Esq.]

rule. In courts of error, the judgment will not always be against him committing the first fault; because it may be cured by a verdict, and because the decision below may have been made on other grounds entirely; and the party may wish, and it may be proper to allow him, to amend. So the judgment may be reversed to enable the court to have the matter presented suitably, and then the whole case is left open to amendment and another trial, without rendering judgment for either the plaintiff or the defendant. See Davis v. Garland, 4 How. [45 U. S.] 431. Nor can the court, where the suit is brought, go back in a case like this to the first fault, unless it be one bad on general demurrer. For objection should have been taken to it specially, by the opposite party, before pleading over. In this case, the defendant is a surety in a bond, and the objection to his plea is, that it is bad for not setting out the articles of association, and denying a breach of them, as well as of the condition to perform them. But the idea that he should go into this greater particularity is, in my opinion, not well founded. The defendant is not supposed to have those articles in his possession like the plaintiff or the deceased principal in the bond. When, therefore, he gets oyer of the conditions of the bond, all of which are affirmative, and among them one to fulfil these articles, and then proceeds to allege a performance generally, or in the language of the condition, he does all that is at first necessary. 1 Chit. Pl. 514; 8 Term R. 459; 2 Saund. 413; Hughes v. Smith, 5 Johns. 168; 2 Johns. 413. Some cases seem to have required sums and dates to be given, such as 1 Doug. 214, and 2 N. H. 130. But if that is the true construction of them, it is apparent that they cannot be sustained as sound law. Sneed v. Wister, 8 Wheat. [21 U. S.] 690, is cited against this conclusion. But the court merely ruled in that case, that the defendant could not crave oyer of a deed, named in the condition of the bond; and, if he wishes to use it, must produce it himself or show an excuse. But here no oyer of the articles is craved, nor any use made of them by the defendants.

Let us then proceed to examine the replication, to see whether the charge of duplicity against it is well sustained. What constitutes duplicity in such a case? Not more than one fact being alleged, not a connected proposition made, embracing several facts, but distinct defences, in case of pleas, or separate and independent breaches in replication, or different causes of action set out in writs. 1 Chit. Pl. 261; 2 W. Bl. 1022; 1 Burrows, 316; 2 Johns. 433–462; 3 Johns. 315; 3 Caines, 160. See various other cases, showing that any number of facts are not double, if they go to establish a single point as a breach or a single justification. Steph. Pl. 274; Gould, Pl. 421–427; 7 Bac. Abr. tit. "Pleading"; 9 Wend. 143; 6 Mass. 338; 6 Brown, Parl. Cas. 27; 5 Pick. 221; Story, Pl. 283–287.

Examples, however, throw more light on questions like this, than any general definition. Thus, a defence that the plaintiff had married, and her husband released the cause of action, is good as a plea, because though two facts are alleged, they both unite to constitute but one defence. While a plea justifying a trespass, as moderate correction, and averring also a release, is double; the two facts being disconnected, and constituting two independent defences. So a justification by an assistant to a deputy sheriff, that the warrant was regularly issued and delivered to the deputy sheriff, that he seized the property by virtue of its being the property of the judgment-debtor, but in possession fraudulently of the plaintiff, and that the defendant acted in aid and by command of the deputy sheriff, are dependent facts, making but one defence. Patcher v. Sprague, 2 Johns. 462. As to the English precedents since William III., it is to be noticed that they are not always applicable, being made under a statute in that reign, by which double breaches are allowed to be assigned in replications in actions on bonds to secure the performance of covenants. 1 Chit. Pl. 688. And this act is in analogy to the common law rule in actions in covenants, where a double breach is not considered as duplicity. But that statute is not in force in New Hampshire, and is a departure from the common law generally, as well as the practice in this state. Mooney v. Demeritt, 1 N. H. 187. Here a forfeiture is settled by the trial of one breach, and damages are then assessed for all that can be proved in a hearing afterwards in chancery. Parker v. Colcord, 2 N. H. 38, 39. While there, no damages were assessed but on the breaches assigned and tried. 1 N. H. 188.

The cases in England, where the assignment of a breach must still be single, are numerous, and some of them are much like the present, where the assignment has been considered not double. In a part of them the objections there are made for other reasons; such as, want of sufficient particularity. Yet if open to objections for duplicity, they would probably have been taken or made. Thus in Shum v. Farrington, 1 Bos. & P. 640, the case was debt on bond and the plea craving oyer. It appeared by the condition that the defendants became bound for the faithful conduct of R. S., as agent to the plaintiff, to receive and pay money, and account truly, &c. The plea then alleges general performance. Replication, that the agent received £2000 belonging to the business, and hath not paid to the plaintiffs and given a fair account thereof. Special demurrer, that the names of the persons from whom he received the money, and the time are not set out. No objection was made that the replication was double. In Cornwallis v. Savery, 2 Burrows, 772, the breach was the

receipt of a sum, and not accounting for it. This was held to be single, as both must unite; the receipt and not accounting, in order to constitute a breach of the condition of a bond. Barton v. Webb, 8 Term R. 459. If the breach was averred to be receipts of money from different persons, A. and B. and C., then it would be double. 1 Strange, 227; case cited, 2 Burrows, 773. In Adams v. Mack, 3 N. H. 493, a similar view was taken, and the court held, that a plea justifying the sale, as well as the taking of the goods sued for, was not double, both being necessary to constitute a full defence to the charge of converting them. See, also, Gullusha v. Cobleigh, 13 N. H. 79.

The conclusions of the court, then, may be summed up as follows. The demurrer is to be considered as a special one; and if duplicity existed in the replication, it could thus be taken advantage of, and judgment be rendered against the plaintiff for it, unless there was such previous fault in the plea as is bad in general demurrer. See some exceptions. Steph. Pl. 163, 164; 5 Barn. & Ald. 507; Garland v. Davis, 4 How. [45 U. S.] 131. But the plea, I think, contains no such fault. The plea avers a general performance of all the previous duties named in the condition of the bond, and, as before suggested, seems sufficient, especially as the articles of the association were not in the possession of the sureties. After craving oyer of the bond and condition in which they are named, but are not produced with it, it is enough to allege generally a compliance with them all. One of them was, to keep fair and honest books and accounts of all his doings with the association; another was, faithfully to keep their secrets; another, to conform to articles and by-laws; and another, to obey all written instructions from the association. The replication evidently does not intend to assign any breach of the first, second or fourth heads of duty, except as some of them may be included in the third to conform to the articles and by-laws. But after averring what the articles and by-laws were, in respect to his making purchases as agent for the association, and also to contract to pay for labor required in weaving, &c., and once in three months or oftener, if requested, account for money received for them, and likewise give statements of what was received and services rendered; the replication alleges that J. S. Rundlet became agent, and while so, received $35,566.66 for said association on account of it, and his duty to use it, and that he was directed to use and pay it in the business of said association; yet he hath not so used it, nor accounted for it, nor paid the same to or for the association. Though inartificial in some degree, this breach is much like those assigned in Shum v. Farrington and Cornwallis v. Savery [supra]. And though no question was raised as to duplicity, in the first case, it was in the last, and it was held to be single (not needing to be cured by the statute of William III). Here the duty was to use the money in behalf of the association; there, to account for it. Here, then, the breach is, that he did not so use the money, and the other allegations which follow are merely connected with that averment, to make this single breach complete and full by adding, not new breaches and independent ones, but facts showing him liable for not so using the money, because he had not, instead of that, paid it over or in any way accounted for it. But these last allegations do not seem meant, nor are they fairly to be construed, as separate and independent breaches. They are rather component parts or elements, tending to show the first breach existing unatoned for, and not in any way satisfied or commuted. Strange as it may seem, also, it is not averred that any duty to pay over the balance existed, and hence of necessity on that account, also, an averment of not paying them over cannot be considered as an averment, of a second distinct breach of what there is not stated to have been any duty to be broken or fulfilled. For reasons like these the replication is adjudged good.

On announcing this opinion as formed, the case was disposed of on the docket by agreement.

JACKSON (SCHNEIDER v.) See Case No. 12,469.

## Case No. 7,146.

JACKSON v. SIMONTON.

[4 Cranch, C. C. 12.] [1]

Circuit Court, District of Columbia. May Term, 1830.

INFORMAL BOND—CERTIFICATE OF DEFALCATION—HOLDING TO BAIL.

Upon an informal bond given by a marshal, payable to the president of the United States and his successors, instead of to the United States, the court *held* the defendant to bail upon a certificate of defalcation from the treasury department.

This was an action of debt on a bond given to Andrew Jackson, president of the United States, and his successors in office, dated June 6, 1829. The condition was:

"That whereas John Dean aforesaid has been duly appointed marshal of the Southern judicial circuit of the United States district court, (at Key West,) of the territory of Florida. Now if the said John Dean will faithfully and impartially discharge all and singular the duties incumbent on him as such, then this obligation to be void, otherwise to remain in full force and virtue. Jno. Dean, (L. S.) J. W. Simonton, (L. S.) J. Whitehead, (L. S.) R. D. Richardson, (L. S.)"

[1] [Reported by Hon. William Cranch, Chief Judge.]

"Teste: Elizabeth B. Hutchinson. Mary B. Hutchinson. Edward Stubbs."

The following indorsement is on the bond: "The within bond is accepted as a temporary compliance with the requirement of the law, and to serve until Mr. Dean can have an opportunity to see the judge and obtain his approbation. M. Van Buren, June 10, 1829."

Mr. Swann, Dist. Atty., produced a certificate from the treasury department, with all the forms required to make it evidence under the act of congress in that case provided, that John Dean stands charged with the sum of $2500, due and unaccounted for by him; and contended that this is as good as an affidavit to hold to bail.

Bail required by THE COURT (nem. con.)

[See Case No. 7,147.]

## Case No. 7,147.

JACKSON v. SIMONTON.

[4 Cranch, C. C. 255.] [1]

Circuit Court, District of Columbia. Nov. Term, 1832.

OFFICIAL BOND—INFORMALITY—LIABILITY OF SURETIES.

1. A marshal of the Southern judicial district in the territory of Florida could not lawfully enter on the duties of his office before he had given bond and taken the oath required by the twenty-seventh section of the judiciary act of September 24, 1789 [1 Stat. 87].

2. It is not a compliance with the requirement of that act, to give a bond to Andrew Jackson, president of the United States, and his successors in office, not executed by two good and sufficient sureties, inhabitants and freeholders of the district of which he was appointed marshal, and not approved by the judge of that district; and not purporting to be for the faithful performance of the duties of his office by himself and his deputies, and not correctly describing the office to which he had been appointed.

3. The president of the United States had no authority from the United States to take a bond from a marshal payable to himself and successors, as president.

4. The judge of the district was the only person designated by the act of congress to take the bond and judge of the security, and he could only take it in the name of the United States.

5. If the marshal was never qualified to enter upon the duties of the office, he could not violate those duties, and his sureties were not liable for any money which the officers of the government might have put into his hands before he was authorized to receive it.

Debt, on a marshal's official bond taken to Andrew Jackson, president of the United States, and his successors in office.

CRANCH, Chief Judge (nem. con.). This cause is submitted to the consideration of the court upon a general demurrer to the declaration. It is understood that it was intended to submit to the court the question whether the bond is, in law, valid against the defendant, who is a surety only, under any form of declaration which the attorney could draw, consistently with the facts in the case; and, consequently, that he may so amend his declaration; and that the defendant had oyer on the bond before he demurred; and that the breach, insisted upon by the plaintiff, is, that the marshal has not accounted to the United States for $2,500 advanced to him as marshal. The bond, with its condition and indorsements, is in these words:

"Know all men by these presents that we, John Dean, and John W. Simonton, and John Whitehead, and R. D. Richardson, are held and firmly bound unto Andrew Jackson, president of the United States, and his successors in office, in the penal sum of twenty thousand dollars, for the payment of which, well and truly to be made, we bind ourselves and each of our heirs, executors, and administrators, jointly and severally, firmly by these presents, signed, sealed, and dated this 6th day of June, 1829. The condition of this obligation is such, that whereas John Dean aforesaid has been duly appointed marshal of the Southern judicial circuit of the United States district court (at Key West) of the territory of Florida: Now, if the said John Dean will faithfully and impartially discharge all and singular the duties incumbent on him as such, then this obligation to be void, otherwise to remain in full force and virtue. In testimony whereof we have hereunto set our hands, and affixed our seals, this —— day of ——, in the year of our Lord one thousand eight hundred and twenty-nine, and of the independence of the United States the fifty-third year. John Dean. (Seal.) J. W. Simonton. (Seal.) J. W. Whitehead. (Seal.) R. D. Richardson. (Seal.)

"Test: Elizabeth B. Hutchinson. Mary B. Hutchinson."

On the back of the bond was this indorsement: "The within bond is accepted as a temporary compliance with the requirements of the law, and to serve until Mr. Dean can have an opportunity to see the judge and obtain his approbation. M. Van Buren. June 10, 1829."

Upon this demurrer, the following questions arise: 1st. Was this marshal obliged to give the bond required by the 27th section of the judiciary act of the 24th of September, 1789 [1 Stat. 73], before he could lawfully enter upon the duties of the office? 2d. If he was, is this bond a substantial compliance with the requirement of that law, so as to authorize him to enter upon those duties? 3d. If not, is it a good bond at common law? 4th. If so, can the condition of it be broken by any act of the said John Dean, before he was authorized by law to enter upon the duties of the said office?

1. Was this marshal obliged to give the bond required by the 27th section of the act of 1789, before he could lawfully enter upon the du-

[1] [Reported by Hon. William Cranch, Chief Judge.]

ties of the office? By that act the United States were divided into thirteen judicial districts, in each of which a district court was to be held by a district judge; and the 27th section provides "that a marshal shall be appointed in and for each district, whose duty it shall be to attend the district and circuit courts, when sitting therein;" "and to execute throughout the district, all lawful precepts directed to him and issued under the authority of the United States." "And before he enters on the duties of his office, he shall become bound for the faithful performance of the same, by himself and by his deputies, before the judge of the district court, to the United States, jointly and severally, with two good and sufficient sureties, inhabitants and free holders of such district, to be approved by the district judge, in the sum of twenty thousand dollars; and shall take, before said judge, as shall also his deputies, before they enter on the duties of their appointment, the following oath of office," etc. The thirteen districts provided for by that act were, Maine, New Hampshire, Massachusetts, Connecticut, New York, New Jersey, Pennsylvania, Delaware, Maryland, Virginia, Kentucky, South Carolina, and Georgia. The constitution of the United States had not, then, been adopted by North Carolina and Rhode Island. But the 27th section says, "in and for each district;" not each of the said districts. Perhaps the word "said" was intentionally omitted, so that the language of the act might apply to districts thereafter to be formed. The act of the 4th of June, 1790, for giving effect to the judiciary act within the state of North Carolina, provides that it "shall have the like force and effect," within that state, "as elsewhere within the United States;" and declares that state to be a district, but does not specially provide that there shall be a marshal. (1 Stat. 126.) The act of the 23d of June, 1790, for giving effect to the judiciary act within the state of Rhode Island, has the same provisions. (1 Stat. 128.) The act of the 2d of March, 1791, "giving effect to the laws of the United States within the state of Vermont," declares that all the laws of the United States, not locally inapplicable, shall have the same force and effect within the state of Vermont as elsewhere within the United States; makes the state a district, and provides a judge, but no marshal; yet the 7th section recognizes the existence of a marshal by giving him a compensation for taking the census. (1 Stat. 197.) The act of the 31st of January, 1797, giving effect to the laws of the United States within the state of Tennessee, has the same provisions, except that it says nothing of a marshal. (1 Stat. 496.) The act of the 19th of February, 1803, to provide for the execution of the laws of the United States within the state of Ohio, declares that all the laws of the United States not locally inapplicable, shall have the same force and effect, within that state, as elsewhere within the United States. The fourth section provides for a district attorney, and the fifth for a marshal, who shall perform the same duties, be subject to the same regulations and penalties, and be entitled to the same fees, as are prescribed to marshals in other districts. (2 Stat. 201.) The act of the 3d of March, 1817 (3 Stat. 390), respecting Indiana, is in the same words; so is the act of the 3d of April, 1818 (Id. 413), respecting the state of Mississippi; and of the 3d of March, 1819 (Id. 502), respecting Illinois; and of the 21st of April, 1820 (Id. 564), respecting Alabama; and of the 16th of March, 1822, respecting Missouri. By the act of the 3d of March, 1805 (Id. 338), it is enacted, that the superior courts of the several territories of the United States in which a district court has not been established by law, shall, in all cases in which the United States are concerned, have, and exercise within their respective territories, the same jurisdiction and powers given, by law, to the district court of Kentucky district, &c., that is, the jurisdiction and powers of district and circuit courts of the United States excepting appellate jurisdiction. The act of the 8th of April, 1812, for the admission of the state of Louisiana into the Union, &c., makes the state of Louisiana, and the remnant of the territory of Orleans, one district, and provides for a judge and attorney, but does not provide for a marshal, otherwise than by enacting that the laws of the United States shall have the same force and effect in that state as elsewhere in the United States. (2 Stat. 701.) The act of the 26th of March, 1804, erected the territories of Orleans and Louisiana. The eighth section provides for a district court in the territory of Orleans, a district judge with the jurisdiction of a district and a circuit court; an attorney, and a marshal, who was to perform the same duties, be subject to the same regulations and penalties, and be entitled to the same fees, to which marshals in other districts were entitled for similar services, and $200 for extra services. (2 Stat. 283.) By the acts of the 30th of March, 1822 (3 Stat. 654), and 3d of March, 1823 (Id. 750), for the establishment of a territorial government in Florida, it is enacted that there shall be a superior court for East Florida, and another for West Florida; that there shall be two marshals, one for each of the said superior courts, who shall perform the duties, &c., (as in the above act of the 26th of March, 1804), and be entitled to the same fees to which marshals in other districts are entitled for similar services. The act of the 26th of May, 1824 (4 Stat. 45), provides for three superior courts in the territory of Florida, and a marshal for each of the said courts, who shall perform the same duties, &c., as above, &c. The act of the 15th of May, 1826, § 9 (4 Stat. 164), requires that the marshal of each district (in the territory of

Florida), shall execute bond, with security to be approved by the said judges, conditioned for the performance of the duties required of the executive officers by the laws of the said territory, in the sum of $10,000, which shall be recorded by the clerks of the said courts. And by the act of the 23d of May, 1828 (4 Stat. 291), it is enacted, "that there shall be another judicial district in the territory of Florida, to be called the Southern District, embracing all that part of the territory," &c. "There shall also be appointed an attorney and marshal who shall exercise all the duties, give the same bond and security, and be entitled to the same salaries, fees, and compensation that is now allowed by law to attorneys and marshals in other districts in the territory." This is the act under which Mr. Dean was appointed marshal.

It appears, from a view of all these acts admitting new states into the Union, and creating new judicial districts, that in some instances congress has supposed that when a new judicial district was created a marshal would be appointed as a matter of course under the general words of the 27th section of the judiciary act of 1789 (1 Stat. 73), directing "that a marshal be appointed in and for each district;" and that, in other instances they have, in the acts creating new judicial districts, expressly provided for the appointment of a marshal, and declared that he shall perform the same duties as are prescribed to marshals in other districts. In no case have they expressly required that the marshals of these new districts should give the bond and take the oath required by the 27th section of the act of 1789; but that was among the duties prescribed to the marshals in other districts, and consequently became also the duty of the new marshals. And such has been the uniform practice of the government. The new marshals have always been required to give the bond and take the oath prescribed in the 27th section of the act of 1789, before entering upon the duties of their office. The language of the act of the 23d of May, 1828, is certainly very inaccurate; but it was evidently the intention of the legislature to subject the marshal who might be appointed under that act, to the same duties, regulations and penalties to which marshals in other districts, in the territory, were subject. Among those duties was that of giving the bond, and taking the oath required by the 27th section of the act of 1789, as well as that of giving the bond in the penalty of $10,000 required by the ninth section of the act of the 15th of May, 1826. This marshal therefore was obliged to give the bond and take the oath required by the 27th section of the act of 1789, before he could lawfully enter on the duties of his office.

2. Is this bond a substantial compliance with the requirement of that act? It is clear to us that it is not. It is not a bond "to the United States;" it is not executed by "two good and sufficient sureties, inhabitants and freeholders of the district" of which he was appointed marshal; nor "approved by the district judge" of that district; nor does it purport to be "for the faithful performance of the duties of his office by himself and his deputies;" nor does it correctly describe the office to which Mr. Dean had been appointed. The office created by the act of the 23d of May, 1828, is that of marshal of the Southern judicial district in the territory of Florida; but the office described in the condition of the bond is that of "marshal of the Southern judicial circuit of the United States district court at Key West, of the territory of Florida.

3. But may it not be valid as a voluntary bond? It appears, upon its face, to be taken by the president of the United States, colore officii, for it is made payable to him "and to his successors in office." It is not a personal contract, and must have been intended for the use of the United States. But the president had no authority from the United States to take such a bond, or to enter into any such contract on the part of the United States, with the marshal. The judge of the district was the only person designated by the act of congress, to take the bond, and judge of the sufficiency of the security; and he could only take it "in the name of the United States." Nor could the secretary of state accept any other bond than one given and approved according to the statute; nor authorize the marshal to enter upon the duties of his office until such bond was given. This bond cannot be considered as having been accepted by the United States, because not accepted by the judge who alone had authority from the United States to accept it. It cannot, therefore, be considered even as a voluntary bond; not having been delivered to the proper officer.

4. But if it should be considered as a valid bond at common law, yet there has been no breach of its condition; for if Mr. Dean was never qualified to enter upon the duties of the office, he cannot have violated those duties; and his sureties are not answerable for any money which the officers of the government may have put into his hands before he was lawfully authorized to receive it, and which he may have misapplied, or not accounted for, before he was qualified to act as marshal. He could do no act as marshal until he had given the bond required by the statute, and until it had been received by the proper officer. No officer of the government can take a valid bond to himself colore officii, or in his official character, which he is not specially authorized by law, to take. The officers of the government are not corporations sole. They cannot take bonds to themselves and their successors in office. The successor, as such, cannot maintain an action upon such a bond. The United States can act only by authorized agents. No per-

son can lawfully assume an agency which shall bind the United States. Upon the whole, then, it seems to us, that this bond is absolutely void. Judgment for the defendant upon the demurrer.

The following authorities were consulted: Armstrong v. U. S. [Case No. 549]; U. S. v. Hipkins [Id. 15,371]; U. S. v. Morgan [Id. 15,809]; U. S. v. Sawyer [Id. 16,227]; U. S. v. Hillegas [Id. 15,366]; U. S. v. Barker, 12 Wheat. [25 U. S.] 559; 5 Com. Dig. 207, 219, "Officer," H; 2 Com. Dig. "Chancery," 4, D, 12, "Obligation," "Duress;" Bartlett v. Willis, 3 Mass. 105; Inhabitants of Nottingham v. Giles, 1 Penning. [2 N. J. Law] 120; U. S. v. Gordon, 7 Cranch [11 U. S.] 287; Speake v. U. S., 9 Cranch [13 U. S.] 29; Tingey v. Carroll [Case No. 14,056], in this court at May term, 1828; 3 Inst. 149; 2 Inst. 210; U. S. v. Nichols, 12 Wheat. [25 U. S.] 505; U. S. v. Kirkpatrick, 9 Wheat. [22 U. S.] 720; U. S. v. Vanzandt, 11 Wheat. [24 U. S.] 184; Com. Dig. "Pleader," 2, W. 25; Norfolk's Case, Hardr. 464; Anonymous, 2 Salk. 438; Churchill v. Perkins, 5 Mass. 541; Clap v. Cofran, 7 Mass. 101; Beawfage's Case, 10 Coke, 100; Morse v. Hodsdon, 5 Mass. 314; Bartlett v. Willis, 3 Mass. 86; Bull. N. P. 171, 172; Rex v. Bradford, 2 Ld. Raym. 1327; Scrogs v. Gresham, Moore, 193, pl. 342, And. 129; Mitchel v. Reynolds, 1 P. Wms. 181; Shep. Touch. 359, etc.; Respub. v. Lacaze, 2 Dall. [2 U. S.] 118.

[See Case No. 7,146.]

JACKSON (SIMS v.). See Case No. 12,890.

JACKSON (SMITH v.). See Cases Nos. 13,064 and 13,065.

## Case No. 7,148.

JACKSON v. SPRAGUE.

[1 Paine, 494.] [1]

Circuit Court, N. D. New York. Sept. Term, 1825.

VENDOR AND VENDEE—METES AND BOUNDS—REPUGNANCY.

1. Where the quantity of a tract of land is given as well as the metes and bounds, the latter will control the location, although they contain less than the given quantity, if they can be ascertained with certainty.

[Cited in Bowen v. Galloway, 98 Ill. 42.]

2. This rule applies in all cases, whether the lands have been surveyed or not. As where land was granted to be run upon a given base, which had never been surveyed, but could be ascertained from a known point, and parallel lines were to be run from each extremity of the base, until a certain quantity was obtained, but a portion of the base had been cut off by a prior grant so as to narrow the extent between the parallel lines, it was *held*, that the lines could not be continued, in order to make up the deficiency out of the lands of the grantor, beyond the limits which they would have reached, to make up the quantity, if the base had remained undiminished.

3. Where the different parts of a description of the metes and bounds are repugnant and contradictory to each other, such parts are to be rejected, and such retained as will leave enough plainly and clearly to designate the land intended to be conveyed.

[Error to the district court of the United States for the Northern district of New York.]

At law.

T. A. Emmet, for plaintiff.

S. Jones, for defendant.

THOMPSON, Circuit Justice. This case comes up on a writ of error to the district court for the Northern district of this state. And the question presented for consideration arises out of a special verdict, upon which judgment has been given for the defendant. The result depends entirely upon the construction and location of the deed from Robert Morris to Andrew Craigie, of the 6th of April, 1797, under which [Havens], the lessor of the plaintiff, claims. The description of the land conveyed by this deed is as follows: "Beginning at the southwest corner of a certain tract of land of one hundred thousand acres granted to Craigie, Watson, and Greenleaf, on the 18th of February, 1792, thence extending east along the southern boundary of said tract six miles, thence southerly so far, as by lines to be drawn from those two points, parallel to the eastern and western boundaries of the said one hundred thousand acre tract, will include therein the quantity of thirty-three thousand seven hundred and fifty acres of land." This deed recites an agreement made on the 5th of August, 1795, between the parties, by which Morris covenanted to convey a tract of land corresponding in description with that contained in the deed. Morris, by a deed bearing date the 27th of February, 1793, had conveyed to Leroy, Sincklair, and Boon, a certain tract of land, which cut off two miles in width along the western side of the tract conveyed to Craigie, comprising eleven thousand six hundred and ninety-four acres. And the real question in the case is, whether the location of Craigie's deed can be extended south so as to make up this deficiency. When the agreement of the 5th of August, 1795, was entered into with Craigie, Morris owned the land south of the tract covenanted to be conveyed; but on the 1st of May, 1796, before the deed was given, he conveyed that land to Samuel Ogden, under whom the defendant claims, and proved title to the premises in question, as found by the special verdict.

Whatever claim the lessor of the plaintiff may have upon the covenants in the deed to Craigie, for an indemnity for this deficiency, there is no principle of law that will uphold a construction of the deed extending it so far south as to make up the deficiency, so as to entitle the plaintiff to recover in this case.

[1] [Reported by Elijah Paine, Jr., Esq.]

There is no uncertainty in the description, nor any part of it, which can be rejected, so as to favour the plaintiff's construction, even if Morris now owned the land on the southern bounds of the Craigie tract. A court of law has no authority by way of compensation to substitute one tract of land for another. But the legal title of Ogden, under whom the defendant claims, is older than that of Craigie. What a court of equity would do as between Craigie and Ogden, if the latter had notice of the articles of agreement of the 5th of August, 1795, cannot now be taken into consideration. But if no impediments, growing out of the rights of third persons, were presented against the plaintiff's claim, there is no principle of law upon which it could be sanctioned. The place of beginning in the description of the land, appears from the deed and the finding of the jury, with so much certainty and precision, that it cannot be rejected. And when this is once fixed, the residue of the location is plain and simple, admitting of no doubt. It begins at the southwest corner of the one hundred thousand acre tract, granted to Watson, Craigie, and Greenleaf; and the jury have located this tract, as laid down on the diagram set out in the special verdict, and about the correctness of which there does not appear to have been any question. All the deeds and conveyances set out in the special verdict were given without any actual survey. But in one of them reference is had to a certain Indian deed, and an Indian village, which must have been a place of public notoriety; and which afforded a point from which the location of the one hundred thousand acre tract could be ascertained. Assuming then, as I think I am warranted in doing, that this tract is correctly laid down on the diagram, the grant to Craigie must be located in reference to that. It is to extend along the southern boundary of that tract six miles so as to make the same width; and then from the extremities of this six miles line as a base, lines are to be extended so far south as to include the thirty-three thousand seven hundred and fifty acres.

In this description there is no ambiguity nor uncertainty. It was said, however, that the description requires these extended lines to be parallel with the east and west bounds of the one hundred thousand acre tract, and which could not be the case if it was a mere extension of those lines. This is undoubtedly mathematically true. But this part of the description may be rejected as repugnant to other parts, consistently with the soundest rules of interpretation. Whatever is repugnant and contradictory may be rejected, if enough is left plainly and clearly to designate the land intended to be conveyed. To retain this and reject the other parts that are repugnant to it, the description would be left imperfect and unintelligible.

It is worthy of remark that Craigie is one of the grantees in the one hundred thousand acre tract; and if the location of that, as laid down on the diagram, has been with his assent, it goes very far to conclude him, as to the location of the grant to himself alone. It has been urged, that as there was no actual survey, the quantity of land was the material part of the description, and that such location ought to be made as to embrace this quantity. The mere fact of no survey having been made, cannot change the settled rules of interpretation. Where metes and bounds are given, which can be satisfactorily ascertained, they will control the effect and operation of a deed, without regard to quantity. It was no doubt the understanding and expectation of the parties, that thirty-three thousand seven hundred and fifty acres of land were conveyed by the deed. And in all cases where quantity is mentioned, there is the like understanding; but this cannot control the construction. The intention is to be collected from the deed, and the language of the parties must be understood according to the settled rules of interpretation. But if we were to travel out of the deed to ascertain the intention of the parties, as to the location, it is very evident it would not support the plaintiff's construction; for it was clearly understood that the Craigie tract was to be located directly south of the one hundred thousand acre tract, and to be of the same width. The diagram contained in the margin of the deed to Cottinger as set out in the special verdict, is a strong confirmation of this, showing the relative situation of these several tracts. The remedy in this, as in all other cases where there is a breach of the covenants in a deed, must be for compensation in damages, especially if recourse is had to a court of law.

This case is not to be distinguished from that of Jackson ex dem. Craigie v. Wilkinson [17 Johns. 146], decided in the supreme court of this state, in which a construction and location is given to the grant now in question. This being the direct and only point before that court, the decision would be entitled to great weight, if not of controlling influence, even if the point admitted of doubt, in order to preserve harmony of construction in relation to the same title. But it is not a question upon which I entertain the least doubt or hesitation. The judgment of the district court is accordingly affirmed.

JACKSON (STEPHENSON v.). See Case No. 13,374.

## Case No. 7,149.

JACKSON v. UNITED STATES.

[4 Mason, 186.] [1]

Circuit Court, D. Massachusetts. Oct. Term, 1826.

CUSTOMS DUTIES—COASTING VESSEL—LANDING GOODS WITHOUT A PERMIT.

A vessel engaged in the coasting trade, and having goods on board, which have not paid

[1] [Reported by William P. Mason, Esq.]

duties, is not within the purview of the 50th section of the revenue act of 1799, c. 128 [1 Story's Laws, 615; 1 Stat. 665, c. 22], as to landing foreign goods without a permit.

[Cited in U. S. v. Curtis, 16 Fed. 189.]

Debt against the plaintiff in error [Daniel Jackson] for the penalty of 400 dollars, for being knowingly concerned or aiding in the unlading of a hogshead of distilled spirits brought from a foreign port from the schooner Alert, within the port of Plymouth, without a permit, &c., contrary to the 50th section of the revenue collection act of 1799, c. 128 [1 Stat. 665, c. 22]. There was a second count, alleging the rum to be brought from some foreign port in an unknown vessel, and lost or cast overboard on the high seas, and taken up and brought into port by the Alert, and landed without a permit, and that the plaintiff in error was knowingly concerned therein, &c. &c. Plea, the general issue, nil debet.

The cause came, by writ of error, from the district court upon a bill of exceptions taken to the opinion of the judge at the trial. The substance of the bill of exceptions was as follows:—

"1. That an article of merchandise, whether of foreign growth and manufacture, or not, found derelict at sea, whether casually lost or designedly thrown overboard and abandoned by any other ship or vessel, and picked up and brought into the United States in a licensed coasting vessel, was not goods, wares, and merchandise brought in any vessel from any foreign port or place, within the meaning of the 50th section of the said act.

"2. That the Alert was not a registered vessel, but was a vessel duly licensed to carry on the coasting trade conformably to the laws of the United States; that as she had on board, except the said hogshead of rum, goods, wares, and merchandise of the growth, product, and manufacture of the United States only, and no other distilled spirits, nor any wine either in casks or bottles, nor any sugar in casks or boxes, nor any tea in chests or boxes, nor any coffee in casks or bags, nor any foreign merchandise at all, nor any goods, wares, and merchandise, consisting of such enumerated or other articles of foreign growth or manufacture, or both, of which the aggregate value was more than 800 dollars; that it was not requisite for the master or commander of the said vessel to deliver a manifest, make an entry, or obtain a permit previously to the landing of said hogshead of rum.

"3. That if the said 50th section of the statute of the United States, regulating the collection of duties, could apply to any goods brought from any foreign country in a coasting vessel, or taken from another vessel at sea by such coasting vessel, still it could not apply to goods or merchandise thrown on the coast of the United States, or found derelict upon or near such coast, commonly called salvage goods; that such goods were not liable to duties; that the several provisions of the laws of the United States, relative to delivery and manifest, report and entry, and obtaining a permit, could not, from necessity, apply to them."

Mr. Blake, Dist. Atty., for the United States.

L. Shaw and Mr. Bartlett, for plaintiff in error.

The former cited The Industry [Case No. 7,028]; The Harmony [Id. 6,081]; Act 1793, c. 128, § 36 [1 Story's Laws, 606; 1 Stat. 655, c. 22]; and contended, that the 50th section of this act was applicable as well to coasting vessels as vessels engaged in foreign trade. The latter contended, that the section was inapplicable to the case of coasting vessels, which, under circumstances like the present, the voyage being from one port to another within one of the great districts of the United States, created by the act of 2d of March, 1819, c. 172 [3 Story's Laws, 1727; 3 Stat. 492, c. 48], were not obliged to enter and obtain a permit for landing goods. They cited the act of 1799, c. 128, §§ 21, 23, 24, 36, 37 [1 Stat. 642, c. 22], and referred to the coasting act of 1793, c. 8, §§ 14, 15, 18, 4, 32 [1 Stat. 305], as containing ample and direct provisions for the purpose of securing the revenue, and regulating the trade. They farther contended, that no duties were payable in case of derelict or shipwrecked goods, and cited Peisch v. Ware, 4 Cranch [8 U. S.] 346, 363. They farther contended, that the doctrine in The Industry and The Harmony [supra] did not apply to goods found derelict at sea.

STORY, Circuit Justice. In the present case the facts are, that the schooner Alert was a coasting vessel duly licensed, and bound on a voyage from a port in the state of North Carolina to the port of Plymouth in the state of Massachusetts. She picked up a hogshead of West India rum at sea on her passage, and on her arrival at Plymouth the same was unladen without any permit, and without any payment of duties. The schooner had no other distilled spirits, or wine or tea, or any other goods of foreign growth or manufacture on board, the whole cargo consisting of domestic produce. The voyage being from one port to another within one of the great districts established by the act of 2d of March, 1819, c. 172 [3 Stat. 492, c. 48], it falls under those sections of the coasting act of 1793, c. 8 [1 Stat. 305], which regulate coasting vessels, trading from one district to another in the same state, or from a district in one state to a district in an adjoining state. These sections are the 14th, 15th, and 18th of the act. From the facts stated, the schooner, not having on board foreign goods of the stipulated description or value provided for by the 14th and 15th sections, was not bound

to deliver a manifest of her cargo or obtain a permit, previous to her departure on the voyage, or on her arrival in the port of discharge, to make any report thereof at the custom-house. She falls then within the purview of the 18th section only and the master was obliged to keep a manifest on board, and to exhibit it for the inspection of any revenue officer requiring the same. And the omission is punished by a specific personal penalty; and any foreign goods found on board, and not included in the manifest, are declared to be forfeited. The question is, whether a coasting vessel, under such circumstances, is within the purview of the 50th section of the revenue collection act of 1799, c. 128 [1 Story's Laws, 615; 1 Stat. 665, c. 22]. That some of the sections of that act are applicable to coasting vessels, as well as vessels engaged in foreign trade, is clear from the terms of the act, and was so adjudged by this court as to the 54th section of the act in U. S. v. Mantor [Case No. 15,719]. That many, and indeed most of the sections are applicable solely to vessels engaged in foreign trade, is admitted, and is indeed too plain for argument. The words of the 50th section are, "no goods, wares, or merchandise, brought in any ship or vessel, from any foreign port or place, shall be unladen or delivered from such ship or vessel within the United States, &c. &c. without a permit from the collector," &c. &c.; and if so unladen, "the master, &c. and every other person, who shall knowingly be concerned or aiding therein, or in removing, storing, or otherwise securing the said goods, &c. shall forfeit and pay each severally the sum of 400 dollars for each offence," &c. It has been already decided in this court, in the cases cited at the bar (The Industry [Id. 7,028], The Harmony [Id. 6,081]), that this section applies to all goods brought from a foreign port, or place, whether they were so brought in the vessel from which they are unladen, or were, in the course of the voyage, transhipped from another vessel into the former. The court then thought, that the act, though inartificially worded, meant to annex the qualification "of foreign port or place" to the goods, and not to the vessel. That point is not now in controversy.

The first objection stated is, that these goods being found derelict on the seas were not liable to the payment of duties on importation in any vessel. But it seems to me, that they are liable to the payment of duties upon the principles decided by the supreme court in the case of The Concord, 9 Cranch [13 U. S.] 387. But if they were not so liable, that would not excuse the unlading of them without a permit, for no foreign goods, whether liable to duty or not, or even if prohibited, can be landed without a permit. This has been often decided in this court; and the principle is affirmed by the supreme court, in Harford v. U. S., 8 Cranch [12 U. S.] 109. See The Betsy [Case No. 1,365]. Then again, it is said, derelict goods are not within the provisions of the collection act of 1799, c. 128, because they are cases of rare occurrence, and all the requisites, required by the act on importations, cannot be complied with. The case of Peisch v. Ware, 4 Cranch [8 U. S.] 346 is cited in support of this position. But it is pushing the doctrine of that case far beyond its just import to assert, that because all the requisites of the act cannot be complied with in a particular case, there is a dispensation of compliance with any. The authority of that case is admitted in the most extensive reach of its reasoning; but that reasoning goes no further than to declare, that no forfeiture shall accrue for violations of the regulations prescribed by the act, arising from unavoidable accident or necessity. The act does not require impossibilities; but supposes the party able to comply, and the case such as admits of compliance with its requisitions. But if the party can comply to a certain extent, he is bound pro tanto to follow the law; and he is excused, so far only as he is unavoidably prevented from compliance. In the present case, the goods might have been entered at the custom-house, and a permit obtained for the unlivery, upon security for the duties. The party voluntarily, and, in the eye of the law, criminally, omitted his duty, and engaged in smuggling.

The great difficulty in the case arises from another consideration. Coasting vessels, in the predicament of the Alert, are not obliged to enter, or obtain permits at the custom-house. The language of the 50th section is applicable to vessels having on board foreign cargoes, and obliged, before unlading, to obtain a permit. If it is to be extended to vessels engaged in the coasting trade, it must be applied to all indiscriminately, whether they have on board foreign goods of small or of large value; whether these goods have already paid duty, or are dutiable or not. If it is to be construed in this extensive sense, it would certainly overturn the great object of the provisions of the 14th and 15th, and, above all, of the 18th sections of the coasting act. It would be an implied repeal of them. I do not think, that the argument, to this extent, can be maintained. The clause now in question is but a transcript of the 12th section of the collection act of 1790, c. 35, and of the 27th section of the collection act of 1790, c. 35 [1 Stat. 163]. The coasting act passed after those acts; and the fair presumption is, that it was not, as to the point under consideration, to be affected by them, it not being in pari materia. If the act of 1799, c. 128 [chapter 22], could be supposed to have a different operation, it having passed after the coasting act, the provisions of the latter are fully recognized as in force by the act of 1819, c. 172 [chapter 48]. Unless coasting vessels are generally within the purview of the 50th section of the act of 1799, I cannot perceive, how having

on board foreign goods which have not paid duties, or have not been regularly imported, can change the interpretation. If coasting vessels are not bound to obtain a permit before unlading, it appears to me difficult to maintain, that the 50th section works a forfeiture, because that is not done, which the law does not compel the party to do.

I am aware, that this view of the act leaves the revenue system exposed to great frauds; and that if coasting vessels are exempted, under like circumstances, from obtaining permits, there is great probability, that the revenue will suffer to an alarming extent by a very easy, and at the same time a very mischievous process. The remedy, however, lies with congress, and not with courts of law; and indeed the government would not now be without some remedy by the forfeiture of the vessel under the 32d section of the coasting act, and the forfeiture of the coasting bond under the 4th section of the same act. I have been struck, as the learned judge of the district court was struck, with the obvious inconveniences of this limitation of the terms of the 50th section. But after due deliberation I am not satisfied, that where the party is excepted by law from obtaining a permit, he may yet be within the penalty of this section. The case of coasting vessels does not appear to me to be intended to be reached by it. I cannot consider a coasting vessel quo ad this transaction, as losing her coasting character. The judgment, therefore, of the district court must be reversed, and a venire facias de novo awarded. Judgment reversed.

JACKSON (UNITED STATES v.). See Cases Nos. 15,453–15,459.

JACKSON (UPTON v.). See Case No. 16,802.

## Case No. 7,150.

JACKSON v. VICKSBURG, S. & T. R. CO. et al.

[2 Woods, 141;[1] 2 N. Y. Wkly. Dig. 262; 13 Alb. Law J. 353; 1 La. Law J. 118; 22 Int. Rev. Rec. 160; 23 Pittsb. Leg. J. 159.]

Circuit Court, D. Louisiana. March, 1876.

RAILROAD BONDS—NEGOTIABILITY — HOLDER FOR VALUE.

1. A railroad company executed bonds for £225 each, if payable in London, or for $1,000 each, if payable in New York or New Orleans, and with coupons attached, by each of which the company promised to pay £9, if payable in London, or $40 if payable in New York or New Orleans, and the bonds declared that the president of the company was authorized by his indorsement to fix the place for the payment of both the principal and interest of the bonds. The bonds were indorsed as follows: "I hereby agree that the within bond and the interest coupons thereto attached shall be payable in ——," and the indorsement was signed with the genuine signature of the president. *Held*, that while in this condition, the bonds were not negotiable instruments.

2. If such bonds were stolen from the company, and passed into the hands of bona fide holders for value, such holders would have no authority to fill the blank left in the indorsement and thus fix the place of payment, but would hold the bonds subject to any defect of title arising from the manner in which they were put in circulation.

[This was a bill in equity by Henry R. Jackson against the Vicksburg, Shreveport & Texas Railroad Company and others.]

This cause was heard upon exceptions filed to the report of the master. The purpose and prayer of the bill was to sell the road of the defendant company to pay the bonds secured by a mortgage executed by the company. A reference was made to the master to ascertain and report what bonds were bona fide issued by the Vicksburg, Shreveport & Texas Railroad Company, the names of the owners, and the amounts due to the holders of said bonds so issued. The master reported seven hundred and fifty bonds of $1,000 as having been bona fide issued by the company, and as secured by said mortgage. The report then gives a list of two hundred and twenty-eight bonds of $1,000, which the master says were not bona fide issued by the railroad company, and are not secured by the said mortgage. To this part of the report, exceptions have been filed by several of the holders of the excluded bonds, on the ground that the master erred in reporting that said bonds were not secured by the mortgage. Upon these exceptions the case was heard.

Thos. Allen Clarke, Thomas L. Bayne, and Joseph P. Hornor, for the exceptions.

John A. Campbell, contra.

WOODS, Circuit Judge. The facts upon which the master relied for the basis of so much of his report as is excepted to are as follows: In April, 1864, during the late war carried on by the United States against the seceding states, the bonds in question were in the office of the railroad company at Monroe, Louisiana. During the month just named, a raid was made upon Monroe by the naval forces of the United States, and at that time the office of the company was broken open and these bonds carried off by persons connected with the expedition, without the consent or knowledge of any of the officers of the company. In short, the bonds were stolen from the office of the company. They were afterwards put in circulation, and bought by the holders at from fifteen to twenty cents on the dollar. The face of the bonds certified that "the Vicksburg, Shreveport & Texas Railroad Company is indebted to John Ray or bearer, for value received, in the sum of either two hundred and twenty-five pounds sterling, or one thousand dollars lawful money of the United States of America, to-wit: two hundred and twenty-five pounds

[1] [Reported by Hon. William B. Woods, Circuit Judge, and here reprinted by permission.]

sterling, if the principal and interest are payable in London, and one thousand dollars lawful money of the United States of America, if the principal and interest are payable in New York or New Orleans, which sum said company promises to pay to John Ray or bearer, on the first day of September, A. D. 1877, and also to pay interest thereon, at the rate of eight per cent. per annum, on the first day of March and the first day of September of each and every year. * * * And the president of said company is authorized to fix, by his indorsement, the place of payment of principal and interest in conformity with the tenor of this obligation." The bonds were signed by the president and treasurer, and bore the seal of the company.

Upon the back of each of the bonds in question was an indorsement as follows: "I hereby agree that the within bond and the interest coupons thereto attached shall be payable in ——. C. G. Young, President." The coupons attached to said bonds declared that "the Vicksburg, Shreveport & Texas Railroad Company will pay the bearer hereof (on a specified date) nine pounds sterling, if payable in London, or forty dollars, if payable in New York or New Orleans."

Upon this state of facts, the question for solution is, whether the bonds are good in the hands of bona fide holders for value. If the bonds are negotiable, this inquiry must be answered in the affirmative. Generally, bonds issued by a corporation, and payable to bearer, have the qualities of negotiable instruments. Knox Co. Com'rs v. Aspinwall, 21 How. [62 U. S.] 539; Woods v. Lawrence Co., 1 Black [66 U. S.] 386; Mercer Co. v. Hackett, 1 Wall. [68 U. S.] 83. But it is claimed that there are peculiarities about these stolen bonds which deprive them of their character as negotiable instruments. These are, that the amount for the payment of which the bond is given is uncertain. It is clear that the sum of £225 payable in London, with £9 interest payable every six months, at the same place, is entirely different from $1,000 payable in New York or New Orleans, with $40 interest payable semi-annually at the same places. This uncertainty, unless cured, robs the bonds of their character as negotiable instruments. Story, Prom. Notes, §§ 20, 21; Story, Bills, § 42; Bayley, Bills, 11; Pars. Notes & B. 37. But it is claimed that the uncertainty is cured by the genuine signature of the president of the railroad company, appended to the indorsement upon the bonds, and above set forth. It is true that the indorsement leaves the place of payment blank, and so leaves the amount and interest of the bonds uncertain. But the argument is, that the president having signed the indorsement and left the place of payment blank, the holder is authorized to fill the blank, and thus render the amount of the bond definite and certain, and that that is certain which can be made certain. If the holder of the bond were authorized to fill this blank, doubtless the results claimed to flow from this fact would follow. But is the holder of these stolen bonds authorized to fill this blank in the indorsement? He is not expressly authorized; for the bonds say that the place of payment should be designated by the president. Can it be said that when the president signed the indorsement and left the place of payment blank, he authorized any one who might steal the bonds, or to whom the thief might sell them, to fill the blank? If any one was authorized by implied contract to fill the blank, it was some person to whom they had been issued by the company, or who had acquired them after such bona fide issue. There can be no implied authority to any one to fill the blank, unless the bonds were bona fide issued and delivered by the railroad company. To hold that a thief of the bonds, or any one holding under him, had implied authority to perfect the bond, appears to me to be entirely untenable. The uncertainty in the bond as to amount of both principal and interest and place of payment remains, notwithstanding the signature of the president to the indorsement, and this uncertainty deprives the bonds of the quality of negotiable instruments. The holders, though bona fide for value, are not protected by the rules which govern the transfer of commercial paper, and must hold the bonds subject to all the infirmities which attach to the title to them.

These views are sustained by the court of appeals of the state of New York, in a case arising upon some of these same stolen bonds, in which it was decided that a bona fide holder of the bonds was not authorized to fill the blank left by the president in the indorsement, and that he acquired and could convey no title to the bonds. Ledwick v. McKim, 53 N. Y. 307. The exceptions to the master's report must be overruled, and the report confirmed.

## Case No. 7,151.

JACKSON v. WHITE.

[1 Pet. Adm. 179.] [1]

District Court, D. Pennsylvania. 1806.

SEAMEN'S WAGES—EVIDENCE.

A receipt in full given by a mariner not admitted as conclusive evidence against him.

A receipt from the seamen, purporting to be "in full of all debts, dues and demands," was produced to repel a claim for wages. It had been made use of, to shew an adjustment of a charge for a violent and unjustifiable assault and battery, wantonly and cruelly committed.

BY THE COURT. From my own observation, I can truly state that, I have too often seen advantages attempted under colour of such receipts. I am warranted both by

[1] [Reported by Richard Peters, Jr., Esq.]

common law authorities, and chancery decisions, relative to instruments of much greater solemnity, to say, that although such receipts are in general respectable evidence, yet they are by no means conclusive. Fraud, duress, misconception, mistake, in either party, are open to enquiry. If in the settlement of the account any such ingredients appear, or any improper practices, in obtaining the receipt are discovered, the whole matter is enquirable into, and justice must be done, notwithstanding any prima facie evidence, arising on the face of such receipts, tending to foreclose investigation.

JACKSON (WILSON SEWING MACH. CO. v.). See Case No. 17,853.

## Case No. 7,152.

JACKSON INS. CO. v. STEWART.

[1 Hughes, 310;[1] 6 Am. Law Reg. (N. S.) 732.]

Circuit Court, D. Maryland. Nov., 1866.

BILL OF EXCHANGE — ACTION UPON — STATUTE OF LIMITATIONS—PERIOD OF WAR—EFFECT OF.

A declaration of war by competent authority puts an end to all rights of action as between the citizens of the respective belligerent powers, from its date to the conclusion of peace; suspends the running of the statute of limitations, and also the running of interest upon debts between citizens of the respective belligerents.

[Cited in Ward v. Smith, 7 Wall. (74 U. S.) 450; Semmes v. City Fire Ins. Co., Case No. 12,651; Brown v. Hiatt, Id. 2,011; Kanawha Coal Co. v. Kanawha & Ohio Coal Co., Id. 7,606; Caldwell v. Southern Exp. Co., Id. 2,303.]

[Cited in Perkins v. Rogers, 35 Ind. 137.]

This was an action [by the Jackson Insurance Company of Tennessee] on a bill of exchange, drawn in Memphis, in February, 1861, at sixty days, on James A. Stewart [of Maryland] payable at the Farmers' and Planters' Bank, in Baltimore, and accepted by Stewart, but protested for non-payment, April 26th, 1861. Plea: Statute of limitations. Replications: 1st. That war existed when the cause of action accrued, and that three years had not elapsed between the close of the war and the commencement of the suit. 2d. That the president of the United States declared war against Tennessee, by his proclamation of August 16th, 1861 [12 Stat. 1262], which was continued until, by the proclamation of the president of June 13th, 1865 [13 Stat. 763], Tennessee was restored to the Union; and that the intervals of time which elapsed from the maturity of the bill to the beginning of the war, and from the close of the war to the commencement of this suit, did not together amount to three years. To these replications a general demurrer was filed by defendant.

[1] [Reported by Hon. Robert W. Hughes, District Judge, and here reprinted by permission.]

George W. Brown and Arthur George Brown, for plaintiff.

Jarvis Spencer, for defendant.

GILES, District Judge. Unquestionably in this case lex foci prevails, and not lex loci contractus; hence the court will apply the law of Maryland, which requires suit to be brought within three years. 1 Code Md. art. 57, §§ 1, 2. In this law there are certain specified exceptions provided for, but it is a mistake to suppose that exceptions may not arise other than those mentioned in the statute. The law always supposes the existence of a party in being capable of suing; and if, when the cause of action occurs, there is no such party capable of suing, limitations do not begin to run until such a party comes into being. Hence, if war had existed at the time this cause of action accrued, limitations would not have begun to run against plaintiff's claim until the war ended. On the 7th of September, 1861, this court decided that the president of the United States had the right, by proclamation, to recognize the existence of a state of war, and that the war, from and after the date of such proclamation, existed between the states mentioned in the proclamation and the rest of the United States; also that the late war, when so declared and recognized by the president's proclamation, became a civil war, and imposed upon both belligerents all the rights and consequences of such a war. This was one of the earliest decisions in regard to our late civil war, and the principles there enunciated have since been fully confirmed by the supreme court in the Prize Cases, 2 Black [67 U. S.] 635. The justices of that court were unanimous as to all the consequences which resulted from a state of civil war, but the three dissenting judges were of the opinion that the war began only after the proclamation of the president of August 16th, 1861, passed in pursuance of power conferred upon him by the act of July 13th, 1861 [12 Stat. 255]. As regards the state of Tennessee, there can be no doubt that war existed in consequence of the proclamation of the president of August 16th, 1861, and not before, as that state was not included in the previous proclamations. It is a well-settled principle, that contracts made before war are only suspended by the war, whereas, contracts made during the war, are void. This principle is fully recognized by the supreme court in regard to our late civil war. In ancient times private property of alien enemies, and debts of every kind were confiscated to the state. Happily, all this has been changed in modern times; and now, while contracts made during war between alien enemies are absolutely void, being against public policy, private interests are protected, and bona fide contracts made before the breaking out of the war are suspended during its continuance, but revive at its termination. To the honor of the Unit-

ed States and Great Britain be it said, that these rights have always been respected by them.

It has been repeatedly decided by both state and federal courts, that where, by a legislative enactment, parties are prevented from prosecuting their claims, the interval during which such prevention lasts is not to be counted as part of the time allowed by the statute of limitations. Now, the power to make war and peace is by the constitution of the United States delegated exclusively to the federal government; and as during the war, the plaintiff, being a corporation of the state of Tennessee, had no right to bring suit against the defendant, who was a citizen of Maryland, the Maryland statute of limitations was suspended during such period. The general rule unquestionably is, that where the statute of limitations has once begun to run, no subsequent disability will arrest it. But we have already seen that a legislative enactment suspends the running of the statute, and the same result follows from the declaration of war by the supreme power of the land. For it is a well-recognized principle of the law of nations that the right of a creditor to sue for the recovery of his debt is not extinguished by the war. It is only suspended during the war, and revives in full force on the restoration of peace. A war, then, having certainly existed between Tennessee and the federal government, from the president's proclamation of August 16th, 1861, and which, although a civil war, yet, according to the decision of the supreme court in the Prize Cases, carried with it all the consequences and disabilities of a public war, one of which, as we have seen, was the suspension of the right to sue during the war; it follows, therefore, that the plaintiff in this case could have instituted no proceedings in this court until peace was proclaimed by the president's proclamation of June 13th, 1865. This suspension being by the exercise of the paramount authority of the government, cannot be held to work a forfeiture of the plaintiff's cause of action, but his right to sue, suspended by the war, revived when it ceased; and as it has not been three years from the maturity of the cause of action to the commencement of the war, and from the termination of the war to the commencement of this suit, this suit is not barred by limitation, and the demurrer is therefore overruled. The case being then, by agreement, submitted to the court, judgment was given for the full amount of the plaintiff's claim, together with interest from the 26th of April, 1861, to the 16th of August, 1861, and from the 13th of June, 1865, to date, no interest being allowed for the time during which the war lasted.

NOTE [from 6 Am. Law Reg. U. S. 732]. The foregoing opinion, although not containing anything of particular novelty, in presenting familiar rules of law, as applicable to alien enemies, is one of some interest, at this particular time, in its application to contracts made with the residents in the states where the Rebellion extended, both before and during the existence of the controversy. We have had no leisure to consider the points with much care, but their obvious reasonableness, justice, and practical character seem to present them in such a light as to preclude all doubt of their soundness. The authorities cited by the plaintiff's counsel in the argument of this case upon the point that the existence of war suspends the operation of the statute of limitations so long as the war continues, inasmuch as the remedy is thereby suspended, seem very fully to sustain the proposition. Wall v. Robson, 2 Nott & McC. 498; Moses v. Jones, Id. 259; Nicks v. Martindale, Harp. 138; Ogden v. Blackledge, 2 Cranch [6 U. S.] 272; Hopkirk v. Bell, 3 Cranch [7 U. S.] 454. Indeed we are not aware that the question really admits of much controversy, as applicable to international wars. And since the late civil conflict practically interrupted all intercourse and all commerce between the different sections, we see no ground upon which, in this respect, any distinction should be made between this and international wars, so long as there existed an actual non-intercourse and a practical impossibility of enforcing the claim.

## Case No. 7,153.

In re JACKSON IRON MANUF'G CO.

[15 N. B. R. 438;[1] 2 Mich. Lawy. 435; 2 Cin. Law Bul. 154, 157.]

District Court, E. D. Michigan. April 25, 1877.

CHATTEL MORTGAGES—VALIDITY.

To sustain a mortgage, otherwise invalid as a preference, upon the ground of a promise to give security, made at the time of the loan, the prior promise must contemplate the giving of a specific and definite security—such an agreement as could be enforced by a bill for specific performance.

[Cited in Lloyd v. Strobridge, Case No. 8,435; Re Wood, 5 Fed. 447. Approved in Douglass v. Vogeler, 6 Fed. 56.]

[See In re Batchelder, Case No. 1,098.]

On petition of Albert Burrell for the payment of a chattel mortgage from the proceeds of the mortgaged property. The petitioner set forth that he was a creditor of the bankrupt in the amount of two promissory notes of $2,500 each, given in May, 1873, secured by chattel mortgage dated October 8, 1873, upon a quantity of iron and other personal property; that the mortgage was executed by Amos Root, J. B. Eaton, H. K. Fritz, and Daniel B. Hibbard, an executive committee of the company, to Daniel B. Hibbard and H. K. Fritz, mortgagees; that it was given in pursuance of a resolution passed by the directors May 20, 1873; that petitioner held these notes and this mortgage by assignment from Hibbard and Fritz; that the property has been sold by the assignee for $2,522.28 over and above the expenses of sale. The answer of the assignee admits the notes and mortgage, the sale of the property and the amount realized, and admits that on the 20th of May,

[1] [Reprinted from 15 N. B. R. 438, by permission.]

1873, a resolution was adopted by the board of directors in the following words: "Resolved, that the executive committee be authorized to take such steps as they deem proper, and to the interests of this corporation, to protect or secure individuals whenever they may become liable as indorsers or otherwise for this company." [And also sets forth the following as one of the by-laws of the company: Section 9.—"All notes, obligations and contracts of this corporation shall be signed by the president, and countersigned by the secretary provided no obligations shall be incurred to exceed $5,000, without the consent of the board of directors, and the indebtedness of the company shall not exceed $20,000, unless authorized by said board." He further alleges, that nowhere in the articles of incorporation or the by-laws is there any other direction or authority for executing chattel mortgages than that contained in this by-law. That the records of the corporation show that Fritz & Hibbard were present at the meeting of the stockholders, at which the by-laws were adopted, and knew of the same.][2] He further alleges that at the time of the giving of the mortgage the company was insolvent; that a petition for adjudication was filed December 13, 1873; that the mortgage was given within four months prior thereto with a view to give a preference to the mortgagees, who were directors of the company, and had reasonable cause to believe it insolvent.

Hibbard & Lothrop, for petitioners.
John D. Conely, for the assignee.

BROWN, District Judge. There can be no doubt that the chattel mortgage in question was out of the usual and ordinary course of business of an iron manufacturing company, and therefore prima facie a fraud upon the bankrupt act. Rev. St. § 5130. Nor do I think the petitioners have rebutted this presumption of a preference. At the date of the mortgage the debts of the company amounted to about $25,000. Its assets, including unpaid subscriptions to the capital stock, the amount of which is not stated, were $33,000. While it does not positively appear that the notes given to Hibbard and Fritz were overdue, though given five months before, it does appear that six suits, involving over $10,000, had already been commenced against the company; that the mortgagees were both directors and were fully informed of its financial condition. I think I am bound to infer, as a matter of fact, that the company was not paying its debts in the ordinary course of its business, and was insolvent; that the mortgagees had reasonable cause to believe it so, and that the transaction was a preference, unless it can be supported upon the theory of a prior agreement to give the mortgage. As the mortgage was given less than four months before the commencement of proceedings in bankruptcy, it falls within the inhibitions of section 35 [of 1867 (14 Stat. 534)]. It was provided by section 10 of the act of June 22, 1874 [18 Stat. 180], changing the time mentioned in section 35 from four to two months, that this provision should not take effect until three months after the passage of the act. As the mortgage was given in October, 1873, the claim that it was affected by the amended act cannot be supported. There is, undoubtedly, authority for the proposition that a conveyance which would otherwise be a preference may be supported if given in pursuance of a former valid agreement. The general doctrine is stated in Cook v. Tullis, 18 Wall. [85 U. S.] 322, that an exchange of values may be made at any time though one of the parties to the transaction be insolvent. To the same effect are Sawyer v. Turpin, 91 U. S. 114; Clark v. Iselin, 21 Wall. [88 U. S.] 360; Watson v. Taylor, Id. 378. In the application of this principle it is immaterial whether there be simply an exchange of legal securities, or whether the security be given in pursuance of a prior agreement, performance of which may be enforced in equity. The English cases are numerous, and transactions of this nature have been frequently supported. In Hutton v. Cruttwell, 1 El. & Bl. 15, a trader, being indebted in £200 to a third party, agreed with the defendant that on defendant paying the amount, she (the trader) would assign by bill of sale all her effects to defendant to secure him. A deed of assignment was executed some months afterward, containing a power to defendant to enter and sell the property and repay himself. Afterward the trader, who had remained in possession, sold the property herself, and paid the £200 to defendant. Becoming bankrupt, her assignee sued defendant to recover the amount. The jury having found that the deed was not executed with intent to defeat or delay creditors, and the payment not made in contemplation of bankruptcy, the court held that the transaction was as if the deed had been executed at the time of payment by defendant to the creditor, which constituted a good consideration between the trader and defendant. It does not appear whether the agreement to assign was in writing or not, but the sale was to include all the trader's effects. In the case of Harris v. Rickett, 4 Hurl. & N. 1, the bill of sale was supported as having been executed in pursuance of a former agreement. In Ex parte Fisher, 7 Ch. App. 636, it was held that where a sum of money is advanced upon faith of a promise by the debtor to give a bill of sale of his property, the sum so advanced is to be considered as advanced upon the security of the bill of sale, but in such case the promise must be an absolute one. A trader had applied to a creditor who had previously advanced him £600 for a further advance of £100, which was accordingly made, on the debtor giving

[2] From 2 Mich. Lawy. 435.

a conditional promise that if he did not repay the £100 within ten days he would make an assignment of all his property to the creditor, to secure both the past and fresh advance. Default was made in payment, and the assignment was executed. It was held an act of bankruptcy and void against creditors. In delivering the opinion the court observes: "Although we do not dispute the rule that where a sum of money is advanced on the faith of a promise that a bill of sale shall be given, such sum is to be treated as a present advance on the security of a bill of sale, we do not think this rule will protect transactions where the giving of the bill of sale is purposely postponed until the trader is in a state of insolvency, in order to prevent the destruction of his credit, which would result from the registering of a bill of sale. * * * We are of the opinion that, if we were to hold this bill of sale to be valid, we should practically abrogate the rule that the assignment of the whole of a debtor's effects in consideration of a past debt is an act of bankruptcy, and should in every case enable a favored creditor, who can trust his debtor to give him a bill of sale of all his property when required, to obtain payment of his debt in full, to the prejudice of the other creditors." See, also, Ex parte Cohen, 7 Ch. App. 20; Ex parte Izard, 9 Ch. App. 271; Wadsworth v. Tyler [Case No. 17,032]; Ex parte Hodgkin, L. R. 20 Eq. Cas. 746.

In all these cases, however, the instrument was executed in pursuance of a prior agreement, which could have been enforced by a bill for a specific performance, so that there was in reality no additional security whatever. There are a few later English cases which seem to extend the doctrine still further, and to hold that every security or payment made in pursuance of a prior general promise to secure or pay is not a fraudulent preference within the meaning of the act. In Ex parte Kevan, 9 Ch. App. 752, a manufacturer being pressed for payment by a creditor, in August, 1872, promised to send £2,350 on account of the debt. On the 4th of November he sent bills amounting to £4,000 or £5,000 to the creditor, who received the proceeds and applied the £2,350 toward the debt. The manufacturer was at that time in insolvent circumstances, and on the following day committed an act of bankruptcy. It was held not to be a fraudulent preference, apparently upon the theory that, although it appeared the manufacturer could not, at the time when payment was made, pay all his debts out of his own money, it did not appear that he had at that time any immediate intention of stopping. It is true the court incidentally remarks: "It is difficult to say that any part of this payment was a fraudulent preference, because, as to the £2,350, it was a payment in pursuance of a previous agreement, and it is the same as if it had been paid in August, when the agreement was made, at which time Crawford had no thought of stopping." But, from the conclusion of the opinion, the case appears to have been decided really upon the ground that the creditor received the payment bona fide for a valuable consideration, and with no notice of the insolvency of the debtor. If the payment in this case were supported upon the ground of prior promise to pay, there would be an end of fraudulent preferences. No preference is ever made, except in pursuance of a prior promise to pay. The idea of a preference implies a pre-existing debt, which the debtor is bound and has in law promised to pay. The theory of the bankrupt law is that he shall not be permitted to fulfil promises of this kind, made to one creditor, in preference to those made to his other creditors, and as observed by Judge Hall, in Graham v. Stark [Case No. 5,676]: "The maintenance of the doctrine contended for would defeat the purposes of the bankrupt act."

I find the modern English doctrine on the subject of fraudulent preferences tersely stated by Vice-Chancellor Malins, in Smith v. Pilgrim, 2 Ch. Div. 127, in the following language: "Having now occasion to consider the law of fraudulent preference, and having had on many other occasions to look into the authorities, I am bound to say it is in a state of very considerable difficulty. There is no absolute rule; its application must depend upon the circumstances of each particular case. But to this extent it now seems to be clearly settled, and by all the authorities. A debtor must not of his own mere motion, without pressure or application, give a security to a creditor on the eve of bankruptcy, and if he does, that is a fraudulent preference. But if there be any pressure or negotiation for a security on the part of a creditor, then the fact that the creditor knows the debtor to be in embarrassed circumstances is no objection to the validity of the security." He also quotes with approbation the following language from the opinion of Lord Romilly, in Johnson v. Fesenmeyer, 25 Beav. 88: "If a man is insolvent, and disposes of a portion of his property in favor of a bona fide creditor, although upon the eve of bankruptcy, and although this fact be known or believed by both parties, it may be a perfectly valid and legal transaction. To render it invalid, there must be a disposition on the part of the insolvent to favor that particular creditor, and this is generally shown by the fact that the first step or proposal toward the disposal of the property in favor of that creditor proceeds from the insolvent debtor; but if the creditor, although he knows the debtor is insolvent, presses and insists upon having a security for his debt, and the debtor yields to that pressure, and gives the security, although it may be well-known to both at the same time that the effect will be to give that particular creditor an advantage over the

other creditors of the insolvent, the transaction, in my opinion, is perfectly good and valid." It is hardly necessary to say that this language is wholly inapplicable to our bankrupt system. The current of authorities is uniform, that if the knowledge of both parties of a present or an approaching insolvency be shown, the intent to prefer is presumed from the fact of preference, and the element of pressure on the part of the creditor plays no part in the transaction. As a matter of fact, preferences are rarely given, except under pressure, and the debtor is presumed to act voluntarily, if he yields to unlawful solicitation. Indeed, the American cases lend no countenance to the loose doctrines laid down in the recent English cases. In Arnold v. Maynard [Case No. 561], the court remarked respecting a mortgage given as a preference: "It is wholly immaterial whether the mortgage was voluntary or spontaneous on the part of the mortgagor, or was given on the request or demand of the mortgagee, or upon a verbal promise made in general terms, when the debt was contracted, to give security upon request, if at the time of the giving of the mortgage, the mortgagor knew that he was insolvent, and could not further continue his business, but must stop the same, and he intended by such mortgage to give a preference." The facts of the case are not given, but the law is stated, as I understand it, in the words above quoted.

In Graham v. Stark [supra], it was urged that certain securities were not void, because the bankrupt long before the securities were given, and at the time of the loans, promised to give security when required, and executed the mortgages in fulfilment of such promise under pressure from the mortgagees. It was held this position could not be maintained, and the court very pertinently remarked: "The provisions of the bankrupt act embrace payments for the purpose of giving a preference, as well as the giving of securities, etc., and it would hardly be contended that a preference by way of payment, otherwise invalid, would be valid because the debtor had agreed to pay the debt at the time it was contracted." In Blodgett v. Hildreth, 11 Cush. 311, it was held that the insolvent law of Massachusetts excluded any executory agreement for the giving of security between a debtor and creditor. It is true, the statute was more stringent than the corresponding section of the bankrupt law. And I should not feel justified in saying, following this opinion, were the question directly presented, whether a security could not be sustained if given in pursuance of a direct promise made at the time of the advance to give the particular security afterward executed. The question is somewhat discussed in Ex parte Ames [Case No. 323], and, although the facts are not fully given, Judge Lowell intimates the opinion that "it is not perhaps the law, as it is in England, that a general promise of security given at the time the debt is contracted may be executed after the debtor has become insolvent. Such a preference will not save the act from being a preference if it would have been one without the promise."

I should feel no hesitation in sustaining a security given in pursuance of a valid promise, made at the time of the advance, to give the specific security afterward executed, but to sustain such security, given in pursuance of a promise in general terms to give some security, would open the door to the very evils which the bankrupt law was intended to prevent. I will not undertake to say whether the prior promise must be in writing or not, or whether, if the advance be made upon the faith of a contemporaneous oral promise to give a definite security, the court might not sustain the security, on the ground that the money advanced was so far a part performance of the contract as to entitle the creditor to a specific performance. But in the case under consideration there was no definite agreement made at the time the notes were given. Mr. Hibbard says: "It was talked up with the company that we had got to borrow some money or get some money some way. They agreed to pass a resolution to give a chattel mortgage for whatever money was borrowed, and they did so." Clearly the "talk" of individual directors is not the act of the corporation. The resolution itself is still less definite. It simply authorized the executive committee to take such steps as they deemed proper for the interest of the corporation, and to protect and secure individuals when they might become liable as indorsers or otherwise. I do not see how a bill in equity could be sustained to enforce such an agreement. To authorize a specific performance the contract should be clear, definite, and unequivocal in all its terms. If the terms are uncertain or ambiguous a specific performance will not be decreed. 2 Story, Eq. Jur. 764–767. The complainant must point out definitely the security to which he is entitled, and not ask the court to determine what security shall be given. In this resolution no property is specified upon which the security shall be taken, nor does it indicate in any way the character of the security. Having advanced the money the creditors waited several months, and until the corporation had become insolvent, before taking the security. Nor does it appear that any creditors were secured under this resolution except these mortgagees, who were not only directors of the company, but members of the executive committee which signed the mortgage. Upon the whole, I have come to the conclusion that the resolution was too indefinite to support the chattel mortgage in question, and that the petition must be dismissed.

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JACKSON IRON MANUF'G CO. (WOODS v.). See Case No. 17,993.

JACKSONVILLE, P. & M. R. CO. (ANDERSON v.). See Case No. 358.

JACKSONVILLE, P. & M. R. CO. (SEARLES v.). See Case No. 12,586.

JACKSON WATER CO. (BAYERQUE v.). See Case No. 1,136.

## Case No. 7,154.

The JACMEL PACKET.

[2 Ben. 107;[1] 7 Int. Rev. Rec. 108; 1 Am. Law T. Rep. U. S. Cts. 52.]

District Court, S. D. New York. Jan., 1868.

BOTTOMRY—BARRATRY OF MASTER—SALVAGE—PREMIUM ON GOLD.

1. A master of a vessel which had sailed from Singapore, bound to Australia, barratrously ran away with the vessel to the port of Aspinwall, in New Grenada. There he had made arrangements to sell the vessel and cargo, when C., the British consul, who was also Lloyd's agent there, discovered the fraud, and, by the aid of the authorities, the prosecution of the fraud was prevented, and the master absconded. The American consul thereupon appointed a new master, S., for the vessel, and directed him to bring her to New York, as the nearest proper port. C. thereupon advanced $1,616.82 in gold to pay bills incurred for the vessel, and took a bottomry bond, executed by S., as master, on the vessel and cargo, to secure the payment of these advances, with 40 per cent. premium. The bond also recited, that it had been agreed between S., the new master, and the United States consul and C., that C. was entitled to a reasonable sum for salvage, as a reward for his recovery of the property; and the bond then assigned the vessel and cargo to C. for the fulfillment of the contract. On the arrival of the vessel at New York, this libel was filed by C. to enforce the bond. No one appeared for the vessel, but an answer was put in by Lloyd's agent in New York, intervening for the interest of underwriters on the cargo. The only defence set up was, that S. was not lawfully appointed master, and had no authority to execute the bond. *Held*, that the advances were made by the libellant on the credit of the vessel and cargo, and the case was, therefore, a proper one for the giving of a bottomry bond.

2. S., having been appointed master by the American consul in a foreign port, agreeably to the usage of merchants under the circumstances, had the same authority to execute the bond as if he had been appointed directly by the owner of the vessel.

[Cited in The Giles Loring, 48 Fed. 470.]

3. The libellant must have a decree, therefore, for his advances and the premium, no objection being taken to the latter as excessive, but without any allowance for premium on gold.

[See Baker v. Ward, Case No. 785.]

4. The libellant's claim to be recompensed for his services in detecting the fraud and recovering the property was a proper one to be allowed under the bond, not however as salvage, but pro opere et labore.

In admiralty.

R. D. Benedict and J. Solis Ritterband, for libellant.

Martin & Smith, for claimants.

BLATCHFORD, District Judge. This is a libel filed on a bottomry bond, executed at the city of Colon, or Aspinwall, in New Grenada, January 7th, 1867, by Thomas C. Saunders, master of the brig Jacmel Packet, on the vessel and her cargo, conditioned for the payment to the libellant [William F. Cowan], at New York, of $1,616.82, with 40 per cent. premium, the said amount in gold coin having been advanced at Colon by the libellant to the master, to furnish supplies and repairs for the vessel at Colon for a voyage to New York. The bond also sets forth, that the brig was, on the 6th of August, 1866, chartered and freighted, at Singapore, by her late master, John A. Dawes, to a house there, to convey a cargo of pepper and other articles to Melbourne, in Australia; that the cargo, with a slight deficiency, is on board; and that the late master feloniously deviated from his voyage, and brought the vessel and cargo to the port of Colon, and had already made arrangements to defraud the owners of the vessel and cargo by a sale thereof, when, through the instrumentality of the libellant, the papers and documents appertaining thereto were brought to light, and the barratry prevented, and the cargo and vessel secured to their lawful owners. The bond then states, that it is agreed between Captain Saunders, and the United States consul at Colon, and the libellant, that the libellant "is entitled to a reward for the recovery of the property, as a fee, premium, or salvage, which amount, it is mutually agreed, shall, without delay, be paid in the city of New York, in United States gold, out of the proceeds of the said ship and cargo, and to be levied and adjudged by any competent average adjuster." The master then, by the instrument, mortgages and assigns to the libellant the vessel and cargo, for the due fulfillment of the contract.

The answer is put in by Lloyd's agent at New York, intervening for the interest of underwriters in England on the cargo. There is no answer on the part of the vessel. The only affirmative defence set up in the answer for the cargo is, that Captain Saunders was not lawfully appointed master of the vessel, and had no power to execute the bond, and make the vessel and cargo liable.

The libellant was Lloyd's agent at Colon, and also the British consul there at the time of the transactions in question. The vessel arrived at Colon, under the American flag, in December, 1866, and Captain Dawes put her papers into the hands of the American consul there. He put the papers into the hands of the libellant for an investigation of the case, and the libellant detected the fraud of Captain Dawes. Thereupon, Captain Dawes abandoned the vessel, and absconded, and the American consul appointed Captain Saunders to be master of the vessel, and directed him to take her to New York, as the nearest proper port. There appears, from the evidence, to have been a necessity for all the repairs and supplies that are covered by the bond. All the averments of fact

[1] [Reported by Robert D. Benedict, Esq., and here reprinted by permission.]

stated in the bond are supported by the evidence.

The evidence shows, that the libellant himself furnished directly to the vessel a large portion of the supplies, and paid bills for repairs, and advanced money to the seamen for wages, and paid the consul's bill, and paid bills for articles used for repairs, and also paid for supplies purchased at Colon from other parties. It is apparent, from the evidence, that the libellant furnished these supplies, and paid and advanced these moneys, on the credit of the vessel and cargo, and not at all on the personal credit of the master or the owners. The case was, therefore, a proper one for the giving of a bottomry bond. 1 Pars. Mar. Law, bk. 1, c. 11, F, p. 422, note 5, and cases cited. And Captain Saunders, having been appointed master by the American consul, in a foreign port, agreeably to the usage of merchants, under the circumstances disclosed in this case, had the same authority to execute the bond as if he had been appointed directly by the owner of the vessel. The Zodiac, 1 Hagg. Adm. 320; The Nuova Loanese, 22 Eng. Law & Eq. 623; Macl. Shipp. 153.

The rate of maritime interest, forty per cent., contracted for in the bond, is very high, but no objection is taken to it in the answer as excessive under the circumstances. The bond is made payable within a reasonable time after the arrival of the vessel at New York, or any other port, and previous to making any delivery of the cargo at any port. She arrived at New York February 2d, 1867. The libel was filed February 9th, 1867, and the monition was returnable and returned February 26th, 1867.

I award a decree to the libellant for the amount of his advances and payments, $1,616.82, and for forty per cent. premium thereon, as maritime interest, amounting to $646.73, making a total of $2,263.55. No premium to make this amount equal to gold, can be allowed, under the rule adopted in this court. This sum of $2,263.55 will be subject to interest at the rate of 6 per cent. per annum from February 26th, 1867, to the time of entering the decree herein.

In regard to the claim for a reward or compensation to the libellant for his services in discovering the fraud of Captain Dawes, and preserving the vessel and cargo for their lawful owners, the claim is a proper one to be allowed under the bond. It is not allowed in any respect as salvage, but as a remuneration for services, pro opere et labore, under the peculiar circumstances of the case. On the facts, the case resembles, in many material points, the case of The Zodiac, 1 Hagg. Adm. 320, and the case of The Gauntlet, 3 W. Rob. Adm. 82; in both of which cases an allowance for kindred services was made on a bottomry bond which covered them. In the present case the libel avers that the vessel and cargo were worth $20,000. This averment is denied by the answer, and I find nothing in the proofs showing what their value was, or what a proper allowance would be. I am, therefore, without any guide whereby to determine the amount. As the vessel has been sold in another suit on a claim for wages, and there is no balance remaining from her proceeds, if the amount of such remuneration to the libellant is not agreed upon between the libellant and the claimants of the cargo, there must be a reference to take testimony by which to fix it.[2] When the amount is fixed, as it was, by the bond, to be paid out of the proceeds of vessel and cargo, and no time for payment was specified, the amount will be allowed at the date of entering the decree, without any interest upon it. The libellant will be entitled to the costs of the suit.

## Case No. 7,155.

### The JACOB E. RIDGWAY.

[8 Ben. 179.] [1]

District Court, E. D. New York. June, 1875.

SALVAGE—PERIL FROM FIRE—EXORBITANT CONTRACT.

A schooner lying at a pier on the other side of which a vessel was burning, was hauled out into the stream by a tug, under an agreement by the mate in charge to pay $500. The peril of fire was not great, the labor of the tug took but 15 or 20 minutes, and the risk run was insignificant. *Held*, that the sum claimed was exorbitant, and the agreement should not be enforced, and that $100, with witness fees paid, should be allowed for the service.

[Cited in Brooks v. The Adirondack, 2 Fed. 393.]

In admiralty.

Benedict, Taft & Benedict, for libellant.

R. H. Huntley, for claimant.

BENEDICT, District Judge. This action is brought to recover the sum of $500, claimed to have been agreed to be paid by the mate of the schooner Jacob E. Ridgway, when in charge of that vessel, she being at the time in danger of taking fire, as she lay at a pier in the East river, from a burning vessel that was on the opposite side of the pier.

It is not denied that the libellant's tug took hold of the schooner and towed her out into the stream from the upper side of the pier, at a time when the steamboat River Belle was burning on the opposite side of the pier; but it is denied that the mate, who was in charge, ever employed the libellant's vessel at the price of $500, or any other price. And it is also denied that the schooner was in peril.

Upon the question of fact, as to the employment of the tug, the weight of evidence is with the libellant. The mate, it is true,

[2] This amount is fixed, on a reference, at $858.

[1] [Reported by Robert D. Benedict, Esq., and Benj. Lincoln Benedict, Esq., and here reprinted by permission.]

denies making any agreement with the tug; but he has a strong motive to make the denial, and his manner upon the stand, coupled with the fact that no other person is produced from the schooner, although three other persons were on board, lead me to doubt his testimony, and I conclude that he did request the tug to tow him out into the river, and did agree to the price demanded for such services, viz., $500.

Nevertheless, the service rendered was a salvage service, being performed for the sole purpose of removing the schooner from a position of danger; and contracts made for such services, and under such circumstances, are always scrutinized by a court of admiralty. Those courts, while they endeavor to encourage the rendering of services to vessels in distress by giving liberal awards, are also careful to protect vessels against the effects of improvident agreements made under such circumstances. The admiralty courts are courts of equity, and the power to relieve from such contracts has been frequently exercised. The present appears to be a case justifying resort to this power.

The contract upon which the libellant relies, was entered into when the vessel was actually in no great peril, for the weight of the evidence is that steam fire engines were upon the dock, which proved able to prevent the dock shed from catching fire, and which were able to have preserved the schooner even if the shed had caught fire. There was, nevertheless, apparent peril, sufficient to affect the judgment of the mate in charge and to justify a desire to move the schooner.

The risk run by the tug in towing the schooner into the stream was insignificant. The time occupied in the service did not exceed fifteen or twenty minutes. No extraordinary labor was required, and no injury sustained. For such a service the demand of $500 appears to me exorbitant. The circumstances did not justify the making of such a demand, nor the acquiescence in it by the mate.

The amount should be reduced to one hundred dollars. For that sum, with the taxable fees of his witnesses, the libellant may have a decree.

## Case No. 7,156.

The JACOB G. NEAFIE.

[8 Ben. 251.] [1]

District Court, E. D. New York. Oct., 1875.

NAVIGATION LAWS—INSPECTION OF PASSENGER STEAMBOATS—PLEADING.

1. A libel was filed on behalf of the United States against a steamtug, to recover a penalty of $500 under the 4499th section of the Revised Statutes of the United States. It averred that the vessel, on a certain day, received and carried passengers in the harbor of New York; that no application in writing for an inspection of the vessel had previously been made by her master or owner, as required by section 4417 of the Revised Statutes, and that no such inspection had been had. The owners of the tug excepted to the libel for insufficiency, claiming that section 4417 of the Revised Statutes did not require the master or owner of a vessel to make such application and that that section applied only to such vessels as were engaged in the business of carrying passengers for hire: *Held*, that, under the section in question, it is the duty of the master or owner of a vessel engaged in carrying passengers to make such written application for her inspection.

2. The section applied not only to vessels whose regular business it was to carry passengers, but to any vessel which at the time was carrying passengers for hire.

3. The libel was sufficient.

In admiralty.

Geo. B. Hoxie, Asst. Dist. Atty., for the United States.

Benedict, Taft & Benedict, for claimant.

BENEDICT, District Judge. This case comes before the court upon exceptions to the sufficiency of the libel filed against the steamboat in behalf of the United States. The libel filed avers that the steamboat Jacob G. Neafie, a vessel propelled wholly by steam and navigating the bay and harbor of New York, on the 28th day of November, 1874, received on board and carried passengers in and through the bay and harbor of New York; that no application in writing of the master or owner of said vessel for an inspection thereof as a passenger boat had ever been at that time made to the local inspector, as required by section 4417 of the Revised Statutes; and that at the time no inspection had ever been made or certificate of inspection issued to said steamboat, as required by law, to authorize her to receive on board or carry passengers; whereby it is claimed that a penalty of $500 was incurred, and that said vessel became liable therefor and subject to be seized and proceeded against by way of libel by virtue of section 4499 of the Revised Statutes of the United States. To this averment it is objected, that it states no offense. The argument is that section 4417 imposes no duty upon the master or owner of the vessel to make application for her inspection, but simply declares the duty of the local inspector to act, when called upon to act by a written application of the master or owner of a steam vessel, employed in the carriage of passengers.

But I think the section, fairly construed, does create a duty on the part of the ship owner to make a written application for inspection once in every year, in behalf of a vessel employed in the service of carrying passengers. The intention of the statute is manifestly to cast upon the owner of the vessel the responsibility of setting in motion the local inspector by a written application; and it proceeds upon the presumption

[1] [Reported by Robert D. Benedict, Esq., and Benj. Lincoln Benedict, Esq., and here reprinted by permission.]

that the inspectors, being public officers, will discharge their duty when applied to. This construction is necessary to preserve the efficiency of the statute. To construe it otherwise, is to leave it optional with the owner of the vessel whether his vessel be inspected or not, for the duty to inspect, and perhaps also the power, is dependent upon the fact that written application for inspection is made. If this construction of section 4417 is correct, it follows that, by virtue of section 4499, any vessel propelled by steam without such application having been made, becomes liable to the penalty of $500 imposed by that section.

It has been further contended that section 4417 by its terms indicates that it is intended to apply only to vessels whose regular service is the carrying of passengers, and that this libel must fail inasmuch as it omits to show that the carriage of passengers was any part of the regular service of the vessel proceeded against, but on the contrary shows the vessel to be a tug boat.

The libel does, however, show that the vessel proceeded against on the 28th of November, 1874, received on board and carried passengers in the harbor and bay of New York, and it may fairly enough be considered to aver that on that day she was employed in the service of carrying passengers for fares as part of her business for that day. So understood, the libel is sufficient. The intention of the act is to compel every steam vessel, before engaging in the service of carrying passengers, to be inspected, with a view of ascertaining whether she may be used to transport passengers with safety to life. The necessity for inspecting exists, as well where the vessel engages in the business of carrying passengers for a single occasion and outside of her regular business, as when her daily occupation is the carrying of passengers; and such a vessel should be held to be a vessel employed in the service of carrying passengers, within the meaning of section 4417. My conclusion, therefore, is, that the libel sufficiently states an offense, and that the exceptions must be overruled, with liberty to answer within one week.

## Case No. 7,157.

### JACOB v. UNITED STATES.

[1 Brock. 520.] [1]

Circuit Court, E. D. Virginia. Nov. Term, 1821.

PENALTIES—ACTION TO RECOVER—DEBT—DEMURRER TO EVIDENCE.

1. In England, where a penalty is given by statute, and no remedy for its recovery is expressly given, debt lies, and, it seems, that this principle is equally applicable here.

[Cited in U. S. v. Gates, Case No. 15,191; Stockwell v. U. S., Id. 13,466; U. S. v. Willetts, Id. 16,699; Stockwell v. U. S., 13 Wall. (80 U. S.) 543; U. S. v. The C. B. Church, Case No. 14,762; U. S. v. Elliot, Id. 15,043.]

[Cited in Ransdell v. Patterson, 1 D. C. Ct. App. 491.]

2. It is a rule of law, that a statute, applicable in its terms to particular actions, cannot be applied by construction, to other actions, standing on the same reason.

[Cited in Wilson v. Rousseau, Case No. 17,832; U. S. v. Laescki, 29 Fed. 700.]

[Cited in Adkison v. Hardwick, 12 Colo. 582, 21 Pac. 908; Bedell v. Janney, 4 Gilman (Ill.) 207.]

3. An action of debt, founded upon an act of congress, is brought to recover a penalty, in which the declaration charges, that the defendant "did forcibly rescue, or cause to be rescued, from the said collector, or one of them, the said spirits," &c., adopting the phraseology of the act. *Held*: That, although the offence might have been stated with more precision, and, although the declaration might have been held ill, on special demurrer, yet it is a defect of form merely, which after judgment, is cured by the statute of jeofails.

[Cited in U. S. v. Clarke, 20 Wall. (87 U. S.) 106.]

4. An action of debt to recover a penalty, is a "civil cause," within the meaning of the 9th section of the judicial act [1 Stat. 76], from which a writ of error lies from the district court, to the circuit court of the United States.

[Cited in Boyd v. Clark, 13 Fed. 909.]

5. A demurrer to evidence, supposes that evidence to be already admitted, and no objection can then be taken to it, on the ground that it is inadmissible. Where incompetent testimony is admitted, the proper remedy is, by a bill of exceptions. If the party declines taking this course, and demurs to the evidence, he waives all objection to its admissibility, and places his cause on its sufficiency to establish the fact in controversy.

6. A party, who demurs to evidence, is bound to admit every conclusion that may fairly be deduced from it.

7. The rule that secondary evidence is inadmissible, when primary evidence is attainable, though a sound general rule, is subject to some exceptions where general convenience requires it. Proof, for example, that an individual has acted notoriously as a public officer, is prima facie evidence of his character, without producing his commission or appointment.

[Cited in Com. v. Kane, 108 Mass. 425; North v. People, 139 Ill. 102, 28 N. E. 971.]

[Error to the district court of the United States for the Eastern district of Virginia.]

The United States brought an action of debt, and obtained a judgment in the district court at Richmond, against the plaintiff in error for $500, and their costs. This suit was brought to recover a penalty for an alleged violation of the act of congress, of the 21st of December, 1814,—2 Story's Laws, p. 1439, c. 168, repealed [3 Stat. 152], entitled "An act to provide additional revenue, for defraying the expenses of government, and maintaining the public credit, by laying duties on spirits, distilled within the United States, and territories thereof, and by amending the act laying duties on licenses to distillers of spirituous liquors." The 9th section of that act, provides that if any per-

[1] [Reported by John W. Brockenbrough, Esq.]

son shall forcibly rescue, or cause to be rescued, any spirits, still, boiler, or other vessel, after the same shall have been seized by the collector, the person so offending shall, for every such offence, forfeit and pay the sum of $500. The declaration adopted the phraseology of this section, and charged the offence in the alternative, viz: that the defendant did forcibly rescue, or cause to be rescued from the said collector, or one of them, &c. No objection was made to the declaration in the court below. The defendant pleaded the general issue of nil debet, and, on the trial, the plaintiff offered in evidence the depositions of John Gilfillen and Benjamin Harvie, Sen. deputies of William M'Kinley, collector of internal duties in the 5th collection district of Virginia, going to show that the said M'Kinley was the collector of internal duties, and that the defendant Jacob, had applied to him, in that character, for a license to carry on the business of distilling, which license M'Kinley refused to issue, the defendant not having complied with the requisitions of the act of congress. That notwithstanding the refusal of the collector to issue the license, until the terms of the law were complied with, the defendant engaged extensively in the business of distilling spirits, and by direction of their principal, the deponents repaired to the distillery of the defendant, which they found in full operation, and seized fourteen barrels of spirits, as being forfeited to the United States, which were forcibly rescued by the defendant Jacob. These depositions were read in evidence, under written agreements of the counsel for the defendant, that they were to be admitted in evidence, in like manner, as if the matter thereof was testified to in open court, by the witnesses, after being informed that, if otherwise, they were entitled to any part of the penalty, they would not, being called on as witnesses, be entitled thereto: every objection to the credit of the witnesses, and to their competency, except such as might be made were the witnesses testifying in open court, being reserved to the defendant. To this testimony the defendant, by his counsel, demurred, and the jury found a verdict for the plaintiffs, subject to the opinion of the court, on the demurrer to evidence. The court below overruled the demurrer, and gave judgment for the plaintiffs. The defendant obtained a writ of error to this judgment, and on the 11th of December, 1821, the following opinion was delivered by

MARSHALL, Circuit Justice. This is a writ of error to a judgment, rendered in favour of the United States, in the district court, in an action of debt, brought to recover a penalty, alleged to be incurred by the defendant, in violating some of the provisions of an act of congress, imposing duties on spirits, distilled within the United States. The defendant below, demurred to the testimony, and now insists that the judgment ought to be reversed, because: 1st. The declaration is insufficient, in not alleging the offence with precision. 2d. The testimony is insufficient, because it does not show, that the goods received were seized by an authorized officer.

1st. As to the sufficiency of the declaration. It states the seizure, and adds, that the defendant did forcibly rescue, or cause to be rescued, from the said collector, or one of them, the said spirits, &c. The plaintiff in error contends, that this charge is too vague, and that the declaration, instead of alleging in the alternative, that he had committed one, or another, of several different offences, ought to have alleged, specifically and singly, the offence that he did commit. The cases cited in argument, prove conclusively, that this error would have been fatal in an indictment or information;[2] but the counsel for the plaintiff, has shown no case, and I can find none, in which it has been deemed fatal in an action of debt. He contends, that in England, an action of debt is not brought in such a case; but the books say, expressly, that where a penalty is given by a statute, and no remedy for its recovery is expressly given, debt lies.[3] He contends with more reason, that where different remedies are allowed, the form of the remedy adopted, ought not to vary the case; nor ought a court to sanction, in one species of action for a penalty, a more lax mode of proceeding, than is allowed by the general principles which regulate suits for penal offences. If a precise charge would be required in an information, there can be no reason, he contends, for dispensing with this precision, in an action of debt, brought to recover the same penalty, for the same offence. This is true, in reason. But it is equally true in law, that a statute, applicable, in its terms, to particular actions, cannot be applied by construction, to other actions standing on the same reason. But the application of such statute, to an action which it expressly comprehends, cannot, on that account, be denied.

Upon this principle, it is contended on the part of the United States, that the act of jeofails, applies to this declaration, and cures the fault which has been assigned in it. The 32d section of the judicial act, enacts, "that no summons, &c., or other pro-

[2] See the authorities on this subject, collected in a note, to the case of The Caroline [Case No. 2,418].

[3] 1 Chit. Pl. 105; 1 Rolle, Abr. 598, pl. 18, 19; President & College of Physicians v. Salmon, 1 Ld. Raym. 682. The form of the action is not given by the statute, on which this prosecution was founded, but the fines, penalties, and forfeitures, incurred by force of the act, might be sued for, by bill, plaint, or information. Section 21.

ceedings in civil causes, in any of the courts of the United States, shall be abated, arrested, quashed, or reversed, for any defect, or want of form, but the said courts, respectively, shall proceed and give judgment, according as the right of the cause, and matter in law, shall appear unto them, without regarding any imperfections," &c., except such as shall be alleged as causes of special demurrer. Judicial Act 1789; 1 Story's Laws, p. 66, c. 20, § 32 [1 Stat. 91]. Is the defect in this declaration, an error of substance, or of form? The act of congress, 4 [Bior. & D. Laws] p. 730, § 9 [3 Stat. 155], describes the offence in the very words of the declaration. The penalty is incurred, by any person who "shall forcibly rescue, or cause to be rescued, any spirits, &c., after the same shall have been seized," by any collector. The offence is equally consummated, and the penalty equally incurred, by rescuing, or causing to be rescued, from any collector whatever, any spirits, &c., which he had previously seized. It might have been more technically correct, to have alleged the offence in the declaration, with more precision, and this declaration might have been ill, on a special demurrer. But if the defendant waives this exception, by going to trial on the fact of rescue, the defect appears to me, to be cured by the statute. The defect seems to me, to be a defect of form, whenever the defendant must, of necessity, be guilty of a breach of the law, and have incurred the penalty for which the suit is brought, if the allegation in the declaration be true. This seems to me, to constitute the difference between form and substance. The defendant has a right to insist on a precise statement of the offence with which he is charged, that he may know how to defend himself. This right is to be exercised by a special demurrer, and may be waived. If, instead of exercising it, he prefers going to trial on the fact, and it be found against him, the only question of substance, as it seems to me, which can arise upon the record, is, whether the fact be charged in such terms, that if committed, the penalty of the law must be incurred. If, then, the 32d section of the judicial act, applies to the case, the defendant comes too late with his exceptions to the declaration. That section, in its terms, applies to all civil causes, in any of the courts of the United States. An action for debt for a penalty, appears to me to be a "civil cause" under the 9th section of the judicial act, which defines the jurisdiction of the district courts. But I am relieved from a critical examination of this question, by the circumstance that, if it be not a civil cause, this court has no jurisdiction over it. The 22d section of the judicial act, under which this writ of error must be sustained, allows it only in "civil actions." If, then, the 32d section of the act does not apply, because this is not a "civil cause," the writ of error must be dismissed for the same reason.[4]

But the counsel for the plaintiff contends, that the statute does not apply, for another reason. In England, a statute is not supposed to relate to the crown, unless the king be expressly named. I do not recollect, that this principle, which is a branch of the royal prerogative, has ever been recognized in the courts of the United States, nor does it appear to me, to be necessary to inquire, in this cause, how far the principle may be applicable in our government. I do not think it necessary to make the inquiry, because the judicial act does expressly comprehend the United States. It gives the courts of the Union, jurisdiction in suits brought by the United States. The question, therefore, is not, whether a general statute, not mentioning the United States, shall comprehend them in its general provisions, but whether a statute, made both for the United States, and for individuals, shall embrace the United States, by provisions, not particularly mentioning them, but which are adapted to them, and made in terms sufficiently comprehensive to include them. This question is already settled in the supreme court. The 26th section of the act directs, that in all causes brought for a penalty annexed to articles of agreement, &c., the court shall render judgment in case of default, demurrer, &c., for so much as is due according to equity. This section does not mention the United States, but it has been determined in the supreme court to extend to them. So in the cases to be carried by appeal or writ of error, from an inferior to a superior tribunal, in the 21st and 22d sections of the act, the United States are not mentioned, but those sections have always been construed to comprehend their suits. I think it, then, very clear, that the 32d section of the judicial act extends to this case, and cures the error, if there be one, in this declaration. This is a point on which I have never entertained a doubt.

The second question appeared to me, at the argument, to deserve serious consideration, and I reserved the cause, in consequence of doubts which I then entertained upon it. Subsequent consideration has removed those doubts, and I now think the judgment of the district court correct on the demurrer to evidence, as well as on the sufficiency of the declaration. It was very properly observed, by the attorney for the United States, that a demurrer to evidence, supposes that evidence to be already admitted. If the testimony be inadmissible, its admission may be opposed;

[4] A libel against a vessel claiming forfeiture thereof, for exporting cannon, &c., under the act of 22d of May, 1794 [1 Stat. 369], is a "civil cause," within the meaning of the judicial act. It is a process in the nature of a libel, in rem, and does not, in any degree, touch the person of the offender. U. S. v. La Vengeance, 3 Dall. [3 U. S.] 297, 1 Pet. Cond. R. 132.

and if the objection be improperly overruled, the remedy is by a bill of exceptions. If, instead of taking this course, the party chooses to admit the evidence, and to demur to its effects, he waives his objection to its inadmissibility, and places his cause on its sufficiency to establish the fact in controversy. The question, whether it ought to be rejected as mere secondary evidence, is no longer to be asked, and the cause rests upon the question, whether, being admitted, it proves the fact in controversy.[5] If a note, or other ordinary instrument of writing, have a subscribing witness, the paper cannot be proved even by a person who saw it executed; but if a witness, who saw it executed, be offered, and the party to the writing, instead of objecting to his being sworn, admits it, and demurs to the testimony, the only question, then, seems to me to be, whether his testimony be sufficient to convince the mind, that the paper was executed by the person charged therewith.

There is another principle also applicable to the case. The party who demurs is bound to admit every conclusion, which the jury might rightfully draw from the testimony. Could the jury in this case have rightfully concluded, that this seizure was made by a collector of the internal revenue? It seems to me, the jury might very correctly draw this conclusion. The witness states that the plaintiff in error applied to M'Kinley, as the collector, for a license. The conversation shows, that the plaintiff in error had transacted business with him as collector. The witness, in positive terms, states him to be the collector. It is apparent that he acted as collector, and was understood by the plaintiff in error to be invested with that office. But had the defendant below excepted to the testimony, instead of admitting it, and demurring to it, I still think the question ought to be decided against him. The rule that secondary evidence shall not be admitted where primary evidence is attainable, although a sound general rule, has been relaxed in some cases where general convenience has required the relaxation. The character of a public officer is one of those cases. That he has acted notoriously as a public officer, has been deemed prima facie evidence of his character, without producing his commission or appointment. In the trial of the Gordons (Leach, Crown Cas. 515) this principle of evidence was sustained by all the judges, even in a case of murder. It is also laid down in 4 Term R. (Durn. & E.) 366; 3 Term R. 635; 3 Camp. 432; and in Phil. Ev. 180. The case at bar is, I think, completely within the principle of these cases.

The judgment of the district court is affirmed with costs.

[5] Mr. Stephens, in his Treatise on Pleading (page 112), says, that a party disputing the legal sufficiency of any evidence offered, or its admissibility in point of law, may demur to the evidence; but the case cited by him from 2 H. Bl. 208, does not justify this commentary. The question, whether the admissibility of evidence can be considered by the court in deciding on a demurrer to that evidence, did not arise in the case from Blackstone, nor does it appear ever to have arisen in any subsequent case in this country, or in England. In Bank of U. S. v. Smith, 11 Wheat. [24 U. S.] 171 (6 Pet. Cond. R. 261), Johnson, J., in delivering the opinion of the court, said, that by the demurrer to evidence the defendant had taken the questions of fact from the jury, where they properly belonged, and had substituted the court in the place of the jury, and that every thing which the jury could reasonably infer from the evidence demurred to, must be considered as admitted. Since such is the effect, then of the demurrer to evidence, it seems quite clear, that the question of the admissibility of evidence, is not open on a demurrer to evidence; its admissibility being a question of law which it is the exclusive province of the court, as such, to decide. See, also, The Palmyra, 12 Wheat. [25 U. S.] 1.

JACOBI (UNITED STATES v.). See Case No. 15,460.

## Case No. 7,158.

Ex parte JACOBS.

[3 App. Com'r Pat. 245.]

Circuit Court, District of Columbia. Dec. 3, 1859.

PATENTS—APPLICATION OF OLD DEVICE.

[The application of an old device for the construction of the exterior of iron safes to the construction of the interior of iron jail walls is patentable.]

[Appeal by Enoch Jacobs from the commissioner of patents refusing to grant him letters patent for an improvement in the construction of iron jail walls.]

MORSELL, Circuit Judge. The appellant states his claim thus: "What I claim in the construction of jail and prison-houses is the improved iron walls for the same, consisting of the following parts arranged and united as set forth, to wit, the entire wall plates A having their edges closely abutting the joint plates, e, united to, and uniting the plates A by rivets i, which have their riveted ends inwards and counter sunk to the depth of the thickness of the plates A, all in the manner and for the purposes herein set forth." The commissioner's report is dated 28th of July, 1859, and states that "a careful review of the said application of said Jacobs has resulted in convincing us [the examiners] that it is devoid of patentable novelty in view of the reference given, and for the reasons stated by the examiners in charge. A final rejection is therefore recommended." The acting commissioner says: "The aforegoing report is confirmed, and the patent prayed for dissolved." The first report of the examiner in charge is dated March 31st, 1859, and directed to said Jacobs, and says: "Your application for improvement in wrought iron jail plates has been examined,

and found not to present any patentable novelty. It is not seen that your construction differs from that employed in safes, iron houses &c. Your second claim is the well-known method of riveting plates to angle iron; and your third claim is to a guard precisely like that used in bank-vaults, safes &c." The second is dated June 30th, 1859, directed to the same person, and says: "Your application for improvements in the construction of iron jails has been examined. Your device consists simply in making the joints of the metallic plates perfectly smooth on the inside, by the perfectly common resort of butting or flush edges and counter-sunk-rivets. This is a very usual method of finishing iron safes externally, principally for neatness of appearance, though it is obvious it would present the same advantage in this case as in yours. The patent of William Beschke, Nov. 22, 1853, for joining iron plates, may be referred to as also presenting substantially the same smooth face, the rivets being of course counter-sunk." To which decision the said Enoch Jacobs filed four reasons of appeal. The first states that the commissioner erred inasmuch as he has mistaken the invention for a smooth or even surface in the jail-wall, a casual and not necessary result of the devices claimed.

2nd. The amended claim filed 22nd of June, 1859, forms the subject of the 3rd rejection by the office and the grounds of this appeal. But the official action, and the references both apply chiefly to the smooth surface, therefore the applicant for aught shown by the office is entitled to the devices claimed.

3rd. No one of the references made by the office is pertinent to the devices claimed, the application has therefore been rejected substantially without a reference.

4th. The amended claim may be regarded as a combination of three distinct devices which together constitute the invention, viz. the construction of the jail-wall. They are therefore patentable as the means adapted to the end.

On the day and place appointed for the hearing all the original papers and documents in the cause were duly laid before me by the commissioner. Also the argument in writing of the attorneys for the appellant, and the case was submitted.

It is apparent from the aforegoing statement that the rejection of the appellant's claim is only upon the ground that it is devoid of novelty, because it is a mere double use. It is said to be the same in principle with the iron safes and vaults of banks, iron houses &c, and a reference is given to the patent of William Beschke, Nov. 22nd, 1853. The appellant's improved structure is a wrought iron plate jail, with certain peculiar devices in combination, used for the purpose of making a jail-wall proof on the inside against the attempts of criminals within to escape by means of a crow or other instrument to prize the plates apart. It is not denied that the appellant fully accomplished all this. With respect to safes and bank vaults the object in their construction is to secure them against felons from breaking in from without. This general description certainly shows a very wide and substantial difference between the two. So widely do they differ in their purpose and use that no one would ever pretend to think even of using one for the other, nor can they under such circumstances be considered as equivalents for each other; and there will be found, by a careful consideration of the devices used in the appellant's construction, differences in the nature, arrangement, and designs equally great. As he states his invention, it consists mainly in the combination of these ingredients: The wall plate A, the joint or splice plate e, and the rivet i. The wall is almost a seamless wall, and wherever a seam occurs the edges on the inside are contrived to meet perfectly close, and all the rivet holes are counter-sunk on the inside of the wall to the depth of the wall plate, so that the counter-sink exactly fits the head of the rivet. If then the purpose was effected, the result was a great public good and benefit. The combination itself was new. With respect to the reference to the patent of William Beschke for his iron building, there are substantial variances in the construction itself, as to the seams or joints in the increased number and mode of securing them, and in other respects between that and the appellant's jail. Upon the whole the main purposes of the two were radically different, and, although a purpose merely is not patentable, yet, united with effecting a great beneficial and new result, as in this case, it is so. I think therefore that the decision of the commissioner is erroneous, and ought to be, and is hereby, annulled.

## Case No. 7,159.

In re JACOBS.

[18 N. B. R. (1879) 48.][1]

District Court, E. D. Texas.

INVOLUNTARY BANKRUPTCY—COMPOSITION PROCEEDINGS.

1. The 17th section of the bankrupt act, passed June 22, 1874 [18 Stat. 182], section 5103a of the Revised Statutes, providing for the settlement of estates in bankruptcy by composition proceedings, does not, in providing a remedy, operate to repeal the general provisions of the bankrupt law; the section is rather to be construed in harmony with the general principle pervading all bankrupt laws.

2. The authority of a bankrupt court upon the submission of a resolution in composition proceedings, duly accepted and confirmed by the requisite number of creditors under the provisions of said section, is not limited to the determination of a mathematical result.

3. In the absence of fraud, accident, or mistake, the determination of the creditors is final

[1] [Reprinted by permission.]

as to the quantum of composition; but when through preferences, fraudulent under the bankrupt act, injustice has clearly been done to the body of creditors, the ancient maxim must apply, "The law would rather tolerate a private loss than a public evil," and the court will not lend its aid to the relief and discharge of the debtor, and create a precedent for the doing of that which bankrupt laws were devised to prevent.

On the 26th day of February, 1878, a petition in bankruptcy was filed by Messrs. Dalsheimer Bros., of Camden, New Jersey, and other creditors, against [B. H. Jacobs] said debtor. On the same day the debtor filed a waiver of service of process and copy of petition, and admitted that the petitioning creditors constituted the requisite one-fourth in number and one-third in value of all his creditors, and on the 2d of March following a petition was filed for a general meeting of his creditors, to consider a composition of thirty per cent. proposed by him; accordingly such meeting was held before the register on the 26th day of March, 1878, and continued by adjournment to the 2d day of April, 1878, when, after examination into the debtor's affairs, and after there had been submitted to the meeting by Messrs. Mann & Baker, counsel for John Mahon & Sons, opposing creditors, a statement, admitted by the debtor to be correct, showing certain preferences to home creditors, a resolution to accept the proposed composition was passed, accepted, and confirmed by the requisite number of all the creditors, which proceedings were duly certified and reported to the court by Arthur W. Andrew, register presiding, without an expressed opinion as to whether the composition should or should not be confirmed. Upon hearing, the debtor was adjudged bankrupt, but a rehearing being granted, the court re-referred the matter to the register, with instructions to examine the debtor's books of account to determine their correctness, also to take the testimony of witnesses if deemed necessary, and to report to the court after such investigation whether, in the opinion of the register, "said composition should or should not be confirmed." In compliance with this order, the register again reported to the court on the 18th day of May, 1878, attaching to his report the depositions of certain witnesses, one of whom was a preferred creditor, and a statement of facts elicited from these examinations. These briefly were: That said B. H. Jacobs, being a clerk and salesman in the house of A. Kory & Bro., a firm composed of A. and M. Kory, his brothers-in-law, dealers in boots and shoes on Market street, in the city of Galveston, on the 15th day of May, 1875, bought out his employers' interest for fourteen thousand eight hundred and fifty-six dollars and twenty cents, paying five thousand dollars cash, his entire capital, and executing severally to A. and M. Kory his notes for the balance in amounts proportioned to his vendors' respective partnership interests in the stock purchased. That as their successor he continued the business till the date of bankruptcy proceedings, during which time Mr. M. Kory acted as his salesman. His purchases during the period, excluding original stock, were sixty-eight thousand five hundred and twenty-four dollars and fifty-five cents, and entire sales about seventy-three thousand four hundred dollars. His profits, as estimated by him, were twelve per cent. upon sales. By the entries upon the "cash," however, his private expense account stands charged with a larger sum than the aggregate of such profit. From the 15th of May, 1875, to the day his commercial paper went to protest, January 4, 1878, it appears that at no time was he in condition to pay his original purchase-money notes and continue his business without sacrificing his principal stock. Added to this he was compelled to pay a surety debt during the year 1877, amounting to two thousand six hundred and fifty dollars. He renewed the notes given to A. Kory & Bro. for his original purchase after maturity, "being unable to pay them when due." Those due A. Kory were renewed August 1, 1877; nevertheless, during the succeeding autumn months, he purchased goods to the amount of twenty-four thousand six hundred dollars, of Northern creditors, and "as he made sales" canceled the indebtedness due to creditors who were members of his family. Of these obligations he paid six thousand seven hundred and sixty dollars in the months of November and December, 1877, alone. The relationship existing between himself and the late firm of A. Kory & Bro., as shown by the testimony adduced, is conclusive that they were fully advised of his insolvent condition. The deposition of M. Kory, who was his salesman, brother-in-law, and a member of his family, is sufficiently explicit on this question. The "cash" shows the following payments in the latter part of December, 1877:

| | | | |
|---|---|---|---|
| Dec. | 18th, | to Max Kory | $676 45 |
| " | 23d, | " " " | 250 00 |
| " | 26th, | " " " | 250 00 |
| " | 28th, | " Adeline Levy | 650 00 |
| " | 28th, | " A. Kory | 700 00 |

On the 4th of January following, his commercial paper in the hands of A. E. & H. Bacheller, of Boston, went to protest, and sixty days after the last payment made to A. Kory a petition for adjudication of bankruptcy was filed against him, followed by his petition for a general meeting of his creditors to consider his proposed composition.

BY ARTHUR W. ANDREWS, Register: I desire most respectfully to submit the following as my opinion of the law applicable to the foregoing state of facts, and as to what decision the court is called upon to render upon a submission of the whole case as directed. The power of this court as a court of bankruptcy was invoked by the petitioning creditors, under the provisions of section 5021 of the Revised Statutes, defining what are acts of bankruptcy. The special aver-

ment relied upon by the petitioners is stoppage of payment of commercial paper, made and passed by the debtor in the course of his business as a tradesman, or retail dealer, and failure to resume payment for a period of forty days. Under these averments the debtor was by the court adjudged bankrupt on the 6th day of May, A. D. 1878. Under a further provision of section 5021, any payment made by a debtor, he being bankrupt or insolvent or in contemplation of bankruptcy, with intent to delay or defeat the operation of the bankrupt act, is a sufficient ground for adjudging a debtor bankrupt, and, if fraudulently made, of preventing his discharge under the fifth clause of section 5110 of the Revised Statutes. Fraud under the bankrupt act has been clearly defined. "The act was designed to secure an equal distribution of the property among the creditors, and any transfer made with a view to secure the property or any part of it to one, and thus prevent such equal distribution, is a transfer in fraud of the act." Martin v. Toof [Case No. 9,167]; Toof v. Martin, 13 Wall. [80 U. S.] 40; In re Kingsbury [Case No. 7,816]: "When a merchant or trader * * * has shown his inability to meet his engagements, one creditor cannot, by collusion with him, * * * obtain a preference to the injury of others." Beattie v. Gardner [Id. 1,195]; Smith v. Buchanan [Id. 13,016]; Buchanan v. Smith, 16 Wall. [83 U. S.] 277; Sage v. Wynkoop [Case No. 12,215].

The foregoing statement of facts is conclusive that certain preferences were made to creditors whose relationship to the business and family of the debtor advised them fully of the insolvency of the debtor, and this fact is admitted by one of them. They held his commercial paper which was not paid at maturity. "Insolvency means an inability to pay debts as they mature and become due and payable." In re Bininger [Case No. 1,420]. "The term 'insolvency' imports a present inability to pay." In re Oregon B. Printing Co. [Id. 10,559]. They had sold him his original stock in trade; one of them was his salesman, and the other conducted business in the same, or in an adjacent building.

Within the sixty days preceding the protest of his commercial paper, and within the four months next preceding the commencement of bankruptcy proceedings, his cash account, admitted to be correct by him, shows payments to A. & M. Kory to the amount of four thousand eight hundred and ten dollars and ten cents, beside other payments to non-resident members of his family, in aggregate six thousand seven hundred and sixty dollars and ten cents. "Every person of a sound mind is presumed to intend the necessary, natural, or legal consequence of his deliberate act." In re Smith [Case No. 12,974]. "When the probable consequence of an act is to give a preference, the debtor will be conclusively presumed to have intended to give such preference." In re Drummond [Id. 4,093]; Samson v. Burton [Id. 12,285]; Traders' Nat. Bank v. Campbell, 14 Wall. [81 U. S.] 87; Campbell v. Traders' Nat. Bank [Case No. 2,370].

The last payments made to his home and family creditors were made on the 28th day of December, 1877. One of them was made to A. Kory; the seventh day thereafter his commercial paper, held by a Northern creditor, went to protest. To make a preference absolutely void under section 5130, the same must have been made within two months of the date of the filing the petition for adjudication against him. Sixty days thereafter, or on or about the date of the expiration of this limitation of time, bankrupt proceedings are commenced, the debtor accepting service of petition, and waiving copy of order to show cause. Secured by this supposed statutory aegis, the debtor invokes the power of the court of the United States, sitting as a court of bankruptcy, to coerce such minority of his creditors as may object to the acceptance of such proposition in composition as may be proposed by him, and offers one of the preferred creditors as indorser for his deferred payments therein. "The principle of the bankrupt laws being the equal distribution of the property and effects of a bankrupt among his creditors, acts which are done with the object of preventing an equal distribution of the property and effects of a bankrupt among his creditors, are fraudulent within the meaning of those laws." Kerr, Fraud & M. 280.

It is contended by those in favor of enforcing the terms of the composition offered and accepted by the requisite number of creditors in these proceedings, that whatever violations of the principle or letter of the law may be brought to the notice of the court, "it is powerless unless it shall appear that the interest of the creditors will not be promoted by the terms of composition." In re Allen [Case No. 210]. Such construction carries us to this result: "That the court must consider that the 17th section of the bankrupt act, as amended, operates to supersede or repeal, at least in part, the very section of the Revised Statutes through which the court obtained jurisdiction of the subject matter, to wit, section 5011. "Reason is the soul of the law" (4 Coke, 48); "and the ancient maxim ought rather to obtain, 'Lex citius tolerare vult privatum damnum quam publicum malum.'" It is better that a present personal loss should be sustained than that the court should create a precedent that would operate to give full authority to all debtors to do that which bankrupt laws were especially devised to prevent. But it appears to me the whole law may be construed harmoniously.

"It is an established rule in the exposition of statutes, that the intention of the lawgiver is to be deduced from a view of the whole and every part of the statute taken and compared together. * * * 'Scire leges non hoc

est verba earum tenere, sed vim ac potestatem,' and the reason and intention of the law will control the strict letter of the law when the latter would lead to palpable injustice, contradiction, and absurdity." 1 Kent, Comm. 462; Cannon v. Vaughan, 12 Tex. 399. The legislative intent in framing the 17th section of the bankrupt act as passed June 22, 1874 [18 Stat. 182], as stated by Justice Miller, "was to mitigate in favor of the debtor the rigor of the act of 1867 [14 Stat. 517]." In re Scott [Case No. 12,519]. It is derived from the British act of 1868, but contains this clause not found in the English law: "Every such composition shall, subject to priorities declared in said act, provide for a pro rata payment or satisfaction in money to the creditors of such debtor." It therefore appears that the leading principle upon which all bankrupt acts are founded is especially recognized. This section also provides that upon hearing the court shall determine whether the accepted composition is for the best interest of all concerned, and also that the court may set aside the composition if it cannot proceed without injustice to creditors.

It is urged in particular that the requisite number of creditors having by their signatures confirmed a resolution to accept a composition, the court has no discretion under the statute whatever fraudulent preferences may have been brought to the notice of the court, but must recognize the act of such creditors as determining the best interest of all concerned. That in fact the court sits at a hearing in composition chiefly to determine a mathematical result; given the aggregate of the debtor's liabilities, and the entire number of his creditors, has a sufficient body of his creditors, in number and amount, accepted his terms? Such has not heretofore been the ruling of this court. In re Fox [Case No. 5,006]; In re Cramer [Id. 3,344]. It would seem a better construction of the composition act to consider it a part and parcel of the bankrupt law, and that the debtor who would profit by its privileges must be subject to its general provisions, and that the discretion accorded to the court in this matter is the discretion accorded to a court of equity. "Nothing can call forth this court into activity but conscience, good faith, and reasonable diligence." Story, Eq. Jur. 1520. In the absence of fraud, the determination of the creditors is, under the English decisions, final as to the quantum of composition. "The only exception we would recognize," says Judge Emmons, "is where it manifestly appears there was some fraud, accident, or mistake,—such a contingency as would incline the court, ex mero motu, to refuse to proceed." In re Weber Furniture Co. [Case No. 17,331]. Being therefore of the opinion that the payments made to A. and M. Kory during the months of November and December, 1877, were made out of the proceeds of goods for the most part recently purchased and unpaid for, and were made in contemplation of bankruptcy, and that the persons so preferred received the same knowing the insolvency of the debtor, and that such payments were made in fraud of the bankrupt act, notwithstanding the same were made sixty days prior to the filing the petition for adjudication of bankruptcy against said debtor, in my opinion no proposal in composition ought to receive the approval of the court unless the pro rata offered to all the creditors should be equal to such amount as they otherwise would be entitled to receive if no such preference had been made, taking the present estimated assets of the bankrupt and the thirty per cent. now offered in composition as the basis of such calculation, following in principle the decisions heretofore rendered by the honorable the judge of this court. In re Cramer; In re Fox, supra. I am therefore of the opinion that the composition of thirty per cent. proposed by the bankrupt should not be confirmed. All of which is most respectfully submitted.

MORRILL, District Judge. I concur in the opinion and conclusion of the register, and order accordingly.

## Case No. 7,160.

In re JACOBS.

[5 Sawy. 458.] [1]

District Court, D. California. April 28, 1879.

BANKRUPTCY—OBJECTIONS TO DISCHARGE—AMENDMENTS.

The court has authority to allow, in its discretion, amendments to specifications of objections to bankrupt's discharge, or to enlarge the time for filing such specifications after the time for appearance or that for filing specifications has expired.

[In the matter of A. and S. Jacobs, bankrupts.]

T. B. Bishop, for bankrupts.

W. Barber, for opposing creditors.

HOFFMAN, District Judge. The adjudication in this case was made September 13, 1870. The examination of the bankrupts was concluded in the latter part of 1870, or early in 1871. Their petition for a discharge was not filed until March 22, 1875. On the return day creditors duly appeared in opposition, and objections to the discharge were filed on the sixteenth of June, 1875. No further proceedings were had in the case until December 5, 1878, when a motion was made on behalf of the bankrupts to dismiss the objections for want of prosecution. This motion was denied.

The objecting creditors then moved (March 4, 1879) for leave to amend the specifications of objections. This motion was elaborately argued, and is now to be decided. The orig-

[1] [Reported by L. S. B. Sawyer, Esq., and here reprinted by permission.]

inal specifications alleged as the ground of objection to the discharge that the bankrupts had failed to keep proper books of account. It is sought to amend this specification by adding an averment that the bankrupts concealed books and papers relating to their estate. The omission to specify this ground of opposition in the original objections is explained as follows in the affidavit of the counsel for the opposing creditors.

The petition for discharge was not filed until more than four years subsequently to the conclusion of the bankrupts' examination. Before preparing the specifications the counsel endeavored to find the record of the bankrupts' examination, in order to ascertain what grounds of objection it disclosed, and for this purpose obtained from the court two extensions of time to file specifications.

After diligent inquiry at the offices of the register, the clerk and the assignee, he was unable to find the document sought for. It had probably been mislaid or lost at the time of the death of the late Mr. Register Bates, by whom the examination had been taken. The counsel was thus, as he supposed, compelled to draw the specifications from his recollection of the facts elicited at the examination.

When the prosecution of the application for a discharge was resumed, on December 5, 1878, some three years and a half thereafter, it occurred to the counsel that he had procured for the use of his clients in New York a certified copy of the record of examination. He thereupon wrote to New York for the copy, and it has recently been forwarded to and received by him.

He finds, on examination, that it contains evidence tending to show that the bankrupts, and especially S. Jacobs, concealed from, and failed to surrender to, the assignee, various books and writings relating to their estate. The affidavit further alleges that when preparing the objections more than four years subsequently to the close of the examination, and in the absence of the record, the fact that such evidence had been elicited escaped his recollection, and it was only recalled to his remembrance by the perusal of the certified copy. Under these circumstances he asks to be allowed to amend the objections so as to include the ground of objection above stated.

It is, I think, apparent that if the law allows to the court any discretion with regard to this application, it should be exercised in favor of the opposing creditors. The inability of the counsel to obtain access to the original record of examination was in no respect caused by his fault or negligence, nor can his failure to recollect the contents of the record after an interval of more than four years, during which the proceedings had been suspended and apparently abandoned, be justly deemed an indication of want of diligence or of memory. The new specification sought to be introduced is founded on the confessions of the bankrupts made in the course of this very proceeding, and on their examination regularly taken before the register. And they now, while asking after such great delay to be admitted to the benefits of the act, are endeavoring, on merely technical grounds, to avoid being confronted with their own admission that acts have been committed by them which, by the very terms of the law, deprive them of the right to a discharge. The counsel for the respective parties mutually reproach each other with inexcusable delay and negligence, but in my opinion with very unequal justice.

The object and effect of the bankruptcy act are two-fold: 1. To distribute among the creditors the assets of the bankrupt; and, 2. To afford to the latter, in proper cases and on his own application, the benefit of a discharge. In this latter proceeding, as it is exclusively for his benefit, he is the promover and actor. It is for him seasonably to make his application, and diligently to press it to a determination. Until he applies for his discharge the creditors can take no action, except after the expiration of a reasonable time, to obtain leave from the court to prosecute their demands before the ordinary tribunals. When the petition for discharge is presented, it is then the duty of the opposing creditors to make due appearance and file their objections within the prescribed period. But beyond this they are under no absolute obligation to press the cause to a conclusion. It is for the bankrupt, like any other plaintiff or petitioner who asks for relief at the hands of a court, to speed the cause to a final decision.

The motion to dismiss the specifications of grounds of opposition, for want of prosecution, seems to have been founded on an entire misconception of the nature of the proceeding and the relative rights and duties of the parties. As well might the plaintiff in a suit in which a general denial of the cause of action had been pleaded, and who for several years had taken no steps to bring the issue to trial, ask for a dismissal of the plea and judgment in his own favor because his adversary had not moved in the cause. With far greater reason might the creditors have asked, in December, 1878, that the petition filed on the twenty-second of March, 1875, nearly four years after the adjudication, and which remained unacted on for three years and a half after the specifications of objections had been filed, should be pronounced deserted and abandoned. Whether such an application would have been granted it is unnecessary to say, but certainly the court, unless a very strong showing to the contrary had been made, would have given leave to the creditors to resort to their legal remedies before the ordinary tribunals.

It is contended on behalf of the bankrupt that general order No. 24, which requires that opposing creditors shall enter their ap-

pearance on the return day of the rule to show cause and file their specification of grounds of opposition within ten days thereafter, unless the time shall be enlarged by order of the district court, absolutely prohibits the filing of specifications either original or amended after the expiration of the ten days, unless the court shall have previously extended the time.

But such I do not conceive to be the effect or intention of the order. It was framed to prescribe a general rule of practice to be usually followed and observed, but it was not intended to deprive the district courts of their ordinary power to open defaults and to relieve against accidents, inadvertencies and excusable neglects. It was not designed to secure to the dishonest bankrupt the benefit of the act whenever the attorney of the opposing creditors might, from accident, forgetfulness or insuperable impediment, fail to appear at the return day, or to omit to file within the ten days thereafter specifications of the opposition in due form.

I am not aware that the courts have in any case given to general order No. 24 a construction so narrow and literal, and which would defeat one of the principal objects of the act by enabling the dishonest bankrupt to obtain by accident those benefits under it which are expressly reserved for the honest. On the contrary, we find that from an early period after the passage of the act the courts have freely relieved against the consequences of inadvertence, mistake or unskillfulness.

In Re Grefe [Case No. 5,794], Mr. Justice Blatchford allowed creditors to file their specifications after the expiration of the ten days and as of a time within ten days after the return day of the order to show cause. The register, it has been held, may grant an application for additional time (In re Seckendorf [Id. 12,600]; In re Belden [Id. 1,238]), subject to the corrective authority of the court, in case of abuse of the power (In re Robinson [Id. 11,939]).

The practice of granting leave to amend defective specifications was early adopted, and seems to have been followed without question of its correctness, and this where the specifications were so vague and general as not to present any triable issues, and when they were so adjudged on demurrer. In re Hill [Id. 6,482]; In re Rathbone [Id. 11,580]; In re Burk [Id. 2,156]; In re Bellis [Id. 1,275].

In Re Houghton [Id. 6,730], Mr. Justice Lowell observes: "I have decided in one case that the discretion of the court to enlarge the time extends to the time of appearance as well as to that for filing specifications, and may be exercised after the time has expired as well as before."

It is clear from the language of this very eminent judge that any construction of order No. 24 which would leave the court powerless after the expiration of the ten days to relieve against accidents, oversights or venial neglects, would be rejected by him as wholly inadmissible. It is unnecessary to cite further authorities on the point under consideration. I have no doubt that the court has authority to allow in its discretion amendments to specifications, and that this case is a proper one for its exercise.

The opposing creditors have leave to amend, according to the prayer of their petition.

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JACOBS, The SEARLE W. See Case No. 12,588.

JACOBS (BLANCHARD'S GUN-STOCK TURNING FACTORY v.). See Case No. 1,520.

JACOBS (DELILAH v.). See Case No. 3,773.

JACOBS (GELL v.). See Case No. 5,426.

JACOBS (GILL v.). See Case No. 5,426.

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## Case No. 7,161.

JACOBS v. HAMILTON COUNTY.

[4 Fish. Pat. Cas. 81; 1 Bond, 500.] [1]

Circuit Court, S. D. Ohio. Jan., 1862.

CORPORATIONS — COUNTY COMMISSIONERS IN OHIO —LIABILITY FOR TORTS—INFRINGEMENT OF PATENTS.

1. Corporations created by law, enjoying special franchises conferred for the benefit of the members, as well as for the public good, are liable for acts of misfeasance, malfeasance or nonfeasance, if injuries result to others from such acts.

2. Under the laws of Ohio the board of commissioners of a county is not such a corporation, and is not liable in an action sounding in tort.

[Cited in May v. Juneau Co., 30 Fed. 242. Criticised in May v. Mercer Co., Id. 249. Disapproved in May v. Logan Co., Id. 259, 260.]

3. It is a quasi corporation only, and its power to sue, and its liability to suit, must be controlled and limited by the terms of the statute creating it.

[Disapproved in May v. Logan Co., 30 Fed. 260.]

4. We look in vain in that statute for any provision authorizing the commissioners to do a wrongful act, or pledging the property or funds of the county to respond in damages for such act.

[Cited in Fry v. Albemarle Co., 10 Hans. (86 Va.) 199.]

5. The contractor who does the work is liable for the infringement of a patent, and can not defend himself against the claim of a patentee by asserting that he committed the wrong under a contract with the county commissioners.

6. Nor will he be protected from such liability because he entered into the contract in ignorance of the fact that the work he agreed to do would violate a patent.

This was a demurrer to a declaration in an action on the case brought to recover damages for the infringement of four letters

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[1] [Reported by Samuel S. Fisher, Esq., and by Lewis H. Bond., Esq., and here compiled and reprinted by permission.]

patent, covering various improvements in iron plate jails, granted to and belonging to the plaintiff [Enoch Jacobs]—the infringement in the jail of Hamilton county, Ohio, then in process of construction under contracts made by the board of county commissioners.

George M. Lee and S. S. Fisher, for plaintiff.

W. S. Scarborough and E. A. Ferguson, for defendants.

LEAVITT, District Judge. This is an action on the case against the board of commissioners of Hamilton county for an alleged infringement of the plaintiff's exclusive right to certain improvements in the construction of jails, secured to him by a patent granted by the United States.

The declaration is in the usual form, averring that the defendants "unlawfully and unjustly, against the will of said plaintiff and without his leave or license," made certain prisons in imitation of the plaintiff's invention, and in violation of his exclusive right under his patent, for which he claims a large sum in damages. To this declaration the defendants have filed a general demurrer, which presents the question now before the court.

There can be no controversy as to the nature of the claim against the defendants as asserted in the declaration. It is a claim against the commissioners of Hamilton county, as a body corporate under the laws of Ohio, for an alleged act of malfeasance committed by them in their corporate character. It is equally clear that, if damages are recovered for the wrongful act charged, they can only be paid out of a fund raised, or to be raised, by taxation on the property of the people of the county.

It is not denied by the counsel for the defendants that corporations created by law, enjoying special franchises conferred for the benefit of its members, as well as for the public good, are liable for acts of misfeasance, malfeasance, or nonfeasance, if injuries result to others from such acts. But it is insisted that, under the laws of Ohio, the board of commissioners of a county is not such a corporation, and is not liable in an action sounding in tort.

It is clear this question must be decided by a reference to the statutes of Ohio, creating a board of commissioners in every county of the state, and defining their powers and duties. Unless the legislative power of the state, either by express enactment, or by clear implication, has imposed a liability on the people of a county to respond to an injured party for damages sustained by the wrongful acts of the commissioners, it does not exist, and can not be enforced. Now, it is undoubtedly true that the laws of Ohio have imposed it as a duty on the commissioners of every county to provide a court-house and jail, and such other buildings as are needful for the due administration of justice or other specified purposes. But we look in vain for any provision in those laws authorizing the commissioners to do a wrongful act, and pledging the property or the funds of the county to respond in damages for such act.

But the question involved in this case has been settled by the supreme court of Ohio, and the decision of that court is authoritative on this court. It involves a construction of the statutes of Ohio, relating to the powers and duties of county commissioners, and by the long-settled rule of the supreme court of the United States, scrupulously followed by the lower courts of the Union, such a decision, even if against the views and opinions of those courts, will constitute a rule of decision for them.

The case of the Commissioners of Hamilton Co. v. Mighels, 7 Ohio St. 109, is decisive of the case before this court. In that case Mighels brought suit against the commissioners, alleging, in substance, that in the progress of the construction of the county court-house, a certain opening or hole in the stairway leading from the first to the second story of the building was negligently suffered to remain without any guard or protection, and that the plaintiff, in pursuit of his lawful business, fell into it, thereby sustaining serious bodily injuries for which he claimed compensation.

In deciding that case the court, after an extended review of the legislation of the state as to the powers and duties of the board of county commissioners, were brought unanimously to the conclusion that they were not liable to the suit of the plaintiff, so far as he claimed damages from the county, for the alleged wrongful acts of the commissioners. The court held that, although the statute conferred on the commissioners the power of suing and being sued, which is a capacity or attribute of a corporation, the board was only a quasi corporation; and that its power to sue, and its liability to suit, must be controlled and limited by the terms of the statute prescribing in what cases such power and liability existed. And as the power to sue and liability to suit were limited to cases of contract, the statute could not by implication be extended to the case of a tort. The court say: "It is worthy of notice that this statutory enumeration of the matters in respect to which the board of commissioners may sue, is confined to matters of contract. As to all actions, or subject matter of actions sounding in tort, the statute is silent." And in the closing paragraph of the opinion of the court on the point in question, the court says: "We conclude, therefore, whether we look solely to the language of our statute and apply to it those principles of construction which seem to be indicated by the narrow range of the objects and purposes of the county organization, or are governed by the light to be de-

rived from analogous cases elsewhere determined, that if this action can be maintained at all, a foundation for it must be found elsewhere than in the provisions of our statute."

The case referred to must be viewed as decisive of the question raised on this demurrer. It can make no difference in the principle of the two cases, that in the case before the supreme court of Ohio, the tort charged, and for which it was sought to make the board of county commissioners liable in their official capacity, was an act of nonfeasance, while in this it is an act of misfeasance. The principle involved is precisely analogous, whether the cause of action alleged is the wrongful omission to perform a duty, or a positive act of misfeasance. In either case there is no law by which the people of a county are responsible to the injured party for an injury sustained by the tort. The right to recover in either case must rest on an express statutory provision. There can be no pretense of any such right, in virtue of the common law. This proposition is beyond all doubt in an action for the infringement of a patent right granted under the laws of the United States. The patent itself, with all the privileges which it confers, is the creature of the statute; and, it is clear, there can be no remedy for a violation of a patent, except as it is conferred by the statute.

I am not able to see the force of the argument, urged by plaintiff's counsel, that he may be without a remedy for his alleged wrong, unless this action can be sustained against the board of commissioners. It is urged that the grant to the plaintiff secures to him the exclusive right to make, use, and vend the patented improvement, without any exception or reservation. Hence, it is insisted, if any person or corporation can violate it with impunity, the patentee suffers a wrong without the possibility of a redress. To this it may be replied, that the tax-payers of the county, being the parties alone interested, and virtually the defendants in the action, have had no agency in the commission of the alleged wrong. They have neither violated the plaintiff's rights, nor have they authorized the commissioners, as their agents, to do so. There would be no justice, therefore, in holding that their funds, contributed in the form of taxes, should be applied to the payment of damages for an act not authorized by them, and which has no sanction in the laws of the state.

But the plaintiff is not without remedy if there has been an infringement of the plaintiff's patent, as alleged by him. The fact alleged in the declaration is that the injury to the plaintiff consisted in the unlawful use, by the defendants, of certain improvements in the construction of iron prisons, embraced in the patent. Now, the court will take notice, that, by the statute of Ohio, the county commissioners can authorize the erection of buildings for the use of the county only by contract. As a necessity, therefore, there must be a contractor, who obligates himself to do the work according to a proposed plan or specification, for a fixed compensation. There can be no question, that if the contractor, in the fulfillment of his obligation, violates the patent right of another, he is answerable for the infringement. He can not defend himself against the claim of the patentee by asserting that he committed the wrong under a contract with the county commissioners. It was his own folly to have imposed on himself such an obligation, and he alone is responsible for the injury which another may sustain as the consequence. If he had foreknowledge that the work he had bound himself to perform involved an infringement of a patent right, it was his business to have procured a license for the use of the improvement; and, failing to do so, he takes on himself the responsibility of a violation of the patent. If he entered into the contract in ignorance of the fact that the work he had agreed to do would violate a patent right, he is not, therefore, protected from liability. This fact may have a bearing on the question of the amount of damages to be recovered, but does not destroy the right of action by the injured party. And it is no answer to this view of the subject, that cases may occur in which the patentee may fail in the enforcement of his just rights by the insolvency or irresponsibility of the contractor. This is an incident often connected with cases of legal liability, which can have no influence upon the application of known and settled legal principles. Such a result may be a great misfortune to a losing party, but can not furnish a reason for casting responsibility upon another party, not legally chargeable with it.

The question whether the commissioners are liable, personally and individually, for the infringement charged in the plaintiff's declaration, is not before the court for its decision, and has received no consideration.

Upon the whole, the demurrer must be sustained.

## Case No. 7,161a.

JACOBS v. JACOBS.

[Hempst. 101.] [1]

Superior Court, Territory of Arkansas. Jan., 1831.

JUSTICES OF THE PEACE—TRANSCRIPT.

1. It is incompetent for a justice of the peace, after he has certified a transcript to the circuit court, to supply defects by certificate or otherwise; nor can they be supplied by the testimony of persons present at the trial.

2. The transcript, as certified, must be taken as true, and no extraneous matter can be received to add to or diminish it.

[1] [Reported by Samuel H. Hempstead, Esq.]

3. Where it does not appear that an appeal was prayed on the day of trial, and ten days notice is not given to the adverse party where the appeal is taken afterwards, it is proper to dismiss it.

4. But it can only be dismissed with costs, and it is erroneous to give judgment for the money in controversy.

Appeal from Lafayette circuit court.

Before JOHNSON, ESKRIDGE, and BATES, JJ.

ESKRIDGE, J. This was an action for the recovery of money due upon an account brought by Thomas Jacobs [administrator of Keziah Jacobs, deceased] against John Jacobs, before a justice of the peace for the county of Lafayette. There was a verdict and judgment before the justice, in favor of the plaintiff, for $78.00, from which the defendant appealed to the circuit court, which having dismissed the appeal, the cause has been brought by appeal to this court.

Two questions are presented by the record: First, whether the circuit court erred in dismissing the appeal; and second, whether the judgment rendered by that court, upon such dismissal, was correct and suitable. A justice of the peace is required by the statute to keep a docket, and to note in it every step taken in the progress of a cause pending before him, and a transcript from the docket thus kept is made evidence; and it is incompetent for the justice, after he shall have certified a transcript from his docket to the circuit court, to supply any defect that may exist in it, by certificate or otherwise; nor can such defect be supplied by the testimony of persons who were present at the trial before the justice. The transcript, as certified by the justice, must be taken as true, and no extraneous matter can be received by the court to add to or diminish it.

The circuit court decided correctly in refusing to receive both the certificate of the justice and the affidavits of witnesses that an appeal was prayed for on the day of trial. The fact, whether an appeal was taken on the day of trial, was an important one in the progress of the cause, which ought to have been noted by the justice on his docket. The statute provides, that when an appeal is prayed for on the day of trial, it shall not be necessary to give notice to the adverse party; and, on the other hand, when an appeal is not prayed for on that day, a notice of ten days must be given to the opposite party. It not appearing from the transcript of the justice's docket, as certified to the circuit court, that either an appeal was prayed for on the day of trial, or that ten days notice, as required, was given, the appeal was very properly dismissed by the circuit court. But, however correct the decision of the circuit court may have been in dismissing the appeal, the judgment of that court upon the dismission was erroneous, and must be reversed by this court. The circuit court, instead of dismissing the appeal, and rendering a judgment for costs only, gave a judgment for the money in controversy, as also for costs. This was error, and on this ground the judgment of the Lafayette circuit court must be reversed. Judgment reversed accordingly.

## Case No. 7,162.

JACOBS v. LEVERING.

[2 Cranch, C. C. 117.] [1]

Circuit Court, District of Columbia. April Term, 1816.

MILITIA—IMPRESSMENT.

A commanding officer of the militia has no lawful authority to impress the horse of a citizen, even in time of war.

Trespass for impressing the plaintiff's horse.

E. J. Lee, for plaintiff.

J. D. Simms, for defendant, offered a witness to prove an order from General Young, commanding the militia, to impress horses.

THE COURT (THRUSTON, Circuit Judge, absent), decided that such an order would be no justification.

JACOBS (MOORE v.). See Case No. 9,767.

JACOBS (THOMSON v.). See Case No. 13,982.

## Case No. 7,163.

JACOBS v. UNDERWOOD.

[See 63 N. C. 112.]

JACOBSON (UNITED STATES v.). See Case No. 15,461.

## Case No. 7,164.

JACOBSON'S CASE.

[See Case No. 15,461.]

JACOBUS (FAIRBANKS v.). See Case No. 4,608.

## Case No. 7,165.

In re JACOBY.

[1 N. B. R. 118; [2] Bankr. Reg. Supp. 26; 6 Int. Rev. Rec. 149.]

District Court, S. D. New York. Oct. 18, 1867.

BANKRUPTCY — ARREST — STAY OF PROCEEDINGS AGAINST BANKRUPT IN STATE COURTS.

The bankrupt was held in custody by the sheriff of the city and county of New York, under three several orders of arrest. Four actions

[1] [Reported by Hon. William Cranch, Chief Judge.]

[2] [Reprinted from 1 N. B. R. 118, by permission.]

were pending against the bankrupt in state courts. *Held*, that proceedings will be stayed, and the bankrupt will be discharged from arrest in proper cases, until the question of his discharge in bankruptcy shall be passed upon in the bankruptcy court. Testimony ordered to be taken and certified by a referee as to whether the actions were for claims that would not be discharged in bankruptcy.

[Cited in Re Wright, Case No. 18,065; Re Mallory, Id. 8,991; Re Brinkman, Id. 1,884; Ex parte Schulenburg, 25 Fed. 212.]

In bankruptcy.

BLATCHFORD, District Judge. The order to show cause made herein on the 11th day of October, 1867, why Henry Jacoby, the above named bankrupt, should not be discharged from the custody of the sheriff of the city and county of New York, under three several orders of arrest named therein, and why all further proceedings in the four several actions named should not be stayed to await the determination of this court in bankruptcy upon the question of the discharge of said Henry Jacoby, having come on to be heard, and it appearing that a copy of the said order to show cause had been duly served upon Messrs. Capron & Lake, two of the attorneys therein named. Now, after hearing Aaron Frank, Esq., for the motion, and Charles H. Smith, Esq., Charles H. Van Brunt, Esq., and Samuel Hirsch, Esq., in opposition thereto, it is ordered that the said Jacoby be and he is hereby discharged from the arrest and imprisonment under which he is held by the sheriff of the city and county of New York under the order of arrest made in the action in the court of common pleas in and for the city and county of New York, wherein Lazarus Hallgarten is plaintiff, and Henry Jacoby and another are defendants, and that all further proceedings in the said action be and the same hereby are stayed to await the determination of this court in bankruptcy on the question of the discharge of said Jacoby. And it is further ordered that all further proceedings in the action now pending in the supreme court of the state of New York in and for the city and county of New York, wherein John A. Lockwood is plaintiff, and Henry Jacoby and another are defendants, be and the same hereby are stayed to await the determination of this court in bankruptcy on the question of the discharge of said Henry Jacoby.

And it is further ordered that in the action in the supreme court of the state of New York, in and for the city and county of New York, wherein Oliver E. Wood, Israel A. Barker, and John Maxwell are plaintiffs, and Henry Jacoby and another are defendants, it be referred to Joseph Gutman, Jr., Esquire, a commissioner of the circuit court of the United States for the Southern district of New York, as a referee, to take and certify evidence upon the question as to whether or not the said action is founded on a debt or claim created by the fraud or embezzlement of the said bankrupt or by his defalcation as a public officer, or while acting in any fiduciary character, and to report thereon with all convenient speed. And it is further ordered that in the action in the supreme court of the state of New York in and for the city and county of New York, wherein Solomon Mannes is plaintiff, and Henry Jacoby and another are defendants, it be referred to the said Gutman, as a referee to take and certify evidence upon the question as to whether or not the said action is founded on a debt or claim created by the fraud or embezzlement of the said bankrupt, or by his defalcation as a public officer, or while acting in any fiduciary character, and to report thereon with all convenient speed. And it is further ordered that all parties shall have due previous notice of all proceedings before said referee hereunder, and the opportunity of attending before him, and shall be at liberty to examine the said bankrupt and any other witnesses in the premises, and that all further proceedings in the said last named two actions, except such as relate exclusively to the holding of the said Jacoby in custody under the said orders of arrest therein, be and the same are hereby stayed to await the determination of this court in bankruptcy on the question of the discharge of said Jacoby.

## Case No. 7,166.

In re JACOBY.

[1 Wkly. Notes Cas. 15.]

District Court, E. D. Pennsylvania. Oct., 1874.

POSTPONEMENT OF PROOF BY REGISTER—RESIDENT ASSIGNEE.

At the first meeting of creditors held in Norristown, the register (Chase) postponed certain proofs of debt until an assignee was chosen; some on account of informalities and others for objections made which threw a doubt on their validity. At said meeting George B. Snyder, of Philadelphia, was chosen assignee of the bankrupt, who resided and did business in Norristown. Exceptions were taken to the rulings of the register in regard to postponing said proofs, and to the election of an assignee not resident in the same place as the bankrupt. The proceedings were reported to the court, with the exceptions thereto.

J. V. Gotwaltz, for exceptant.

THE COURT held that a postponement of proof of a claim until an assignee is chosen is entirely within the discretion of the register, under the 23d section of the bankrupt act [of 1867 (14 Stat. 528)], and suggested that the parties should agree on a suitable person residing in Norristown to be associated with Mr. Snyder as co-assignee.

JACOBY (UNITED STATES v.). See Case No. 15,462.

## Case No. 7,167.

JACQUES v. COLLINS et al.

[2 Blatchf. 23.] [1]

Circuit Court, S. D. New York. May 25, 1846.

DISCOVERY — STATUTORY PROCEEDINGS — ACT OF SEPTEMBER 24, 1789—FORM OF PETITION.

1. In a proceeding in this court under section 15 of the judiciary act of September 24, 1789 (1 Stat. 82), to obtain a discovery, in an action at law, of documents in the possession of the adverse party, it is only requisite that the cause should be at issue, and that the court should be satisfied that the evidence required to be disclosed will be pertinent to such issue, and that the circumstances should be those in which a discovery would be decreed in chancery.

[Cited in U. S. v. Youngs, Case No. 16,783; Paine v. Warren, 33 Fed. 358; Kirkpatrick v. Pope Manuf'g Co., 61 Fed. 48; Exchange Nat. Bank v. Washita Cattle Co., Id. 191.]

2. It is not necessary that the petition for the discovery should contain the formalities of a bill of discovery in chancery; but it is enough if it contains a notice to the opposite party of the time and place of making the application, and a plain designation of the documents sought for.

[Cited in Gregory v. Chicago, M. & St. P. R. R., 10 Fed. 531.]

This was an action at law to recover damages for alleged false representations made by the defendants [Edward K. Collins and others] concerning the character and condition of divers goods shipped at New-York by one De Goer on board a vessel for England, the plaintiff [John Jacques] averring that, by reason of those representations, he was induced to advance a large sum of money to De Goer, by way of loan, on the goods as security, which money was entirely lost. The defendants now presented a petition to the court, setting forth that the cause was at issue; that, prior to the making of the loan, a correspondence took place between the plaintiff and De Goer, in which the special motives and reasons for the loan were set forth, the reverse of those averred in the declaration; that the loan was made on certain bills of lading, invoices, and other documents, transferred to or deposited with the plaintiff by De Goer, as security for the loan; that De Goer had absconded, and his testimony as a witness could not be obtained; that the defendants had served a written notice on the plaintiff to deposit the correspondence and the other papers with the clerk of this court, so that the defendants might take copies of them, or to serve copies of them, duly verified, on or before a day named, but the notice had not been complied with; that the papers in question were not in the possession or under the control of the defendants; and that the discovery of them was necessary to enable the defendants to prepare for trial. The petition prayed a discovery either by a deposit with the clerk, or by the service of sworn copies, and was verified by one of the defendants, to the effect that the papers were not in their possession or under their control, and that the affiant was advised by counsel and believed that the discovery was necessary to enable the defendants to prepare for trial. There was added a certificate of counsel that he had given such advice.

Francis B. Cutting, for plaintiff.

Seth P. Staples and John Anthon, for defendants.

BETTS, District Judge. The petition now presented conforms to the course of practice in the state courts (Grah. Pr. bk. 3, c. 6), but an objection is taken to its sufficiency, on the ground that, if it were filed in chancery to compel a discovery of the same papers, it would be bad on general demurrer, and that the present proceeding is substantially of the same character as if it were had in equity.

The supreme court of New York seems to regard the state statute as transferring to the law courts the jurisdiction and practice of chancery in relation to this subject of discovery, to be exercised conformably to standing rules of court. Townsend v. Lawrence, 9 Wend. 458. There is a difference, however, in the terms of the state and United States statutes, which may perhaps require some diversity of proceeding in executing them. 2 Rev. St. 199, §§ 21, 22; Act Sept. 24, 1789, § 15 (1 Stat. 82). The act of congress requires that the circumstances shall be those in which a discovery would be decreed in chancery, but it in no respect designates the chancery practice as the mode by which the law courts shall execute the power. It also differs from the state statute in limiting the proceeding to cases in which issue is joined, and in which it is made to appear satisfactorily to the court that the evidence required to be disclosed will be pertinent to such issue.

No method of proceeding being prescribed by congress, this court has always considered the purpose of the act best fulfilled by adopting the most simple and expeditious course of procedure, and avoiding the formalities of a bill of discovery in chancery. A mere notice to the opposite party of the time and place of application, and a plain designation of the documents or pieces of evidence sought for, have been acted upon in this court as sufficiently fulfilling the terms of the law.

The standing rules of this court make no direct provision for this proceeding, and the adoption by them of the state rules, to apply in cases where none are specifically established by this court, may very well embrace the regulations of the supreme court of the state governing these applications. The petition in this case, whether considered in that view, or only in relation to its constituent parts, is sufficient in

[1] [Reported by Samuel Blatchford, Esq., and here reprinted by permission.]

substance, and adequate notice has been given to the plaintiff. The objection, therefore, that the petition is defective as a bill of discovery, cannot avail, and the plaintiff must produce and leave with the clerk the papers called for by the petition, or, at his election, serve copies of them on the defendants' attorney.

[Upon the trial the verdict was in favor of the defendants. Case No. 7,168.]

## Case No. 7,168.

JACQUES v. COLLINS et al.

[19 Hunt, Mer. Mag. 183.]

Circuit Court, S. D. New York. 1848.

SHIPPING—FALSE REPRESENTATIONS—DESCRIPTION IN INVOICE.

[1. Shippers for the account and risk of another, having had no opportunity of examining the goods, are not liable to the consignee for a false description thereof in the invoice upon the faith of which the consignee has made advances to the owner, when such false description has been ignorantly copied by the shippers from the invoice under which the goods were imported into the port of shipment.]

[2. False representations afford no cause of action, unless it appears that plaintiff relied upon them.]

[This was an action at law by Jean Jacques, an alien, against Edward K. Collins and others, for false representations. A petition by the defendants for the discovery of certain papers in the possession of the plaintiff was granted. Case No. 7,167.]

Early in September, 1835, Messrs. E. K. Collins & Co., of this city, received a letter from one S. X. Barnard, of New Orleans, informing them that he had shipped to their order 14 bales of sarsaparilla belonging to his friend J. B. De Goer, of Mexico, which he requested E. K. Collins & Co. to store in a dry place until the arrival of De Goer, who was coming on to New York with 73 ceroons of cochineal, which he was about to ship to London. The sarsaparilla arrived, and was stored by E. K. Collins & Co. according to the order of Barnard. With Barnard, the defendants had no acquaintance; the name was printed in the bill of lading, giving the impression of an established house.

About the same time, when the said letter purported to have been written, a person of very gentlemanly address and appearance, apparently a Mexican, presented himself on board the Arkansas, Rice, master, at New Orleans, and wished to engage freight for 73 ceroons of merchandise, declaring also his intention to come to New York as passenger. He accordingly, after some negotiation, engaged his passage and freight, and the 73 ceroons were shipped, and bills of lading signed, calling them 73 ceroons merchandise. On the voyage to New York, De Goer inquired of the captain the standing of the defendants, and also of Goodhue, & Co., and Howland & Aspinwall, being anxious to make up his mind to which house he would consign his ceroons. He also, at the same time, told the captain that the ceroons contained cochineal. On the arrival of the Arkansas in New York, and somewhere about the 4th of October, 1845, Mr. De Goer presented himself at the counting house of E. K. Collins & Co. with a letter of introduction from S. X. Barnard. He also brought with him about $1,000, which he placed in their hands for safe keeping. A few days after this, he caused the 73 ceroons of cochineal to be advertised for sale. The ceroons remained on board the Arkansas. A box however containing 73 small tin boxes, said to be samples from each ceroon, was exposed at the store of the defendants to the examination of purchasers. The quality was highly approved of by the brokers who examined it, but no sales took place, the price being above the market. The reason assigned by De Goer for this was the expected war with Mexico, which would, in his judgment, much enhance the value. Having failed to make any sales, De Goer resolved to send his cochineal to London, and accordingly requested Mr. Collins to ship for him. He engaged freight on board the British bark Cosmo, bound to Bristol, of which vessel the plaintiff was the consignee.

The defendant's cartmen, under the direction of De Goer, conveyed the goods from the Arkansas to the Cosmo. The bills of lading were filled up in the name of the defendants, as shippers, describing the article as 73 ceroons of merchandise. The invoice was a copy of the one brought on by De Goer, naming the article cochineal, the weights were Spanish, and at the foot the foreign expenses and charges, together with those in New York, were entered. The defendants, by this invoice, appeared as the shippers for the account and risk of De Goer. They, at the request of De Goer, insured the article with several companies as cochineal, loss payable to themselves or order. They also cleared the article at the custom-house in New York as cochineal. The only service for which they charged any commission was the insuring. After the ceroons had been about ten days on board the plaintiff's vessel, he advanced to De Goer $11,500 on the cochineal, and had the same consigned to one Bushnell, in Bristol. To Bushnell, De Goer wrote full instructions, and, among others, bound him, on account of the expected war, not to sell under forty days; and, if a proper price could not be obtained at Bristol, to send the article to London. The Cosmo arrived at Bristol early in December, and, the market not affording a purchaser, it was sent to London. There, under some direction in relation to the separation of qualities, the ceroons were opened, and were all found to contain Indian corn. De Goer has never since been heard of.

The plaintiff set up a custom among

merchants to advance and loan money on the production of the bill of lading, invoice, and policy of insurance, and insisted that under this usage the defendants ought to have examined the article before they signed an invoice which represented it as cochineal. That, having made a false representation negligently, it was a fraud in law, and they were bound to reimburse the plaintiff, who had sustained a loss by their improper act. The usage to advance on such papers when the goods were on the high seas was not contested, nor when the goods were here, and a well-known resident merchant asked the advance; but it was fully proved that, when a stranger appeared to be the owner, it was the usage of merchants to call personally on the shipper and learn his history and standing. The defendants also proved that it was the usage of forwarding merchants to copy the invoice sent to them by the principal when they failed to sell, and were directed to ship the article to another port, without examining the contents or packages, confining themselves merely to the examination of the numbers and marks.

The defendants also proved, by several highly respectable merchants, that cochineal is put up in a peculiar way; that it is first contained in a linen bag called a "shirt," that this is secured by an outer case of ox hides, closely sowed with thongs, and this is again contained in a covering of grass matting; that each ceroon, on account of the peculiarity in the packing, is accompanied by a tin box containing the sample, by which it is uniformly sold; that when a consignee fails to sell, and is directed to send it elsewhere, he copies the original invoice, and ascertains that the number of ceroons is right, but never examines the contents to see whether the ceroons truly contain cochineal; that after sale, and at no other time, the purchaser opens a triangular space in the hide, and so ascertains the quality.

Cutting & Lord, for plaintiff.
Anthon, Staples & Wood, for defendants.

NELSON, Circuit Justice, charged the jury that as to the custom proved by the plaintiff it did not go far enough,—it did not show that it was the usage of merchants to hold the shipper responsible for advances, when the article so shipped proves to be an imposition; that, to make the defendants responsible, the plaintiff was bound to prove that he knew the ceroons did not contain cochineal, and fraudulently represented that they did, or, if they did not know what the contents were, that they, with the like intent to defraud, represented as a fact a matter of which they had no knowledge; that the only representation alleged in the case was the description in the invoice; that no verbal representation was proved; that, as they were under no obligation to examine the article, the false statement in the invoice would not charge them, unless they had made up the invoice with intent to defraud; that, also, it did not appear that the plaintiff had loaned upon the inspection of the papers,—he might have relied on the appearance of Mr. De Goer and on the possession of the goods; that, as the claim here was highly penal, most unquestionable evidence was necessary to affect the defendants.

The jury returned a verdict for defendants.

JACQUES (DERBY v.). See Case No. 3,817.

JACQUES (WELLS v.). See Cases Nos. 17,398 and 17,399.

## Case No. 7,169.

### JACQUETTE v. HUGUNON.

[2 McLean, 129.] [1]

Circuit Court, D. Illinois. June, 1840.

PLEADING AT LAW — NIL DEBET — ACTION UPON JUDGMENTS—NUL TIEL RECORD—PLEAS.

1. Nil debet cannot be pleaded to an action on a judgment.

[Cited in Wilcox v. Kassick, 2 Mich. 170.]

2. The judgment is as final and conclusive in every other state, as in the one where it is entered.

[Cited in Burnham v. Webster, Case No. 2,179.]

[Cited in Melhop v. Doane, 31 Iowa, 400; Paine v. Schenectady Ins. Co., 11 R. I. 416.]

3. The plea of nul tiel record brings before the court the validity of the judgment and the description of it, as set forth in the declaration.

4. A release, the statute of limitations, or payment, may be pleaded.

[Cited in Harding v. Hawkins, 141 Ill. 577, 31 N. E. 307.]

[Action at law by Joseph Jacquette against Daniel Hugunon.]

Mr. Butterfield, for plaintiff.
Mr. Spring, for defendant.

OPINION OF THE COURT. This suit is brought on the record of a judgment obtained in the state of New York. The defendant filed the pleas of nul tiel record and nil debet, and the question is whether the latter plea can be pleaded to an action on a judgment. Under the constitution and laws of the United States a judgment obtained in one state has the same effect in every other state. It is conclusive of the subject matter of controversy, and no plea can be filed which contradicts the record. The statute of limitations of the state where the suit is brought may be pleaded, also a release or payment, but the plea of nil debet which controverts the judgment, cannot be pleaded. Armstrong v. Carson [Case No. 543]; Mills v. Duryee, 7 Cranch [11 U. S.] 481; Hampton v. Mc-

[1] [Reported by Hon. John McLean, Circuit Justice.]

Connel, 3 Wheat. [16 U. S.] 234; McElmayle v. Cohen, 13 Pet. [38 U. S.] 324. The plea of nul tiel record is the proper and the only plea that brings before the court the validity of the record, and the description of it as set forth in the declaration. The demurrer to the plea of nil debet, considered as filed, is sustained.

## Case No. 7,170.

Ex parte JAFFRAY et al.

In re WAITE et al.

[1 Lowell, 321;[1] 2 N. B. R. 452 (Quarto, 146); 2 Am. Law T. Rep. Bankr. 77.]

District Court, D. Massachusetts. April, 1869.

INVOLUNTARY BANKRUPTCY — PROSECUTING CREDITOR—COUNSEL FEE—COSTS.

1. A creditor who successfully prosecutes a petition in invitum for adjudication of bankruptcy, may tax reasonable counsel fees as part of the costs to be paid in full out of the assets.

[Cited in Re Schwab, Case No. 12,498; Re Mitteldorfer, Id. 9,675; Re King, Id. 7,780; Re New York Mail S. S. Co., Id. 10,208.]

2. The fee bill of 1853 (10 Stat. 161), does not interfere with the practice of courts of equity to allow counsel fees as costs in certain cases.

3. Costs can be taxed for only two counsel of the same party.

4. The expense of a short-hand writer cannot be taxed.

[This was a petition by E. S. Jaffray & Co. for an adjudication of bankruptcy against Walter H. Waite and E. J. Crocker. See Case No. 17,044.]

Edwin H. Abbot, for petitioning creditors.

LOWELL, District Judge. The petition in this case was filed against the bankrupts by a firm whose debt was much larger than those of all other creditors together, and was founded on an alleged act of bankruptcy committed in the then recent execution of a mortgage of the entire property of the bankrupts. A jury trial was waived and a long hearing was had before me on oral evidence, which resulted in an adjudication of bankruptcy, on the ground that the mortgage was a technical fraud (Re Waite [Case No. 17,044]); and following upon this a compromise was made by the assignees with the mortgagee, by which about eight thousand dollars were paid for the benefit of the unsecured creditors, assuring them a dividend of twenty-five per cent. The case is now ready for settlement, and the petitioning creditors ask that counsel fees may be allowed them out of the estate. The assignees do not oppose, but submit their rights and duties in the premises to the decision of the court.

Two authorities are cited in support of this taxation: In re Williams [Case No. 17,704], and In re O'Hara [Id. 10,465], and none are known to me which are opposed to it; but, on the contrary, I am informed that the practice has been followed in some districts in cases which have not been reported. The reasons given in these judgments for allowing counsel fees to be paid out of the fund are convincing. A petition in invitum to have a debtor adjudged bankrupt is for the benefit of all his unsecured creditors; and a favorable decree gives them all a proportionate advantage, and the court has no power to order, as is often done in chancery, that this advantage shall depend upon their contributing to the expenses of the suit; but any creditor may carry on the proceedings if the petitioner should refuse or neglect to do so; and after adjudication all may prove their debts. In this case the fund from which the dividend will be paid is due entirely to the exertions of the petitioners in setting aside the mortgage; and in most cases, though not in this, no single creditor, nor any three or four of them, have a sufficient interest to enable them to undertake the conduct of the proceedings without positive loss of money if they cannot tax the expenses upon the fund, for those expenses will usually exceed the dividend on their debts. At the same time the promptness and secrecy which are often vital to the success of these cases, the number and various residences of the creditors, and the difficulty of combining them in any joint enterprise, present obstructions, some of which will exist in all cases, and which must tend to prevent this matter from being properly regulated by agreements among the creditors before suit brought, and to discourage a resort to the court of bankruptcy in those cases in which its jurisdiction is the most necessary and beneficial, and to put creditors at a disadvantage in their dealings with a debtor who is disposed to force them into a settlement of his own proposing. Such settlements, when fairly entered into between persons equally informed of their rights, and equally able to enforce them, are not to be discountenanced; but it is of the utmost importance that the parties to them should stand, as far as possible, on equal ground.

The strong equities of the petitioners' case are not difficult to discover; and the practice under the act of 1841 [5 Stat. 440], was to allow such a charge out of the assets, as I find by examining the records. My doubt was of my power in the premises under the fee bill of 26 Feb., 1853 (10 Stat. 161) which does not appear to sanction it, and does appear to be intended to cover the whole ground of taxation of costs at law and in equity and admiralty; and by the general orders, these petitions follow the rule of cases in equity in all matters of costs. Upon reflection I have concluded that the fee bill is probably intended to reach only taxable costs commonly so called, and may have its full effect without being construed to

[1] [Reported by Hon. John Lowell, LL. D., District Judge, and here reprinted by permission.]

take away the power of a court of equity to permit counsel fees to be taxed in those cases where a fund is in court, upon or to which different parties have distinct rights or claims, as when a trustee applies for instructions, and causes the adverse parties to interplead. In these and some other cases, in the Massachusetts practice, the statutes regulating costs are not held to have taken away the power of the courts in this matter.

I have been referred to the record of a case in equity in the circuit court in which Judge Sprague, since the passage of the fee bill, ordered the counsel fees of all parties to be paid out of the fund; and Judge Kane adopted a like rule in Ex parte Plitt [Case No. 11,228]. These decisions, and those in bankruptcy already cited, fully justify me in construing the statute in the way which the equities of the case so clearly demand.

The register has reported that the fees charged are reasonable, and that full value has been received for them in the services rendered. In this opinion I concur; and considering, as I have already shown, that the dividend as well as the adjudication depended upon the result of the hearing, the petitioning creditor did the work of the assignee as well as his own; and it was so well done that no further action was needed. I shall allow the charges for retainers and those for the trial fees of two counsel as taxed; three counsel are not permitted to speak for the same party, and did not do so in this case; and I must disallow the taxation for the third counsel. Nor can I, consistently with our practice, tax the charge for reporting the evidence. It is to be hoped that the time will come when we may employ a short-hand reporter responsible to the court, as is now done in many other tribunals; for the practice would undoubtedly tend to the furtherance of economy as well as of justice. Counsel fees to be taxed.

## Case No. 7,171.

JAFFRAY v. DENNIS.[1]

[2 Wash. C. C. 253.] [1]

Circuit Court, D. Pennsylvania. Oct. Term, 1808.

INTEREST—RATE—PROOF.

1. To prove the rate of interest allowed in any one of the states of the United States, the law of the state must be produced.

2. The rate of interest fixed by the law of Georgia, the contract having been made there, will be allowed in the courts of the United States, although it may exceed the rate authorized by the law of the state, in which the circuit court holds its sessions.

[Cited in brief in Kavanaugh v. Day, 10 R. I. 399.]

This was an action on an account, contracted and settled in Savannah. The plaintiff's counsel claimed eight per centum as the legal interest of Georgia; which rate of interest he proved by a witness.

THE COURT informed the counsel, that he must produce the law of Georgia, if he claimed higher interest than is allowed here. In the several states of the Union, the rate of interest is regulated by law; and therefore, any other species of evidence than the law itself, is inadmissible. It is otherwise as to foreign countries, where the rate of interest is regulated by custom. The jury, however, may find six per centum; and upon examining the law, if it can be procured, we can make an addition, if the Georgia interest be higher, provided both parties agree.

This was agreed to. Verdict at the rate of six per centum.

The law of Georgia was afterwards produced; and the court increased the judgment by the addition of the two per cent.

## Case No. 7,172.

JAFFRAY et al. v. MURPHY.

[19 Int. Rev. Rec. 143.]

Circuit Court, S. D. New York. 1874.

CONSTRUCTION OF TARIFFS.

1. When the terms used in a tariff act are general, they include all the subordinate or special kinds of the goods so generally described, notwithstanding that dealers and others, in speaking of a particular kind of such goods, commercially describe them usually by a specific name.

2. In section 8 of the act of June 30, 1864 [13 Stat. 210], the term "silk" before the articles therein enumerated, e. g., "silk vestings, . . . . . laces . . . . . etc.," in the absence of any other consideration than the terms of the statute, the word "silk laces" embrace all laces made of silk; and to restrain or limit this meaning it is not enough that witnesses say that, in commerce, a thing included in the general designation is usually or universally spoken of by its specific, particular name.

[Cited in Morrison v. Arthur, Case No. 9,842.]

[See Duden v. Murphy, Case No. 4,113.]

3. Specific names, however, when used in tariff acts, are to be construed according to their general use in trade and commerce.

[Cited in Arthur v. Morrison, 96 U. S. 110.]

4. Proof as to the commercial designation of an article named in a tariff must go to show that the name of the goods in question is identical with the specific term used in the statute.

5. Proof that a silk lace is known in trade as "black thread lace" does not take it out of the duty laid upon it as silk lace in 1864, and subject it to duty under a prior act designating "thread lace."

6. Unless the goods in question were themselves specifically known exactly as "thread lace," to distinguish them from other laces made of silk (in which case congress must be presumed to recognize the distinction), they were dutiable at sixty per cent. ad valorem under section 8 of the act of June 30, 1864.

[Cited in Morrison v. Arthur, Case No. 9,842.]

[See Duden v. Murphy, Case No. 4,113.]

[1] [Originally published from the MSS. of Hon. Bushrod Washington, Associate Justice of the Supreme Court of the United States, under the supervision of Richard Peters, Jr., Esq.]

[This was an action at law by E. S. Jaffray and others against Thomas Murphy to recover an excess of duties illegally exacted by him as collector of the port of New York.]

Isaac Phillips and Stanley & Clark, for plaintiffs.

H. E. Tremain, for defendant.

WOODRUFF, Circuit Judge (charging jury). I shall not deem it my duty in this case to enter very largely into the discussion of the testimony, but hope to be able to present to you the rules of law applicable to the case in a form which will be intelligible to you. I shall go so far by way of illustration, and refer to some testimony, perhaps, as may be sufficient to enable you to apply those rules to the particular case in question. The plaintiffs here paid to the United States, upon the specific goods which are in controversy, a duty of sixty per cent. ad valorem. They claim that thirty per cent. only should have been exacted. No question is made here now that they protested against the exaction in due season, and complied with all the preliminary steps which are prescribed by the statute to entitle them to come into this court and assert their claim to a reimbursement; and they are, therefore, in a situation to claim reimbursement, and to have your verdict for the amount it legally exacted, if such exaction be upon the evidence as you shall find it an illegal one. The defendant comes in answer to this claim to justify the exaction of the duty of sixty per cent; and upon the defendant is the burthen of justifying that exaction by proving, to your satisfaction, facts which, according to the law as it shall be expounded to you by the court, entitled him to require sixty in place of thirty per cent. And for that purpose the defendant refers to the statute, to the terms of which I will call your attention. It is founded in the eighth section of the act of June 30, 1864 [13 Stat. 210], in these words: "On and after the day and year previously mentioned in the act, in lieu of the duties heretofore imposed by law on the articles hereinafter mentioned, there shall be levied, collected, and paid on the goods, wares, and merchandise enumerated and provided for in this section imported from foreign countries the following duties and rates of duty; that is to say, on all silk vestings, pongees, shawls, scarfs, mantillas, pelerines, handkerchiefs, veils, laces, shirts, drawers, bonnets," and other articles which I need not dwell upon, sixty per cent. ad valorem. "Silk laces" are the important words in question in this case.

Now, gentlemen, that statute, and those words of that statute, are in form general on "silk laces." Its words are apt to include all laces made of silk. Its language is intelligible; it is comprehensive; it is a part of a statute which contains classifications of goods according to the material of which they are made. The statute is not exclusively occupied in classifying by material, but many of its clauses classify the subject of duty by the material of which it is made; and this section does not purport to specify or particularize the kinds of laces made of silk which it defines. It is "on silk laces," without discrimination, without pointing at all to the name by which they are known in commerce, and without specifying at all any of the different kinds of laces made of silk of which the witnesses have spoken; and it is my duty to say to you, gentlemen, that the mere fact that silk laces are divided into kinds, which in trade and commerce are designated by descriptive names which are known as designating different kinds of silk laces, is not enough to take any goods out of these comprehensive terms. Nor does the fact (if it be proved) that some laces made of silk are made by machinery, and some laces made of silk are made by hand, of itself withdraw any of them from the general designation of silk laces which is employed in this section of the statute.

The tariff acts generally, as I have said of this particular act, employ two modes of designating the subjects of duty; perhaps more, but two in particular which are pertinent to the discussion which has been had before you, and which may be important, perhaps, when you come to apply what I have to say to you to the evidence, and to the consideration of this case. One is, as I have suggested, the classification with reference to the material of which the goods are made, and another is by specific technical names given to specific articles. Now, gentlemen, when the goods which are subjects of duty are designated by the material of which they are made or composed, the statute is to be construed as presumptively including such goods by whatever subordinate or specific name they may be known; and though all in the commercial world are in the habit of using the specific name when they speak of the particular article in question. For example, to illustrate: If we have a tariff act which imposes a particular duty on cotton goods, if that designation alone is used in the legislation pertaining to the subject of duty upon the importations, it presumptively includes all cotton goods, even though importers, merchants, dealers, and customers all the country through, when they speak of a particular kind of goods made of cotton, always give the special name of the article; as, for example, under this attempted illustration, muslin, cambric muslin, cotton drilling, cotton shirting, cotton sheeting. Doubtless the list might be largely increased, providing that customers wanting cambric muslin never go into a store and ask for cotton goods, or providing that importers importing cambric muslin never advertise or speak of it among themselves or import it, or deal in it with customers, under the name of cotton goods, but deal in it and speak of it as cam-

bric muslin, or that parties who deal in or are in the habit of selling or using cotton drilling use that as the appropriate commercial name, would not tend to withdraw those goods—would not withdraw those goods from the general designation in a statute wherein a duty was imposed upon cotton goods, they being made of cotton, which I have assumed for the purposes of my illustration. In such cases, gentlemen, the terms of the statute include all the subordinate or special kinds of cotton goods, notwithstanding that dealers and others—men in trade and commerce—when they speak of the goods they want, or the goods they offer for sale, or the goods they wish to buy, describe them by the specific name of the article which they wish to buy, sell, advertise, or import.

A similar illustration might be supposed in regard to silk goods. These suggestions are hypothetical, and are only given to you that you may understand the view which the court takes of the law. I say a similar illustration might be supposed in regard to silk goods and their various subordinate names; for instance, suppose there is a duty on silk goods, and nothing else in a statute or prior legislation to limit or control the signification, then, as I have before said, the term would indicate all goods made of silk. Possibly, also, it might include some goods that contained part cotton, if such were in use and were made, imported, and known in trade and commerce as silk laces. But leaving that point out of view, as it is not material here, it is sufficient to say that it would include all goods made of silk. Now, I say, the fact that customers and dealers, importers, traders, and commercial men at large, or the whole world, were in the habit of asking for taffeta when they wanted taffeta, or advertising taffetas if they had taffetas for sale, and that taffetas were therefore known as descriptive of the particular article among commercial men throughout the country—or lute-strings or any of those terms which are descriptive subordinate designations of a kind of silk goods. I say that evidence that the importer had introduced them into the market and entered them by their specific name would not withdraw them from the general designation of silk goods. So here in the application of this statute to the case which is now before you, in the absence of any other consideration than the terms of the statute, the word silk laces embrace all laces made of silk; and to take any kind of silk laces out of the classification imposing a duty of sixty per cent., it is not enough that the plaintiffs show that some laces made of silk are commonly known as blonde laces, or that some laces made of silk are commonly known (and no matter how extensively or among what class) as Brussels lace, or that some are commonly known as thread laces, guipure laces, etc., I say it is not enough; and I have been thus precise and particular in order that you may not be misled by the idea that where general terms are used in the statute, they do not embrace the particulars. They do embrace the particulars, if there be nothing else to throw light upon the subject, and to restrain their meaning or withdraw particular articles from it. I therefore say again, it is not enough that the witnesses, merchants, or others say that, in trade and commerce, a thing included in the general designation is commonly or universally spoken of by its specific, particular name, in order to designate a particular kind of silk laces which the customer has in view, or which the merchant desires to buy or import.

Now, gentlemen, starting with these general propositions, which I desire to make entirely specific, and hope to make intelligible, I come to inquire what then is the precise question in this case. It is claimed here that in trade and commerce a discriminative term has been long used to designate the particular goods now in question, which has been adopted by congress even, and which has operated to withdraw the goods now in question from the general description, and has assigned them to a distinct class or subject of duty. Now such a result might be wrought out by a universal practice among merchants and dealers, men conversant with the articles in question, of discriminating between silk laces and the goods in question; and if that has come to be the universal acceptation of the term appropriately describing these goods, so as to give to the term "silk laces" a technical meaning instead of a general meaning as I have just defined it, and as it is on its face, then the particular name would prevail in the statute, and this would be specially true if we found that congress itself had adopted the designation into its legislation.

Now in support of the claim that these goods now in question have been withdrawn from the general designation, "silk laces," and have acquired a specific name, counsel referred to the fact that in the statute of 1861 [12 Stat. 178], there were two clauses, one of which corresponds substantially with the act under which this duty was exacted, and which employs the term "silk laces" and another clause which is not found in the act now in question, and which speaks of thread laces as a distinct and specific thing, indicating that in the eye of the legislators there was a distinction arising from the usage of trade, and the common acceptation of the terms in the community to which they were addressing their laws, which it became them to recognize, and to which their law should be applicable. We find this clause on which the counsel rely, in the act of 1861, first a clause which prescribes the duty upon silk ribbons, galloons, braids, fringes, laces, tassels, buttons, button cloths, etc. Now if I were called upon to construe the words of that section, I should be compelled to say to you, so far as laces are concerned, just what

I have been compelled to say to you in regard to this section of the act of 1864, under which the duty was exacted, that it is comprehensive, that on its face and in the absence of any consideration affecting its construction, it embraces all laces made of silk, just as I have said of the act of 1864. And whereas the duty upon the laces described in section sixteen is fixed at thirty per cent. ad valorem, we find that the duty upon thread laces and insertings, is made by section twenty of that act, twenty per cent. ad valorem. So that it is entirely plain, gentlemen, that when this act was passed, for some reason, and in view of some supposed facts at least, congress attempted to and did discriminate between those goods which they intended to describe by the term "silk laces," and the goods named in the twentieth section, under the designation of thread laces and insertings. Now the counsel for the plaintiff rely upon that designation, and apply the act of 1864 in this way: They say that section eight, which I have just read to you, although broad and comprehensive in its terms, and although its terms are apt to include all these goods, all laces made of silk, yet, inasmuch as those same terms, or substantially the same terms, were included by the act of 1861, and as congress declared a discriminating duty in favor of thread laces, and added to the act of 1864 "that the duties upon all goods, wares, and merchandise imported from foreign countries, not provided for by this act, shall remain as they are," that congress meant that the duty on thread laces should remain unaltered. Now, gentlemen, under that claim two questions arise. First, what were in the act of 1861, called thread laces? Were they these goods that are now in question? I say this in relation to that question; that specific names when used in tariff acts are to be understood according to their general use in trade and commerce, and among those who import by and deal in those articles. According to that understanding, gentlemen, what were the articles that were distinguished in the act of 1861 from silk laces, and were they the articles which are here produced, and upon which the government in this instance exacted sixty per cent.? On behalf of the defendant it is claimed here that the proof requires you to find what the thread laces mentioned in the act of 1861 were thread laces literally so-called, that they were laces made of thread as distinguished from laces made of silk; and that thread is linen. I don't know that I gave the illustration which lies in the line of this suggestion, that no dealer, no customer desiring silk ever asked for thread, and that the term thread is to be taken according to its acceptation throughout the community among merchants, to mean linen as distinguished from silk, thread not silk; and that thread laces here mean thread, being as is claimed just as much thread and distinguished from silk, as silk is appropriately "silk" in distinction from thread. It is claimed on the part of the defendant that this view of the meaning thread lace is corroborated by the testimony of witnesses. In regard to which there is, as you will recollect, more or less tending to support that claim, namely: That thread laces not only means the "thread laces" as described in my last suggestion, but that it is itself a specific term, and that the goods now in question are not known in the market as thread laces, but for the very purpose of discrimination, and for distinguishing and designating these goods otherwise known, as some of the witnesses say, as Chantilly laces. For the purpose of distinguishing these goods, the witnesses call them "black thread laces." It is claimed on the part of the defendant that the evidence tends to show that what was known as thread laces—thread laces simply and singly—under the act of 1861, was lace made of thread; but when these goods were introduced into the market, they came by their appropriate and definite signification of "black thread laces," and fall therefore within the same designation as Pointe d'Alencon lace, Brussels lace, and guipure lace which are made of silk. If that be so, then the duty was rightly imposed upon them as silk laces at sixty per cent.

If the proper name of these goods in trade and commerce was, when this act of 1861 was passed, "black thread lace" to distinguish it from the article known in trade and commerce, bought and sold as "thread lace," then I say that the duty was rightly imposed upon it as silk lace at sixty per cent., and the defendant is entitled to your verdict. On the other hand, if the goods now in question were generally known and designated in trade and commerce by this specific name of thread lace, without anything more, and were distinguished by that from other laces made of silk, it is to be assumed for the purposes of this trial at least, that congress meant to adopt that denomination; and if these goods were thus designated so as not to be included in the term "silk laces" in the act of 1861, then they are not included in the term "silk laces" in the act of 1864, and the plaintiffs are entitled to a verdict. These two propositions, gentlemen, seem to me to embrace the very point and gist of the controversy between these parties.

I have not gone in detail into the various and minute special requests of the counsel for the defendant. I cannot spend time over them. I might lay down perhaps nearly all the various propositions, which are general, by saying on this subject that congress addresses its legislation on the tariff to the understanding of men engaged in the business to which the tariff laws relate; they use terms in the sense in which those parties employ them, save always that when they use general terms that are comprehensive, and embrace all the articles re-

ferred to; you do not gain by dividing them into distinct and separate designation; they still belong to the same class, come under the same definition, and are liable to the same rates of duty. There are several other propositions which perhaps I have not touched upon, but which I will dwell more upon if counsel think it important. I have been called upon to say that, as the counsel for the plaintiffs insist, if these goods are not commonly known as silk laces, then they are not liable to pay duty at the rate of sixty per cent. In that particular proposition I cannot fully concur. The term silk laces does not include them, and they are liable to pay the duty which was exacted, unless they have acquired another name which distinguishes them from silk laces in general, and which has been sanctioned by the discrimination made in the previous tariff laws, or unless the term "silk laces" itself had, prior to this legislation, obtained by general use among commercial men, and in trade and commerce, a specific and discriminative restricted meaning which excludes these laces. Now on that subject the witnesses with considerable uniformity say that the term silk lace is general, and does not describe any particular kind of lace made of silk; their testimony in that respect, confirming what I have said to you is the construction of the act, and the meaning of the term, standing by itself and unaffected by other considerations. Some of them stated that it has no peculiar meaning in trade and commerce. One or more said, if I understand them correctly, substantially, that it is not a term used in asking for any particular kind of laces, and one (I don't profess to give the precise words, and you will correct me in these matters, if I don't state them with entire accuracy), if a customer were to ask for silk lace he should conclude that he didn't know much about laces. Now, testimony of this description tends to show that the term silk laces employed by the government is not a term of technical or commercial signification at all, but that it is used as I have said it must be regarded, except so far as it may be affected by the considerations to which I have alluded, as embracing laces made of silk.

Now, gentlemen, you will apply to this case the instructions which I have given; and without my repeating the testimony or commenting upon it. The discrepancy in the language of the witnesses is not very great, and I apprehend that you will have no difficulty in reaching a result. If the plaintiffs are entitled to recover, there is no dispute about the amount.

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JAGGER (MANY v.). See Case No. 9,055.

JAILER (UNITED STATES v.). See Case No. 15,463.

JAILER OF WARREN COUNTY (RAMSEY v.). See Case No. 11,547.

## Case No. 7,173.

The JAMAICA.

[11 N. Y. Leg. Obs. 242.]

District Court, S. D. New York. 1853.

COLLISION — STEAMSHIP AND SAILING VESSEL — LOOKOUT—DAMAGES—APPORTIONMENT.

1. The steamboat having had the sailing vessel in full view, time enough to have avoided her, is to be held responsible "prima facie" for steering clear, without requiring the latter to do anything.

[Cited in The Empire State, Case No. 4,475.]

2. Where, under the circumstances, it was easy for the steamboat to pass to the right of the sailing-vessel, it was her duty to have been so navigated.

3. If any doubt existed, as to being able to clear the latter, the steamboat was bound to have delayed for a moment, thereby enabling the canvas to pass out of the way.

[Cited in Clark v. The Ellen, Case No. 2,819.]

4. Under the circumstances, *held*, that it was the right of the canvas to keep her course, and that she was not required to deviate therefrom to avoid a collision, when doing so would encounter the risk of going ashore.

5. Where the steamboat had been seen by those on board the sailing-vessel some time before the collision, on the opposite side of a channel two thousand feet wide, which the steamboat must cross to intercept the track of the canvas, *held*, that the master of the latter vessel had the right to rely entirely upon the steamboat's being kept clear of him; and his lookout was properly stationed to watch the quarter where danger was apprehended, to wit, the shore and reef near to which the canvas was being necessarily navigated.

6. That after a collision with the steamer would have become apparent to a lookout on board the sloop, it would have been too late for the sloop to have done anything, without encountering greater risk to herself; and had a lookout been stationed, in reference to the steamboat, a collision would have taken place.

7. That the want of such lookout was not a fault authorizing the application of the rule of apportionment.

The libellants in this case sought to recover the damages sustained by them as the owners of the sloop Atlas, in consequence of a collision which occurred in the port of New York, in the month of January, 1848. The Atlas had left her moorings in Harlem river, and was proceeding on her way to the southeastern shore of Staten Island. About midday she reached Buttermilk Channel, and was proceeding along the shore of Governor's Island, with the wind about north-northwest, and her mainsail and jib set. The tide was running out, and was nearly at the last of the ebb. The master was at the helm, and her crew were on deck. One of her crew was easing off the main-sheet, another was at the peak-halyards, and the third was forward. The last was to the windward of the jib, in which position he could not, as he stated, see a vessel approaching on the leeward side. The course of the sloop was about south-southwest, and her master stated that she was about four hundred yards from Governor's Island when he

saw the Jamaica come out of her dock, at the foot of Hamilton avenue, on her way to the ferry dock at Whitehall. The sloop was running as near to Governor's Island as her master deemed it prudent to go, for the purpose of keeping her as far to windward as practicable, in order to weather Red Hook. The collision occurred after the sloop had passed considerably below the dock on Governor's Island, and she was at the time much nearer Governor's Island than the opposite shore. The testimony on the part of the respondents, standing alone, would lead to the conclusion that she was about two-thirds the distance across from the Brooklyn shore; but the testimony of the master and crew of the sloop (and whose testimony, in respect to the position of their own vessel, is entitled to more weight), would authorize the conclusion, that more than four-fifths of the channel between Governor's Island and the Long Island shore was to the leeward of the sloop at the time the collision occurred. Indeed, if their testimony is to be implicitly relied upon, the sloop could not have been even two hundred feet from the Governor's Island shore. It was not claimed that the channel was at all obstructed by other vessels, or that the sloop was not in full view of those in charge of the steamer, from the time the latter left her dock until the occurrence of the collision. It appeared that the steamer did not, on leaving her dock, proceed at once up the channel, with the view of passing to the right, and under the stern of the Atlas; but that, after the steamer had advanced some distance into the channel, she stopped her engine, and was carried down the channel by the tide. The pilot of the steamer stated that he was uncertain which side of the steamer the Atlas intended to go; and he appears to have waited for the sloop to change her course and avoid the steamer, instead of so directing the course and action of the steamer as to pass the sloop under her stern. It also appears, from his testimony, that when the danger of collision became obvious and imminent, he placed the head of the steamer towards the sloop as much as he could, to avoid receiving the blow on the steamer's side. The sloop was struck on her larboard quarter by the bow of the steamer, and some of her stanchions and upper works were carried away. Her boom was struck about six feet from the side of the sloop by the corner of the steamer's cabin. The boom was broken and the sail torn off. Some other damage was done, but the amount was not large.

E. Ketchum and W. Q. Morton, for libellants.

J. P. Rolfe and William Rockwell, for the Jamaica.

HALL, District Judge. The collision in this case occurred at midday in a channel about two thousand feet in width, and which was at the time unobstructed, except by the vessels which came in collision. The sloop Atlas was proceeding down Buttermilk Channel, on a trip to the southeastern shore of Staten Island, and those in charge of the steam ferry-boat Jamaica were probably aware that the master of the sloop was intending to pass through the channel, and to take the Governor's Island side, with a view of keeping as far to the windward as practicable, in order easily to clear the point at Red Hook. The steamer's course was across the channel (but heading up against the ebb-tide), from the foot of Hamilton avenue to her landing at Whitehall, and both wind and tide were favorable to the perfect control of the steamer, in attempting to pass to the right and under the stern of the sloop. It was easy for the steamer to do so at the time she left her dock, and such was her obvious course and duty. But if there had been the least doubt of her being able to pass at a safe distance under the stern of the sloop at the time the Jamaica was about to leave her dock, she should have delayed for a single minute, during which time the sloop (at the rapid rate she was then running) would have been much below the line over which the steamer was ordinarily run before the latter could have crossed the track of the Atlas. But there was no need of delay. The steamer, with wind and tide favorable to its perfect command, might with ordinary care have easily avoided the collision, and it was the right of the sloop to keep her course, and the clear duty of the steamer to avoid her. The sloop had, before the collision occurred, passed much below the line of the steamer's usual course, and it is impossible to resist the conclusion that there was culpable negligence, or want of skill, on the part of those in charge of the steamer. They seem to have acted upon the supposition, that it was the duty of the sloop to change her course to avoid the collision; and it was urged on the hearing that she should have done so immediately before the collision occurred, and should have run in still nearer to Governor's Island, for the purpose of avoiding the steamer. The sloop was then as near to the island as her master deemed it prudent to go; and, considering the width of the channel, the relative position and course of the respective vessels, and the fact that one had the advantage of steam power, with a favorable wind aud tide, I deem it quite certain that it was not the duty of those on board the sloop to change her course, as contended for by the respondents.

It was also urged, on the part of the respondents, that the sloop had not a sufficient lookout, and that if a sufficient lookout had been kept, she might have luffed, and thus avoided the collision. From the testimony of the master and crew of the sloop, I am quite satisfied that after the probability of collision became apparent, the

sloop could not have luffed without danger of running aground; a risk which, under the circumstances of the case, it was not the duty of the master of the sloop to encounter. The master of the sloop appears to have relied upon those navigating the steamer to take the measures necessary to avoid a collision, and his lookout seems to have been kept solely with a view to guard against danger from the windward. He was running near to the shore, for the purpose of keeping as far as practicable to the windward of Red Hook, and he appears to have thought it necessary to guard against the dangers of the reef at the southwesterly point of Governor's Island (a reef he was then rapidly approaching), rather than against the danger of collision with the steamer on the opposite side, when it was the obvious duty of those in charge of the steamer to take efficient means to render a collision impossible. He had seen the steamer, and assured himself that she had ample room in the wide and unobstructed channel, and had, I think, a right to assume that the steamer would follow the rule of navigation applicable to the circumstances, and pass at a safe distance to the right and under his stern.

After a careful consideration of the case, I am not able to say that the omission of the master of the sloop to sustain a lookout to the leeward was a fault requiring an apportionment or division of the damages in this case. The duty of those in charge of the steamer was so clear and palpable, it was so obvious that the exertion of ordinary care on their part would certainly prevent all danger of collision, that the master of the sloop was justified in directing his attention to the shore and reef on the opposite side of his vessel, and in leaving to the master of the steamer the whole duty of avoiding a collision between the sloop and steamer. If the pilot of the steamer saw that the sloop was a bad steering vessel, or was uncertain of her course, he should have given her a wider berth by heading up the channel, instead of allowing the steamer to float with the tide until there was danger of a collision, and then heading her on to the sloop as much as possible, that the steamer's side might be secured against the impending blow. I am unable to perceive that the master of the sloop had any reason to apprehend that an attempt would be made to run the steamer out of her accustomed course, and incur the hazard of passing across the bows of the sloop (which, with a fresh wind and favoring tide, was running at a very rapid rate, and about crossing the steamer's track), when it was apparent that the steamer could pass under the stern of the sloop with great ease and perfect safety.

In my judgment, the libellants are entitled to a decree for their damages and costs, and the usual order for a reference, to ascertain the amount of such damages will be entered.

## Case No. 7,174.

Ex parte JAMES.

[See Case No. 7,175.]

## Case No. 7,175.

In re JAMES.

[2 N. B. R. 227 (Quarto, 78);[1] 1 Gaz. 78.]

District Court, District of Columbia. 1868.

BANKRUPTCY—DISCHARGE—DISTRIBUTION.

When a bankrupt has obtained his discharge, and a balance of his deposits for fees with the register has been paid over to the assignee, it should be distributed among the creditors who have been returned by the bankrupt, pro rata. If only one creditor has proved his claim, he will be entitled to full payment if the fund is sufficient. The money should be distributed among the creditors, although they have failed to make proof of their claims.

[Cited in Re Hoyt, Case No. 6,806.]

WYLIE, Judge. When a bankrupt has obtained his final discharge, and a balance of his deposits for fees in the hands of the register has been paid over to the assignee, the balance in such case should be distributed among the creditors who have been returned by the applicant himself, in proportion to the amount of their several claims. If only one creditor has proved his claim, he would have been entitled to full payment, if the fund had been sufficient. The question is not, therefore, a question between different creditors contesting over the distribution of a fund which is inadequate to the payment of all; but it is a question whether the money shall be returned to the bankrupt himself, after he has returned a list of creditors to whom he has acknowledged on record that it should be paid. In such case the money should be distributed amongst the creditors, although they have failed to make proof of their claims.

[See In re Brisco, Case No. 1,886; In re Haynes, Id. 6,269.]

## Case No. 7,176.

The JAMES.

[Nowhere reported; opinion not now accessible.]

## Case No. 7,177.

JAMES v. ATLANTIC DELAINE CO. et al.

[3 Cliff. 614.][2]

Circuit Court, D. Rhode Island. Nov. Term, 1867.

INSOLVENCY—EXECUTION OF RELEASE BY ASSIGNEE—FRAUDULENT MISREPRESENTATIONS—RIGHTS OF ASSIGNOR—RECONVEYANCE.

1. The treasurer of the corporation, respondent, furnished to the assignee in insolvency of

[1] [Reprinted from 2 N. B. R. 227 (Quarto, 78), by permission.]

[2] [Reported by William Henry Clifford, Esq., and here reprinted by permission.]

the complainant an incorrect and untrue statement of the account between them and the complainant, by which the assignee was induced to entertain a proposition to withdraw a suit of the complainant against the corporation, and which resulted in the execution of mutual releases between the assignee and the corporation in respect to all the interest of the complainant. The complainant never assented to the proposition or the settlement, but they were procured with his assignee, by the false statement of the accounts by the treasurer of the corporation. *Held*, that the complainant was entitled to a decree, according to the prayer of the bill, unless the corporation had other defenses which could be sustained.

2. The settlement being prejudicial to the complainant, the assignor, he was entitled to the residue of his estate, if any, in the hands of the corporation, after his debts outstanding at the date of the assignment were paid.

3. By the extinguishment of the debts the assignee became the trustee of the complainant, and the latter became clothed with all the rights and powers of cestui que trust, to the same extent as the creditors previously had whose claims he had extinguished.

[Cited in Carpenter v. Robinson, Case No. 2,431.]

4. The complainant was the proper party to come into a court of equity and pursue the trust estate, it appearing that it had been improperly parted with by the trustee.

5. When the objects of the trust are fulfilled, equity will compel a conveyance to the cestui que trust, he being the sole beneficiary.

Bill in equity praying that a release given by the assignee in insolvency of the complainant [Lucinda James, administratrix of Charles T. James] to the corporation respondent, might be declared void, and that it might be set aside as having been obtained by fraudulent representations and concealments, and for certain other specific relief. The original complainant, on the 1st of January, 1851, entered into a contract with certain persons therein named to erect certain buildings of certain prescribed dimensions adapted to the purpose of a factory for the manufacture of delaines. The terms of the contract required that the other contracting parties should furnish the land for the site, and that they should pay to the complainant for the materials to be furnished by him in erecting the mills and supplying them with machinery, and for his services, the sum of $260,000 in certain installments, as therein provided. The conditions of the instrument required the complainant to complete the works by the 1st of August following, and the stipulation was that he should take the general charge of the mills for the term of two years from the date of the contract. Progress was made in the works; but the parties, in May of that year, procured an act of incorporation and made a supplemental contract in which the original complainant agreed that the respondent corporation might assume the entire obligations of those who had contracted with him, and that he would proceed to complete the contract as if it had been originally made with the respondent corporation, and stipulated to discharge the individual parties from all liability, except as stockholders of the company. It was conceded that the company was duly organized with a capital stock of $300,000, divided into shares of $1,000 each, and the record shows that the complainant subscribed for one half of the amount of the capital stock. Unable to complete the undertaking without a loan, the complainant, on the 1st of August, in the same year, borrowed of the other contracting parties the sum of $75,000 to carry on the work, and as security for the payment of the same, gave them a mortgage of that date of his homestead and other valuable real estate, and of all his interest in the respondent corporation, and of other rights and interests. They made the advance, but it was not sufficient to enable him to complete the undertaking, and on the 2d of September of that year he made an assignment of all his estate, real and personal and mixed, in trust for his creditors. Due conveyances of the same were accordingly executed, but the terms of the instrument empowered and required the assignee to complete the contract with the respondent corporation. Pursuant to that authority and requirement the assignee completed the buildings and put the mill in operation, and proceeded to execute the other trusts created under the instrument of assignment. The clear inference from the record was, that the factory, including the buildings and machinery, was completed by the assignee under the provisions giving that authority in the instrument of assignment, and it did not appear that the respondent corporation made any objections to the acceptance of the works when the same were ready for delivery. Efforts were made by the complainant to raise money to pay his debts, and to secure a reconveyance of the property, rights, and credits assigned and mortgaged, and as a means of promoting that object he requested the treasurer of the respondent corporation to furnish him with a statement of the company's accounts with his estate, with a view to the settlement of the same; but the treasurer of the company refused to furnish any such statement, and the complainant, as he alleged, was thereby prevented from procuring the necessary means for that purpose. An attempt was also made by the treasurer of the company, under a power contained in the mortgage, to sell the homestead and other separate property of the complainant, mortgaged to secure the loan; but the allegation was that the company and their treasurer were prevented from so doing by a writ of injunction issued from the state court. Enjoined from selling the interest of the complainant, the charge was that the respondent corporation and their treasurer instituted other means to secure the absolute control of his stock, and to accomplish the same end. Being enjoined not to sell at the suit of the assignee, and being again requested to furnish a true statement of the accounts, their treas-

urer furnished a statement to the assignee. The material charge of the bill of complaint was, that the statement so furnished was incorrect and untrue, and that it was so made and rendered with intent to deceive and defraud the assignee; and that the assignee was thereby deceived as to the true state of their accounts; and that he was thereby induced to entertain a proposition which resulted in the withdrawal of the injunction suit, and in the execution of mutual releases between him as such assignee and the respondent corporation in respect to the entire interest of the complainant in all the assigned and mortgaged property. The averment of the bill of complaint was, that the complainant never assented to the proposition or to the settlement, but that the same was influenced and procured by the false statement of the accounts between the parties, as rendered by the treasurer of the respondent corporation. The principal issue between the parties grew out of the charge of fraudulent representation and concealment, which was expressly denied in the answer.

J. H. Parsons, T. A. Jencks, and Caleb Cushing, for complainant.

Abraham Payne and R. W. Greene, for respondents.

CLIFFORD, Circuit Justice. Before proceeding to consider the merits of the issue, it becomes necessary to determine the question as to the competency of certain witnesses examined by the respondents. Two depositions, to wit, that of George W. Chapin and that of Lyman B. Frieze, offered by the respondents, are objected to by the complainant, because they are parties to the suit. They were both taken (as now offered) subsequent to the passage of the Act of the 3d of March, 1865, which provides that in actions by or against executors, administrators, or guardians, in which judgment may be rendered for or against them, neither party shall be allowed to testify against the other as to any transaction with or statement by the testator, intestate, or ward, unless called to testify thereto by the opposite party, or required to testify thereto by the court. 13 Stat. 533. The original complainant died in October, 1862, intestate, as appears by the record. Tested by the foregoing provision alone, it is quite clear that the deponents are not competent witnesses to testify against the present complainant as to any transaction with or statement by her intestate, as they were not called to testify by the opposite party, nor required to testify by the court. Application for such an order was never made to the court, and none such was ever passed in the case. None of the prior proceedings have any effect to take the two depositions out of the operation of that provision of law. Both of the deponents gave depositions in the case before the first hearing upon the merits. They were taken at that time also by the respondents upon the ground that the practice of the state courts furnished the rule of decision; but they were stricken out by the order of the court before the hearing, because parties, except in certain special cases, were not, under the general rules of equity law, competent witnesses in suits in equity, as previously decided by this court. Subsequently the parties were heard, and the case was held under advisement; but the court, at the June term, ordered that the same should be reargued, and thereupon it was ordered, upon motion and consent of parties, that the time for taking further testimony be extended to the 1st of November, in the same year. In the meantime the complainant died, and the cause being revived, the time for taking testimony was extended from time to time, until the 1st of April, 1865, as appears in the supplemental record. Suffice it to say, that both of these depositions were taken subsequent to the act of the 3d of March, 1865, and the question of the competency of the deponents is controlled by that provision.

Any restatement of the facts proved, except to a limited extent, is unnecessary, as they are succinctly stated in the narrative of the case. The execution of the contract and of the mortgage is admitted, and there is no controversy as to the deed of assignment and the appointment of the assignee in insolvency. Satisfactory proof, also, is exhibited that he completed the contract, and that the buildings and machinery were accepted by the other contracting parties. The respondents admit that the mutual releases as between the company and the assignee, as set forth in the bill of complaint, were duly executed. The effect of these several instruments was, that the entire interest of the original complainant in the company property and in the capital stock, and his entire interest in the mortgaged estate, passed into the hands of the respondent corporation. Mention is not made of the fact that the mortgage was executed to the treasurer of the company, as it is not controverted that he held it as trustee for the company. The corporation respondents claimed a lien upon the stock held by the original complainant, under the provisions of their charter; and it is fully proved that their treasurer in February, 1853, advertised the other mortgaged property for sale, and that they were prevented from carrying out their intention by the injunction suit prosecuted by the assignee. They also claimed damages for the delay in completion of the contract, but the original complainant claimed a much larger sum for moneys expended in extra work not included in the contract.

Full proof is also exhibited that the treasurer of the respondent corporation was several times requested to furnish a true statement of the accounts between the parties,

and that the only one he ever did present deserving the name is the one he presented, or caused to be presented, to the assignee, and which was used as the basis of the computations at the date of the settlement. Beyond question, that statement was inaccurate in large amounts, and greatly so to the prejudice of the original complainant.

Viewed in every aspect, it is the conclusion of the court, not only that it was false, but that it was furnished with the intent to deceive and defraud, by promoting a settlement prejudicial to the original complainant and more favorable to the respondent corporation than truth and justice would admit. Such being the views of the court, it is clear that the complainant is entitled to a decree, unless some one or more of the defenses can be sustained.

The settled rule of law is, that the assignor in such a case is entitled to the residue of the estate, after his debts outstanding at the date of the assignment are paid. Halsey v. Fairbanks [Case No. 5,964]; Brashear v. West, 7 Pet. [32 U. S.] 608. By the extinguishment of the debts, the assignee became the trustee of the complainant; and the latter, as the assignor, became clothed with all the rights and powers of a cestui que trust to the same extent as the creditors previously had whose claims he had extinguished. Lazarus v. Com. Ins. Co., 5 Pick. 81. Consequently the complainant was the proper party to come into a court of equity, and pursue the trust estate, it appearing that it had been fraudulently or improperly parted with by the trustee. Story, Eq. Pl. § 221; Oliver v. Piatt, 3 How. [44 U. S.] 400; Lewin, Trusts, 730; Hovenden v. Lord Annesley, 2 Schoales & L. 633. Where the purposes of the trust have been satisfied, equity in a proper case will compel a conveyance from the trustee to cestui que trust, as he has the sole beneficial interest.

The argument for the respondent is that these principles cannot apply in this case, because it appears that two of the debts of the original complainant have not been paid. Much weight would be given to that objection as between the assignor and assignee, if the estate continued in the latter, and he was still engaged in executing the trust; but when it appears that the trust property has been fraudulently or improperly conveyed to another, not as a means of executing, but as a means of extinguishing the reversionary interest of the assignor, the objection cannot be sustained. The rights of such creditors in such a case will be protected in the decree granting relief. Want of diligence in the institution of the suit is another defense much pressed in the argument. The record shows that the mutual releases were executed on the 2d of March, 1853; and the bill of complaint was filed on the 1st of March, 1859, before the claim was barred by the statute of limitations. But the argument is, that staleness of claim is often admitted in equity as a good answer to a bill of complaint, when the period which has elapsed is less than the time required as a legal bar to a common-law suit, and the proposition is correct, as was held by this court, and has since been affirmed in the supreme court. Badger v. Badger, 2 Wall. [69 U. S.] 94. The correctness of that rule, properly applied, cannot be doubted, but it is equally clear that it should seldom or never be applied in cases of trust, where the means of knowledge are wholly or even chiefly on one side. When the fraud charged and proved consists of misrepresentations and concealments, courts of equity are reluctant to apply the rule at all, unless it appear that the rights of innocent third parties will be injuriously affected if that defense is overruled. The affairs of the complainant had become much complicated, and the evidence shows that the mutual releases were executed without his consent and against his wishes. He lost by the arrangement, not only all claim to the possession or control of the property, but all direct means of consulting the books and papers containing the evidence of his rights. Looking at the circumstances of the case, I am clearly of the opinion that it is one where equity will apply that rule. Provost v. Gratz, 6 Wheat. [19 U. S.] 481; Michoud v. Girod, 4 How. [45 U. S.] 503; Baker v. Whiting [Case No. 787]; 2 Story, Eq. Jur. §§ 15, 20.

The details of the evidence have purposely been avoided, as the case is one, if the decree be for the complainant, which must go to a master, where further testimony may be taken as to amounts. The conclusion of the court is, that the complainant is entitled to a decree; that the release of March 2, 1853, given by the assignee to the respondent corporation, is void, and that the same be set aside as having been obtained by fraudulent representation and concealment; and also to a decree for an account, including an account of all assigned and mortgaged property, subject to the payment of the debts, if any, due to the creditors of the assignor, as secured in the instrument of assignment, reserving all further orders or decrees as for other specific relief or otherwise, until the true state of the accounts is fully ascertained. Decree accordingly, and the case must be referred to a master, to state the account for the consideration of the court.

[See Case No. 7,178.]

## Case No. 7,178.

JAMES v. ATLANTIC DELAINE CO. et al.

[3 Cliff. 622.] [1]

Circuit Court, D. Rhode Island. June Term, 1873.[2]

INSOLVENCY—ASSIGNOR AND ASSIGNEE — EXTINGUISHMENT OF DEBTS — RIGHTS OF ASSIGNOR — FRAUDULENT MISREPRESENTATIONS —EXECUTION OF RELEASE BY ASSIGNEE.

1. The complainant agreed with certain firms to construct and put in operation a factory. To obtain and secure a loan of money from these firms, he executed a mortgage, with power of sale for breach of condition, to the treasurer of the company, as trustee for the corporation, upon all his stock and interest in the company. He also executed to the same firm, as trustee of the lenders of the credit, separate mortgages of the same kind upon his homestead and farm, together with other property. Subsequently failing, he made an assignment of his property. By the terms of the assignment the liability to the company was made a charge upon the assets named in the assignment, with directions to the assignee to apply all the assigned estate, as he could, to the fulfilment of the contract of the assignor for the building and equipment of the mill. The assignee made an arrangement with the company to furnish the money to forward the contract of the assignor, and charge the same to the assets in his hands. Under this arrangement the factory was completed. The assignor continuing embarrassed, the trustee was directed to advertise the properties for sale. The assignee failing to raise the amount necessary to meet the assignor's liabilities, wrote to the treasurer of the company demanding a statement of the condition of the company, so that he could represent the assignor's stock in its true light and sell it for its true value. The trustee stated that such an account could not be given, and the assignee then obtained an injunction restraining the proposed sale of the stocks until the further order of the court. Certain of the mortgagor's creditors tendered to the company the amount of the mortgage debt which the company refused to accept, and the court passed an order enjoining the sale unless the trustee would file a stipulation not to enforce the mortgage against property subject to the lien of the complainant in that suit. Two suits were pending to redeem the properties mortgaged, and the order restraining the sale of the stock was in force when the sale of the homestead took place. On that day the trustee sent to the assignee a paper described as a statement of the company's affairs. He afterwards on oath acknowledged that it was transcribed from a private memorandum kept by him, and it nowhere appeared on the company's books. *Held*: That being furnished as a copy from the company's books, it must be assumed that the assignee received it as an official account and gave it full credence as furnished by the company's officers.

2. The alleged statement was not only false, but furnished with intent to deceive and defraud by promoting a settlement prejudicial to the mortgagor and more favorable to the company than truth and justice would admit. In such case the assignor is entitled to take the residue of the estate after his debts outstanding at the date of the assignment are paid.

[See note at end of case.]

3. By the extinguishment of the debts the assignee became the trustee of the assignor, and the latter clothed with all the rights of cestui que trust to the same extent as the creditors previously had been whose debts he had extinguished; and consequently the complainant could come into a court of equity and pursue the trust estate, it having been fraudulently or improperly parted with by the trustee, and under the decretal order the complainant was entitled to redeem the mortgaged property just as her intestate might have done, if the settlement and release had never been executed.

4. This case was twice referred to a master, but inasmuch as the exceptions which accompanied the respective reports made it necessary, if attempting to decide the case at this stage, for the court to adjudicate the whole controversy as if no reference had been made, the court again sent the whole case to the master with specific instructions for a statement of the accounts between the parties.

[See note at end of case.]

Exceptions to master's report recommitted, supplemental report and exceptions to supplemental report.[3]

Certain mercantile firms, desirous of engaging in the manufacture of fabrics known as delaines, contracted with the original complainant to construct a factory for the purpose, and to put the same in operation, as he was known to possess great skill and experience in such enterprises, as well in the choice of sites and making the necessary erections, as in the selection of machinery and putting the same in operation. Five firms entered into an association for the purpose before they were incorporated, and to accomplish the object they agreed to create a stock of three hundred shares of $1000 each; and it appeared that the complainant [Lucinda James] became the subscriber for one half the amount; and that they also contracted with him to build and equip the mill and put it in operation for the sum of $260,000. He made that contract on the 1st of January, 1851, prior to the passage of the act incorporating the company, which became a law at the next session of the legislature of the state, which convened in May following. Slight alterations were made in the contract by mutual consent subsequent to the act of incorporation, and on the 1st of August of the same year, the complainant associated with him his son-in-law as a contractor, and the incorporated company assumed the entire obligations of the contract as the other contracting party. Application was made at the same time by the complainant to the five firms whose members subscribed for the other half of the stock of the company, for a loan of $75,000, and it appears that they advanced him the amount for which he applied by signing accommodation notes and by accepting his drafts, and that he gave them satisfactory security for the loan in a mortgage executed to the treasurer of the company, as trustee for the corporation, which made the advances, including in the instrument all his interest in the stock and property of the company. He also executed to the same person, as trustee of the lenders of the credit, separate mort-

[1] [Reported by William Henry Clifford, Esq., and here reprinted by permission.]

[2] [Reversed in 94 U. S. 207.]

[3] The first opinion delivered in this case by Judge Clifford may be found [Case No. 7,177].

gages of his homestead in the city of Providence, and of his farm in the town of Scituate, together with certain bonds and notes of a Western corporation. Though he obtained the pecuniary assistance for which he applied, yet it was not sufficient for the purpose, and on the 2d of September of the same year he failed in business, and made an assignment of all his property of every name and description to an assignee. His assets consisted of the several properties described in that mortgage, and of the other real and personal property, stock and promissory notes specified in the schedule annexed to the second deposition of the assignee, as exhibited in the record. By the terms of the instrument, he made his liability under the contract with the company for building and equipping the mill, a charge upon the assets specified in the assignment, and directed the assignee to apply all the assigned estate, as the same should come to his hands, to the fulfilment of that contract so far as the same was necessary to build and equip the mill and put the same in operation.

Due acceptance of the trust was made by the assignee; but he soon found that means to carry forward the work could not be raised fast enough by converting the assigned property into money; and to obviate that difficulty he made an arrangement with the company, through their treasurer, to supply the deficiency, and to charge the same to the assets in his hands. Advances were made by the treasurer under that arrangement, as claimed by the respondents, to the amount of $53,314, and it appeared that the assignee completed and equipped the mill early in February, subsequent to his appointment, and that the mill with its machinery was delivered to the company in the course of that month. Success ultimately attended the enterprise; but the contractor, through whose skill and experience it was originated and put in operation, continued to be embarrassed, always claiming, however, that he would be able in time to meet his liabilities, and that the property mortgaged to the company would revert to him under circumstances which would enable him to save a large portion of his estate. Negotiations to that end were instituted early in that season, and were continued throughout the year, but they resulted in nothing of value to either party. Power to sell for breaches of condition was conferred upon the mortgagee or trustee in each of the mortgaged deeds, and it appeared that the person for whose benefit the respective mortgages were given directed the trustee to advertise the several properties for sale under that power, it being understood by the moving party that the mortgaged properties, other than the stock of the complainant in the company, should all be first sold and applied to discharge the mortgage debts. All of the advertisements bore date the 5th of February, but the respective sales were appointed for different days, the last of which, to wit, the sale of the homestead and of the stock held by the complainant in the company, for the 26th of that month, which was near the close of a short session of congress, and at a time when the assignor of the several properties was a senator in congress, and under the obligation of official duty to attend the daily sessions of the senate. Differences of opinion existed between the parties as to the amount due from the mortgagor to the company, but it was known to the assignee that the sale of the Warwick farm and other collateral securities had reduced the original mortgage debt to $52,000, and that he could have the contemplated sales postponed if he could raise that sum, as the disputed amounts were under arbitration; and if the corporation had any claim against him as assignee, they could enforce it by their charter lien, or in due course of legal proceedings. Efforts of various kinds were made to raise the necessary amount; but the assignee, finding it impossible to do so, in the absence of his assignor, on the 15th of February addressed a written communication to the treasurer of the company, and demanded "a statement of the condition, standing, and accounts of the company," so that he might be able to represent the stock advertised to be sold in its true light, "and make it sell for what it was worth."

Instead of complying with that demand, the trustee called upon the assignee to convince him that such an account could not be made at that time, and he professed to believe that the assignee was satisfied with his explanations; but it was evident that he was under a mistake, as it appeared that, failing to obtain the required statement, he instituted a suit in equity in the state court against the trustee to enjoin the proposed sales of the several properties, and that the court, no satisfactory accounts having been rendered, enjoined the sale of the stock until the further order of the court. Proceedings to accomplish the same object were also instituted by certain creditors of the mortgagor having a lien upon the Scituate farm, in the course of which the creditors tendered to the company the amount of the mortgage debt, which the company refused to accept; and the court passed an order enjoining the sale, unless the trustee would file a stipulation not to enforce the mortgage against the property subject to the lien of the complainant in that suit. Efforts were made by the assignee to prevent the sale of the homestead, but without success, because it appeared that the sale was made at the time specified in the advertisement prepared and published by the trustee. Two days before the sale of the homestead, the assignee informed the mortgagor that he had succeeded in stopping the sale of the stocks, but that the application for an injunction as to the sale of the other properties had been denied; and it appeared that it was on the very day that the sale of

the homestead took place that he gave to his assignee a full description of the nature of the efforts he had made to prevent the consummation of that design. Such a statement as that demanded was not furnished during the controversy growing out of the application to enjoin the proposed sales, and the letter of the assignee addressed to the assignor on the day of the sale, furnished no evidence that negotiations were pending for a settlement, or for a transfer of the equities of redemption. Two suits were pending to redeem the properties mortgaged, and the order of the state court restraining the sale of the stock was in full force when the sale of the homestead took place. Both of these parties were in some respects the representatives of the original owner of the property, and as such were bound to good faith in their dealings with the same; but they were pursuing opposite aims, as the trustee was endeavoring to effect a sale of the mortgaged properties, and the assignee was exerting all his power to prevent the accomplishment of that object. Nothing occurred to change these relations prior to the sale of the homestead; but it appeared that the trustee on the same day addressed a letter to the assignee, enclosing a paper which he described "as a statement of the affairs of our company," without making any reference to the fact that the assignee had ten or twelve days before demanded of him a statement of the condition, standing, and accounts of the company, which he had neglected and refused to furnish. A similar request had previously been made and refused, and the charge was, that the statement as furnished was incorrect and untrue, and that it was so made and rendered with intent to deceive and defraud the assignee, and that the assignee was thereby deceived as to the true state of the accounts, and that he was thereby induced to entertain a proposition which resulted in a withdrawal of the injunction suit and in the execution of mutual releases between him as such assignee and the respondent corporation, in respect to the entire interest of the complainant in all the assigned and mortgaged property.

In a prior opinion in the same case, the court ordered a decree referring the same to a master. [Case No. 7,177.] By that order the court set aside the instrument of release and settlement executed by the assignee of the original complainant to the treasurer of the corporation respondents, and adjudged and decreed that the same were void, as having been obtained by the assignee by fraudulent representations and concealment. Such an adjudication entitling the complainant to relief, the court sent the cause to a master to take an account of all the dealings between the original complainant and his assignee and the respondent company or their treasurer, including an account of all assigned and mortgaged property held by the original complainant, and by him assigned and mortgaged to those parties, or which passed or came into the hands, possession, or control of the respondent company or their treasurer under the operation of the said instruments of settlement and release, and in any other manner subject to the payment of the debts, if any, due to the creditors of the original complainant, as secured by the instrument of assignment.

Pursuant to that decretal order, the master gave notice and heard the parties, and on the 10th of December, 1870, made his report to the court, annexed to which were the exceptions of the parties to the finding of the master; and the court, having heard the case upon the exceptions to the master's report, passed an order that the report be recommitted to the master with instructions that he append to it a supplemental report comprising two summary statements, showing, first, the result to which he came under the theory of accounting first adopted on motion of the complainant; secondly, showing the result to which he came under the second theory, which he adopted at the suggestion of the respondents, reserving the exceptions filed by each party, and giving to each party the right to except to the supplemental report.

Enough was done under that order to constitute, as the master supposed, a compliance with these instructions, and he accordingly, on the 20th of June, 1872, made a supplemental report which appeared in the record. Prior to the hearing upon the exceptions to the master's report, the respondents filed a petition for a rehearing of the case upon the merits, but they withdrew the same at the suggestion of the court that the application was premature when the hearing was asked upon the exceptions, it being understood that the withdrawal was without prejudice to the right to renew it at the proper time. On the 19th of August, 1872, the master filed his supplemental report, to which were annexed the exceptions of the respective parties; and on the 3d of September following the respondents filed their petition for leave to review the original decretal order. Sufficient appeared in the original record to satisfy the court that the exhibit made by the treasurer of the company to the assignee as the basis of the settlement between the parties was erroneous and false; and the court accordingly found that the settlement and release executed by the assignee of the original complainant were obtained by fraudulent representations and concealment.

Certain statements appeared in the original report of the master which tended to show that the court erred in that finding of fact. Such also were the views of the respondents; and it appeared that they, in pursuance thereof, on the 3d of September in the same year, renewed their application for a review of the original case, insisting that the decretal order was for the wrong

party; and it also appeared that the court, in view of the statements contained in the report of the master, tending to show that the court erred in the said finding, passed an order granting a rehearing "as to that fact," and gave leave to each party to take further proof on the question whether the statement of the accounts furnished by the treasurer of the corporation to the assignee, was or was not false, as found by the court. Proofs were taken by both parties under that order, and the cause, on the 23d of October following, came to hearing upon the proofs exhibited and the exceptions of the respective parties to the supplemental report of the master.

Jas. H. Parsons, Thos. A. Jenckes, and Caleb Cushing, for complainants.

A. Payne, R. W. Greene, and B. R. Curtis, for respondents.

Before CLIFFORD, Circuit Justice, and KNOWLES, District Judge.

CLIFFORD, Circuit Justice. Questions of considerable difficulty are presented in the case, which arise out of the application for a review, and others arise upon the exceptions filed by the respective parties both to the original and supplemental reports of the master, all of which are still open for consideration, as it was not intended that any of them, except the one withdrawn by the complainant, should be superseded by any subsequent order in the cause. Before attempting to examine the several exceptions to the master's report, it becomes necessary to decide whether the view of the court as embodied in the decretal order is correct, as that presents a preliminary question which, if decided in favor of the respondents, will terminate the controversy.

Coming to the application for review, the question is, whether the statement of the accounts furnished by the treasurer of the corporation to the assignee of the original complainant was or was not false, as found by the court in the opinion delivered at the time the decretal order was entered. Aid in solving the questions presented will be derived from a proper understanding of the exact relations which the parties sustained to each other in the original transactions, out of which the controversy has arisen; and for that purpose it will be necessary to refer very briefly to the original record, as those relations commenced in an enterprise which originated even before the respondent company was incorporated. (At this point the court recited the facts substantially as they appear in the statement.)

Facts and circumstances were introduced at the original hearing sufficient to satisfy the court that the charge made in the bill of complaint was true, and the court accordingly entered the decretal order, which is the subject of complaint in the application for a rehearing.

Having carefully weighed the facts and circumstances introduced in evidence, the court came to the conclusion that the release given by the assignee to the company was void, and adjudged and decreed that the same be set aside as having been obtained by fraudulent representations and concealments. Certain suggestions were made at the recent argument to the effect that the exhibit in question was not properly before the court at the final hearing, when the decretal order under revision was entered; but it cannot be necessary to consume time in discussing that proposition, as the record is full of evidence to refute it, and to show that both parties, as well as the court, treated it as a most material part of the proofs of the case. Undoubtedly it first came into the case as an exhibit to the deposition of the treasurer of the company, and it is equally true that certain portions of his deposition were excluded as unauthorized at that time by the acts of congress; but the record shows that the time for taking proofs was subsequently enlarged, which enabled the respondents to retake that deposition and some others which had been excluded under the same ruling, congress having in the mean time made parties competent witnesses in equity suits as well as in actions at law. Nor is there any doubt entertained that the decision was correct upon the evidence then before the court in entering the decretal order. Much discussion on that topic is unnecessary, as the proposition is scarcely denied.

Suppose that it is so, still it is insisted that the new evidence taken under the recent leave granted for that purpose is sufficient to show that the finding of the court was erroneous; but the court is not able to concur in that view. Instead of that the new evidence convinces the court that the original decision was correct, and that the release executed by the assignee was properly set aside, as having been obtained by fraudulent representations and concealment. Considerable embarrassment, it must be confessed, was experienced in conducting the original investigation, as the books of the company were not before the court; but the facts and circumstances adduced in evidence were amply sufficient to convince the court that the account exhibited was not an official account made by the company or by its managers, and that it was not an account copied from any official statement of the affairs of the company in respect to its dealings with the original complainant. All doubt upon the subject is now removed, as the party who furnished it to the assignee, as the basis of the settlement, confesses under oath that it was transcribed from a private memorandum kept by him, and that it nowhere appears on the books of the company as an exhibit of their affairs, which, of itself, in view of the circumstances attending the settlement and transfer, is sufficient to justify the finding of the court, as it false-

ly purports to be "a true copy from the books." Reference to the charter will show that the annual meetings of the company were required to be held on the first Wednesday of February in each year, and the by-laws require that the directors at each annual meeting should give a summary account of their management to the company for the preceding year, and at all other times when required by the stockholders representing one third of the capital stock. Apart from that it was also made the duty of the treasurer to render to the directors semi-annually an account of the affairs of the company, and at all other times when required, and at each annual meeting to exhibit his account to the corporation. Inasmuch as this statement was furnished as a true copy from the books, it must be assumed that the assignee received it as an official account, made under the obligation of law and of the contract between the parties to which it related, and that he gave it full credence as an official exhibit made by the proper officers of the company in the performance of their appropriate duties.

Nothing of the kind, however, appears on any of the books, and the party who furnished it testifies under oath that "it came from my private letter book." Items of large amount were included in the statement, which do not appear in the books at all, and some of those which do appear are erroneous in large amounts, as is evident from the proofs exhibited in the record, thus fully justifying the remark of the court in the former opinion that the statement was inaccurate in large amounts and greatly to the prejudice of the original complainant. Viewed in every aspect, it is the conclusion of the court, not only that it was false, but that it was furnished with the intent to deceive and defraud by promoting a settlement prejudicial to the original complainant and more favorable to the respondent corporation than truth and justice would admit.

In such a case the settled rule is, that the assignor is entitled to take the residue of the estate after his debts outstanding at the date of the assignment are paid. Halsey v. Fairbanks [Case No. 5,964]; Brashear v. West, 7 Pet. [32 U. S.] 608.

By the extinguishment of the debts the assignee became the trustee of the assignor, and the latter became clothed with all the rights and powers of a cestui que trust, to the same extent as the creditors previously had been whose claims he had extinguished. Lazarus v. Commonwealth Ins. Co., 5 Pick. 81. Consequently the original complainant was the proper party to come into a court of equity and pursue the trust estate, it appearing that it had been fraudulently or improperly parted with by the trustee. Story, Eq. Pl. § 221; Oliver v. Piatt, 3 How. [44 U. S.] 400; Lewin, Trusts, 730; Hovenden v. Annesley, 2 Schoales & L. 633.

Tested by these considerations, the court is of the opinion that its finding as exhibited by the decretal order is correct, and that the original complainant was and is entitled to the relief therein adjudged and decreed. Renewed reference to the defences set up in the answer will not be necessary, as those matters were fully considered in the former opinion, to which reference is made as expressive of the present conclusions of the court. The complainant being thus entitled to relief, the only remaining question of much importance is, what is the proper measure of that relief, which is a question of great difficulty and embarrassment.

Twice the court has referred the case to a master, with a view to solve the difficulty and to discover the true theory of doing justice between the parties without complete success, since the exceptions which accompany the respective reports make it necessary for the court to adjudicate the whole controversy to the same extent as if no reference had been made.

Separate examinations of the several exceptions under the circumstances will not be attempted, because it would extend the opinion to an unreasonable length without accomplishing anything of value to either party. Such an investigation would not serve any useful purpose, because neither the reports of the master, nor the exceptions, nor both combined, are of a character to enable the court to come to a satisfactory result without a further reference. Much has been accomplished by the master which will be of great value in the further investigation of the subject, and the criticism of the parties, exhibited in their exceptions, will also be of service in framing a new report; but the court is not able to deduce from the record in its present condition, without performing work which belongs to a master, such a result as the court is prepared to adopt as the final decree in the case.

Governed by these considerations, the court will send the whole case to the master, with more specific instructions for a new report, and for a statement of the accounts between the parties in respect to the mortgage debt. Under the decretal order the complainant is entitled to redeem the mortgaged property just as her intestate might have done if the settlement and release mentioned in the decretal order had never been executed. The release and settlement having been set aside, because obtained by fraudulent representations and concealment, it is clear that the complainant is entitled to have an account against the respondents as against mortgagees wrongfully in possession, including the net and annual profits of the property without being accountable for the losses of subsequent years. All sums due to the mortgagee will first be charged to the mortgaged estate, as ascertained from the agreements and actual dealings of the parties, whether advanced to the actual mortgagor or his assignee. Having ascertained

the unpaid balance of the mortgage debt including interest to the present time, the master will next proceed to take an account of the net earnings of the mortgaged property, as against a mortgagee wrongfully in possession, deducting insurance, taxes, repairs, including ordinary improvements such as relate to the operative machinery and the motive power of the mill, and including all the net earnings subject to those deductions, whether actually declared as dividends or not, and however the same may have been expended or appropriated. Earnings of one year are not to be set off by the losses of a subsequent year, as the respondents are to be treated as mortgagees wrongfully in possession, but in ascertaining the earnings of a particular year, the losses of that year are to be deducted from the gross earnings in order to ascertain the net earnings of the year, as well as the cost of insurance, taxes, repairs, ordinary improvements, running expenses, and commissions. Shares of the stock paid, the complainant is entitled to recover in specie, but the complainant is not entitled to recover the thirty-seven shares never paid, as it cannot be said that those shares are wrongfully in the possession of the respondents. Nothing having been paid for the same, the court is of the opinion that no recovery can be had on account of those shares.

Estimates of earnings will be made on the basis of the shares paid, without including those not paid, and the master, on stating the accounts, will be governed by the principles herein laid down, and will deduct the amount of the unpaid mortgage debt from the amount of the earnings of the mortgaged property, adjusting interest to the present time, and state the exact amount which the complainant is entitled to recover. Interest upon the total amount of profits earned prior to the date of the decretal order, will be computed from the date of that order to the completion of the report of the master. Profits earned subsequently to the date of the decretal order will only bear interest from the close of the last year included in that computation. Power is vested in the master to call for new accounts, and to hear the parties further if necessary, to enable him to state the account as required, and he will submit his draft report to them, as required by the rules.

[NOTE. The defendants then appealed to the supreme court, where the decree was reversed, and the bill dismissed, in an opinion by Mr. Justice Strong, who said that canceling an executed contract is an exertion of the most extraordinary power of a court of equity. Such power should never be exercised except in a very clear case. When false representations are alleged, their falsity must be certainly proved, and it must be shown that the complainant has been deceived and injured by them. The fundamental averment of fraud in this case is not sustained by proof, and, moreover, the bill was not filed until nearly six years had elapsed. Mr. Justice Clifford dissented. 94 U. S. 207.]

## Case No. 7,179.

JAMES v. ATLANTIC DELAINE CO. et al.

[11 N. B. R. (1875) 390.] [1]

Circuit Court, D. Rhode Island.

BANKRUPTCY — PETITION AGAINST OFFICERS AND STOCKHOLDERS OF A CORPORATION — LIABILITY FOR DEBTS OF CORPORATION — WHETHER PROVABLE AS A DEBT.

1. A judgment creditor of a manufacturing corporation in Rhode Island cannot sustain an involuntary petition in bankruptcy against the officers or stockholders of the corporation.

2. The stockholders, by reason of the failure to comply with the requirements of the law by the directors of the corporation, are not subject to the liability of copartners as if they had never been incorporated; and creditors do not possess the rights, and are not entitled to pursue the remedies, which are furnished by established law against any ordinary copartnership or any individuals.

3. When a statute which confers the right also declares what course shall be adopted to enforce it, the party is restricted to the remedy so provided, and cannot resort to the ordinary remedies provided by the common law, or by general legislation.

4. The stockholders, by reason of their joint and several liability, do not become copartners, so that an act of bankruptcy by one of them in respect to their joint affairs would subject all the members, as partners, to a liability to be adjudicated bankrupt as a firm.

5. If two persons are jointly and severally liable for a debt and are not copartners, and one of them does an act which would subject him to a decree of bankruptcy, the other is in no way affected by such act of his associate.

6. The statute liability of the stockholders of a corporation for its debts, is not such a claim as can be proved in bankruptcy against them; it is not their debt within the meaning of the bankrupt act [of 1867 (14 Stat. 517)].

[Cited in Garrett v. Sayles, 1 Fed. 377; Fourth Nat. Bank v. Francklyn, 120 U. S. 754, 7 Sup. Ct. 761.]

This was a petition to the circuit court to review the action of the district court in dismissing the petitioner's petition to have the respondents declared bankrupts.

The petitioner, as plaintiff in a suit in equity in the circuit court of the United States against the Delaine Co., had obtained a decree in her favor for six hundred and eighty-nine thousand six hundred and eighty-eight dollars and seventy-eight cents; upon which an appeal had been taken to the supreme court; but no bond given. [See Cases Nos. 7,177, 7,178.] Upon this decree, execution had issued against the company. By the laws of Rhode Island, under which the company was incorporated, the directors and stockholders, in case of non-compliance with certain provisions of the statute, are made jointly and severally liable for the company's debts; and the remedy to enforce such liability against such directors and stockholders is provided in the statute creating it. The petitioner in bankruptcy filed her petition against the corporation and the directors and stockholders jointly, praying that

[1] [Reprinted by permission.]

they all might be declared bankrupts for certain acts of bankruptcy committed by the corporation, and which she alleged, by reason of their being directors and stockholders and personally liable for its debts, were also acts of bankruptcy as to the other respondents; and on the ground that all these parties were by statute jointly and severally liable for the corporate debts. Before the hearing on the petition in the district court the company were adjudicated bankrupts on another petition; and the petitioner thereupon dismissed it from her petition, and sought to proceed against the other respondents only on the ground of their joint and several liability—claiming in effect that this was a partnership liability. Numerous objections were taken to the petition as to its form and substance, especially as to the right to join the respondents in one petition; but the main objection was that this statute-liability was not such a claim as could be proved in bankruptcy, but a specific one, created by the statute, and which could only be enforced in the manner specifically provided by the statute. This objection was sustained by Knowles, J., in the district court [case unreported]; and thereupon the petitioner filed this petition for review in the circuit court.

James H. Parsons and T. A. Jenckes, for petitioner.

Charles Theo. Russell, for Knight & Greene.

Charles Hart, for Chapin.

SHEPLEY, Circuit Judge. The principal question presented for review is, whether a judgment and execution creditor of a manufacturing corporation in Rhode Island can sustain an involuntary petition in bankruptcy against the officers or stockholders of the corporation for acts of bankruptcy committed by the corporation, such officers or stockholders being subject to the liabilities imposed by the laws of the state upon a failure to comply with the statutes relating to such corporation. The law of 1844, in force at the date of the incorporation of the Atlantic Delaine Company, and which, it is conceded, was continued by chapter 128 of the Revision of 1857, required that annually, on or before the 15th of February, a certificate signed by a majority of the directors, stating the amount of capital stock paid in, etc., should be filed in the town clerk's office where the manufactory is established, and that on failure so to do, all the stockholders of such company shall be jointly and severally liable for all the debts of said company then existing, and for all that shall be contracted before such notice shall be given, unless said company shall have become insolvent, etc. The charter of this company declared that the liability of its members and officers shall be fixed and limited to the statute of 1844, and by the same statute it was provided that when the stockholders of any manufacturing company shall be liable to pay the debts of such company, or any part thereof, their persons and property may be taken therefor, on any writ of attachment or execution against the company for such debt, in the same manner as on writs and executions issued against them for their individual debts. A remedy in equity was also provided against stockholders or officers of the company.

It is claimed by the learned counsel for the petitioner, that the stockholders of this company, by reason of the failure to comply with the requirements of the law, are subject to the liability of copartners, and continue liable for all the debts of the company in the same manner as if they had not been incorporated, and that the creditors possess the rights, and are entitled to the remedies, which are furnished by established law against any ordinary copartnership or any individuals. In the opinion of the court such consequences cannot result from the liability enforced by this statute. When a statute confers a right, or subjects any one to a new liability without providing a distinct remedy, in such case the common law will afford the means by which the party can obtain the benefit to which he is entitled by the statute. But when a statute which confers the right also declares what course shall be adopted to enforce it, the party is restricted to the remedy so provided, and cannot resort to the ordinary remedies provided by the common law or by general legislation.

It is quite clear, from all the authorities, that under the provisions of the statute invoked in this case the petitioner was restricted in her method of redress. The persons or property of the stockholders might be taken upon a writ of attachment or execution against the company, or resort might be had to a bill in equity, but an action at law could not be maintained to recover from the stockholders the amount of the judgment against the company. Those provisions of the Rhode Island statute were taken literally from an act previously in force in Massachusetts, and they have received judicial constructions from the supreme court of each of the states. Knowlton v. Ackley, 8 Cush. 97; Moies v. Sprague, 9 R. I. 557. And it is sufficient to remark that it was decided by each of these learned tribunals that the remedies given by the statute are exclusive, and that an action at law cannot be maintained against the stockholder in a manufacturing corporation on account of a liability incurred by him solely under the provisions of this statute. At common law the stockholders of a corporation, unless it was otherwise provided by law, would have been exonerated from liability on all contracts of the corporation, as "the common law recognizes only the creature of the charter, the body corporate, and not its individual members." By its incorporation the Atlantic Delaine Company became a body politic, created by law, and, as a legal being, to be regarded entirely distinct from all members composing it. It

is claimed that the stockholders made themselves at once liable as copartners until they released themselves by the performance of those acts which, by the provisions of the manufacturing acts, they were required to do before they could escape from their individual liability. The relation of debtor and creditor did not exist between the stockholders and the creditors of the corporation: the corporation was the sole debtor, capable of making its own contracts, and the only one directly liable upon them, and the only party against whom an action at law could be sustained upon its obligations. Superadded to this was also the collateral liability of its stockholders contingent under circumstances of a special restricted nature and extent, and to be enforced only in a special limited manner. There being at common law no liability of its stockholders for the debts of the corporation, we must resort to the charter or other positive provisions of law to ascertain the liability to which its stockholders may be subjected, and, as remarked by Shaw, C. J., "such liability depends solely upon provisions of positive law, is to be construed strictly, and not extended beyond the limits to which it is plainly carried by the provisions of the statute." 9 Cush. 199. In the present instance we there find the liability to be "a joint and several liability," to be enforced in a certain definite prescribed method, and only by that method. In no portion of the statute is the liability arising from a partnership anywhere suggested as attaching to the stockholders under the circumstances of the present case. Such a liability, with the resulting consequences, is of a much more stringent character than the words found in the statute would imply; and the court is not, by any judicial construction or legislation, to interpolate it. On the contrary, on the sanction of the high authority of Shaw, C. J., it is the duty of the court to allow to the creditor the rights and remedies clearly enforced upon him by the law, but not to extend them beyond the plain ordinary signification of the language of the statutes.

A large number of decisions of the courts of various states have been cited by the learned counsel for the petitioner, in relation to the liability of stockholders for debts of the corporation. An examination of nearly all of them discloses that the actions were brought either to enforce the remedy specifically provided by the local law against such stockholders, or, where no such remedy was expressly provided by the local law, to sustain an action at common law against them in favor of a creditor of the corporation, the stockholders, in a large proportion of the cases, having been made liable under all circumstances for the debts of the corporation. In many of these cases the courts do speak of the liability of the stockholders in such case as being "like that of partners," but I am not aware of any in which they are declared, by reason of such liability, to have thereby become partners with all the consequences of that relation attending such liability. In none of these cases can I discover that there was any attempt to extend the liability beyond that expressly declared by the law, or, where a remedy was specially provided, to allow the party to have recourse to any other; and there is nothing found in any of these decisions in conflict with the views herein expressed by the court, which recognize to its full extent "the joint and several liability," under the Statutes of Rhode Island, of the respondents, and the right of the creditors of the company to the remedies provided by law. The court cannot enlarge the liability, or substitute another remedy for the ones expressly provided by statute. It cannot, therefore, be conceded that by reason of this joint and several liability the stockholders became copartners, so that an act of bankruptcy by one of them in respect to their joint affairs would subject all the members, as partners, to a liability to be adjudicated bankrupt as a firm. But if it were admitted that, as between themselves, the stockholders, by reason of this joint and several liability, were copartners, yet, in the view of the court, the admission would not afford much aid to the petitioners in support of this petition against them. The stockholders must not only be shown to have been copartners inter sese, but also copartners with the company. The material acts of bankruptcy set forth and relied on in this petition are the acts of the corporation in the management and conduct of its business, in alleged violation of the bankrupt act, and thereby committing acts of bankruptcy. It is very clear if two persons are jointly and severally liable for a debt, and are not copartners, and one of them does an act which would subject him to a decree of bankruptcy, the other is in no way affected by such act of his associate. The relation of partners must exist between them, and one of the members of the partnership, in that capacity, and not as an individual, must commit an act of bankruptcy in order to subject his copartner to the provisions of the act relating to involuntary bankruptcy. It is quite clear that the relation of copartners did not exist between the company and its stockholders by reason of their statutory liability. In Moss v. McCollough, 5 Hill, 135, cited in the brief of the petitioner's counsel, Cowen, J., says: "But to say that the stockholders and the corporation are members of the same firm would be to violate all analogy. They are not jointly liable, nor does their relation in any respect resemble that of partners, unless it be in the power of the corporation to bind others; this, however, is to bind others in a distinct obligation, nor can the latter bind the corporation."

The Atlantic Delaine Company, by its violation of the bankrupt act, has committed various acts of bankruptcy, and it having been so adjudged on another petition, the petition-

er in the present case has discontinued the petition as against the company; but as the company and its stockholders were not copartners, the latter are not, by reason of such acts of the corporation, made liable to be adjudged bankrupts. It is charged in the petition that three of the respondents, Hoyt, Greene, and Knight, did cause the property of the company to be attached on legal process on their own behalf. It is sufficient to observe, that by so doing they have not violated any provision of the bankrupt act, so as thereby to have themselves committed any act of bankruptcy; and the same remark applies to the amendment, filed April 21, 1874 [18 Stat. 178], charging the defendants with committing an act of bankruptcy by allowing the company to be adjudged bankrupt. The averments against Josiah Chapin are, that he did procure and suffer his property to be taken on legal process by the attachment thereof on debts due by the Atlantic Delaine Company. This would constitute a valid charge against him on a petition that he should be adjudged a bankrupt individually. But, as the petition now stands, the purpose and object is to obtain an adjudication against the respondents jointly, and the others can in no way be affected by any such violation of the bankrupt law by one of the defendants. They are strangers to his proceeding, and so long as the petitioner claims and insists on a joint liability, she should be bound by her claim, and not be at liberty, on such joint petition, to rely upon the independent liability of one of the respondents in order that she may prevail as to him if she should fail in establishing a joint liability of all the parties. The court is also of the opinion that the petitioner is not shown to be such a creditor of the defendants as will authorize her to sustain her petition against them. Her claim is not provable in bankruptcy against them, and therefore cannot be a basis for involuntary proceedings in her behalf; it is not their debt within the meaning of the act. This precise question was fully discussed by the supreme court of Massachusetts, in Kelton v. Phillips, 3 Metc. (Mass.) 62, and in Bangs v. Lincoln, 10 Gray, 600, in which cases it was decided that a claim of this nature was not provable in insolvency. The provisions of the Massachusetts insolvent law upon this point are almost identical with those found in the bankrupt act, and the court entertains no doubt that the same construction should be given to the bankrupt act. If the proof of petitioner's debt should not be allowed by the register, and she should, upon appeal, be compelled to resort to an action at law to enforce her claim against the assignee, she would, in the opinion of the court, meet with insuperable difficulties in sustaining it, as under the decisions in Massachusetts and Rhode Island, the stockholder is not subjected by the statute to liability to such an action. The liability which the officers incur by a failure or neglect to perform their duties is most clearly in the nature of a penalty, and the remedy prescribed against them is an action on the case or a bill in equity. If the court is correct in the conclusion that the stockholders are not subject to a decree of bankruptcy on this petition, it is quite manifest that the same result must follow as to the officers. The decree of the district court dismissing the petition in bankruptcy is affirmed, and this petition for review and revision of that decree is dismissed.

## Case No. 7,180.

JAMES v. BLAUVELT et al.

[21 Leg. Int. 172; [1] 26 Law Rep. 485.]

Circuit Court, E. D. Pennsylvania. 1864.

STAMP DUTY ON CONVEYANCES—HOW ASSESSED.

1. A seller of unimproved land, in order to obtain an expected profit of nearly twice its value, conveyed it in fee, with a stipulation that he would, by certain instalments, advance more than four times its value towards the cost of stipulated improvements; and received, when he conveyed it, mortgages of it securing a sum composed of its value as unimproved, the stipulated amounts of his advances, and the amount of his intended profit. This was done under an arrangement that the purchaser should not become a debtor for any of these amounts. The seller therefore made the conveyance to an irresponsible middleman, who executed the mortgages and the bonds which they secured, and the stipulation to improve the land; and thereupon conveyed it, while still unimproved, for a nominal consideration, to the party who had, from the first, been the intended purchaser, describing it as subject to the mortgages. The stipulated improvements having been completed, the value of the land, as enhanced by them, exceeded greatly the whole amount secured by the mortgages. A double stamp duty was not incurred by the duplication of the original conveyance.

2. The conveyance from the middleman required no stamp, the consideration or value not exceeding one hundred dollars.

3. The conveyance to him should have been stamped under an assessment of the duty, not upon any prospective enhancement of the value of the land by the stipulated improvements, nor upon the value of it as unimproved at the date of the conveyance, nor upon the expected profit, but upon the consideration estimated as the whole amount of the return secured by the mortgages to the seller, not deducting his advances.

In equity. In the act of 1st July, 1862, c. 119, the clause imposing stamp duties upon conveyances makes the duties assessable in respect of the consideration or value. No stamp is required, unless the consideration or value exceeds one hundred dollars. 12 Stat. 481, 482. Tatlow Jackson, on the 13th April, 1863, received a conveyance of unimproved land in Philadelphia, which was afterwards divided into 240 building lots. The whole consideration of the conveyance to him was reserved in ground rents, extinguishable

[1] [Reprinted from 21 Leg. Int. 172, by permission.]

on the payment of amounts, in the aggregate, $65,000. On 11th May, 1863, Jackson conveyed the whole of the land to the respondent, Fredericks, in fee, by a deed containing a covenant of Jackson to discharge all accruing ground rent, and extinguish the ground rents on or before 1st July, 1864. Fredericks executed 240 bonds of the same date with the conveyance to him, each bond conditioned for the payment by him to Jackson of $2,000, at a certain time, with interest half-yearly; and, on the same day, executed 240 mortgage deeds, each conveying one of the lots to Jackson in mortgage, to secure one of the bonds. By an agreement between these parties, of the same date, Fredericks engaged to build, within a limited period, upon each lot, a house of a certain value, greater than the mortgage debt charged upon it; and Jackson engaged to advance to Fredericks, towards the cost of each building, $1,200, in the whole, $288,000, payable by instalments at certain stages of the progress of its construction. The extinguishment money, $65,000, which Mr. Jackson was to pay, was the whole value of the unimproved land. On his pecuniary advances, $288,000, his premium, secured by the mortgages, was to be $127,000. The three amounts, together $480,000, were the gross aggregate of the mortgage debts. By a deed of 13th May, 1863, Fredericks, who was an irresponsible person, conveyed to the complainant in fee, for the nominal consideration of one dollar, the 240 lots, described as each subject to a mortgage for $2,000. A house having been built upon one of them, and the ground rent upon it extinguished, the respondent, Blauvelt, on 1st March, 1864, by a written agreement, purchased it for $4,500, from the complainant, who now sues to compel a specific execution of this agreement. Mr. Blauvelt makes no other objection to completing his purchase, than that the conveyances from Jackson to Fredericks, and from Fredericks to the complainant, were not duly stamped. According to the phraseology of the writings, $800, which was the excess of each mortgage debt above the stipulated amount of Mr. Jackson's advances towards the cost of each building, was the consideration receivable by him for the conveyance of each lot. This, on the 240 lots, was $192,000. The stamp duty, under the act of congress, if assessable in respect of a consideration of this amount, would have been $380. Stamps to the value of $380 were affixed to the conveyance from Jackson to Fredericks. On the conveyance from Fredericks to the complainant, there was no stamp. The complainant insisted that this deed required none, and that the former deed was duly, if not too highly, stamped; but submitted the questions to the court's decision, offering to put such stamps, if any, upon both deeds, or upon either of them, as might be requirable, in order to make the title unobjectionable. The court directed that notice of the pendency of the suit should be given to the attorney of the United States for this district. He was present at the hearing.

Mr. Price, for complainant.
Mr. Drayton, for respondent Blauvelt.
Mr. Gilpin, U. S. Atty.

CADWALADER, District Judge. Formerly, in the case of an agreement between the owner of an unimproved suburban lot of ground and an intended purchaser, that the latter party should, within a limited time, build upon the lot a house of a certain value, and that the seller should, by instalments, at certain stages of its construction, advance, towards its cost, a part of its intended value, the course of business in this neighborhood was to postpone executing the conveyance until the house was duly finished. The gross amount receivable by the seller, including his pecuniary advances, with interest, was often secured at the same time, by a mortgage to him of the house and lot conveyed. In order to avoid inconveniences from statutory liens for work and materials, another method of carrying the purposes of the parties into effect, has been substituted. The conveyance of the lot is now made before the building is begun. The mortgage to secure the gross returns is executed at the same time. A cotemporaneous agreement, containing the mutual executory engagements, operates as a deed leading or declaring those intents and uses of the conveyance and mortgage, which do not appear on their face. The purposes to be carried into effect are, under this modern method of conveyancing, precisely the same as they were under the former method. Under these arrangements, the hazard that the purchasers would prove to have been parties of slender means and imperfect integrity, was, of course, proportional to the premiums receivable by the sellers on their pecuniary advances towards the cost of the buildings. The failure of such speculations was notoriously frequent. This made the better class of builders unwilling to engage in them without an exemption from personal responsibility for the mortgage debts. A third method of conveyancing, which is not unobjectionable, was therefore adopted in some such cases. According to this method, the unimproved lot is conveyed, in the first instance, to an irresponsible middleman, such as the defendant, Fredericks. He executes the bond and mortgage, and sometimes, also, as was done here, executes, as a party, the agreement which ascertains the practical uses and purposes of the conveyance and mortgage, ostensibly as if it were intended that he should retain the proprietorship, and build the house. This done, he conveys the unimproved lot, subject to the mortgage, for a nominal consideration, to the party who has, from the first, like the complainant in this case, been the intended purchaser. With reference to certain judicial decisions in Pennsylvania, great caution is required in so penning the

deed which conveys the lot as to exclude the implication of an engagement on the part of such actual purchaser to discharge the mortgage debt.

One of the questions in this case was, whether a double stamp duty had been incurred through this duplication of what was in effect a single conveyance. The parties to such a fiction could not reasonably have complained if this had been the legal consequence. If an action at the suit of the United States had been brought, in order to test the question, I would probably have directed the case to stand over until the determination of such collateral suit. But none has been brought; and, upon reflection, I think that the double duty would not be recoverable. The conveyance from Fredericks to the complainant, separately considered, required no stamp. If, with reference to the entire transaction, the full amount of stamp duty was not paid, the whole deficiency should be assessed upon the conveyance from Jackson to Fredericks. As to this deed, the decision should be the same as it would have been if the conveyance had been a direct one from Jackson to the complainant, without the interposition of Fredericks. If every house and lot of the two hundred and forty had been worth as much as the price for which the defendant, Blauvelt, has purchased one of them, the whole value, when all the houses were finished, would have been $1,080,000. There is no necessity to inquire precisely what may be the whole actual value of all of them, as it is thus enhanced by the improvements. If the execution of the conveyance had, according to the former course of business, been postponed until after the houses were built, a question whether the stamp duty should have been assessed upon such enhanced value, or upon the consideration of the conveyance, might, perhaps, have arisen. But such a question cannot arise under the modern method, which has been adopted in this case, of conveying the lots while unimproved. A prospective, as distinguished from an existing value of the subject of a conveyance, cannot be regarded in making the assessment under the act of congress. This remark applies, without exception, to conveyances of land, of which the value is, under existing stipulations, to be enhanced by future buildings or other improvements, however unqualified the stipulations may be. But such prospective enhancement of the value of the subject of a conveyance, must not be confounded with an excess of its consideration beyond the present value of the subject. In this case, the value of the unimproved lots, when conveyed, was only $65,000. But the consideration, by whatever standard measurable, was of much greater amount. According to the import of the act of congress, the assessment of the stamp duty is to be made in respect of the consideration or value. When the present value of the subject is less than the conventional or actual amount of the consideration, the stamp duty must be assessable on the consideration, without any reference to value. Parties may be so bound conventionally by their own language in a conveyance, that when the consideration expressed in it is greater than the actual consideration, and greater than any value of the subject, the stamp duty will, under this act, be assessable as if the actual consideration were that expressed. No such case is here in question. The dispute is, whether the amount of the consideration, as conventionally estimated by the parties, was not less than the actual amount. If thus less, the duty should have been assessed on the actual consideration, without reference to the language of the writings. The facts are undisputed. The only question is by what standard the actual consideration should have been measured. The proper measure was the same as it would have been if the conveyance had been postponed until after the houses were finished. In a case of such postponement, the consideration would not be enhanced, because the enhancement of the value of the subject, when conveyed, would be actual instead of prospective. Nor was the consideration of the conveyance, which in fact was made before the lots were improved, less in amount because the stipulated enhancement of their value was, at its date, prospective only. The conveyance, which simply executes a contract of sale or exchange, is a mere transfer of property. The consideration of other contracts, executory or executed, may be merely that which induces the consent of a party. But the consideration of sales or exchanges includes whatever else may be receivable in return for their subjects. Here consideration must not be confounded with profit. A consideration of great value may be receivable without the receipt of any profit. When, as in the present case, a seller is to get a profit, the beneficial return is compounded of the cost of the subject and of the profit. There may, however, be a gross return to him, which includes an addition to such beneficial return. This addition, though not profitable, but the reverse, may nevertheless be part of the consideration. Mr. Jackson, that he might get a profit of $127,000, conveyed these lots when worth $65,000, with a stipulation that he would advance $288,000 towards the cost of the stipulated improvements, and received, at the same time, the mortgage security for a return of the three amounts, together, $480,000. The beneficial return to him, composed of the first and second amounts only, was $192,000. The gross return was the whole $480,000. The question is, whether stamp duty is assessable on the beneficial, or on the gross return.

If the word "value" in the act of congress, could be understood as meaning value of the consideration, the assessment might properly be made upon the beneficial return alone. But the words "consideration" or "value," as used in the act, have no such import. Their

application cannot be such that the word "value" qualifies the word "consideration." The consideration is to be understood as that of the conveyance, the value as that of the subject of conveyance. The question depends, therefore, upon the unqualified import of the phrase "consideration of a conveyance." When moneys advanced, or to be advanced, by a seller, towards the cost of improving the subject of sale, are a part of the gross return, it might, at first view, seem reasonable to deduct them, as was done by the parties in this case, and estimate the consideration as the difference. But the consideration is not thus measured in conveyancing. In the language of conveyancing, the gross return is understood as the consideration. The question, without being changed in substance, may be simplified in form, by supposing that the execution of this conveyance had been postponed until after the houses were finished, and the ground rent was extinguished, the advances having, in the meantime, been made by Mr. Jackson, and that he had received, at the date of the conveyance, a single mortgage, securing the whole $480,000. In the ordinary phraseology of such a mortgage, the land mortgaged would be described as the same which had, by deed of the same date, been conveyed to the party mortgaging it for the consideration which the mortgage secured. Such phraseology is not without legal importance. In most, if not in all, of the states of this country, there are, as in England, known distinctions between a mortgage for the consideration of a conveyance and other mortgages. Under the recording acts of Pennsylvania, mortgages of land generally have priority only from the time of recording them; but a mortgage for the purchase money of the land mortgaged, if recorded at any time within sixty days from its execution, retains its priority against other mortgages recorded in the meantime. In this, and in other respects, the mortgages to Mr. Jackson were for the purchase money of the land, or, in preciser language, for the consideration of the conveyance. They were so to their whole amount of $480,000. As to the $288,000 advanced by him, their incidents at law, and in equity, were not, in any respect, less those of mortgages for the consideration than as to the $65,000 which extinguished the ground rents, or as to the premium of $127,000, which was to be his profit. The consideration of his conveyance was therefore not less than $480,000. The stamp duty which should have been paid, was $940. Of this, $380 has been paid. The complainant, by affixing stamps of the additional value of $560, may make his title unexceptionable. When they shall have been affixed, a specific execution of the purchase will be decreed, if the complainant, acquiescing in this opinion, shall ask such a decree. I had great doubt, at first, upon the question of the amount of consideration. The doubt no longer exists. But I regret that the circuit judge was not present at the argument. After the intimation of my opinion that the $560 is due, an action to recover it will doubtless be brought at the suit of the United States, if it should remain unpaid. If the complainant prefers that the question should be decided in such an action, and the trial of it can be expedited, the present cause may stand over to await the result. If the trial of such an action cannot be sufficiently expedited, and the complainant's counsel wishes this case argued before both judges, it may stand over for a reargument.

The complainant acquiesced in the foregoing opinion, and affixed additional stamps of the value of $560 to the deed; whereupon, a specific execution of the purchase was decreed; and it was ordered that he should pay all costs.

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JAMES (CAMPBELL v.). See Case No. 2,361.

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## Case No. 7,181.

JAMES v. GORDON et al.

[1 Wash. C. C. 333.] [1]

Circuit Court, D. Pennsylvania. Oct. Term, 1806.

EJECTMENT—EVIDENCE.

1. By the common practice in Pennsylvania, where more than one warrant issues to one person, he uses the name of a third person, who is considered merely as a nominal person; the title being in him who pays the money to the office, and obtains the warrant.

[Cited in Herron v. Dater, 120 U. S. 472, 7 Sup. Ct. 624.]

2. The copy of an award, exemplified by the certificate of the proper officer of one of the courts of the state, cannot be read in evidence; because, the act of assembly of 1715, which authorizes the recording of certain instruments, relates only to deeds, and not to awards. If the original were lost, or in the possession of the adverse party, the contents might be proved by a witness; but the attestation of the clerk is not evidence.

3. A paper signed by A B, as attorney for B C, cannot be read in evidence, without the power of attorney being produced.

4. Deeds of commissioners of taxes were suffered to be read, reserving the question of their regularity; although it did not appear that district assessors had been appointed; and the deeds were under the common seal of the commissioners, and not under the private seal of each; and the law authorized the commissioners to sell, and not to convey.

[This was an action of ejectment by the lessee of James against Gordon & Bowen.]

The plaintiff gave in evidence, a warrant dated in 1763, to Francis Drumgold, for 300 acres of land, on the south branch of Dumming's creek, adjoining his other land. A receipt from the receiver general of £15,

[1] [Originally published from the MSS. of Hon. Bushrod Washington, Associate Justice of the Supreme Court of the United States, under the supervision of Richard Peters, Jr., Esq.]

from Peters & Clark, in part for the above land, dated in 1765. A survey of 516¼ acres, made upon the above warrant, which survey, in 1770, was returned and received for the use of the assignees of Clark; and their deed from Clark to three persons, as trustees to the survivor, of whom the lessor of the plaintiff is heir at law. The defendants' counsel moved for a nonsuit, upon the ground, that, by the plaintiff's own showing, the title was out of him, the warrant having issued to Drumgold, who had the legal title, and no deed shown from him to Peters and Clark.

WASHINGTON, Circuit Justice. It is a great inaccuracy, to say, that the legal title was in Drumgold. The warrant merely gave him an equitable title, and not that, unless he paid the money; and the questions are, whether the warrant was applied for by him, or by Peters & Clark; and whether this is not a proper case to leave to the jury, to presume that the warrant was really taken out by those who paid the money, and who merely used the name of Drumgold as a nominal person, a practice common in this state, where one man takes out many warrants? The warrant, issued in 1763, is paid for in 1765, by Peters & Clark, who had it executed and returned; and it is received for their use. The defendant does not pretend to claim under Drumgold, or to show a subsisting right in any person under him; and the plaintiff appears in court, with the original warrant as one of his title papers. The jury may certainly presume, that the name of Drumgold was merely used by Peters and Clark, the real grantees. Motion overruled.

The defendant read an agreement, between George Crogham on the one part, and William Peters, J. Warden and A. James, assignees of Clark, in which is recited a deed formerly made by Crogham to Peters and Clark, of a number of tracts of land, to secure a debt from Crogham, which was then proved; and stipulating for a re-conveyance, on certain terms, of particular parts of the land, to be ascertained and determined by arbitrators. A copy of the award, from the records of one of the courts, attested by the proper officer, was now offered; and objected to, because not a paper directed by law to be recorded. The law of 1715, authorizes the recording of all deeds and conveyances, of, and concerning lands, or whereby they may be in any manner affected, to be acknowledged by the grantors, or proved by two witnesses; or if they be dead, or cannot be had, their handwriting may be proved, or if not, then that of the grantors. In this case, the signatures of the arbitrators were proved, and of one of the witnesses; but it does not appear that the witness could not be had. The objections were: 1st. That this was not a deed; 2d. If it were, the other witness should have proved it, or it should appear that he could not be had.—Answer. That the defendants do not claim under this award, but it was a paper put on record by Peters & Clark. That this is a paper connected with the agreement to which it refers, and it does affect land.

BY THE COURT. The law clearly relates to deeds, and this is not a deed; of course an attested copy given by an officer, who is not directed by law to record it, is not evidence. If the original were lost, or in possession of the adverse party, the contents might be proved by a witness; but the attestation of the clerk is not evidence.

The defendant offered a paper in evidence, signed by Richard Peters, as attorney for William Peters.

BY THE COURT. You must produce the power of attorney, under which the agent acted.

The defendant then offered a deed, dated in 1774, from the commissioners for selling lands, on which the taxes had not been paid, to the person under whom the defendant claimed; he being the highest bidder. Objected to, because it did not appear that assessors had been appointed; and in cases of this kind, the greatest strictness is required, in proving that every requisite of the law was complied with. The law required the assessment to be made by the court and district assessors, and it should be shown that the latter were regularly appointed; and a number of strong cases were read, decided in the supreme court, in support of this doctrine, as applied to sales for non-payment of taxes, and other similar cases.

BY THE COURT. This point may be reserved till we have gone through the opening; because the rule laid down, that every delegated authority, particularly to deprive men of their property, contrary to the rules of the common law, should appear to be strictly pursued; yet it may be an important question, whether a defendant, who has for a great number of years been in quiet possession, under such sales, may not call in the aid of presumptions, which would not be allowed to a person out of possession.

The defendant then offered a deed, dated in 1787, signed by the commissioners, for another part of the land in question, which concludes thus, "as witness our hands, and to which we have caused our common seal to be affixed." There are three seals in the upper margin of the deed. The grantors acknowledged the deed, in court, to be their act and deed. This was objected to, because it was sealed with a common seal; whereas the law directs a deed to be given by the commissioners, under their hands and seals. Instead of affixing their individual seals, they put a common seal, as if they were a corporate body. Another objection to the deed was, that the laws, preceding the first sale, did not authorize the commissioners to convey, though it authorized them to sell.

The words are nearly as follows, "that if the taxes are not paid within a certain time, the commissioners shall sell so much, as may be necessary to raise the sum due, and upon all sales made by the sheriff or coroner as aforesaid, the said sheriff, &c. shall convey." So that whether the sheriff is to convey, or the commissioners, it is casus omissus. The deed was directed to be read without prejudice.

The principal questions in the cause were, 1st, whether in fact the land sold, and in the possession of the defendants, is the land mentioned in the warrant granted to F. Drumgold, and surveyed for him; or whether it is not the land granted to James Maze, in whose name it was sold? If the former, then the plaintiff produced the receipts for the taxes, due at the time of the first sale. 2d. Objection, that the assessors were nominated by the commissioners, instead of being elected by the freeholders, as the law of 1758 directed; and that the conveyance was made by the commissioners, without authority. These objections went to the first sale and conveyance in 1774. 3d. As to the sale and conveyance in 1787, it was admitted, that, by the law of 1702, the commissioners are to convey, but they are to do so under their hands and seals; and this conveyance is made under their common seal. Many decisions by the supreme court of this state, were referred to, in which it was determined, that the party claiming lands under these sales, was obliged to prove the regularity of the proceedings in every point, and even the notice of the commissioners was deemed necessary, in the case of Weester v. Cameron [unreported].

WASHINGTON, Circuit Justice (charging jury). Perplexed as this case has been rendered, by the mode in which it has been conducted, it now appears to turn within a very narrow compass, and to depend upon the ascertainment of a single fact, which will be left to you; that is, whether the land now in possession of the defendants, and which they claim under deeds from the commissioners of taxes, is the land surveyed in the name of Francis Drumgold or not. If it be not, then the plaintiff cannot succeed in this action; because the foundation of his title is a warrant, taken out in the name of Francis Drumgold, in 1763. The consideration money was paid by Peters & Clark, in 1765, for a survey of 516¼ acres in the same year, and returned and accepted into the office, in 1770, for the use of the assignees of Daniel Clark, under whom the lessor of the plaintiff deduces his title. Now, this being the title, if the defendants are not in possession of this land, the plaintiff must fail, whether the defendants have title or not. On the other hand, if this be the land surveyed for Francis Drumgold, then the plaintiff is clearly entitled to recover, because the only title of the defendants is derived from a conveyance from the commissioners; who acknowledged in the deed itself, that the land so conveyed had been sold, as the land of J. Maze, for non-payment of taxes. I therefore put out of the question all the other objections made to the legality of the sale, since it is clear, from the deed itself, that it was advertised, and in every respect treated as J. Maze's land; and therefore the notice required by law to be given, was in this case worse than omitted, since it misdescribed the land. To prove that this is the land granted in the name of Francis Drumgold, the plaintiff relies upon the survey itself, which corresponds expressly in courses, distances, calls of adjoining lands, and quantity, to a quarter of an acre. Besides this, he has the evidence of Mr. Taylor, a witness, whose credit has not been impeached, who swears positively to the fact. Against this is opposed, a draught or diagram, of a number of tracts of land, made in consequence of a warrant of resurvey, ordered by the board of property in 1788, at the request of Doctor Smith, who was tenant in common with Peters & Clark, in a great number of warrants, issued to them in 1763, in different names; of which that to Francis Drumgold was one. To this warrant of resurvey, is annexed a list of those warrants, amongst which, are two to James Maze, one to Francis Drumgold adjoining Maze; and the one in question, adjoins this other tract. The surveyor was directed to lay down these tracts, to show their interferences, and what parts had been sold for taxes. Upon the diagram thus returned, the land in question is marked for James Maze's land, and two tracts adjoining it are marked for Francis Drumgold.

Upon this piece of evidence, the following considerations occur to me, which I deem it my duty to submit to the jury. 1st. This resurvey was made twenty-three years after the original survey was made; and as the surveyor does not inform us by what evidence he was guided in locating these several tracts of land, its accuracy may well be doubted. 2d. It does not appear, that a survey for James Maze, or of Francis Drumgold's other tract, ever was made; for they are not mentioned in the original list of surveys returned in 1770, and accepted for the use of the assignees of Clark; and it is therefore probable, that these were lost warrants. 3d. The tract laid down on this paper, as James Maze's, corresponds with the survey originally made for Francis Drumgold, in courses, distances, calls of adjoining tracts, and in quantity, to a quarter of an acre; whereas that laid down for Francis Drumgold, has no resemblance to the original survey in any of these particulars, and is more than 100 acres short in quantity. 4th. G. Woods, who received in 1774 and 1776, the taxes due on Francis Drumgold's land, is admitted by both sides to have been well acquainted with these lands; and in that re-

ceipt, he calls it Francis Drumgold's land, and distinguishes it by the precise quantity, to wit: of 516¼ acres. The jury then must decide this fact, whether the land sold was for Francis Drumgold or not: if they are satisfied that it was, their verdict must be for the plaintiff; if otherwise, then for the defendant.

Verdict for plaintiff.

[See Cases Nos. 7,184 and 7,185.]

JAMES (GRAY v.). See Cases Nos. 5,718 and 5,719.

JAMES (GREENE v.). See Case No. 5,766.

JAMES (HAYDEN v.). See Case No. 6,260.

## Case No. 7,181a.

JAMES v. JENKINS.

[Hempst. 189.] [1]

Superior Court, Territory of Arkansas. July, 1832.

ATTACHMENT—AFFIDAVIT—SERVICE OF WRIT.

1. The affidavit in attachment may be made before the clerks of the circuit courts.

2. The proceeding by attachment is in derogation of the common law, and when the service of the writ does not conform to the statute the judgment is erroneous.

Error to Chicot circuit court.

Before JOHNSON, ESKRIDGE, and CROSS, JJ.

OPINION OF THE COURT. [Samuel] Jenkins, the defendant in error, sued out an attachment from the office of the clerk of the circuit court of Chicot county, against [Thomas] James, and prosecuted the same to judgment. The object of the plaintiff in error is to reverse this judgment. Various grounds are relied on for that purpose.

First, it is contended that the affidavit upon which the attachment issued, is insufficient, the clerk having no power in such cases to administer oaths in vacation. Secondly, there was no service of the writ, and of consequence, that every subsequent step taken in the cause was erroneous. These are the only grounds we deem it material to notice. The first has been urged with some plausibility, but the practice has uniformly been, in making the affidavit required, to take the oath before the clerk; and although we have found no express provision in our statute delegating the power, yet we think it is impliedly given, and that the legislature obviously so intended it.

The second objection is of a more serious character. The only return made by the sheriff is in these words: "Served the within writ of garnishee on the within-named Squires' Ward, Wm. B. Patton, and John S. Been, by reading the same within their hearing, in the presence of James Estill and William Springer, on the 17th day of November, in the township of ——, and county of Chicot. Nov. 17, 1828." The manner of serving the writ of attachment is pointed out in the third section of the act of 1818, entitled, "An act to provide a method of proceeding against absent and absconding debtors;" and requires that the officer should go to the place where, or the person in whose hands or possession the lands, tenements, goods, chattels, and effects are supposed to be, or the person supposed to be indebted to the defendant, and then and there declare in the presence of one or more creditable persons of the neighborhood that he attaches the same. The return of the sheriff does not even purport to be a service of the writ of attachment, and if it did, there has been no compliance with the provisions of the statute. The proceeding by attachment is derogatory of the common law, and there should at least be a substantial observance of the provisions of the statute authorizing it. Judgment reversed.

[1] [Reported by Samuel H. Hempstead, Esq.]

## Case No. 7,182.

JAMES v. LYCOMING INS. Co.

[4 Cliff. 272; [1] 4 Ins. Law J. 9.]

Circuit Court, D. Massachusetts. Oct. 6, 1874.

FIRE INSURANCE — INVALIDATION OF POLICY — INCREASE OF RISK—CONSTRUCTION OF CONTRACT—CONDITION SUBSEQUENT—WARRANTIES—NOTICE OF REPAIRS.

1. Repairs which have become indispensably necessary to remedy defects in a building and machinery, which endanger the safety of the property insured, may be made, and old machinery may be replaced with new, without invalidating a policy of insurance, if the structures made, or changes effected, are reasonably necessary, and do not increase the risk.

2. In this case, work was done in taking out an old boiler, and putting in a new one, a brick chimney and fireplace were erected, and a structure to cover the projecting end of the boiler and fireplace, and to afford shelter to the attendant, and steam was used as an auxiliary motive power. *Held*, these facts did not render the policy void under the condition termed the "builder's risk."

3. This condition must receive a reasonable construction, and neither it nor any other condition in the policy can be so construed as not to be repugnant to the nature and purpose of the policy, or inconsistent with the due and customary use of the property.

4. In the construction of a contract, courts of justice are not denied the same light and information the parties enjoyed when the contract was executed, and so may acquaint themselves with the persons and circumstances that are the subjects of the stipulations in the written instrument, and are entitled to place themselves in the same situation as the parties who made the contract, so as to view the circumstances as they viewed them, and so to judge of the meaning of words, and of the correct application of language to the things described.

5. Conditions subsequent, and even mere promissory conditions, may be of a character

[1] [Reported by William Henry Clifford, Esq., and here reprinted by permission.]

that the breach of one or more of them will render the policy null and void; but courts of justice are not inclined to give such conditions that effect unless it clearly appears that such was the intention of the parties as manifested in their language.

6. Affirmative warranties are in general conditions precedent, which, if untrue, whether material to the risk or not, the policy does not attach.

7. Promissory warranties may be express or implied; they usually have respect to the happening of some future event, and in that case are usually held to be conditions subsequent, to be reasonably construed to effect the intention of the parties.

8. Owners of property insured must have the right to repair defects which render property untenantable and unsafe, and unfit for use; if not the effect of the policy would be to render property comparatively valueless.

9. There was nothing unreasonable in this case, in the putting in of the horizontal boiler in the place of the former upright one, or in erecting the structure to cover the projecting end of the boiler, and afford shelter to the attendant.

10. Where there is no increase of the risk by the repairs or necessary alterations, and where the evidence showed that the fire did not occur in consequence thereof, it was *held*, there was no need of notice to the insurance company of the proposed repairs.

Action [by Henry L. James] upon a policy of insurance upon a woollen mill, with an L and the movable machinery, tools, and stock. A total loss was admitted. The agreed statement of facts upon which the case was submitted was, in substance, as follows: $3,500 were insured by the plaintiff for one year, commencing March 14, 1871, as follows, to wit: $1,500 on his stone, frame, and slate-roof woollen mill building and L attached; $1,000 on movable machinery, tools, and furniture therein; and $1,000 on stock, raw, unwrought, and in process, including mill supplies. On the 10th of January following the property was totally destroyed by fire. By the agreed statement it appears that the L, at the date of the policy, contained an upright steam boiler, about eight feet high, with a bonnet four feet high, reaching through the floor into the room above, and that it was used exclusively for heating the premises and for washing wool; and that the mill was situated on a small stream, which at times did not furnish a sufficient supply of water; that it was found in July following, that the boiler and chimney were cracked and in a dangerous condition, so that it was necessary to repair or change them. Payment being refused, the plaintiff brought an action of assumpsit to recover the amount. Proof of loss was waived, and, of course, the judgment should have been for the plaintiff, unless the insurance company showed a good defence, and for that purpose they relied upon the following facts: That the old boiler was removed, and a new horizontal steam boiler, about sixteen and one half feet long, and three and one half feet in diameter, was placed in the L, the end projecting about two and one half feet outside the building; that a brick chimney, separated entirely from the building, and with a brick fire-place, was built at the end of the building outside, and that the boiler itself was set in brick; that the boiler was used not only for heating the premises and washing wool, but that there was attached to it and run by it a steam-engine of fifteen horse power, which was used to supply any deficiency in water power in running the mill; that in order to place the engine and boiler in the mill, the wooden side of the lower story of the L was taken out about ten feet in length and ten feet in height; that a structure from ten to twelve feet wide and fifteen to twenty feet long was subsequently erected to cover the projecting end of the boiler and fireplace and lower part of the chimney, and the man who fed the boiler; that the structure was built of wood and had a shingled roof; that the roof commenced about eight feet high and extended up to the second-story windows; that it did not extend above the second story windows and that the structure was not used except in connection with the boiler. Carpenters and other mechanics were employed in taking out the old boiler, and in placing and setting the new boiler and engine, and in erecting the chimney outside and in putting up the structure. Carpenters and other mechanics having been employed in making these changes, it was insisted by the defendants that the policy became void; but the plaintiff denied that proposition, and referred to other portions of the agreed facts as sufficient to warrant all that was done in effecting those changes: That the boiler and chimney were cracked and in a dangerous condition, and that it was necessary that both should be repaired or changed. That the agreed statement showed that no more steam was made after the boiler was put in than before, and that the mill was never driven by steam power alone, and that steam power was only used a part of the time as auxiliary to the water power. That mechanics only worked there in connection with making the described changes; that there were no mechanics, except bricklayers, inside the mill, save that the superintendent of the mill took up and put down the floor, so far as necessary, and that the carpenter assisted him perhaps for an hour or two. That the structure erected to cover the projecting end of the boiler, the fireplace, and the man who fed the boiler, was reasonable, necessary, and proper for that purpose. That the work had all been done some months before the fire occurred; that the fire was in no respect attributable to these changes, or to the work that was done; nor did the work, during its progress, interrupt the use of the mill. That the structure erected was in the angle formed by the main building and the L, and that two of its sides were the sides of the main building and L, as exhibited on the plan in the case. That the

parties agreed that the carpenters and other mechanics had ceased to work in the building before the time of the fire, and that there was no increase of the risk. It was agreed that the statement should be made part of the record, and if the court should be of opinion that, upon the facts, the action could be maintained, judgment should be entered for the plaintiff for the sum of $3,500, and interest from May 22, 1872; if the court should be of opinion that the action could not be maintained upon the facts, judgment to be entered for defendant, and that each party reserved the right to carry up the case to the supreme court of the United States by appeal, writ of error, exceptions, or otherwise, all in the proper manner and according to law.

Charles Allen, for plaintiff.

G. P. Shattuck and A. T. Sinclair, for defendant.

Before CLIFFORD, Circuit Justice, and LOWELL, District Judge.

CLIFFORD, Circuit Justice. Viewed in the light of the facts disclosed in his several propositions, it is contended by the plaintiff that he is entitled to recover the whole amount of the loss. Two principal questions arise in the case, as follows: 1. Whether the facts as agreed show that by the work done on the premises in taking out the old boiler and putting in a new one, and in building the brick chimney and fireplace, and in erecting the described structure for the purpose mentioned, and in using the steam-engine as auxiliary to the deficient water power, the policy was rendered null and void, irrespective of the condition denominated the builder's risk. 2. Whether the condition embodied in the policy, called the builder's risk, renders the policy null and void in view of the work done on the premises by the insured, and the means adopted by them to accomplish the same, as set forth in the annexed statement, unless permission is indorsed in writing on the policy for the purpose. The condition denominated "builder's risk" is that the working of carpenters, roofers, tinsmiths, gas-fitters, plumbers, or other mechanics, in building, altering, or repairing the premises named in the policy, will vitiate the same, except in dwelling-houses, where five days are allowed, without notice, in any one year, for incidental repairs.

Properly arranged, the several propositions mentioned show the following agreed facts, which are very material to be considered in deciding both of the questions presented for determination: that the boiler and chimney were cracked and in a dangerous condition; that the safety of the property insured required that both should be repaired or that new ones should be put in their place; that steam was used in the premises both for heating the same and for washing wool: that the quantity of steam was not increased by replacing the old, cracked boiler with a new one of sound construction; that the new structure erected to cover the new boiler, the fireplace, and the man who feeds the boiler, was reasonable, necessary, and proper for that purpose; that all the work had been completed several months before the fire occurred; that the work did not interrupt the use of the mill while it was being done, and that the fire was in no respect attributable to the change made in the premises, nor to the work that was done; and that the risk was not increased either by the change made or by the work done. Several other questions were discussed at the bar, but the opinion of the court will be limited to the two questions presented in the agreed statement of facts, without stopping to inquire what the decision of the court would be if the facts were different.

Repairs in this case became indispensably necessary to remedy defects in the premises and the machinery, which endangered the safety of the whole property insured; and the agreed facts show that the repairs made did not increase the risk, and they negative every possible ground of inference that the fire was, in any respect, attributable to the changes made in the premises or to the work that was done in executing the repairs; such an inference cannot be made, as the agreed statement expressly negatives any such theory, and shows that the work was completed several months before the fire occurred. Insurers know as well as the insured, that such a building and its operative machinery are liable to wear out or to get out of repair, and that it is for the interest of the insurer as well as of the insured, that defects which endanger the safety of the property insured, when discovered, should be repaired so as to remove the danger of loss.

Old fixtures and old machinery, under such circumstances, may be fully repaired; or if an old chimney or an old boiler has become so defective that good judgment and common prudence would dictate that one or both should be replaced with new, it is entirely competent for the insured to remedy the defects and remove the danger to the safety of the premises in that way; nor can it make any difference that the new boiler is a horizontal one instead of an upright one, nor that it is a few feet longer than the one in prior use, unless it appears that the change increases the risk or is more likely to occasion loss by the described perils. Attempt is made in argument to maintain that the structure erected to cover the projecting end of the new boiler, and the fireplace, and the man who feeds the boiler, is a greater change in the premises than the law of insurance will allow; but the agreed statement affords a complete and decisive answer to that suggestion, as it shows that the changes made did not increase the risk, and that the structure erected was reasonable,

necessary, and proper for the purpose. Unequivocal support to that view is found in the recent decisions of the courts in England, which show conclusively that the first defence set up by the underwriters cannot prevail. Stokes v. Cox, 1 Hurl. & N. 540.

Commenced as the suit in that case was, in the court of exchequer, it is necessary to refer to the original case in order to understand the full force of the decision in the appellate court. Same Case, 1 Hurl. & N. 320. Insurance was effected in that case on a range of buildings of three stories, all communicating, comprising offices, warehouses, curriers' shops, and drying-rooms, having a stock of oil and tallow deposited therein, a part of the lower story being used as a stable, coach-house, and boiler, and the policy contained the words, "no steam-engine employed on the premises, the steam from the boiler being used for heating water and warming the shops"; that the process of melting tallow by steam in the boiler-house, and the use of two pipe stoves in the building are hereby allowed, but it is warranted that no oil be boiled, nor any process of japanning leather be carried on therein nor in any building adjoining thereto.

Four kinds of insurances were described in the policy, to wit: common, hazardous, doubly hazardous, and special risks, and the policy stated that when insurances deemed special risks are proposed, the most particular specifications of the property and all the circumstances attending the same will be required, and that special risks must be particularized on the policy to render the same valid or in force. Certain conditions were indorsed on the policy, one of which provided that if, after the insurance shall have been effected, the risk shall be increased by any alteration of the materials composing the building, or by the erection of any stove, "coalkel," kiln, furnace, or the like, the introduction of any hazardous communication, or by any other alteration of circumstances, and the particulars of the same shall not be indorsed on the policy, and a proportionate higher premium paid if required, such insurance shall be of no force. After the policy was effected, which was for a special risk, the plaintiff, without notice to the defendants, erected in the stable the machinery of a steam-engine, which was supplied by steam from the boiler mentioned in the policy, but the jury found that the risk was in no way increased. Subsequently, the premises were destroyed by an accidental fire. Creswell, J., presided at the trial, and he directed a verdict for the plaintiff, reserving leave to the defendants to move to enter a nonsuit. Accordingly, the defendants obtained a rule nisi, and the parties were heard before the chief baron and two of his associates, when the rule was made absolute, one of the associate justices dissenting. Whereupon the original plaintiffs removed the cause by appeal into the exchequer chamber, and the parties were there fully heard, and the appellate court unanimously reversed the judgment rendered by the court of exchequer, and directed that a verdict be entered for the plaintiffs. Cockburn, C. J., gave the opinion of the appellate court that the insured in such a case was not bound to give notice to the insurance company of the alteration of circumstances, unless it appeared that the change made increased the risk, which was negatived by the finding of the jury. Exactly the same rule was applied by the court of exchequer, in a subsequent case, where they refer to the final decision in the former case with approbation; and that rule, it is believed, is universally adopted and applied by the courts of that country. Baxendale v. Harvey, 4 Hurl. & N. 444.

Suppose the rule is so when the facts are tested by the general law of insurance, still it is contended by the defendants that the evidence as to the work done in taking out the old boiler and putting in the new one, and in building the brick chimney and the fireplace, and in erecting the described structure to cover the projecting end of the boiler, and the fireplace, and to afford shelter to the attendant, and in using the steam as an auxiliary motive power, render the policy null and void as in violation of the condition denominated "builder's risk." Such a condition, however, must receive a reasonable construction in view of the agreed facts in the case, and that construction must be one not repugnant to the nature and purpose of the contract, nor one inconsistent with the due and customary use and enjoyment of the property. Parties, it is true, may make their own contracts, but courts of justice, in all cases except where the language employed is so explicit and unambiguous that it must be understood that the words speak their own interpretation, may give the language a reasonable construction to effect the intention of the parties as collected from the whole instrument, the subject-matter, and the surrounding circumstances. Of course, the province of construction is limited to the language employed, as applied to the subject-matter and the surrounding circumstances, contemporaneous with the instrument; but courts of justice are not denied the same light and information the parties enjoyed when the contract was executed, and for that purpose they may acquaint themselves with the persons and circumstances that are the subjects of the stipulations in the written instrument, and are entitled to place themselves in the same situation as the parties who made the contract, so as to view the circumstances as they viewed them, and so to judge of the meaning of the words and of the correct application of the language to the things described. Shore v. Wilson, 9 Clark & F. 570; Clayton v. Gregson, 4 Nev. & Man. 602; Add. Cont. 846.

Most of the agreed facts are as material

in considering the present question as in considering the question just decided, of which the following are the most important: 1. That the risk was not increased either by the changes made in the premises or by the work done. 2. That the fire was in no respect attributable to the changes, or to the work, or the subsequent use of the property. 3. That the work was completed several months before the fire occurred. 4. That the repairs became indispensably necessary to render it safe to use the chimney and boiler, without which the mill could not be operated. 5. That the new boiler did not generate any more steam than the old one before it got out of repair. 6. That the structure erected to cover the projecting end of the new boiler, and the fireplace, and to afford shelter to the necessary attendant was reasonable, necessary, and proper for the purpose.

Facts agreed make a part of the case, and are as material in considering the second question presented for decision as the first; and in that view it necessarily follows that the authorities invoked to support the conclusion that the policy, under the general rules of insurance, is not rendered null and void by the changes made and work done by the insured subsequent to its date, are equally applicable in considering the second question presented for decision. Stokes v. Cox, 1 Hurl. & N. 540.

Mills and manufactories having mill, steam, or engine work were denominated in that case special risks in the policy, and the representation therein was that no steam-engine power was employed on the premises. Part of the lower story of one of the buildings was used as a stable, coach-house and boiler-house, and the boiler was used for heating water and warming the shops. Without notice to the defendants, the insured, subsequent to the date of the policy, created in the stable the machinery of a steam-engine which was supplied with steam by the boiler mentioned in the policy. Where the risk is increased by any alteration of the circumstances, the condition was that the policy shall be of no force unless the particulars of the same shall be indorsed on the policy, and, if required, a proportionate higher premium be paid. Afterwards the premises were destroyed by an accidental fire, not attributable to the erection or use of the steam-engine. Held in the exchequer chamber, reversing the court of exchequer, that the policy was not avoided by the introduction of the steam-engine and the use of the steam generated in the boiler to work it.

All that the insured, say the court, is called upon to do in such a case, is, in the event of an increase of the risk, and in that event only to give notice to the insurance company of the alteration of circumstances. Here it is found as a fact that there was no increase of risk; therefore there was no necessity to give notice. Two thirds of a year and more elapsed, in the case before the court, from the commencement of the risk, before the fire occurred, which shows beyond all doubt that the policy attached, as it is not pretended that the case shows any breach of a condition precedent. Conditions subsequent, and even mere promissory conditions, may be of a character that the breach of one or more of them will render the policy null and void; but courts of justice are not inclined to give such a condition that effect unless it clearly appears that such was the intention of the parties as manifested by the language employed in the contract. Whether regarded as a condition subsequent or a mere promissory warranty, the condition in question, it is clear, is not one where a literal compliance with its terms is required. Such a construction would be absurd, as it would render the policy void if the insured employed a mechanic to take out a broken slate and put in a new one, or to replace a broken pane of glass, or to stop a leak in a chandelier or other gas fixture, or in a cistern, or to mend a defective chimney, stove-pipe, or furnace. Sudden defects of the kind often occur which endanger the premises, and the comfort, health and safety of the occupants; but if such is the true construction of the condition, the insured is prohibited from mending the slightest defect or removing the danger by the assistance of mechanics, unless he can apply to the insurance company and get their permission to do so, indorsed on the policy, no matter how urgent the necessity for repairs may be, nor how great the distance may be from the situs of the property insured to the place where the insurance company transact their business. Extreme conditions of the kind, even if they are not void as repugnant to the nature and purpose of the contract, and as inconsistent with the due and customary use and enjoyment of the property, must receive a reasonable construction unless they are expressed in such explicit and unambiguous terms as to amount to conditions precedent or to absolute and unqualified warranties. Warranties may be affirmative or promissory. Affirmative warranties may be express or implied, but they usually consist of positive representations in the policy of the existence of some fact or state of things at the time, or previous to the time, of the making of the policy; and they are, in general, conditions precedent, which, if untrue, whether material to the risk or not, the policy does not attach, as it is not the contract of the insurer. Newcastle Fire Ins. Co. v. Macmorran, 3 Dow, 262; Biccard v. Shepherd, 14 Moore, P. C. 475.

Promissory warranties may also be express or implied; but they usually, not always, have respect to the happening of some future event, or the performance of some future act, in which case they are usually held to be conditions subsequent, and subject to a reasonable construction to effect the intention of the parties as evidenced by the language

employed, the subject-matter, and the surrounding circumstances. Marsh. Ins. 346; 1 Arn. Ins. (2d Ed.) 580.

Stipulations of the kind must receive a reasonable construction; and the rule is that the intention of the parties, if it can be ascertained, is to govern; "and the intention," says Shaw, C. J., "is to be learned from the language used, construed in connection with every part and cause in the contract, the subject-matter respecting which the words are used, and the obvious purpose of each stipulation." Houghton v. Manufacturers' Mut. Fire Ins. Co., 8 Metc. [Mass.] 125; Aurora Fire Ins. Co. v. Eddy, 49 Ill. 106; 1 Pars. Mar. Ins. 423; Daniels v. Hudson R. Ins. Co., 12 Cush. 416; Hall v. People's Mut. Fire Ins. Co., 6 Gray, 185; Columbian Ins. Co. v. Lawrence, 2 Pet. [27 U. S.] 25; Ang. Ins. § 153; Gilliat v. Pawtucket Mut. Fire Ins. Co., 8 R. I. 292.

Beyond all doubt a warranty of an existing fact is a condition precedent; and if it be not true, when the stipulation is reasonably construed, it avoids the policy, whether it is material to the risk or immaterial, as the condition is a part of the contract which cannot be enforced unless it appears that the condition is fulfilled; but the insured, even in such a case, is only held to a substantial compliance, it being well-settled law that the condition cannot be extended by construction so as to include what is not necessarily implied in its terms. Turley v. North American Fire Ins. Co., 25 Wend. 374; Flanders, Fire Ins. 205.

Even words of warranty, unless they are so explicit and unambiguous as to speak their own meaning, are subject to construction, and will receive a strict or liberal construction to meet the justice of the case, as where there was a warranty that a certain cotton mill should be worked by day only, it was held that the warranty was not infringed, because it appeared that the engine and unconnected shafting were kept running all night as the mill and machinery were not substantially worked. Mayall v. Mitford, 6 Adol. & E. 670; Shaw v. Robberds, Id. 75; Whitehead v. Price, 2 Cromp. M. & R. 447; Buny. Ins. 65; 1 Phil. Ins. (4th Ed.) § 872.

Decided cases may be found in which courts have denied that there is any difference between an affirmative warranty and a promissory condition or stipulation; that the latter, as well as the former, must always be regarded as conditions precedent, on the literal truth or fulfillment of which the validity of the entire contract must depend; but it is evident that the rule, if it be one, which is not admitted, must be subject to many exceptions, as otherwise the greatest injustice would be done to the insured by the modern practice of crowding policies of insurance with stipulations imposing almost innumerable conditions, covenants, and agreements providing for a forfeiture of the indemnity, which were wholly unknown to such instruments until within a recent period, and which, it is to be feared, attract very little attention from the owner of the property insured, until they are set up by the insurer subsequent to the loss, to show that the losing party is not entitled to the indemnity for which the premium was paid. Borradaile v. Hunter, 5 Man. & G. 639; Alston v. Mechanics' Mut. Ins. Co. 4 Hill, 329.

Manifest injustice would be done in this case by holding that the condition in question is a condition precedent, as it would prohibit any repairs whatever which involved the necessity of employing a mechanic to work in the mill building. Justice to the defendants, however, makes it proper for the court to say that they do not contend for any such rule. They admit that small repairs may be made, but insist that the repairs made were greater than the law of insurance allows, where the policy contains such a condition as that exhibited in this case, which, of itself, is an admission that the particular condition must receive a reasonable construction not repugnant to the nature and purpose of the contract, nor inconsistent with the due and customary use and enjoyment of the property by the insured. Insurable property is intended for use, and it is not the intent of a policy of insurance to impair the right of use, nor to deprive the owner of the customary enjoyment of the property; and nothing of the kind should be inferred nor admitted, unless it be in obedience to a condition precedent, expressed in explicit and unambiguous terms to that effect. Mills and dwelling-houses almost constantly need repairs; and if they cannot be made, the property is liable to become untenantable, and unsafe and unfit for use; and in many cases, the property would be exposed to the danger of destruction by fire or flood. Owners of property must have the right to repair defects which render the property untenantable, or which expose it to the danger of destruction from fire or flood, else the inevitable effect of a policy of insurance would be, where defects of the kind happen or become known, to render the property comparatively valueless, and of course to deprive the owner of the due and customary use and enjoyment of the property.

Small repairs, such as taking out a broken slate and putting in a new one, or replacing a broken pane of glass, or stopping a leak in a chandelier or other gas fixture, or mending a leaky cistern, or repairing a defective chimney, stove-pipe, or furnace, it is properly conceded, may be made; but the effect of that concession is to admit that the condition in question is subject to a reasonable construction not repugnant to the nature and purpose of the contract, nor inconsistent with the due and customary use and enjoyment of the property. Necessary repairs of the house, whether small or great, could

not be made by the working of mechanics in the premises without avoiding the policy, if it be held that the condition under consideration applies in such cases, as the language of the condition, if taken literally, would forbid everything of the kind; but we are of the opinion that the condition, if construed to exclude all rights of making such repairs, would be void as repugnant to the nature and purpose of the contract as expressed both in the written and printed words of the policy. Stipulations of the kind, however, in a policy of insurance, may be held valid, if, by a reasonable construction, the objection to the literal operation of the instrument may be avoided, even though, if taken literally, they would be invalid. Authorities to support that proposition do not appear to be necessary, as the rule is well established that courts of justice, in the construction of all written instruments, will seek to uphold the instrument, if it can be done by a reasonable construction. Harper v. Albany Mut. Ins. Co., 17 N. Y. 198.

Apply that rule to the present case, and it follows, in the opinion of the court, that the condition in question does not prohibit the insured from remedying defects in the premises or machinery insured, which arose subsequently to the granting of the policy without his fault, or which were wholly unknown to him at that time, provided such defects were of a character to endanger the safety of the property insured, or to render the same untenantable and unsafe, and unfit to be occupied for the purposes and uses described in the policy, unless it appears that the repairs made were unreasonable and increased the risk, or that the fire was in some respect attributable to the repairs or to the work done in making the repairs. Viewed in the light of that proposition, it is clear that the second defence must also be overruled, as the agreed statement distinctly shows that the boiler and chimney were found to be cracked, and in a dangerous condition, so that it was necessary to repair or change them; and that there was no increase of the risk, and that the fire was in no way attributable to the changes made or to the work that was done. Sufficient has already been remarked to show that there was nothing unreasonable done in putting in a horizontal boiler in place of the upright one which was taken out, as the latter reached through the floor into the room above, evidently showing that it was more dangerous to the premises than the new one put in its place. Nor is it necessary to add any thing to show that no objection can be taken to the structure erected to cover the projecting end of the boiler, and the fireplace, and to afford shelter to the attendant, as the parties have agreed that it was reasonable, necessary, and proper for the purpose. When conditions in a contract impose burdens or disabilities on one of the parties, they are to be construed strictly against the party for whose benefit they are introduced. Catlin v. Springfield Fire Ins. Co. [Case No. 2,522]; Hoffman v. Aetna Fire Ins. Co., 32 N. Y. 414.

Where property is insured in contemplation of its use for a known and specified purpose, the contract imports, ex vi termini, a license to keep the articles, and employ the agencies incidental and essential to the beneficial enjoyment of the property for the use proposed; and many courts of high authority hold that a license of this nature, so implied from the language employed in the written portion of the policy, will not be overruled by a printed prohibition contained in some other portion of the same instrument. Harper v. Albany Mut. Ins. Co., 17 N. Y. 197; Bryant v. Poughkeepsie Mut. Ins. Co., Id. 201.

Decisions to that effect are quite numerous, and most of them are based upon the theory that an insurance upon a stock in trade used in a particular business, covers all such articles as are necessarily and ordinarily used in such business. 1 Phil. Ins. (4th Ed.) § 489; Delonguemare v. Tradesmen's Ins. Co., 2 Hall, 621.

Courts of justice agree that the intent of the parties is the primary rule of construction in ascertaining the meaning of a policy of insurance as well as interpreting other contracts, and that it is to be gathered, if possible, both from the written and printed portions of the policy, giving effect to both as far as may be; but they differ widely where certain conditions are found in the printed part of the policy, which are repugnant to the written words contained in the same instrument. None of them, however, support the proposition that a condition in the printed part of the policy, which is repugnant to the nature and purpose of the contract, and inconsistent with the due and customary use and enjoyment of the property insured, is a warranty of a condition precedent, which will avoid the policy, unless the condition is framed in such explicit and unambiguous terms as clearly to show that such was the intention of the parties. Instead of that they all support the opposite theory, that such a condition will not avoid the policy unless its terms are such that the condition, even when compared with every other part of the policy, is not susceptible of any other reasonable construction. Many courts hold that when there is a repugnancy in that behalf between the written and the printed portions of the policy, that the former shall prevail over the latter. Harper v. Albany Mut. Ins. Co., 17 N. Y. 198.

Express decision to that effect was made in the case of Harper v. Albany Mut. Ins. Co., 17 N. Y. 198, in which the opinion was given by the chief justice of the highest court in that state, where he said the plain meaning of the written part should prevail, and printed clauses, if repugnant, must yield,

or they must be construed so as to avoid a conflict of intention. Exactly the same rule has been laid down by the same court, in two other cases, in the first of which it is stated that when a policy of insurance is upon a building and a stock of goods such as is usually kept in country stores, it covers all articles of merchandise coming within such description, even though it include articles generally prohibited except at special rates. Pindar v. Kings Co. Ins. Co., 36 N. Y. 649; Steinbach v. La Fayette Fire Ins. Co., 54 N. Y. 95.

Insurance was granted to the plaintiff in the second case, "on his stock of fancy goods, toys, and other articles in his line of business," and "as a German jobber and importer," with the privilege "to keep fire-crackers on sale." It was stipulated in the policy that if the premises should be used for keeping goods denominated specially hazardous, except as provided in the policy, the policy, so long as the store was so used, should be of no effect. Fire-works were in the class referred to, and it was stated in the policy that insurance thereon added fifty cents per one hundred dollars. Plaintiff kept fire-works, and by their accidental ignition the loss happened. Held, that if, as matter of fact, the keeping of fire-works was in the line of the plaintiff's business, they were embraced in the description of the property, and were covered by the policy. Different views are certainly expressed by the supreme court in the case of Steinbach v. Insurance Co., 13 Wall. [80 U. S.] 185; but it is unnecessary, in this case, to remark upon that difference, as it is obvious that the latter contains nothing inconsistent with the conclusion herein stated, that the stipulation in question is neither an affirmative warranty nor a condition precedent; and if neither, then the authorities are all one way that it is open to a reasonable construction. Decided support to the view that the stipulation is open to a reasonable construction is also derived from the following cases, to which many more might be added. Insurance was granted to the plaintiff upon his wagon-maker's shop. By the conditions of the policy the company were not to be liable for damages resulting from explosions caused by gunpowder, gas, or other explosive substances, or for damages occasioned by the use of camphene, spirit, gas, or burning-fluid, unless otherwise expressly provided. In the building insured was a shop containing paints and a half barrel of benzine, which caught fire and caused the burning of the property. Held, that though the paints and benzine, disconnected and by themselves, would belong to the class of articles excluded by the terms of the policy, yet, as it was proved that they were materials usual and customary in the manufacture of wagons, and were generally kept in the same shop where wagons were made, they were covered by the terms of the policy. Archer v. Merchants' & Manufacturers' Ins. Co., 43 Mo. 439.

Where an insurance was effected on "groceries," and there was evidence that the insurer was informed that alcohol and spirituous liquors constituted a part of the stock, it was held that the question whether those articles were included in the term groceries was a question of fact for the jury; and that where a stock of goods was insured under the general description of groceries, which stock included some of these hazardous articles, the policy was not avoided, because the right to keep such articles was not indorsed in writing on the policy, as required by one of the conditions. Niagara Fire Ins. Co. v. De Graff, 12 Mich. 134.

Spirituous liquors were also classed as hazardous articles in the following case, in which the insurance was effected on a dwelling-house, and the condition of the policy was that the building should not be used for the purpose of storing therein any of the articles denominated hazardous in the policy, and the defendants proved that a tenant used it as a boarding-house, and that she had a regular bar, where liquors were kept in open view and were sold by retail, and they insisted that the breach of the condition avoided the policy; but the court held that the keeping of liquors in the building insured for the purpose of consumption or for sale by retail to boarders and others, is not a storing within the meaning of the policy. Rafferty v. New Brunswick Fire Ins. Co., 18 N. J. Law, 482.

Substantially the same rule was applied in the following case, which was an insurance on a stock of goods and merchandise contained in plaintiff's store, one of the conditions being that the keeping of gunpowder for sale or on storage, upon or in the premises insured shall render the policy void. Leggett v. Aetna Ins. Co., 10 Rich. Law, 206.

Powder was always kept in the store for sale by retail both before and after the date of the policy, and the court held that the keeping and sale, in that way, of small quantities of powder, did not vitiate the policy, as it was part of the stock of goods insured. Cotton in bales, in the following case, was classed as a hazardous article, and one of the conditions of the policy was that, if the building should be used for keeping or storing goods denominated hazardous, then and from thenceforth, so long as the same shall be so used, the policy shall cease, and be of no effect. Moore v. Protection Ins. Co., 29 Me. 100. Bales of cotton were subsequently kept in the store for sale; but the court held that such a condition did not avoid the policy, it being intended merely to protect the insurer against the store being used as a depository of such goods as a sole or principal business. Phoenix Ins. Co. v. Taylor, 5 Minn. 492 (Gil. 393).

Direct support to the conclusion that the condition in question does not avoid the

policy in this case is found in the following case, in which the defence set up by the insurance company was based upon the exact same condition. Franklin Fire Ins. Co. v. Chicago Ice Co., 36 Md. 121. Insurance in that case was effected upon a large building used for storing ice, the policy containing the exact same condition as that under consideration. Instead of conforming to the terms of the condition, the president of the ice company testified that he always kept a crew of men, and a carpenter or two, about the building the year round, and that they were constantly making repairs, and in that way kept the building in a thorough condition. Based on that testimony, the defence was that the policy was avoided; but the court decided otherwise, holding that, by a fair and reasonable interpretation of the stipulation, it cannot be understood as referring to the casual patching up of the building; that it can only be understood as prohibiting such hazardous use as is generally denominated builder's risk, which arises from placing the building in the possession or under the control of workmen, for re-building, alteration, or repairs, and in support of that theory the court said that such a construction as that assumed, if applied, would defeat the intent of the parties, and would be repugnant to the written clause of the policy insuring the building, upon which, looking at its size, structure, and use, they must have reasonably contemplated the necessity for such repairs as the witness describes as indispensable to the proper conduct of the business. Such a building, so constructed, say the court, would necessarily be constantly liable to be injured and damaged by the use for which it was intended, rendering it indispensable for the prosecution of the business, that breakages should be repaired as they should occur, all of which was known to the insurers; and it must be presumed that the necessity for such repairs was in their contemplation at the time the contract was made, and that permission for that purpose was given by the written terms of the policy insuring the premises as an ice-house. Washington Fire Ins. Co. v. Davison, 30 Md. 107.

Text-writers usually adopt the rule laid down in the case of Robertson v. French, 4 East, 136, that where part of the contract is written and part printed, and there arises any reasonable doubt as to its meaning, the greater effect is to be attributed to the written words, inasmuch as the written words are the immediate language and terms selected by the parties themselves for the expression of their meaning, whereas the printed words are a general formula adapted equally to the case in contest, and that of all other contracting parties in respect to similar subject-matters. 3 Kent, Comm. 260; 1 Arn. Ins. (2d Ed.) 79; 1 Phil. Ins. (4th Ed.) §§ 125, 883; Fland. Ins. 70; 2 Pars. Mar. Ins. (5th Ed.) 516; Ang. Ins. 12, 67; Smith, Merc. Law (3d Ed.) 419; Alsager v. St. Katherine's Dock Co., 14 Mees. & W. 797; Coster v. Phoenix Ins. Co. [Case No. 3,264]; Coit v. Commercial Ins. Co., 7 Johns. 390; Park, Ins. 4; 1 Duer, Ins. 64; Bryant v. Poughkeepsie Mut. Ins. Co., 21 Barb. 154; Cushman v. Northwestern Ins. Co., 34 Me. 495.

Adjudged cases, where insurance is granted upon property in contemplation of its use for a known and specified purpose, have decided that such a policy imports, ex vi termini, a license to keep the articles and employ the agencies incidental and essential to the beneficial enjoyment of the same for the use proposed; and many of those cases go further, and hold that a printed prohibition in some other portion of the instrument will not be allowed to prevail against such a license so implied from the language used in the written portion of the policy. Hayward v. Liverpool & London Life & Fire Ins. Co., 2 Abb. Dec. 351.

All of the adjudications upon the subject appear to sustain the first branch of the proposition there laid down, that such a policy implies a license to keep the articles and employ the agencies incidental to the due and customary use and enjoyment of the property; but the following cases, to wit: Lee v. Howard Fire Ins. Co., 3 Gray, 590; Macomber v. Howard Ins. Co., 7 Gray, 259; and Whitmarsh v. Charter Oak Ins. Co., 2 Allen, 582,—may perhaps be regarded as recognizing an exception to the latter branch of the proposition, where the written terms of the policy are repugnant to the provisions contained in the printed part of the policy, if the latter are clear, explicit, and unambiguous.

Support to that view is also derived from the case of Steinbach v. Insurance Co., 13 Wall. [80 U. S.] 183, and from the case of Portsmouth Ins. Co. v. Brinckley, 2 Ins. J., by Potter, 842; but the court here does not find it necessary to examine that subject, having come to the conclusion to rest the decision in the case upon the ground that the condition in question, when reasonably construed, does not prohibit ordinary repairs, nor such as become indispensably necessary to remedy defects on the premises, which endangered the safety of the property, and which occurred without the fault of the insured, provided it appears that neither the repairs made nor the work done in executing the repairs increased the risk, and that the fire was in no respect attributable to the repairs or the work that was done. Having come to that conclusion, it is unnecessary to decide whether the printed part of the policy is or is not overruled in case it is repugnant to the written part; as, when the whole instrument is properly construed, there is not any such necessary repugnancy in this case as is supposed. Such conditions prohibiting repairs which increase the risk, it is held by some courts, are operative only when

the increased risk is in existence, and that the policy becomes effectual as soon as the increased risk terminates. Schmidt v. Peoria M. & F. Ins. Co., 41 Ill. 298; Insurance Co. of North America v. McDowell, 50 Ill. 129; New England F. & M. Ins. Co. v. Wetmore, 32 Ill. 245.

Enough has already been remarked to show that the court here prefers to rest its decision upon a different ground, but it may not be amiss to add that the ground assumed in those cases would necessarily lead to the conclusion that the plaintiff is entitled to recover. Judgment for the plaintiff, as stipulated in the agreed statement, with costs.

## Case No. 7,183.

JAMES et al. v. The SARAH A. BOICE.

[2 Int. Rev. Rec. (1865) 45.]

District Court, S. D. New York.

SALVAGE—PLUNDER OF PROPERTY—WORK AND LABOR.

[Where a vessel had been turned adrift by a privateer, and before she grounded on a bar had been plundered by libelants, they are not entitled to salvage for getting her off. The owners having expressed a willingness to pay them for work and labor done, the matter was referred to a commissioner to report what amount should be allowed.]

This was an action for salvage. The libel alleged that on August 17, 1864, the libelant [Zachariah R.] James discovered the schooner dismasted and apparently deserted, lying on the bar at the mouth of the inlet at Jones' Beach, on the south shore of Long Island, whereupon he boarded her, and found her to be the Sarah A. Boice, of Great Egg Harbor, N. J., with her hold filled with water, dismasted and abandoned by her master and crew, stripped, and dismantled; that accordingly he took possession, and, with the aid of the other libelants, succeeded, at great risk and peril, in getting her over the bar and into the inlet, and that he kept possession of her till September 12th, when she was removed by the owners. It is alleged that the vessel was worth about $5,000, and claimed to be allowed salvages as in a case of a derelict. The answer alleged that about the 11th of August the schooner was captured by the privateer Tallahassee about thirty miles southeast from Fire Island; that her officers and crew were taken from her by force, and the schooner was, after being robbed of furniture and stores by the privateer, left afloat, with her masts and rigging standing, and that she was carried by the winds and waves to the mouth of the inlet at Jones' Beach, where she grounded on the bar on August 19th; that she remained there till the 23d of August, when she worked off on a full tide, and floated into the inlet, where she grounded and remained till she was got off by the claimants; that on August 27th the claimants heard that the libelant, James, who was wreckmaster, under the statute of the state, was claiming to hold the schooner with the other libelants; that they went there and found she had been greatly plundered by the persons claiming to hold her; that they thereupon took possession of her and got her off themselves. The answer also denied that the vessel was derelict, and averred that the libelants had been exposed to no peril, nor was the vessel in peril while the libelants committed these depredations upon her, and that the conduct of the libelants was not with a fair and honest intent to save the vessel for her owners, but with the design to embezzle the entire property, and appropriate it to themselves. The evidence showed that when the libelants fell in with the vessel, she was adrift, and partially despoiled of her equipment and lading. It was notorious in the vicinity at the time that the vessel had been brought to that condition by capture by the Tallahassee, which subsequently landed her master and crew on the south side of Long Island. As soon as the vessel was discovered thus abandoned, she was surrounded by numerous boats and small craft (many of them managed by some of the libelants), which eagerly purloined every article which could be torn away from her stealthily or by violence, which was openly appropriated to the use of the plunderers. Within a day or two after her abandonment, most if not all the libelants fell in with her without proffering her any relief by salvage, because engaged in thus plundering her. They not only plundered her, but cut away and detached valuable parts of her fixtures and equipment, and embezzled everything that they could remove. The weather remained calm for several days, while the vessel drifted, till on August 16th or 17th she drifted on the bar, and was there boarded by the libelants, or some of them, with the purpose of holding her as a wreck under the state law. The captain of the vessel, as soon as he was released, gave information to her owners of her seizure and position, and they took immediate means, by employing a steam-tug, and in other ways, to reclaim her. On the 27th of August they appeared on the scene and demanded the restoration of the vessel. They, however, expressed themselves as willing to pay the libelants, as for work and labor, for what they had done in getting the vessel off the bar and into the inlet, up to the time when the surrender was demanded, and even continued the services of James and some others during the getting the vessel off the beach.

HELD BY THE COURT: That the libel is only for salvage, and that to maintain it as such, it must be supported by proof that the motives and proceedings of the libelants were in all respects lawful, in good conscience, and meritorious. The maritime code in respect to the allowance of compensation for salvage-services is based upon principles of universal equity and integrity. The law

takes under its own authority of administration property rescued from peril by the aid of strangers, and compels it to satisfy them by a reasonable reward for an honest effort to save it from peril; but it shows no countenance or favor to plunderers. A seizure of wrecked property for culpable plunder, constitutes no lawful salvage. That when the libelants first fell in with the schooner in a helpless state, apparently abandoned and derelict, instead of approaching her with the manifestation of a desire to afford her relief, the whole purpose evinced was to embezzle, confiscate, and appropriate to themselves the ruins of the vessel and her effects, and no evidence is furnished that one individual of the multitude which flocked around the wreck evinced the slightest purpose to save her for the unfortunate proprietors. That the presumption is most forcible that all the libelants who engaged in that wrongful depredation and plunder, were well aware that she was not then a derelict, that her owners resided across the bay, in an adjacent state, and scarcely out of eyesight, and had been the victims of a sudden predatory seizure of their property. That it comports in no sense with the semblance of an honest and fair purpose to save and restore to its true owners a vessel discovered, as this one was by the libelants, to have thereafter followed its remains from day to day, as it floated on a smooth sea and in calm weather, making prey of anything that could be picked from it, till the vessel grounded on the bar. It is suspiciously late for them then to arrogate the position of rightful salvors in possession of the wreck, and claim to be entitled to invoke the law to authorize and confirm to them such a privilege. That on strict rules of pleading, therefore, the action would be dismissible, because there is no proof produced under the libel which sustains the only right averred and claimed by the libelants; but as the owners on demanding that the vessel should be delivered up to them by the libelants avowed a willingness to compensate them for the value of the services rendered by them, as work and labor, to the time when the surrender was demanded, and even to continue the services of James and some others of the libelants, the court sees no objection to considering the case as so opened in its legal issues by that assent, as to permit an account to be taken on a reference as to a quantum meruit allowable to the libelants for such work and labor. Had the respondents elected to put the same to trial upon the single issue of the pleadings upon the record, the decree of the court would logically and justly have been in their favor. But having recognized, on their part, that James and some of his associates had rendered services to the vessel before and after the respondents claimed her surrender to themselves as owners, and having called for the particulars of these services, with an offer to satisfy charges in that respect, which were just, and thus acquiesced in making a reasonable compensation to them; and being persuaded that it is competent to the court to regard the proceedings of the libelants, after the vessel grounded on the bar, or in aid of her reaching that point, to have been work and labor for the benefit of the owners, the court considers it equitable to allow such an amount as may be reported by a commissioner as due them therefor, but without costs, except that the fees of the reference shall be taxed half and half to each party. Order accordingly.

## Case No. 7,184.

JAMES v. STOOKEY et al.

[1 Wash. C. C. 330.] [1]

Circuit Court, D. Pennsylvania. Oct. Term, 1806.

EJECTMENT—EVIDENCE—RECORD AS PROOF—SURVEYS—DIAGRAM OF LANDS.

1. The declarations of a person exercising authority, that he possesses it, can never be received as evidence of the fact of his authority.

2. If a record be produced to prove a fact, and is found to be deficient or imperfect, it cannot be assisted by evidence de hors the same; but the perfect record must be produced.

3. Surveys of lands in Pennsylvania, made by order of the commissioners of property, have been supported in Pennsylvania.

4. A diagram made of the tract of land in dispute, and of the adjoining land, offered to show the boundaries of the land, cannot be given in evidence; because it was not made under the order of the court.

5. The court refused to admit in evidence, a verdict and judgment, given in the supreme court of the state, in a case where the person who had lands called for by the warrant; because it was between different persons, and upon a different question.

This was an ejectment for a tract of land in Berks county. The plaintiff [lessee of James] claimed under a warrant to Richard Hockley, and others, dated in 1762, which recited, that a former warrant had issued to the same persons for this land, and had been surveyed, but not returned. He then offered in evidence a survey of this land, or rather a re-survey made by one Jacobs, who was not an authorized or commissioned surveyor; in virtue of a letter to him from the surveyor general, in which he stated; that, at the request of Mr. Peters, who had an interest in the land, the governor had instructed him to direct the said Jacobs to make the survey. This being objected to as an unauthorized survey, since the surveyor general had no right to appoint a deputy, without the approbation of the governor or proprietary, as appeared by his commission; the plaintiff offered in evidence, a decision of the board of property, in a caveat filed by

[1] [Originally published from the MSS. of Hon. Bushrod Washington, Associate Justice of the Supreme Court of the United States, under the supervision of Richard Peters, Jr., Esq.]

the assignee of Clark v. Dougherty [unreported], stating the survey returned; that it should be received and confirmed, and directing a patent to issue. The plaintiffs, in this case, claimed under Hockley and others, by mesne conveyances. They also insisted, that, on the former trial of this cause, in May last, when a juror was withdrawn, that this survey was read, and not objected to. They contended, that the declaration of the surveyor general, that the direction was given by order of the governor, was sufficient evidence of his approbation; and, that the order of the board of property, accepting and confirming the survey, cured any defect in the appointment. The motion was for a nonsuit.

Before WASHINGTON, Circuit Justice, and PETERS, District Judge.

WASHINGTON, Circuit Justice. This direction of the surveyor general, is not given to an officer duly appointed and commissioned; and, it is clear, that, according to the authority given by the proprietary to the surveyor general, he had no authority of himself, to make such a deputation as this, without the approbation of the governor; and such seems to have been the common understanding and practice, so far as I can collect; for, strange as it may seem, no judicial opinion on the point has been given, or it would have been referred to. But circumstances, to show the approbation of the governor, may be resorted to; and, on this ground, the plaintiff relies upon the statement of this fact, in the letter of the surveyor general, and the order of the board of property. As to the first, the regulation of the proprietary, that no deputy should be appointed without his approbation, would be quite nugatory; if the bare declaration of this officer, that this approbation had been obtained, would give validity to his appointment. This, then, per se, will not do. As to the judgment on the caveat; this might be very important, if it appeared to us judicially, that that judgment referred to this survey. An attempt was made to establish this fact, by an agreement between Anderson, who styles himself agent for Dougherty & Smith, and James; stating the existence of the caveat, and referring to this land. But, the court refused to hear that paper; because, if part of a record be produced to prove a fact, and is deficient, you cannot help it out by evidence de hors the record, but must produce the whole record. I find, from [Fothergill v. Stover] 1 Dall. [1 U. S.] 6, that surveys have been supported, made upon special orders from the commissioners of property; but that was a source of authority, much higher than the surveyor general, for the governor was a member of that board. We must then decide, that this survey is inadmissible; that it forms a necessary link in the plaintiff's title; and, of course, that he must be nonsuited. At the same time, the objection is clearly a surprise upon him, in consequence of its having been read at the former trial, and not then objected to; if it had been, he might probably have proved enough to satisfy us, that the governor had approved the declaration of this fact by the surveyor general. The whole record in the caveat, and other papers, might have answered.

PETERS, District Judge, concurred in directing the nonsuit; but we afterwards set it aside on the ground of surprise.

In the progress of the cause, the following objections were made by the defendants' counsel, to papers offered by the plaintiff.

First; a diagram of this and the adjoining lands, made by George Woods, was offered, and objected to.

BY THE COURT. This, not being made under the authority of this court, and being intended to show the boundaries and situation of the lands, is inadmissible.

Second; a verdict and judgment in the supreme court of this state, between Lukins & Lytle v. Thomas Croyle [unreported], the person whose land the plaintiffs' warrant called for, to show the boundaries of Croyle's land to be adjoining the plaintiffs', as he claims, and to prove the claim of Croyle to it. This THE COURT overruled, as being between different persons, and upon a different question.

[See Cases No. 7,181 and 7,185.]

## Case No. 7,185.

JAMES v. STOOKEY.

[2 Wash. C. C. 139.] [1]

Circuit Court, D. Pennsylvania. April Term, 1808.

EJECTMENT—RECITALS—EVIDENCE.

Although the recitals in a warrant, to another than a party to the suit, may not be evidence of the fact stated in them, yet when they are corroborated by circumstances, such as the antiquity of marks on the ground, and by the correspondence between the marked lines and those stated in the warrant, the jury may consider the recital, that a previous warrant for the land had issued, as true; the papers of the surveyor general, to whom the original warrant may have been returned, having been destroyed by fire.

[Cited in Doolittle v. Galena & C. U. R. Co., 14 Ill. 381.]

The lessor of the plaintiff claimed under a warrant, dated the 10th of July, 1762, to William Hockley, which recited that a warrant had issued for the same land, to the same person, in 1755, which had been surveyed, but that the survey had not been returned. The warrant is for five hundred acres, lying above Snake Spring, adjoining Thomas Croyle. The title is regularly de-

[1] [Originally published from the MSS. of Hon. Bushrod Washington, Associate Justice of the Supreme Court of the United States, under the supervision of Richard Peters, Jr., Esq.]

duced from Hockley to the plaintiff, for one-half of the land. The warrant was surveyed in 1767, by Jacobs, under a special order from the surveyor general. This survey, which was objected to and disallowed by the court on the former trial, was now admitted; the whole proceedings, upon the caveat of the plaintiff and Smith, against the assignee of Dougherty, being now produced; in which case, judgment was given for the caveator, and a patent ordered to issue for the land in question. From the blocking of the trees, found in the lines of this tract by the surveyor, who surveyed it under the order of this court, there was strong evidence, that this tract had been surveyed previous to the year 1760; and the location of it then, as laid down by the survey in this cause, was proved by very strong evidence. A survey made for George Croghan, of an adjoining tract of land, in 1755, and patented in 1763, calls for a line of this tract, as Hockley's land, by course and distance. A recovery, in ejectment, by Robert Elliott, against Devenbaugh, in 1793, was also offered as additional proof of the boundaries of the land; which evidence was admitted by the court, in the light, and in the degree of hearsay evidence, as stated on the former trial. Evidence was also given, that the surveyor general's house had been burned, before 1762. The defendant claimed under a warrant dated the 7th of July, 1762, surveyed in 1766: but the location of the land did not appear to the court to interfere with the tract, as claimed by the lessor of the plaintiff.

WASHINGTON, Circuit Justice, charged the jury that the recital, in the warrant of 1762, to Hockley, was, as between these parties, no evidence that a warrant had issued, and been surveyed in 1755; yet, taken in connexion with the antiquity of the marks on the line and corner trees; and the call made by course and distance, of one of the lines of this tract, as Hockley's land, in Croghan's survey, made in 1755; the jury might consider the existence of Hockley's warrant in 1755, as proved; particularly, as the burning of the surveyor general's house accounts for the non-production of the papers, and for the issuing of the second warrant, on the 10th of July, 1762. Should this be the opinion of the jury, then they ought to find for the plaintiff; since the defendant does not set up a title which commences earlier than the 7th of July, 1762. Should the jury not feel themselves warranted in considering the plaintiff's title to have commenced before the 10th of July, 1762, which is three days later than that set up by the defendant; they will then inquire whether the location of the tract under the warrant of the 7th of July, interferes or not with that of Hockley's warrant. To the court, it appears that the survey did not interfere; and if this should be the opinion of the jury, their verdict will, on this ground, be for the lessor of the plaintiff, for an undivided moiety of the land in the declaration mentioned.

Verdict for plaintiff for a moiety.

[See Cases Nos. 7,181 and 7,184.]

## Case No. 7,186.

JAMES et ux. v. THURSTON et al.

[1 Cliff. 367.] [1]

Circuit Court, D. Rhode Island. Nov. Term, 1859.

AWARDS—HOW CONSTRUED.

Awards are to be liberally construed, because they are made by judges of the parties own choosing, but they must decide the whole matter submitted to the referee, and they must be certain, final, and conclusive of the whole matter referred.

[Cited in Fluharty v. Beatty, 22 W. Va. 706.]

At law.

Thomas A. Jenckes, for complainants.

Benjamin F. Thurston, for respondents.

CLIFFORD, Circuit Justice. This is a bill in equity brought by the complainants against Robert L. Thurston, Henry W. Gardner, and Gideon J. Hicks, copartners under the firm of Thurston, Gardner, and Company. Among other things complainants allege that Henry W. Gardner, acting for the firm, made a conveyance of one fourth part of all the property of the firm to Alfred R. Fiske, who transferred to him certain stocks of the Grafton Mills, amounting to six thousand dollars, and upon the delivery of the deed of the property the grantee became a member of the firm; that the consideration of the purchase was twenty-three thousand dollars; that the remainder was paid as follows: Charles T. James made, signed, and delivered to the respondents three promissory notes, antedated as of August 16, 1852. One for six thousand dollars, payable in two years; another for the same amount, payable in three years,—both indorsed by Alfred R. Fiske; and one for five thousand dollars, payable in two years. And the first-named complainant agreed in writing to render services for the firm by using his influence to procure contracts for the manufacture of machinery; and the firm agreed, upon the completion of each contract and payment for the work done under the same, to credit the complainants with a commission of five per cent, to be applied to the payment of their notes. They also allege that Charles T. James received nothing for the notes; that the agreement was that they were to be held as collateral security for the indebtedness of Alfred R. Fiske, to be paid by him in services to be rendered by him as the head of the mechanical department of the establishment. Fiske continued a member of the firm from the 29th

[1] [Reported by William Henry Clifford, Esq., and here reprinted by permission.]

of October, 1852, and was entitled to one fourth part of all the property; but on the 23d of June, 1857, he conveyed to Henry W. Gardner, for the benefit of the concern, all his interest in the property, and withdrew from the firm; that on that day it was agreed in writing that if Fiske or any other person for him should, within five years from that time, pay the amount of his indebtedness as aforesaid, then he, the said Henry W. Gardner, would convey to Phebe Fiske, wife of said Alfred R. Fiske, one fourth part of all the property belonging to the firm; and they aver that both said instruments were executed and delivered without the knowledge of the complainant. Having stated these preliminary facts, they then alleged that the respondents, including said Alfred R. Fiske, commenced a suit against the said James as the maker of the two notes first named, in the supreme court of the state, recovered judgment, and levied the same on certain real estate therein described as the property of the judgment debtor. As alleged, the respondents also commenced a suit on the other note, recovered judgment, and levied the same on certain personal property, as the property of the complainant, but which the complainants aver was the sole and separate property of Lucinda James, the wife of the said Charles T. James. They also allege that on the 31st of December, 1859, Alfred R. Fiske and wife, for a valuable consideration, conveyed to the said Lucinda James all their estate, title, and interest in the property and effects of the before-mentioned firm; that the respondents have constantly carried on the business, made large profits; and they aver that the share of said Fiske is more than sufficient to pay his indebtedness. Wherefore they pray for an account and for a statement of the affairs of the concern and for redemption.

Respondents appeared and made answer to the suit, and a general replication was filed by the complainants. At the June term, 1860, by agreement of the parties, the cause was referred to Edward A. Dickenson, as sole referee. He made a report on the 7th of October, 1861. Complainants excepted to the report of the referee, for the reason that the same did not decide the whole matter submitted to him, and that it was not certain, final, and conclusive of the whole matter referred.

Looking at the conclusion of the report, it is evident that the objections to it are well taken. Awards are to be liberally construed because they are made by judges of the parties' own choosing; but they must decide the whole matter submitted to the referee, and they must be certain, final, and conclusive of the whole matter referred. Carnochan v. Christie, 11 Wheat. [24 U. S.] 446; Caldw. Arb. (Smith's Ed.) 226. Suffice it to say that the report is clearly deficient in all these particulars; hence it seems unnecessary to pursue the subject. The report, therefore, is set aside, and as neither party asks for a recommitment, the cause must stand for trial in this court.

JAMES (UNITED STATES v.). See Case No. 15,464.

## Case No. 7,187.

JAMES v. WHARTON.

[3 McLean, 492.] [1]

Circuit Court, D. Ohio. Dec. Term, 1844.

EVIDENCE—BOOK OF ORIGINAL ENTRIES—PROOF OF HANDWRITING.

1. Where the clerk is dead, who made the entries in a book of accounts, his hand writing may be proved.

2. But the original entries must be proved, and not a copy.

At law.

Mr. James, in pro. per.

Mr. Parrish, for defendant.

LEAVITT, District Judge. This was an action of assumpsit, brought by the plaintiff as an assignee under the bankrupt law. On the trial, a book of accounts was produced; and the plaintiff proposed to authenticate it as evidence to the jury, by proof that the entries which it contained were in the hand writing of a clerk, now a resident of another state. This evidence was objected to, as secondary in its character, and, therefore, inadmissible, unless the death of the clerk was first proved.

The doctrine is now well settled, that a book of accounts may be substantiated by proof of the hand writing of the clerk, who made the original entries, if he is dead, or without the jurisdiction of the court. The case of Cram v. Spear, 8 Ohio, 494, is an authority in point. And recent elementary writers on the law of evidence sustain the position, that the fact of the death of the clerk is not material to the admissibility of this kind of evidence. Greenl. Ev. 143. This writer remarks, that "the value of the entry as evidence, lies in this, that it was cotemporaneous with the principal fact done, forming a link in the chain of events, and being part of the res gestae." Id. 144. But this principle does not apply to the book of accounts, now offered in evidence. This is not a book of original entries, but a mere transcript from that book, made by a clerk, who did not make those entries. The ground on which alone proof of the hand writing of the clerk gives validity to the book of accounts is, that it is the book of original entries; that the clerk is supposed to be cognisant of the transactions which it records; and, that the entries made by him, were made at or near the time they purport to have been made; and are, therefore, a

[1] [Reported by Hon. John McLean, Circuit Justice.]

part of the res gestae. As a mere copy, made by a clerk who did not keep the original book, proof of his hand writing in no way conduces to establish the authenticity of the book offered in evidence; and it is, therefore, excluded from the consideration of the jury.

The plaintiff introduced other evidence to prove his account, and obtained a verdict in his favor.

JAMES A. BURDEN, The. See Case No. 7,296.

## Case No. 7,188.

The JAMES ADGER.

[3 Blatchf. 515;[1] 35 Hunt, Mer. Mag. 453.]

Circuit Court, S. D. New York. Sept. 12, 1856.[2]

COLLISION—STEAMER AND SAILING VESSEL—LOOKOUT—SPEED.

1. In this case, a steamer was *held* liable for the damages caused by a collision between her and a sailing vessel, which took place through the want of a vigilant lookout on board of the steamer.

2. A speed, in the steamer, of between nine and ten knots the hour, was, in this case, *held* to be too great for the reasonable security of sailing vessels in her track, and not to be excused by the fact that she had a contract with the United States to carry the mail in a specified time.

[Cited in The City of Panama, Case No. 2,764.]

3. The disaster in this case was also *held* to be partly due to the fact that the mate of the steamer, who was in charge of her, gave a wrong order as to changing her helm, in view of the approaching collision, without first ascertaining the position and course of the sailing vessel.

[Appeal from the district court of the United States for the Southern district of New York.]

This was a libel in rem, filed in the district court, by the owners of the schooner Trader, against the steamship James Adger, to recover damages for a collision, that occurred on the morning of the 1st of April, 1855, off the Capes of the Delaware, by which the schooner was run down and totally lost. After a decree in favor of the libellants [Todd and others], in the district court [Case No. 14,074a], the claimant appealed to this court.

Francis B. Cutting, for libellants.
Edgar S. Van Winkle, for claimant.

NELSON, Circuit Justice. The schooner was on a voyage from St. Mary's, Georgia, to New York, and the James Adger was bound from New York to Charleston, South Carolina. The wind was northeast by east, and the schooner was close hauled, heading about east southeast. She was struck on her larboard bow, near the fore rigging, by the starboard bow of the steamer. The wind was light, between two and three knots the hour, and the night rainy and hazy. The steamer was going at the rate of between nine and ten knots the hour. Her lights were discovered by the hands on the schooner when she was some three-quarters of a mile off, and a light was immediately shown in a conspicuous place by the mate of the vessel, who had charge of the watch at the time. There is some difference of opinion among the witnesses as to the darkness of the night, and as to the distance a vessel could be seen at the time of the collision; but I am quite satisfied that, if a vigilant lookout had been kept on the steamer, the schooner, with her light, could have been discovered in season to have avoided her. And I may add, that if the night was as dark as is stated by some of the leading witnesses on behalf of the steamer, her rate of speed was too great for the reasonable security of sailing vessels in her track.

In answer to this, it is said that she is under a contract to carry the mail of the United States between New York and the city of Charleston, and to make the passage in sixty hours. But I cannot agree that this affords any excuse for a rate of speed which the law regards, under the circumstances, as dangerous to the lives and property of our citizens, or any exemption from the responsibility common to this species of our commercial marine.

There is another observation that should be made, concerning the conduct of the mate, who was in charge of the steamer at the time. On the report of the vessel to him as ahead, by the lookout, he immediately ordered the helm to be put hard-a-starboard, which was done. He admits that the lookout did not report the course the vessel was heading, nor did he stop to ascertain the fact before he gave the order. He also admits, that if he had known the position of the vessel, he would have ported his helm, instead of putting it hard-a-starboard, and that this would have carried the steamer under her stern. I may add, that it would probably have avoided the misfortune. I think that the decree below was right, and should be affirmed.

JAMES ADGER, The (TODD v.). See Case No. 14,074a.

JAMES AND CATHARINE, The (BAINS v.). See Case No. 756.

[1] [Reported by Samuel Blatchford, Esq., and here reprinted by permission.]

[2] [Affirming Case No. 14,074a.]

## Case No. 7,189.

### The JAMES ANDREWS.

[2 Spr. 121.] [1]

District Court, D. Massachusetts. March, 1862.

PRIZE—ENEMY'S PROPERTY — RESTORATION—PAYMENT OF COSTS—RULE IN INSTANCE CASES.

Where property is captured under circumstances showing a clear case of enemy's property, and the evidence in preparatory is to the same effect, and the claimants are allowed further proof, on which their property is restored to them, it will be on the terms of paying the costs and expenses of the captors. The same rule does not apply to instance cases.

In admiralty.

R. H. Dana, Jr., U. S. Atty., for the United States and captors.

W. R. P. Washburn, for claimants.

SPRAGUE, District Judge. This barque and her cargo have been proceeded against in a cause of prize, as enemy's property. The evidence in preparatory showed them to be the property of James Maloney, a citizen and inhabitant of New Orleans. On the authority of the case of The Amy Warwick [Case No. 341], this would have required their condemnation, as enemy's property. But on the further proof which was allowed (being the same that was used in the instance cause, hereafter referred to), it was made to appear to my satisfaction that the vessel and cargo did not, in fact, belong to persons residing within the rebel states, although all the documents so purported. The vessel and cargo were accordingly decreed to be restored to the claimants, and the counsel for the captors moves that the restoration be on condition that the costs and expenses of the captors be paid.

The ship's register declared her to be the sole property of James Maloney, of New Orleans; and that is the proper document to authenticate the ownership of a vessel, and her home port. Officers have a right to trust to the register, as true. The other documents on board—the manifest and shipping articles—were to the same effect. The name of her home port on her stern, as required by law, was New Orleans. In short, the owners themselves, in every form known to the laws, declared the vessel and cargo to belong to a resident of New Orleans. The capture was not from suspicious circumstances, or doubtful indications, but on the direct proof of official documents furnished by the owners themselves. It is difficult to suppose a stronger case of good cause for capture. The costs and expenses in court were necessarily incurred to condemn the property, on these proofs, which were sufficient. The claimants have been allowed the favor of contradicting their own solemn documents, and of showing, by further proof, that James Maloney did not in fact reside in New Orleans, but in Mexico, and that half the vessel and cargo belonged to Asa F. Cochrane. As to Cochrane, the proof was clear that up to a recent period he had always declared himself a resident of New Orleans; but I am satisfied, on the evidence, that he had changed his residence to Boston before the capture. The trial and examinations have really been for the benefit of the claimants. The order must be for delivery, on condition of paying full costs and expenses.

The bark (but not her cargo) was also seized as forfeited to the United States under Act July 13, 1861, c. 3, § 6 (12 Stat. 257). To enforce this forfeiture, a separate proceeding, by an instance suit, was necessary. The evidence was the same as that in the prize cause. To avoid unnecessary expense to the claimants, but one trial and argument was had. The documents, as above stated, showed the vessel to belong to James Maloney, and that he was a resident of New Orleans. The further evidence offered by the claimants showed her to be the joint property of James Maloney and Asa F. Cochrane, and that at and after the time fixed for the operation of the act of July 13, to wit, Sept. 1, 1861, Maloney resided in Mexico, and Cochrane in Boston. It was objected that the claimants were estopped by the documents, and by the oath of Maloney in taking his register. But, although the point was a nice one, I considered the evidence admissible, and that the court was not precluded from forming an opinion of the truth, notwithstanding the documents and the oath on which they must have been obtained. There was, therefore, in the instance cause, as in the prize cause, sufficient ground for seizure and proceedings; and no damages or costs are asked for, or would be given, against the seizing officer, who was the collector of the customs at Edgartown. But the government asks that the claimants be required to pay costs and expenses. It is admitted that the rule is not the same in seizures for violation of municipal law, as in cases jure belli; and no case has been cited where, in a case of the former class, costs have been decreed against the claimants on a restoration of property. But it is contended that proceedings under Act July 13, 1861, are in the nature of belligerent proceedings. The Marianna Flora, 11 Wheat. [24 U. S.] 1; The Palmyra, 12 Wheat. [25 U. S.] 1. The expenses and costs of proceeding in one cause probably cover nearly all that can be claimed; and I do not feel called upon to make this case a precedent of giving costs against the prevailing party in a proceeding by the government which is not one of prize of war.

In the prize cause, the vessel and cargo are restored on condition of paying costs and expenses. In the instance cause, the vessel is restored without costs.

[1] [Reported by Hon. Richard H. Dana, Jr., and here reprinted by permission.]

## Case No. 7,190.

### The JAMES A. WRIGHT.

[3 Ben. 248.] [1]

District Court, S. D. New York. May, 1869.[2]

MASTER—AGENT—TOW-BOAT—ICE—NEGLIGENCE.

1. Where D., the master of a barge, which lay, laden with coal, at Newburgh, was discharged, and was notified that the barge was put in charge of one W., and on the same day D. was told by the owners of the cargo, who were agents of the owners of the barge, to bring the barge and her load to New York if he got a chance, whereupon he applied to a tug to tow the barge down, and the master of the tug told him it was not safe to take her down, on account of the ice, whereupon D. said he would take the risk, and the tug took hold of her, and, while the barge was being hauled out, W. caused the master of the tug to be told that he must not take the barge, as D. had no authority, but, as D. agreed to take the risk, the tug took the barge in tow, and, in going down the river, the barge was cut through by the ice and sunk, and the owners of the barge and the cargo filed libels to recover for the loss: *Held*, that D. had no authority on behalf of the libellants to take for them the risk of going through the ice.

2. The tug, under the circumstances, took all the risks of safe towage, and it was negligence to tow the barge into the ice, and the tug was liable for the loss.

[Cited in The M. J. Cummings, 18 Fed. 184.]

In admiralty.

W. R. Beebe, for libellants.

D. McMahen, for claimants.

BLATCHFORD, District Judge. These were two libels filed, the first one by the owner of the barge Arctic, and the second one by the owners of a cargo of coal on board of her, to recover damages for the loss of the barge and her cargo, in consequence of her having been cut through by ice in the Hudson river, in the gorge just above West Point, and sunk, about dusk on the evening of the 27th of December, 1867, while in tow of the steam-tug James A. Wright, from Newburgh bound to New York. The libels allege that the barge was taken in tow without authority, and after those in charge of the tug had been forbidden to take her, and that the loss occurred through the fault, negligence and want of care of those in charge of the tug. The defence set up in the answers is, that the towing was authorized by one Dodge, as master of the barge, and in command of her, and exercising control over her navigation; that Dodge agreed to take the risk of the ice; that the barge, on the voyage, sprung a leak by striking ice, and sank because she did not have a proper pump; and that the loss did not happen through fault, negligence and want of care of those on the tug. This defence is sought to be made out principally by the deposition of Dodge, which has been taken on the part of the claimants, but, instead of aiding the defence, it satisfactorily establishes the case on the part of the libellants. The barge was taken in tow, at Newburgh, during the afternoon of the 27th of December. Dodge testifies that he was discharged as master on the 24th of December, and was then notified that the barge was put in charge of one Wanzer, at Newburgh; that, after he was discharged, but on the same day, he was told by the owners of the cargo, who were the agents of the owner of the barge, to bring the barge and her load of coal to New York, if he got a chance; that the master of the tug told him, before they started, that there was ice in the river below, and that it was not safe to take the boat down; that he told the master of the tug that he would take the risk of the ice himself; that, when the barge was about to be taken in tow, he heard the master of the tug and his men forbidden, by a person on the dock, at Newburgh, to move her; that she had a pump which was in good order; that the ice was choked up at West Point, and could be seen ahead before it was reached, there being no open passage through it; and that, after the barge was cut through by the ice, he pumped with the pump until he found she could not be saved. It appears, by other testimony, that Wanzer, on seeing the barge being hauled out to be towed, caused the master of the tug to be told that he must not take the barge with him, as Dodge had no authority. Upon this, the master of the tug at first refused to tow the barge, but, at length, he proposed to Dodge to run the risk, and Dodge said he would take the risk, and then the barge was taken in tow. At the most, therefore, Dodge had authority only to bring the barge and her cargo to New York. He had no authority to have a hole cut in the barge by the ice, and to deposit her and her cargo at the bottom of the river, instead of landing her at New York safely; and he had no authority, on behalf of the libellants, to take for them the risk of going into and through the ice choked up at West Point, at a time when the master of the tug expressly told him that it was not safe to take the boat down. The tug, taking the barge in tow, under the circumstances above stated, took all the risk of her safe towage, and it was negligence on the part of the tug to drag the barge into the choked ice, so that she could be and was cut through and sunk. There must be decrees for libellants, in both cases, with costs, with references to compute the damages.

[Affirmed by the circuit court, on appeal, Case No. 7,191.]

[1] [Reported by Robert D. Benedict, Esq., and here reprinted by permission.]

[2] [Affirmed in Case No. 7,191.]

## Case No. 7,191.

### The JAMES A. WRIGHT.

[10 Blatchf. 160.] [1]

Circuit Court, S. D. New York. Sept. 23, 1872.[2]

TOWBOAT—ICE—NEGLIGENCE—TOTAL LOSS — DISCHARGED MASTER — AUTHORITY TO CONTRACT FOR TOWAGE—DEATH OF CLAIMANT — SURETIES ON BOND.

1. A libel was filed, in the district court, against a vessel. D. appeared, and filed a claim to the vessel as owner, and, with E. and M., as sureties, gave a bond for the value of the vessel, and she was released. D. answered the libel, putting in a defence. Afterwards, and before the trial, D. died. No notice was taken of his death. The trial was had, counsel appearing for D. A final decree was rendered against the vessel, and a summary judgment against D., E. and M. An appeal to this court was taken, on behalf of D., the sureties on the bond for a stay being E. and M. The district court was not advised of the death of D., although his proctors knew of it. No letters of administration on the estate of D. were taken out, until after such final decree was entered. On the trial in this court, counsel appeared for D., as appellant, and urged, as ground for a reversal of the decree, that, by the death of D., the suit abated, and the decree against him was erroneous: *Held*, that the suit did not abate by the death of D.

2. Whether the appeal was properly taken in the name of D., after his death, quere.

3. This court, in decreeing, on the merits, for the appellee, ordered that the death of D. be suggested, and that the judgment be against E. and M.

4. Want of authority, in a discharged master of a vessel, to contract for her towage, considered.

5. Notice to the towing vessel, of such want of authority, considered.

6. Want of authority to contract, on behalf of the towed vessel, that the risks of the towage should not be borne by the towing vessel, considered.

7. Negligence in towing a vessel into a field of ice, and then leaving her to become a total loss, considered.

8. A total loss *held* to have been established by proof; but, the fact that the answer did not deny the allegation, in the libel, of a total loss, and substantially admitted one, would supply the place of absent proof.

9. The commissioner's report as to the value of the lost vessel not disturbed, where there was conflicting evidence.

[Appeal from the district court of the United States for the Southern district of New York.]

In admiralty.

Oliver P. Buel, for libellants.

Dennis McMahon, for claimant.

WOODRUFF, Circuit Judge. These two appeals were heard together, as they were tried below [Case No. 7,190], upon like pleadings, and upon the same proofs, and the decision of the one necessarily determines the right of recovery in the other. The libellants in the first case were the owners of a cargo of coal, laden on board the canal boat or barge called the Arctic, and the libellant in the second case was the owner of the barge itself. The libels allege, that, on or about the 27th of December, 1867, the barge, having the coal on board, was lying at Newburgh, in a safe and convenient place, and that the steam tug James A. Wright, by its agents and servants, against the wish of the libellants, and without authority, although forbidden to do so, took the said barge, with her cargo, away from Newburgh, and attempted to tow her to New York; and that, in doing so, the said barge, and her said cargo, by the fault, negligence, and want of care of those on the said tug, became wholly lost to the libellants. The steam tug having, on the filing of the libels, been attached, and the monition having been served, Silas A. Dakin, alleging himself to be sole owner, appeared and claimed the steam tug. He, with James T. Easton and James McMahon, gave a bond for the value of the tug, and she was released from custody, and was afterwards sold and sent from the United States. Dakin, as claimant, put in answers to the libels. The answers do not deny the total loss of the barge Arctic and her cargo, but deny that the barge was taken in tow against the will of the libellants, or without authority, and deny that they were "lost to the said libellants by the fault, negligence, and want of care of the persons on the tug, but aver that the same were lost in the manner set forth in the answer," which is, in substance, as follows: That, on the 27th of December, 1867, the master and person in command, and who exercised control over the navigation, of the barge, desired to have her towed by the claimant; that the claimant endeavored to dissuade him from so doing, by informing him of the danger of the navigation; that such master made fast his line to another barge there lying, ready to be towed by the Wright, and, notwithstanding the claimant told him he would not tow him, and told him to take off his line, persisted, declaring that, as the claimant had agreed to tow him down, he would not take off his line; that the claimant thereupon told him, that, if he persisted in holding on to the tow, he must understand that the claimant would not be responsible for his boat and cargo, but that he must take all the chances and risk of the ice in the river; that, after this, the claimant told him to take off his line and make it fast to the dock, but the said master refused to fasten his line to the dock, and said he would take all the risk of ice in the river; that the claimant proceeded in his voyage most care-

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[1] [Reported by Hon. Samuel Blatchford, District Judge, and here reprinted by permission.]

[2] [Affirming Case No. 7,190.]

fully, feeling his way through the ice; and that the Arctic lightly struck a field or piece of ice, which caused her to leak some, and, not having a proper pump, she slowly filled, and, although every effort was made to save her, on the part of the claimant, she sank in the flat of the river.

About one year after the answer was put in, Dakin, the claimant, died. No notice was taken of his death, and the cause was thereafter, in March, 1869, brought to trial, at which the proctors and counsel for the claimant attended. Proofs were taken at great length, on both sides. The fact of the death of the claimant was not called to the attention of the court, nor was any question made that the cause did not proceed legally and regularly to the decree, which adjudged the tugboat liable, and directed a reference to compute damages. On the coming in of the report, exceptions thereto being argued, a final decree was entered. Thereupon, the proctors of the claimant gave the usual notice, declaring that the "claimant" thereby appealed to the circuit court, &c.; and the former stipulators, Easton and McMahon, gave the usual bond for the damages and costs, to stay the proceedings. In all this, no notice was taken of the death of Dakin, though it is apparent, from the record, that it was known to his proctors; and it now further appears, that, during the pendency of the suit in the district court, and until after the final decree therein, there were no letters of administration on his estate taken out.

On the appeal to this court, the suit was again brought to trial, and has been fully heard, counsel appearing professedly for the claimant, as appellant, and counsel for the libellants.

(1.) The point first to be considered, now, on this appeal, urged, as ground for reversing the decree of the district court, is, that, by the death of the claimant, the suit abated, and that it was error to proceed therein to a final decree, without calling in the representatives of the deceased. On that subject, I must follow the declaration of the supreme court, in Penhallow v. Doane's Adm'r, 3 Dall. [3 U. S.] 54, that, in proceedings in rem, in admiralty, the death of a claimant does not abate the suit, nor render a subsequent decree therein erroneous. I deem it unnecessary, after that declaration, to discuss the question at length, but, numerous cases relating to the nature of such proceedings, and their conclusiveness as to all persons who do not intervene for the protection of their interest in the rem proceeded against, and relating to the substituted security which, when a discharge of the attached vessel is obtained, stands in court in lieu thereof, tend to the same conclusion. The vessel is the defendant. All the world must take notice, at their peril, that condemnation is sought. All having an interest may intervene, and if, by death, or otherwise, an interest is transmitted or devolved upon persons not previously entitled to intervene, it is for them to protect their own interest, by applying to the court for that purpose. The libellant should not be affected by their neglect. There is no more reason why he should take notice of a change of interest, than that he should originally have made the owner of the vessel a party to the suit. Until some counter utterance from the supreme court, I must hold, that the libellants rightfully proceeded to trial and decree, and that therein is no error. It was suggested, that the decision referred to was made prior to the act of September 24, 1789, and that that act (1 Stat. 90, § 31) establishes a different rule. Not so. The section referred to does not at all relate to or affect suits in admiralty, and the court, in the case cited, plainly announce a general rule, applicable to such suits.

I do not, however, think it clear, that the appeal to this court was properly brought. In that, the deceased claimant is put forward as an actor, seeking the aid of this court, to avoid the decree of the district court. Had the libellants seen fit to move this court to dismiss the ostensible appeal, the question would have been presented; and, if the argument now urged by the proctor for the deceased has any force, it might, perhaps, have resulted in dismissing the proceeding from this court, and in leaving the decree as it now stands in the district court. Whether a deceased claimant can appeal, is a question that has not been argued, and is now not material, except perhaps to determine whether this court ought to examine the case on the merits, or dispose of the matter without such examination.

(2.) Notwithstanding the question last above suggested, I have thought it probable, that, in any event, the parties in interest would desire to know my conclusions upon the other questions raised, which include the merits of the controversy. Those conclusions are:

1st. That Dodge, the alleged master of the barge Arctic, had been discharged, had no authority to employ the tug boat, and could give to her owners no warrant or excuse for removing the barge from the place of safety where she lay. Notwithstanding his testimony, the direct testimony in contradiction, and his own conduct and admission, satisfy me that no such authority was given him.

2d. That Dakin, the master of the tug, was informed of the want of authority in Dodge, and was notified by the person to whose care the barge had been committed, not to remove her. Had there, therefore, been any apparent authority in Dodge, arising from the facts that he had once had control of the barge, and then occupied her cabin as a sleeping room (of which facts, however, it does not appear that the master of the tug had any knowledge), the notice

given was enough to put the master of the tug to enquiry, and, when he accepted the declaration of Dodge, and bargained with him to tow the barge, he acted at his peril.

3d. Taking the authority of Dodge to have been given him in the very terms stated by him, on which the counsel for the nominal appellant relies, it did not warrant the extraordinary agreement which it is alleged was made. Without dwelling on what is claimed by the owners to be a most exorbitant and unreasonable stipulation as to the price for the towage, he was not authorized to relieve the tug-boat from the rules of towage, nor had the master of the tug any ground for the assumption that he had any such authority.

4th. Independent of the question of negligence, in towing the barge into a field of ice, and subjecting her to injury, without any care, painstaking or precaution at the time of her greatest peril, it is not shown that it was necessary to leave her, where she was left after she received her injury, to drift off and become a total loss.

5th. There is nothing in the claim made, on this appeal, that the libellants were bound to make further efforts to find and raise the barge. Some of the testimony which appears in the case may not have been admissible, had objection been made, but enough appears, I think, to establish a total loss. If there was less proof, it is not material, since, as already stated, a total loss is alleged in the libels, and is not only not denied, but the terms of the answers quite plainly admit it.

6th. Upon the conflicting evidence in regard to the value of the barge, there is no sufficient ground for saying that the commissioner's report is not warranted by the proofs. There were estimates of her value greatly in excess of the amount reported, and there were some that were greatly less. It is not a case in which his conclusion from all the testimony should be disturbed.

Upon the merits, I have no hesitation in saying that the decree of condemnation was proper, and that the libellants are entitled to a like decree in this court, awarding them the amount of such decree, with interest and costs, unless counsel desire to be heard on the question, above suggested, whether the appeal to this court ought not to be dismissed. Had the attention of the district court been called to the fact that Dakin, one of the bondsmen on whose stipulation for value the vessel was released, had died, that court would, probably, have ordered summary judgment against the survivors only. The decree is, probably, invalid as to the deceased, and, if so, was not prejudicial to any one. The survivors, certainly, are not prejudiced thereby. But, the summary judgment in this court should contain a suggestion of the death of Dakin, and be entered against the other stipulators.

## Case No. 7,192.

The JAMES BOWEN. The L. P. DAYTON. SCOW NUMBER FOUR.

[10 Ben. 430.] [1]

District Court, S. D. New York. May, 1879.[2]

COLLISION IN HUDSON RIVER—PLEADINGS—TUG AND TOW.

1. The barge C., being towed down the North river alongside of the tug D., came in collision with a scow in tow of the tug B., which was going up the river. The owner of the barge filed a libel against the two tugs and the scow to recover the damages sustained by her. Each of the vessels filed a separate answer. Each tug denied any fault on its part and charged that the collision was due to fault of the other tug. The case was submitted to the court on the pleadings alone: *Held*, that the fact of the helplessness of the barge was prima facie evidence that the collision was caused by the negligence of one or the other or both of the tugs, but was not prima facie evidence of the negligence of either tug alone;

[Cited in The B. B. Saunders, 19 Fed. 120.]

2. The answers of the tugs were not evidence against each other.

[See note at end of case.]

3. There was therefore on the facts admitted no presumption of fault against either tug.

[See note at end of case.]

4. The answer of neither tug admitted that the tug was acting in violation of the 18th rule of navigation.

[See note at end of case.]

5. The question whether that rule imposes on the two vessels an obligation to port her helm depends partly on the distance between the two courses on which the vessels are proceeding, and the rule does not preclude the vessels from passing on the starboard side, if the movement for that purpose is seasonably commenced and executed.

6. The libel therefore must be dismissed against all the vessels.

[7. Cited in The Adolph, 4 Fed. 742, to the point that an innocent third party, injured by a collision, cannot receive damages against either of the colliding vessels without alleging and proving that that vessel committed a fault which caused, or contributed to cause, the collision.]

[This was a libel brought by Thomas McNally, the master and owner of the barge Centennial, against the steam tugs James Bowen and S. P. Dayton and the scow Number Four. The case was submitted upon libel and answers, no testimony being put in on the part of either of said parties.]

E. D. McCarthy, for libellant.

W. D. Shipman and Jos. Larocque, for the Bowen and the scow.

R. D. Benedict and J. E. Carpenter, for the Dayton.

CHOATE, District Judge. This is a libel brought by Thomas McNally, the master and owner of a barge called the Centennial, to

[1] [Reported by Robert D. Benedict, Esq., and Benj. Lincoln Benedict, Esq., and here reprinted by permission.]

[2] [Affirmed in 4 Fed. 834, and by supreme court in 120 U. S. 337, 7 Sup. Ct. 573.]

recover for the loss of the barge and her cargo by collision. The case has been submitted on the libel and answers. The facts admitted by the pleadings are that the Centennial was, on the evening of February 14th, 1879, after dark, which was the time of the collision, in tow of the L. P. Dayton, being lashed to the steam-tug on her starboard side, and her stem projecting about twenty feet ahead of the bow of the tug; that the tug had another barge or canal boat outside of the Centennial, and a third lashed to her port side; that the L. P. Dayton with her tow was bound down the North river to the Erie Basin, Brooklyn; that the steam-tug James Bowen, from Williamsburg, bound up the North river to some point in Jersey City, had the scow Number Four in tow, lashed to her port side; that about off pier one, North river, the Centennial and the scow Number Four thus in tow of said tugs respectively came in collision, by the effect of which the Centennial was so injured that she and her cargo were totally lost. The libel charges various acts of negligence on each of the tugs. It contains no averments of negligence against the scow Number Four. An answer has been put in for the scow, denying any negligence or responsibility for the collision, and it is conceded that the libel must be dismissed as to the scow. It is claimed, however, for the libellant, that he is entitled to a decree against both the tugs upon the pleadings. First, on the ground that as the Centennial was entirely helpless, having no motive or steering power herself, and as the tugs in their answers do not set up in defence any fault in the Centennial, nor any inevitable accident, but allege only against each other negligence which caused the collision, the burden of proof is on them to prove the allegations by which they severally seek to exonerate themselves by reason of the negligence of the other; and, secondly, on the ground that each of the tugs admits in its answer that it was violating the 18th of the rules for prevention of collisions, that is, that in meeting the other tug coming upon the opposite or nearly opposite course, it starboarded, instead of porting as that rule requires of steam vessels, "meeting end on or nearly end on, so as to involve risk of collision," and that therefore unless this breach of a positive rule of navigation is shown by proof to be excused, the libellant may rest on this admission and is entitled to a decree, and that the burden of showing the excuse, if alleged in the answers, is on the tug.

1. As to the first point, the learned counsel for the libellant cites several cases in support of his position. The Granite State, 3 Wall. [70 U. S.] 310; The Louisiana, Id. 164; The Washington Irving [Case No. 17,243]; The Charlotte Raab [Id. 2,622]; Amoskeag Manuf'g Co. v. The John Adams [Id. 338]; The Sea Nymph, 1 Lush. 23. These are cases of libels brought to recover for injuries received by a vessel at anchor or lying at a pier, or a vessel at or immediately before the time of the collision in stays and so having no power to manoeuvre for the purpose of avoiding the danger, except the case of The Washington Irving [supra], which was a libel by a sailing vessel against a steamboat which ran into her while keeping on her course. In all these cases the case shown against the colliding vessel was one in which the libelling vessel was shown either conclusively or prima facie to be without fault and powerless to avoid the injury, and the admission of the collision was itself prima facie proof of negligence of the colliding vessel and of her alone. They, however, are not authorities in favor of this libellant, because his barge, though wholly under the control of one of the tugs, was in motion with that tug, and though, the barge herself was helpless for the purpose of avoiding injury by any movement of her own, yet inasmuch as the injury may have happened through the negligence of either tug, the proof of the helplessness and freedom from fault of the barge only lays the foundation for the conclusion or is prima facie evidence that the collision was caused by the negligence of one or the other or both of the tugs. It is not prima facie evidence of negligence of either, since it is entirely consistent with these facts that it may have been caused wholly by the negligence of the other, nor is there any presumption against either as between the two. Each of the tugs in its answer alleges that it was guilty of no negligence and charges the fault wholly on the other. Of course their answers are not to be taken as evidence against each other. This is not, therefore, a case like those cited where the answer admits or the proof shows a state of facts constituting a prima facie case of negligence and the matter relied on in excuse or explanation is strictly justificatory or excusatory matter as to which the party alleging it assumes the burden of proof; but quite the contrary, it is a case where the facts admitted do not raise any presumption of fault against either of the accused parties.

2. As to the second point taken, I think a fair construction of the answers of the claimants does not support the position that either of the tugs admits that it was acting in violation of the 18th rule of navigation. The answer of the L. P. Dayton admits that the tugs were approaching on opposite or nearly opposite courses, and alleges that it was a case in which each was bound to pass the other on the starboard side; that the Dayton took proper measures to do so, but that the Bowen failed to give heed to her signals, and by her negligence brought the tows together. There is not an admission here that the tugs were, in the language of the 18th rule, meeting "end on or nearly end on, so as to involve risk of collision." It is obvious that two vessels may be proceeding

on directly opposite courses, and yet not be meeting "end on or nearly end on," or proceeding so as to involve danger of collision. The question, whether this rule imposes an obligation on the two vessels to port, depends partly on the distance between the courses on which the two vessels are proceeding, nor does the rule preclude vessels from passing on the starboard side of each other, if the movement for that purpose is seasonably commenced and executed.

The answer of the James Bowen does not admit that the two tugs were meeting "end on or nearly end on, so as to involve risk of collision;" on the contrary, while it admits that each tug blew two whistles as if with the purpose of passing each other on the starboard side, and that the Bowen did starboard for that purpose, yet, in stating the relative positions of the two vessels when the Bowen made the Dayton and when this manoeuvre was commenced on the part of the Bowen, I think the fair meaning of the answer is, that the Dayton was on a course nearly opposite to that of the Bowen, but so far to the eastward of it that the vessels were not meeting "end on or nearly end on, so as to involve risk of collision," and therefore that it was not a case within the 18th rule, and that the collision was caused by the Dayton's not keeping her course, but by her changing her course to the westward, and notwithstanding the movement of the Bowen in the same direction, coming in collision with the Bowen's tow by attempting to cross her bows. Neither answer, therefore, admits the violation of the 18th rule. Libel dismissed, with costs to the several claimants.

[NOTE. Upon appeal of this case by the libellant to the circuit court, Blatchford, Circuit Judge, found, as a conclusion of law, that as the libel in the case of each of the defendants charged negligence in various particulars specified therein, and as the answers in each case denied each of said allegations of fault on the part of the defendant answering, and as the libellant introduced no proof in support of his claim, neither in the district court nor in the circuit court, then the decision of the district court dismissing the libel must be affirmed. The fact that the answers of the several defendants accuse each other of fault does not conclude the case in favor of the libellant, as each of the defendants denies in his own case any fault. Although it might be the proper conclusion from the pleadings in this case that some one or more of the defendants is in fault, yet it is for the libellant to show which one. 4 Fed. 834. The decision of the circuit court was affirmed in the supreme court; Mr. Justice Matthews delivering the opinion of the court, in which he says: "In our opinion, the burden of proof was upon the appellant to establish a case of negligence against each of the tugs, separately and independently. The rule which presumes fault, in a case of collision, against a vessel in motion, in favor of one at anchor, does not apply. In the present case the tow which was injured was not at rest, as respects either of the tugs." The burden of proof is not changed because the facts of the case and the causes of the collision are peculiarly within the knowledge of respondents. There is no presumption against either tug. 120 U. S. 337, 7 Sup. Ct. 568.]

## Case No. 7,193.

The JAMES D. PARKER.

[23 Int. Rev. Rec. (1877) 66; 2 Mich. Lawy. 14.]

District Court, E. D. Michigan.

INFORMATION FOR THE UNLAWFUL TRANSPORTATION OF PETROLEUM.

1. An information in rem. for a violation of section 4 of the act of February 28, 1871 [16 Stat. 441], forbidding the carrying of petroleum upon passenger steamers cannot be sustained.

2. The carrying of petroleum upon passenger steamers in April, 1874, cannot be punished under the Revised Statutes, which were not enacted as a law of congress until June 22, 1874.

The information, after setting forth the seizure of the steamer for a forfeiture incurred under section 4 of the act of February 28, 1871, alleged in substance, that in April, 1874, the steamer being duly licensed and enrolled and engaged in the navigation of the Ohio and Mississippi rivers, carrying passengers and freight, carried twenty barrels of petroleum from Evansville, Ind., to Memphis, Tenn., there being at that time other practical modes of transportation of the same, namely, by railroads connecting the two places. The answer admitted the employment of the vessel and the transportation of the petroleum in question, but denied that it was in violation of any law and that there was any other practical mode of transporting it.

W. W. Murray, Dist. Atty., for the United States.

Mr. Warriner, for claimants.

BROWN, District Judge. Upon the argument it was insisted that the government had no right to institute a proceeding in rem. for the recovery of the penalty provided for the violation of section 4 of the act of Feb. 28, 1871. No exception was taken to the information upon that ground, but as the objection involved the jurisdiction of the court, and as the district attorney did not insist upon the failure of the claimant to put the objection upon record, I think it may, with propriety, be considered in this opinion. The clause upon which the information is based provides that "refined petroleum which will not ignite at a temperature of less than 110 deg. of Fahrenheit thermometer may be carried on board such steamers upon routes where there is no other practical mode of transporting it, and under such regulations as shall be prescribed by the board of supervising inspectors, with the approval of the secretary of the treasury." An earlier clause of the section forbids the carrying of crude or refined petroleum or any other like explosive burning fluids as freight or used as stores on any steamer carrying passengers. Section 4 itself contains no penal clause, but it is insisted by the district attorney that under section 1 the owner was subject to a forfeiture of five hundred dollars, for which amount the steamboat was liable. This sec-

tion provides that "no license, register or enrolment shall be granted, or other papers issued, by any collector or other chief officer of the customs, to any vessel propelled in whole or in part by steam until he shall have satisfactory evidence that all the provisions of this act have been fully complied with; and if any such vessel shall be navigated without complying with the terms of this act, the owner or owners thereof shall forfeit and pay," etc., "for which sum the steamboat or vessel so engaged shall be liable, and may be seized," etc. Section 68 provides that the penalty for the violation of any provision of this act not otherwise provided for shall be a fine of five hundred dollars. The act is entitled "An act to provide for the better security of life on board of vessels propelled in whole or in part by steam, and for other purposes;" and its main object is to require that steamboats carrying passengers shall be provided with the proper equipments for the preservation of life and property in case of disaster. The obvious import of the 1st section is that no enrolment shall be granted by the collector to any steamboat until he shall have satisfactory evidence that such vessel is provided with the proper pipes, fire pumps, hose, life boats, buckets, axes, etc., required by the terms of the act, and if any such vessel shall be navigated without complying with these terms the forfeiture shall be incurred, for which a proceeding in rem. may be taken.

The provision in question has received judicial construction in but one case, viz., U. S. v. The C. B. Church [Case No. 14,762], in which the same construction was given to this section, and it was held that the penalty for a violation of the fourth section could not be recovered by a proceeding in rem., an action of debt against the offending parties being the proper remedy. I fully concur in this opinion, and deem an extended argument unnecessary, as it would be a mere repetition of the opinion of the learned judge in that case. Section 1 evidently points to affirmative acts, "compliances" with the law, something to be done by the owner, and not to a prohibition of the carrying of dangerous articles. It is the failure to provide and keep on board the appliances which are made by law, conditioned and preliminary to the issuing of the enrolment and license, which this section is designed to reach. It provides a penalty for the omission of statutory duty, not for the commission of a positive offence. Section 68 establishes the penalty for a violation of the provision in question, and the personal action is the only remedy. But it is further claimed by the government that the recital of the date of the act is immaterial, and that the action may be sustained under section 4472 of the Revised Statutes, a substantial re-enactment of section 4 of the act of 1871, and section 4499, which provides that "if any steam vessel be navigated without complying with the terms of the title, the owner shall be liable in a penalty of five hundred dollars, for which the vessel may be seized." This and the preceding section are substantial re-enactments of the first section of the earlier act. The transportation, however, is alleged to have occurred in April, 1874, while the Revised Statutes were not enacted until June 22, 1874. It is true that section 5596 repeals all acts passed prior to Dec. 1, 1873, any portion of which is embraced in the revision, and that section 5601 provides that the enactment of the revision is not to effect the repeal of any act passed after Dec. 1, 1873, but as the Revised Statutes themselves were not enacted until June, no proceeding under them prior to that date can be sustained, without giving the revision a retroactive effect. Section 5598 provides that all offences committed and all penalties incurred prior to the repeal, may be prosecuted and punished in the same manner, and with the same effect, as if the repeal had not been made, and as the Revised Statutes did not take effect as a repealing act until June 22, 1874, the law of 1871 was still in force when this offence was committed. As before observed under that statute, this action cannot be sustained.

An order will be entered dismissing the information.

## Case No. 7,194.

The JAMES D. PARKER.

[See Case No. 7,193.]

## Case No. 7,195.

The JAMES GUY.

[1 Ben. 112;[1] 5 Int. Rev. Rec. 68.]

District Court, E. D. New York. Feb., 1867.[2]

LIEN FOR MATERIALS—CREDIT OF VESSEL—INSOLVENT OWNER.

1. Where supplies were furnished in Baltimore to a vessel owned in New York, on the order of her owner, who was then present in Baltimore, the work being charged to the vessel on the bills, for which the owner gave time drafts, which contained the words, "Charge to the account of the steamer James Guy," and the owner was insolvent, and was known to be so at the place of his residence, *held*, that the circumstances showed that the work was done on the credit of the vessel.

[Cited in Pendergast v. The General Custer, 10 Wall. (77 U. S.) 217; The A. R. Dunlap, Case No. 513; The George T. Kemp, Id. 5,341; Stephenson v. The Francis, 21 Fed. 722; Bovard v. The May Flower, 39 Fed. 42; The Stroma, 3 C. C. A. 530, 53 Fed. 283; The Kate, 63 Fed. 713; The Allianca, Id. 732.]

2. It was not necessary for the material man to show that the owner was without credit in Baltimore, in order to hold a lien on the vessel for the work.

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[1] [Reported by Robert D. Benedict, Esq., and here reprinted by permission.]

[2] [Affirmed in Case No. 7,196.]

3. The character of the work and the fact that it was ordered by the owner, established that the work was necessary for the vessel.

4. The responsibility of the boat for the bills was a feature in the transaction recognized by both parties at the time of contracting the debt.

[Cited in The Aeronaut, 36 Fed. 499.]

5. Proof of the bankruptcy of the owner at the time is sufficient proof of the necessity for the credit to the vessel.

6. The libellant, therefore, had a lien on the vessel for his work, unless he had waived it by taking the time drafts.

7. The burden was on the claimant to prove that the libellant agreed to receive the drafts in place of the original claim. No such proof was furnished.

[Cited in The Acme, Case No. 28; The Illinois, Id. 7,005.]

8. The drafts being surrendered in court, the fact that one of them was not due when the libel was filed could not avail to reduce the libellant's claim.

9. The case of Pratt v. Reed, 19 How. [60 U. S.] 359, commented upon.

In admiralty.

Emerson & Goodrich, for libellant.

Beebe, Dean & Donohue, for claimant.

BENEDICT, District Judge. This is an action brought to recover of the steamer James Guy the sum of $2,534, being the amount of a bill of repairs put on that vessel in July, 1866, by Young Tall, the libellant. No question is raised as to the performing of the work or the correctness of the amount charged. The sole controversy is whether the facts establish a lien upon the vessel.

It appears in evidence, that the work in question was ordered by George Olney in Baltimore, where both Olney and the vessel were at that time. Olney was the owner of the boat, and a resident of the city of Brooklyn, New York. The vessel is conceded to have been foreign to the port of Baltimore. The work was commenced on the 17th of July, and soon after it was completed the vessel left Baltimore, and has never since returned. In April following, she came to this port, having shortly before been transferred by Olney to his son-in-law, who is the claimant in this action, and who, as I understand the evidence, must be held chargeable with a knowledge of the existence of this demand at the time he took title.

The work was necessary for the vessel in her then business. Its character shows this, and the fact that the owner himself, being then present, directed the work, also establishes this. One test of necessity is, whether a prudent owner would sanction the expenditure. The Alexander, 1 W. Rob. Adm. 362.

The work was, moreover, done on the credit of the vessel, and not upon the exclusive personal credit of Olney. Upon this point, the testimony of the libellant is positive. He is supported by the circumstance, that the work was at the time charged to the boat, and not to Olney, on the bills. Olney, the owner, knew that it was so charged, for he received without objection the bills made out against the boat; and two time drafts which he gave for the amount, contained the words, "Charge to account of steamer James Guy." Circumstances like these have repeatedly been held sufficient to show an agreement based upon the credit of the vessel.

Furthermore, Olney himself when examined, does not undertake to deny the statement of the libellant, that the credit of the vessel was relied on, and nowhere says that the work was contracted solely upon his personal responsibility. It is indeed true that, as he says, time was stipulated for and time drafts taken for the amount, but that does not show or tend to show that the responsibility of the vessel was not looked to when the debt was contracted, and the credit of the vessel made a part of the agreement. Time is the very foundation and reason of a maritime lien upon a vessel. The maritime law gives the lien in order that the material man may give time, and so the vessel may proceed to make voyages, and earn freight to pay her bills. The Nestor [Case No. 10,126]. And provisions for the credit of the vessel, and for delay of payment, are not only not inconsistent with each other, but the latter feature tends somewhat to show the existence of the former in the agreement. The evidence here, if it be not sufficient to warrant finding an express hypothecation of the vessel as security, shows very satisfactorily to me that the responsibility of the boat for the bill was a feature in the transaction, recognized by both parties at the time of contracting the debt, and this being so, according to the general maritime law, as I understand it, a lien was created which a court of admiralty is bound to enforce. And such, it is conceded, would have been the law of this case previous to the decision of the supreme court in the case of Pratt v. Reed [19 How. (60 U. S.) 359]; but it is contended, that, according to the ruling in that case, this libel must be dismissed, for the reason that it has not been made to appear that at the time of making the agreement in question, Olney, the ship owner, was without credit in Baltimore.

Now with the most sincere desire to give to this and all other decisions of the appellate court their full force and effect as the authoritative guides of the courts below, I find it difficult to consider the case of Pratt v. Reed [supra]. as deciding more than this: that when the circumstances of the case are such as to raise a presumption that there was no necessity for an implied hypothecation, it then becomes incumbent on the libellant to show a necessity for a credit.

But whether such be or be not the true

construction to put upon the decision in the case of Pratt v. Reed, I am quite confident that no such sweeping effect as is here contended for should be given to it. The claim now is that, under that decision, no matter how insolvent in point of fact the ship owner may be, and no matter how devoid of credit he may be in the place of his residence, and no matter what other circumstances attend the contracting of the debt, no implied lien for supplies can ever be held established, in the absence of proof that the ship owner was without personal credit at the time and place of incurring the debt.

Now the opinion delivered in the case of Pratt v. Reed seems to me to indicate that such could not have been the understanding of the court, for if such be the law intended to be declared, it is conceded that it is contrary to the whole current of former decisions upon the subject; but the opinion contains no intimation of an intention to disturb the adjudged cases. Moreover, the case of The Alexander, cited in the opinion in support of the decision, is adverse to such a view of the law, and the facts of the case before the court called for no such determination.

Such a doctrine would have the effect to enable a ship owner to take advantage of a fraudulent credit, temporarily established in a strange community, to deprive material men of that security which under the real facts of the case the maritime law, looking to the interests of commerce and on the considerations affecting public policy, has always given.

And such is the effect sought here. Olney, the owner of this vessel, who contracted the debt in question, was in fact a bankrupt. In the place of his residence, he was, and had been for years, notoriously insolvent. Over thirty judgments, rendered within the past ten years, stand recorded against him in Brooklyn. He was at the time in question so destitute of money that his hotel bill due on his leaving Baltimore, was left partly unpaid. Any personal credit which he might have been able to acquire in Baltimore was wholly fictitious, based upon a concealment of his real position, and at once to be dissipated upon a declaration of the truth. Can such a credit, assuming it to have been proved in this case, in justice to the parties or to the community, be availed of by him as a defence to an action like this? I cannot think that the general language of some parts of the opinion of the supreme court, in the case of Pratt v. Reed, can, with justice to that court, be separated from the facts of the case before it, and considered as decisive of a case like this. My opinion, on the contrary, is, that when the libellant here proved, as he did beyond dispute, that Olney, the ship owner, was in fact bankrupt, without money, he sufficiently proved a necessity for the credit of the vessel. And this I believe to be in accordance with the late decision of Judge Shipman, in the case of The Neversink [Case No. 10,132], and with the decision of Judge Sprague, in the case of The Sea Lark [Id. 12,579].

The result, then, is that the libellant has a subsisting lien upon this vessel, unless it was waived by the taking of two time drafts for the amount, one at sixty and the other at ninety days. Here the burden is upon the claimant to show that the libellant agreed to receive the drafts in lieu of and in place of the original claim. The St. Lawrence, 1 Black [66 U. S.] 532. The drafts were drawn by Olney upon himself, and gave no additional security, and I find no evidence in the case which will warrant the conclusion that the libellant intended by taking them to change the character of the demand from an account against the vessel to an account against Olney personally. Nor do I consider that the fact that one of these drafts had not matured at the commencement of this suit, can be available in reducing the amount of the decree. Both drafts are now due, and both unpaid, and both are surrendered in court; all the delay of payment agreed on has been obtained, and, both drafts having been surrendered, I see no reason why the decree should not be for the whole bill.

My determination, therefore, is that under the facts of this case a lien is established in favor of the libellant for the amount of his bill, and while it is a satisfaction to me to feel that not only the law but the justice of the case require such determination, it is also satisfactory to know that the amount of the claim is sufficient to enable an appeal to be taken to an appellate court, where any error I may have committed can be promptly corrected. Let a decree be entered for the amount of the bill, with interest.

[This decree was affirmed by the circuit court, and by the supreme court, on appeal. See Case No. 7,196.]

## Case No. 7,196.

The JAMES GUY.

[5 Blatchf. 496] [1]

Circuit Court, E. D. New York. Sept. 24, 1867.[2]

LIEN FOR REPAIRS TO VESSEL—NECESSITY — FOREIGN PORT.

1. To sustain a libel in rem against a vessel owned in New York, for repairs put upon her at Baltimore, the necessity for the repairs and for a lien upon the vessel to enable the master to procure them, must be shown.

[Cited in The Washington Irving, Case No. 17,244; The Eledona, Id. 4,340; The Walkyrien, Id. 17,091; The Maitland, Id. 8,979; The George T. Kemp, Id. 5,341; The Aero-

[1] [Reported by Hon. Samuel Blatchford, District Judge, and here reprinted by permission.]

[2] [Affirming Case No. 7,195. Decree of the circuit court affirmed in 9 Wall. (76 U. S.) 758.]

naut, 36 Fed. 499; The Kate, 63 Fed. 713; The Allianca, Id. 732.]

[See note at end of case.]

2. The case of Pratt v. Reed, 19 How. [60 U. S.] 359, explained.

[Appeal from the district court of the United States for the Eastern district of New York.]

This was a libel in rem, filed in the district court, by Young Tall, against the steamboat James Guy, to recover for materials furnished to that vessel in Baltimore, she being owned at the time in New York. Her owner claimed that the articles were not furnished on the credit of the vessel, and that there was no necessity for giving credit to her, because her owner was in good credit at the time. The district court decreed for the libellant [Case No. 7,195], and the claimant appealed to this court.

Emerson, Goodrich & Wheeler, for libellant.

Beebe, Dean & Donohue, for claimant.

NELSON, Circuit Justice. The main question in this case is, whether the steamboat is subject to a lien for the bill of repairs put upon her by the libellant; and that turns upon the point whether the credit was given to the vessel or to Olney, the owner. After a very full examination of the evidence, I am satisfied that it was the intention of both parties that the payment was to be made when the repairs were finished, and that, in the meantime, the mechanic or workman should look to the vessel as his security. It is needless to go over the proofs in support of this conclusion. All the facts and circumstances attending and surrounding the case tend in this direction.

It is supposed by the counsel for the claimant, that the case of Pratt v. Reed, 19 How. [60 U. S.] 359, has an important bearing in this case adversely to the lien. I do not so understand it. The necessity for the repairs and for the lien upon the vessel to enable the master to procure them, are insisted on, in that case, as essential elements to support the lien, and, in respect to the soundness of that view, there can be no controversy; but the necessity for the repairs and for the lien must depend upon the facts and circumstances of the case. In Pratt v. Reed [supra], they repelled the necessity for the lien. In the present case they support it. I am not aware that any other rule has ever been established.

I also concur with the court below, that the claimant, who sets up the purchase of the vessel as a matter of defence, is chargeable, on the proofs, with notice of the charges against the vessel for the repairs.

The decree below is affirmed.

[NOTE. An appeal was then taken by the claimant to the supreme court, where the decree was affirmed, in an opinion by Mr. Chief Justice Chase, who said that liens for repairs made in a foreign port are only allowed on proof of necessity. Where proof of such necessity is shown, and of credit given to the ship, a presumption will arise, conclusive in the absence of evidence to the contrary, of necessity for credit. 9 Wall. (76 U. S.) 758.]

JAMES GUY, The (YOUNGFALL v.). See Case No. 7,195.

JAMES LEAKMAN, The (HERBERT v.). See Case No. 6,397a.

## Case No. 7,197.

The JAMES McMAHON.

[10 Ben. 103.] [1]

District Court, E. D. New York. Sept., 1878.

PLEADING—BREACH OF CONTRACT TO TOW—LIEN.

A libel was filed by the owner of the canal boat M., averring that an agreement was made by her owner with the owner of a tow-boat to tow the M. from New York to Troy for $15: that the $15 was paid and the M. was ready at the appointed place to be taken in tow, and that the tow-boat made the voyage but refused to give the M. a place in her tow and neglected to tow her as agreed, whereby damage accrued, for which the tow-boat was sought to be made liable in rem. The owner of the tow-boat excepted to the libel, claiming that the facts showed an executory contract, not binding on the tow-boat, and out of a refusal to perform which no lien attaches to the boat: *Held*, that the facts set up in the libel constituted a good cause of action in rem against the tow-boat.

In admiralty.

T. C. Campbell, for libellant.

E. D. McCarthy, for claimant.

BENEDICT, District Judge. This case comes before the court upon an exception to the libel, upon the ground that the facts stated do not make out a case of liability on the part of the vessel proceeded against. The averments of the libel are, in substance, that on a day named, the master and owners of the tow-boat James McMahon made a contract with the owner of the canal boat Mars, wherein it was agreed that the James McMahon, then in the port of New York, should tow the boat Mars, upon a voyage from New York to Troy, for the sum of $15 towage. That thereupon the owner of the Mars paid to the owner of the James McMahon the towage agreed on, and thereafter the James McMahon entered upon and performed the voyage from New York to Troy, but refused to give the Mars a place in her tow and wholly neglected to tow the Mars as agreed, although the Mars was waiting at the place agreed on and ready to be towed on the voyage in question, whence damage was caused to the owner of the Mars.

These facts, as the claimant contends, make the case one of an executory contract, not binding upon the tow-boat, and out of a refusal to perform which no lien attaches to

[1] [Reported by Robert D. Benedict, Esq., and Benj. Lincoln Benedict, Esq., and here reprinted by permission.]

the tow-boat. In support of the exception, reference is made to the case of The General Sheridan [Case No. 5,319].

As I view the case it differs from the case of The General Sheridan in several important particulars. First.—In this case the contract was performed so far as the canal boat was concerned. The towage was paid and the boat ready at the appointed place to be taken in tow according to the agreement. Second.—The voyage upon which it was agreed the canal boat should be taken in tow was entered upon. The tow-boat, as had been agreed, took a tow from New York to Troy at the time specified, but did not take the Mars in that tow as it had been agreed she should do.

It is not therefore the case of a contract purely executory. When the breach of the contract occurred, the tow-boat was in the act of making the voyage agreed on. The canal boat was waiting to be taken in tow and the towage had already been paid. I am aware of no authority for holding that in such a case the vessel is not liable for the damages caused by the breach stated.

It will be observed that the contract set forth in the libel was made by the master of the tow-boat, who was also her owner, and, as the libel avers, was in the usual course of the employment in which the tow-boat was then engaged. There is, therefore, no question of want of authority to bind the vessel, as was the case in Grant v. Norway, 18 Eng. Law & Eq. 561, and in The Freeman, 18 How. [59 U. S.] 182. Neither is this the case of an agreement to make a maritime contract, as was the case of The Pauline [Case No. 10,848].

The contract sued on is the maritime contract itself—maritime because it was an agreement to transport a vessel upon navigable waters, and perfected as a contract by the payment and receipt of the towage money. No other payment was to be made, nothing further was to be done by the canal boat and no other contract was contemplated. The liability of the owner was complete. An action in personam in the admiralty, founded upon the contract as it stands, could undoubtedly be maintained. It was a contract for the benefit of the tow-boat, to enable her to earn towage, and it in fact brought her towage to the amount agreed, viz: $15. If, then, the contract had become binding on the owners of the tow-boat, why should not the boat herself be bound, being as it was for the benefit of the tow-boat? No reason is seen for exempting the vessel from liability in such a case, if vessels are ever to be held bound by contracts of affreightment.

It is supposed that the case of Vandewater v. Mills, 19 How. [60 U. S.] 90, referred to in the case of The General Sheridan [supra], as authority for the decision in that case, is an authority adverse to the libellant's claim in this case. But for the reasons above stated, I am of the opinion that the facts in this case already alluded to take it out of the scope of any rule declared in the case of Vandewater v. Mills [supra]. Moreover, this latter case is commented upon, by the supreme court itself, in the case of Bulkley v. Naumkeag Steam Cotton Co., 24 How. [65 U. S.] 392, and pains apparently is there taken to limit its effect, for it is treated as laying down no different rule from that declared in Grant v. Norway, and The Freeman, 18 How. [59 U. S.] 182, in which cases the action in rem failed, for want of authority in the master to bind the vessel for the contract sued on, and as belonging to a class of cases where, as the court say: "There was no contract of affreightment binding between the parties, as there had been no fulfilment on the part of the shipper, namely, the delivery of the cargo." Here the contract is a towage contract, which does not look to the delivery of a cargo on board the ship by a shipper thereof, but to a taking a boat to be part of a tow, on a voyage which was not abandoned, but made; and this contract had become binding on the owners of the tow-boat and been fulfilled by the other party.

In the case last referred to, from the decisions of the supreme court—[Bulkley v. Naumkeag Steam Cotton Co.] 24 How. [65 U. S.] 392—the court go on to announce that it is too narrow and limited a view of the liability of the vessel to require a physical connection with the vessel as a foundation for the liability in rem.

In this case, then, it is a mistake to suppose that the fact that the canal boat was never taken hold of by the tow-boat, is sufficient to exempt the tow-boat from liability. That fact is not material in a case like this, where the tow-boat agreed to come and take the canal boat and tow her to Troy, on a certain voyage, and where the towage agreed on was paid, and the voyage not abandoned, but made; the canal boat not being taken, simply because the tow-boat neglected to stop for her. In such a state of facts, the liability of the tow-boat was complete from the moment of her omission to stop for the Mars, and she is liable to be proceeded against in rem for the damages resulting from such violation of the contract. The exception is therefore overruled, and a decree given in favor of the libellant, with leave to the claimant to file an answer upon payment of costs.

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JAMES MORRISON, The (UNITED STATES v.). See Case No. 15,465.

JAMES NELSON, The (ELLIOTT v.). See Case No. 4,393.

## Case No. 7,198.

JAMESON v. The REGULUS.

[1 Pet. Adm. 212.] [1]

District Court, D. Pennsylvania. 1800.

SEAMEN—SHIPPING WITHOUT SIGNING ARTICLES—HOW PAID.

1. Seaman shipped without signing articles. Question, whether subject to penalties and forfeitures?

[Cited in Wickham v. Blight, Case No. 17,611; Packard v. The Louisa, Id. 10,652; The Warrington, Id. 17,208.]

2. He must be paid according to act of congress [1 Stat. 131], but he is entitled to all benefits and subject to all forfeitures prescribed by the maritime law.

[Cited in The Crusader, Case No. 3,456; United States v. New Bedford Bridge, Id. 15,867; The Atlantic, Id. 620; The John Martin, Id. 7,357; Graham v. The Exporter, Id. 5,667; Bain v. The Sandusky Transp. Co., 60 Fed. 914.]

[Cited in Holt v. Cummings, 102 Pa. St. 214.]

A seaman shipped without signing articles. It was insisted, that he should be subject to no penalties or forfeitures; being exempted by the words of the first section of the act of congress, "for the government and regulation of seamen in the merchants' service."

BY THE COURT. This point has been determined several years ago, in this court. If a seaman ships, and performs his contract, though verbal, he must be paid, at the highest rate of wages, given at the port of shipment, within three months next precedent. He is subject to all the forfeitures imposed, and rules fixed, by the maritime law, which is part of the common law. It must have been perceived by the framers of our law, that the general maritime law applied to this case; and that nothing was deficient, but the mode of estimating services. It was fixed at the highest rate, that masters might be more on their guard, and see that the articles were executed, and thereby avoid the payment of the highest wages to ordinary seamen. Our statute does little more than re-enact several of the old maritime rules. It considers the mariner, not under written or printed articles, a stranger to its provisions, except that which fixes the compensation. For the rest, he is excluded.

When the statute and common law concur, the common law shall be preferred. Ld. Raym. 7. Though a statute lays a penalty on an offence prohibited at common law, an indictment still lies, at common law (2 Hawk. 212); and if the offence be at common law, and also prohibited by statute, it stands as an indictment at common law, if it does not conclude contra formam statuti. Cr. Cir. Comp. 123. These authorities are only mentioned to shew, that though a statute is made on the same subject, the common law is not abolished, but is of higher authority, when both concur.

The seaman not under articles, partakes in none of the regulations,[2] nor is he subject to the penalties or forfeitures, directed therein. "And such seaman or mariner, not having signed such contract, shall not be bound by the regulations, nor subject to the penalties and forfeitures contained in this act." Act for Regulation of Seamen, § 1. Hereby, properly excluding, one whose contract is not made under the act; and of course making that law no part of the terms of his agreement. But he is not out-lawed, and left without any control: he is, on the contrary, governed by the laws existing independent of our act; and is precisely in the situation he would have been, if our law had never been made. If the statute had in express words abolished the common law, and made contrary provisions, this doctrine would not apply. But this is not the question in the present case. The mariner is therefore subject to all penalties and forfeitures, incurred under the maritime laws pre-existent to the act of congress, and, where not contradicted, now in being, and concurrent therewith; though the master is subject to a penalty, for shipping the mariner, without his signing the ship's articles.

[1] [Reported by Richard Peters, Jr., Esq.]

[2] This must not be understood so as to exclude the mariner from the benefits allowed generally by the act to "the crew"; of which he is as much one, as those signing the articles. He is said in the act, not to be "bound by the regulations"—that is—the regulations operating personally, and in the manner therein prescribed, on the articled seamen. But it has been held and decided in this court, that, as one of "the crew," he is entitled to the general benefits necessary for the safety, health, and subsistence of all "the crew." He shall be supplied with medicines, paid his wages, and be retributed for short allowance of provisions, especially if wages are "agreed on," which often happens, though the actual signing of articles be neglected. In the case of short allowance, of provisions, the terms "wages agreed on," are only introduced to designate quantum. And this may be done, by referring to any verbal agreement,[3] or to the "highest price or wages given." "Id certum est, quod certum reddi potest." The seaman may not "be bound" by the "regulations" for the "government" of mariners, exactly as prescribed by the act, yet it does not follow that the owners and master are not "bound" to provide alike, for each of "the crew." It has been doubted whether a seaman, not having signed the articles, is included in the provisions of the 3d section, relative to ships not sea-worthy. This seems, in terms, to contemplate only articled seamen; because, when designating the penalty on a refusal to proceed, the mariner is to be imprisoned "until he shall have paid double the sum advanced to him, at the time of subscribing the contract for the voyage."

[3] It has been contended, that a verbal agreement for less than the "highest wages," should not prevail against the positive injunction of the act, that un-articled seamen shall be paid at the highest rate. I have been of opinion that the agreement of the parties, though verbal, superseded this provision of the law.

## Case No. 7,199.

The JAMES PLATT.

[9 Ben. 491.] [1]

District Court, S. D. New York. May, 1878.

DAMAGE TO CARGO—SHIPMENT ON DECK—NEGLIGENCE.

A quantity of cement was shipped on board a canal-boat at pier 1, North river, to be delivered, 250 barrels on board a steamer lying at pier 36, North river, and 150 barrels in Brooklyn. The 150 barrels were put in the hold, and the 250 were put on deck with the consent of the shipper. The canal-boat arrived at pier 36 too late to deliver the cement on that day, and waited till next day. During the night the cement was damaged by rain, the master of the canal-boat having taken no means to protect it: *Held*, that the injury was caused by negligence of the canal-boat, and that the canal-boat was liable, notwithstanding the consent of the shipper to the shipment on deck.

In admiralty.

A. N. Weller, for libellant.

Beebe, Wilcox & Hobbs, for claimant.

CHOATE, District Judge. The libellant shipped on board the canal-boat James Platt, 400 barrels of cement under an agreement between him and the master, whereby the master agreed to carry the same from pier No. 1, North river, and to deliver them, 250 barrels on board a steamer at pier 36, North river, and 150 in Brooklyn. The agreement was made on the 19th day of February, 1878, and the cement was taken on board on the morning of the 21st. The 150 barrels to be delivered in Brooklyn were put in the hold, the 250 barrels to be delivered on the steamer at pier No. 36 were placed on deck. The freight agreed upon was $23.00 for the entire service. It was undoubtedly the expectation of both parties that the cement to be delivered at pier 36 would be delivered on the same day on which it was taken on board the canal-boat, and this probably accounts for the fact that this part of the cargo was placed on deck while the rest was put in the hold. The libellant knew that the cement bound for pier 36 was placed on deck, and cautioned the master to keep it dry, which the master said he would do. Owing to some delay in getting the cement on the canal-boat, and the lateness of the hour at which she arrived at pier 36, and the stopping of the work of shipping it on the steamer at about half-past six o'clock in the evening, a part of the deck cargo remained on the canal-boat all night, and was injured by the rain, and it is for this damage that the libel is brought. This article is one liable to be injured by exposure to rain, as the master well knew. When the men in charge of the steamer refused to receive any more that night the weather was very threatening, and there was a strong probability of a heavy rain, and it began to rain about eight o'clock in the evening, and rained all night. The master was warned that it was likely to rain by the libellant's agent and by others, and cautioned to protect the cement in case it was left on deck at the end of the day's work, but he took no precautions whatever for its protection, although he could easily and without expense have put it in the hold, or could have obtained tarpaulins to cover it, or have landed it on the pier where it would have been under cover.

The claimants insist that in consenting to the shipment of the cement on deck the libellant took on himself all the risks of its exposure to the weather. Doubtless, he did take the risks of any sudden and unexpected injury by the weather, which could not, in the exercise of due diligence, have been foreseen and prevented by the master, but I think this consent to the stowage on deck was for the convenience of the master to make the delivery to the steamer easier, and that it did not absolve the master from the ordinary obligation of a common carrier to protect the goods, which were in this case peculiarly liable to injury from water. The rule that if goods stowed on deck with the consent of the shipper are jettisoned, the shipper must bear the loss has no application to this case. The carrier is not absolved by the fact that the goods are, with the consent of the shipper, laden on deck from the obligation to protect them against damage from dangers actually foreseen, and easily guarded against while in transit. In this case the master was guilty of gross negligence, and that was the immediate cause of the damage.

Other grounds of defence urged are that there was an express agreement on the part of the shipper that the goods should be put on board the steamer the day they were shipped, and that he was responsible for the refusal of the steamer to take them all that day, but these points have no basis in the evidence.

Decree for libellant for amount of damage agreed upon, $131.00 and costs.

## Case No. 7,200.

The JAMES ROY.

[Affirming Case No. 7,201. Nowhere reported; opinion not now accessible.]

## Case No. 7,201.

The JAMES ROY.

[5 Ben. 177; [1] 14 Int. Rev. Rec. 22.]

District Court, S. D. New York. June, 1871.

COLLISION IN EAST RIVER—STEAMERS MEETING—LOOKOUT—SPEED.

1. The steamer N. was going up the East river, about the middle of it, at a speed of eight

[1] [Reported by Robert D. Benedict, Esq., and Benj. Lincoln Benedict, Esq., and here reprinted by permission.]



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or nine miles an hour. A bark in tow of a tug was coming down the river on the starboard hand of the N., having passed the propeller J. R., which was also coming down the river, at a speed of about four miles an hour, towing a mud scow fastened on the starboard side of the J R., and projecting ahead of her. The bark and tug had passed on the starboard side of the J. R., and then drawn in ahead of her. A lighter was also crossing the river ahead of the J. R. from starboard to port, and, to allow her to go by clear, the helm of the latter was put a little to port and then steadied. As the vessels were in this position, neither the N. nor the J. R. could be seen from each other, but the pilot of the N. had previously seen the escape steam from the J. R. As the bark and tug reached the bend in the river at Fulton ferry, Brooklyn, they sheered to port, and this movement drew them out from between the N. and the J. R., which became then visible to each other. As soon as the N. was seen, the J. R. stopped and backed, which swung the head of the mud scow to port. The N. blew two whistles, and also stopped and backed her engine, but had not time to stop her headway, and her starboard side struck the starboard corner of the mud scow, and the N. very soon sank: *Held*, that the J. R. was not in fault in her rate of speed, or in not sooner seeing the N., or in her navigation.

2. The N. was in fault in keeping up too great a rate of speed when the river was full of vessels ahead of her, and in not stopping and reversing as soon as she should have done, and she alone was responsible for the collision.

In admiralty.

Beebe, Donohue & Cooke, for libellants.
Benedict & Benedict, for claimants.

BLATCHFORD, District Judge. This is a libel filed by the owners of the steamboat Norwalk, to recover for the damages caused by the sinking of that vessel through a collision which took place between her and a scow in tow of the propeller James Roy, on the 25th of May, 1869, in the East river, about the middle thereof, just below the Brooklyn slip of the Fulton ferry, about half past ten o'clock in the morning.

The libel was sworn to seven days after the collision, by George W. Wilson, one of the libellants, who was the master of the Norwalk, and was on board of her at the time of the collision, and saw it, and has been a witness on the trial. The Norwalk was, at the time, bound up the East river, having come from the North river, and was intending to land at the foot of Twenty-Third street, East river, to take on passengers for an excursion. The James Roy had in tow one scow, loaded with mud. The scow was on the starboard side of the James Roy, her bow projecting somewhat ahead of the bow of the James Roy. They were bound from the navy yard, down the East river, to the flats on the New Jersey shore, below Bedlow's island. The extreme forward starboard corner of the scow struck the starboard side of the Norwalk, from twenty-five to thirty feet aft of the stem of the Norwalk, and made a large hole in her, and she soon sank.

The libel states, that, as the Norwalk was proceeding up the East river, there was, to the east of her, that is up the river, a ship being towed on a hawser, coming down the river in an almost opposite direction, and on a course that would pass to the right of the Norwalk; that, astern of such ship, and still more to the right of the Norwalk, was the James Roy, with her tow, on a course which would have carried them to the right of such ship; that the James Roy was going at a greater rate of speed than such ship, and overhauled her; that, as the vessel so stood, the ship and the tug towing her would pass on the Norwalk's right, and the James Roy and her tow still further away on the right; that, in this position, the ship shut the James Roy and her tow out of view from the Norwalk; that the Norwalk proceeded on until the ship permitted a view of the James Roy and her tow, when it was found, by those on the Norwalk, that the James Roy, without warning, without necessity and without any means of knowledge on the part of the Norwalk, had changed her course and was coming across the ship's track astern of her and on to the course of the Norwalk; that, as soon as possible, the wheels of the Norwalk were stopped and backed, and two whistles blown to the James Roy, indicating that the Norwalk could not go to her own right; that such was the fact; and that the tug came on on such changed course, and ran into the Norwalk, sinking her. The libel charges fault on the James Roy: (1.) In not keeping a proper lookout; (2.) In not stopping and backing in time; (3.) In changing her course improperly; (4.) In not in time taking steps to avoid the collision.

The answer alleges, that the James Roy was coming down the river slowly, about astern of a bark (which is the vessel the libel speaks of as a ship); that there was also ahead of the James Roy a lighter going down, and working over towards the Brooklyn shore; that, as the James Roy came near to the lighter it became necessary to avoid her; that, accordingly, the helm of the James Roy was slightly eased up, and her course was changed just enough to enable her to pass under the stern of the lighter without hitting the lighter; that her helm was then steadied as before; that, about the same time or just before, the bark and the tug towing her changed their course more to the southward (that is, towards the Brooklyn shore), and they and the lighter thus passing out from being directly ahead of the James Roy, disclosed to those on board of her the Norwalk, which had till then been completely hidden by the bark and the lighter; that the Norwalk was coming up the river at too rapid a rate, and was without a proper lookout, and did not see the James Roy as soon as she should have done, and no proper effort was made on board of her to change her course or to stop her headway, but, instead of stopping or sheering to the left, as she could and should have done, she kept straight

on until she struck the starboard corner of the mud scow; that the Norwalk was seen as soon as she could be seen from the James Roy, and the engine of the James Roy was at once stopped and backed, whereby her head and that of the scow were swung to port, in order, if possible, to avoid the Norwalk, and she was backed so long before the collision, that, at the time of the blow, she and the scow were dead in the water, while the Norwalk was still making rapid progress through it; and that the collision was occasioned by no fault on the part of the James Roy, but by the fault of the Norwalk: (1.) In running at too great a speed and too close to the bark and the lighter, and to the James Roy and the scow; (2.) In not keeping a proper lookout; (3.) In not sheering to port; (4.) In not soon enough stopping and backing.

The case made by the libel is wholly disproved by the evidence. The theory of the libel is, that the James Roy, going at a greater speed than the bark and overhauling her, was upon a course which would have carried her safely between the bark and the Brooklyn shore, the Norwalk being between the bark and the New York shore, when the James Roy suddenly changed her course by porting her helm, and crossed the track of the bark, and threw herself in the way of the Norwalk, she being hidden by the bark from being seen by the Norwalk, until she suddenly came out from under the stern of the bark. It is conclusively proved, not only that the James Roy was not going at a greater speed than the bark, and was not overhauling her, but that the bark, from having been astern of the James Roy, had passed the James Roy, by going faster than the James Roy in the same direction, and by going between the James Roy and the New York shore. It is also proved satisfactorily, that the James Roy did not change her course to any substantial extent. She went down all the way on a starboard helm, inclining her head towards the Brooklyn shore, while the bark was passing by on her starboard side. After the bark had got by so as to allow of such a movement, the bark and the tug towing the bark were sheered, by starboarding, so as to bring them from being on the starboard hand of the James Roy to being ahead of her. As the James Roy and the bark and the tug towing the bark were going in the same direction, and the Norwalk was going in an opposite direction, and had come from the North river, and was nearer to the New York shore than the bark and the tug towing her were, and the James Roy was dropping astern of the bark, and was going slowly, the line of vision between the James Roy and the Norwalk was intercepted by the bark, so that, for some time, neither vessel was seen by the other. While the James Roy was going down slowly, the Norwalk was going up at a speed of eight or nine miles an hour, double the speed of the James Roy. The pleadings of both parties allege, and the evidence shows, that the removal of the bark out of the way disclosed to each of the vessels—the Norwalk and the James Roy—the view of the other one. There was nothing to indicate to the James Roy that the Norwalk was approaching from beyond the bark. On the other hand, the pilot of the Norwalk testifies that he saw the steam from the James Roy beyond the bark before he saw the James Roy herself. The James Roy was a high-pressure propeller, discharging her exhaust steam by puffs into the air. The Norwalk was a side-wheel low-pressure boat, condensing her exhaust steam. The James Roy proceeded with proper speed and with due care and caution, not substantially changing her course until the starboard of the bark, combined with the greater speed of the bark, disclosed to the James Roy the Norwalk approaching directly towards her. As soon as the James Roy perceived the Norwalk, her engine was stopped and reversed. The effect of so doing was such, that, before the collision, the heads of the James Roy and of her tow were swung to port. I am unable to perceive that there was any fault on the part of the James Roy, or that she is in any manner responsible for the collision.

On the contrary, the evidence shows that the collision was due to fault on the part of the Norwalk. The river was full of vessels ahead of her, and the speed she maintained in entering among them was too great. She ought to have checked that speed sooner. She kept on, unheeding the puffs of steam she saw from the James Roy beyond the bark. She did not stop and reverse as soon as she should have done. She was behind time and was hastening to fulfill her employment, and hence her reckless speed. When the James Roy came into view from the Norwalk, the Norwalk's engine was slowed, stopped and reversed; but her speed before was so great, and the James Roy was so close at hand, that her forward motion was not considerably diminished before the collision took place. The libel must be dismissed, with costs.

This decision was affirmed by the circuit court, on appeal, in August, 1873. [Case No. 7,200.]

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JAMES SMITH, The (HAWES v.). See Case No. 6,238.

JAMESSON (HARMON v.). See Case No. 6,079.

JAMESSON (MANDEVILLE v.). See Case No. 9,011.

JAMESSON (MANNING v.). See Case No. 9,045.

JAMESSON (THOMAS v.). See Case No. 13,900.

JAMESSON (THOMPSON v.). See Case No. 13,960.

JAMESSON (UNITED STATES v.). See Case No. 15,466.

## Case No. 7,202.

The JAMES T. ABBOTT.

[2 Spr. 101.] [1]

District Court, D. Massachusetts. Jan., 1864.

SALVAGE—COMPENSATION.

1. If a vessel in need of salvage assistance makes a signal for a steamer, and assistance is rendered in pursuance of that signal, the signal is to be construed as a signal for assistance, although not necessarily one of distress, and the service as one of salvage.

[Cited in The M. B. Stetson, Case No. 9,363; Baker v. Hemenway, Id. 770; The Athenian, 3 Fed. 250; The New Orleans, 23 Fed. 910.]

2. Amount of compensation.

[Cited in The M. B. Stetson, Case No. 9,363.]

In admiralty.

F. C. Loring & John Lathrop, for libellants.

John C. Dodge, for claimants.

SPRAGUE, District Judge. The suit in this case is brought by the owners, master, and crew of the steam-tug Warrior, for an alleged salvage service in pulling the brig James T. Abbott off the shore at George's island, in Boston harbor, and towing her to Boston. The first question is whether the service was salvage or towage. It appears that the brig while beating through the Narrows, and while in stays, got ashore. This was on the 27th of December, about ten o'clock at night. She remained there until eleven o'clock the next day, when she was pulled off and towed to Boston. I have no doubt that this is a salvage service. The vessel was ashore thirteen hours, and during one high tide. A vessel in that situation cannot be considered as not in some unusual peril, not wholly exposed, yet not so safe as she would have been in a harbor. The wind was not violent at the time nor the weather severe, but the wind was blowing from the north-east, and a storm was threatening which afterwards came. The master of the brig testifies that he made the usual signal for steam only, and did not set a signal of distress; and it is argued that he had a right to choose whether to accept a salvage service or not. This is true. But when a vessel is in a condition to have a salvage service done to her, and the master makes a signal for a steamer, it is considered as a signal for assistance.[2]

What did he want a steamer to do? Did he want it merely to tow him? Certainly not. He wanted it to get his vessel off. The wind at the time the vessel was got off was fair for Boston. I cannot suppose that if the vessel had not been ashore, the master would have made a signal for a steamer. I do not doubt that the master thought a steamer would render him assistance for towage compensation; but if a vessel, really in want of salvage assistance, makes a signal for a pilot, or for a steamer, and assistance is rendered in pursuance of that signal, the signal is to be construed as a signal for assistance, although not necessarily one of distress, and the service as a salvage one.

The only question is as to the amount of compensation; and I have some difficulty in satisfying my mind on this point. The value of the property saved was between seven and eight thousand dollars. The master had made no effort to get the vessel off. I do not think she was in any immediate peril, though there was certainly some peril. The wind was from east or north-east; the weather was thick, and a snow-storm impending, and the night following there was quite a gale. At the time the service was rendered, the wind was not very violent or the weather severe; it was rather a mild day for winter. The crew of the tug were not exposed to any greater hardship than they would have been, if their vessel had been about her regular business, towing vessels. The master did not take any responsibility in going to the assistance of the brig, as one of the owners was on board.

Some question was made as to the risk which the tug ran, in going where she did in shoal water. The owner and the master testified that the tug drew eight feet of water, and once when they sounded they found only nine; that there were rocks there, and that if a rock had struck the fans of the propeller, the tug would have been disabled, and would have drifted ashore. There is some question whether the anchor was ready or not on board the tug. However this may be, I consider that the tug was in some danger, but not in any considerable danger.

In estimating the amount of compensation one criterion is, for what would the owner of the tug, if he had known all the circumstances of the case, have agreed to let his boat go down to get the vessel off; he to receive nothing, if not successful.[3] Considering all the facts in the case, I think three hundred and twenty dollars, and costs, is the proper sum to be awarded. Judgment for libellants.

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[1] [Reported by John Lathrop, Esq., and here reprinted by permission.]

[2] Counsel for the libellants cited on this point The Susan [Case No. 13,630]; The John Bunyan, 8 Law T. (N. S.) 704; The Little Joe, 2 Law T. (N. S.) 473, 1 Lush. 88.

[3] In The M. B. Stetson (U. S. Dist. Ct. Mass., Jan., 1867) [Case No. 9,363], Lowell, J., after citing the above, said: "It is obvious, however, that this rule will not answer for all or most cases, because it takes into view only one side of the question, the risk, labor, and expense of the salvors, without regard to the value of their services to the other party. Where the necessity is more urgent, and no time is given to bargain, and to choose between different offers, another element, namely, what would the owners of the property be willing to give rather than that the service should not be rendered, may fairly be looked at."

JAMES W. EATON, The. See Case No. 7,337.

JAMES WELLS, The (UNITED STATES v.). See Case No. 15,467.

## Case No. 7,203.

JAMIESON et al. v. ALEXANDER.

[1 Cranch, C. C. 6.] [1]

Circuit Court, District of Columbia. April Term, 1801.

EVIDENCE—VARIANCE — ALLEGATA AND PROBATA.

Although the contract offered in evidence vary from that stated in the special count, the receipt for the purchase-money at the bottom of the contract is evidence on the money counts.

Assumpsit on a special promise to deliver flour, and for money had and received.

Mr. Faw, for defendant [Amos Alexander] objected to the contract produced, because it varied from that declared on,—one being a promise to deliver on demand, and the other in one week. 1 Esp. 140.

Mr. Simms, for plaintiffs [Jamieson & Anderson] admitted the variance to be fatal as to the first count, but contended that the receipt at the bottom of the contract for the whole purchase-money was good evidence on the count for money had and received; to which THE COURT assented.

JAMIESON (McCUTCHIN v.). See Case No. 8,743.

## Case No. 7,204.

JAMIESON v. WILLIS.

[1 Cranch, C. C. 566.] [1]

Circuit Court, District of Columbia. July Term, 1809.

DEPOSITIONS—NOTICE OF TAKING—REASONABLE TIME.

Notice of taking a deposition in Alexandria between 9 a. m. and 2 p. m., served by leaving a copy with the wife, at half past 8 a. m., and delivering another copy to the party at market, is not reasonable, although the parties all reside in Alexandria.

Assumpsit for goods sold and delivered.

The plaintiff offered a deposition of John Gird, who was about to go to sea, taken in Alexandria under the act of 1789, § 30 [1 Stat. 88.]

E. J. Lee, for defendant, objected that the notice was not reasonable.

The writ issued 26th of May, 1808. The notice was dated the 27th of May, to appear on the same day, in Alexandria, between 9 and 2 o'clock. It was served by leaving a copy with Mrs. Willis at half past eight o'clock, a. m., on the 27th, and a copy was offered to the defendant at the market, on the morning of the 27th.

Herbert & Swann, for plaintiff, offered evidence that the deposition was not in fact taken till half past ten o'clock, a. m.

THE COURT was of opinion that such notice was not reasonable, although the parties resided in Alexandria. Nonsuit.

Reinstated on payment of all costs and leave to both parties to amend.

JAMISON (LE ROY v.). See Case No. 8,271.

JAMISON (LEVY v.). See Case No. 8,271.

JAMISON (PEARSON v.). See Case No. 10,879.

## Case No. 7,205.

The JANE CAMPBELL.

[Blatchf. Pr. Cas. 101; 20 Leg. Int. 125.] [1]

District Court, S. D. New York. Feb. 25, 1862.

PRIZE—PROCEDURE—NEUTRAL PROPERTY—VIOLATION OF BLOCKADE—UNJUSTIFIABLE CONDUCT OF CAPTORS—ASCERTAINMENT OF DAMAGES.

1. The settled rule of the prize courts is, to require the captors of the vessel to bring in for examination her master and principal officers, and some of her crew; and the examination must be confined to them, unless special permission of the court is obtained to examine other persons.

[Cited in The Louisa Agnes, Case No. 8,531.]

2. Prize law inhibits, under the disallowance of the right of prize to the captors, and the positive infliction of punishment by penalties and costs, any irregularities against the property seized or the captured crew, especially where the latter are neutral.

3. The burden is on the captors to prove the existence of an overruling necessity justifying the spoliation of property found on the prize, or the separation of the officers or crew from the captured vessel, or the omission to send them into port with the prize for examination.

4. The captors held liable in damages for unjustifiable conduct toward the crew and property on the prize after her arrest.

5. There was probable cause for the seizure, but the vessel was neutral property on a lawful voyage and was making for a blockaded port for repairs.

6. Vessel and cargo restored without costs. Reference to the prize commissioners to ascertain the damages.

7. Subsequently both parties were allowed to give further proof as to the intention to violate the blockade.

In admiralty.

BETTS, District Judge. This vessel and cargo were seized at sea, off the port of Beaufort, North Carolina, on the 14th of December, 1861, by the United States steamship of war State of Georgia, and sent into this port as prize, and libelled by the United States and her captors, January 3, 1862. Several other vessels-of-war were, at the time, present at the same station. On the 21st of January, George Campbell intervened and claimed the vessel and cargo, as sole owner of both. The claim of the owner and

[1] [Reported by Hon. William Cranch, Chief Judge.]

[1] [Reported by Samuel Blatchford, Esq. 20 Leg. Int. 125, contains only a partial report.]

the protest of the owner and master set forth with great particularity the grounds upon which the rightfulness of the seizure is contested, and these particulars are reiterated in substance on the examination in preparatorio of those parties. No exception is taken by the libellants to that mode of defence. The main grounds upon which the arrest is maintained, on the part of the libellants, are that the vessel and cargo were really enemy property, though simulated as neutral; that both were procured fraudulently, and with intent to violate the blockade of the port of Beaufort, North Carolina; and that the voyage had been prosecuted for that purpose, up to the time of their seizure in the immediate vicinity of that port. The vessel and cargo belonged wholly to the claimant, and were taken possession of when approaching a blockaded port, under circumstances which justified a suspicion that the object was to enter the port without lawful authority or justifiable cause. But a preliminary question is raised by the defence, impeaching the regularity of the proceedings of the captors, which, in itself, it is alleged takes away all legal justification for the arrest. This irregularity is charged to have been the breaking open and spoliation of the cargo by the captors, after the seizure of the vessel; not bringing into port the master and officers; wrongfully separating the members of the ship's company from the vessel, after her capture, and treating them harshly and unjustly afterwards and then sending the prize into the remote port of New York without them, under the charge of an incompetent crew; and carrying the English flag, under which she had been captured lowered, and the American flag hoisted over it, on her passage and when brought into this port.

The settled rule of prize courts is to require the captors to bring in, for examination before the judge or commissioners, the master and principal officers and some of the crew of the captured vessel, and the examination must be confined to them, unless special permission of the court is obtained to examine others. 1 Wheat. [14 U. S.] Append., Story, J., note, page 496. Prize law, as administered in the English, American, and French tribunals, also inhibits, under the disallowance of the right of prize to captors, and the positive infliction of punishment by penalties and costs adjudged against them, any irregularities against the property seized or the captured crews, especially where the latter are neutral. 2 Wheat. [15 U. S.] Append. pp. 5-7, and notes, and authorities there collected. The general principle declared and enforced is that captors are held responsible for any gross irregularity or wanton impropriety towards the property seized or the ship's company arrested with it, and a satisfactory reason will be exacted for any deviation by the captors from the regular course of proceedings in prize cases. These doctrines are recognized and vigorously applied in the French ordinances (Id. note), and by mutual acquiescence among maritime nations, they supply the restraint which accompany the exercise of belligerent rights under the improved administration of prize law.

Before considering the countervailing evidence, and assuming the proofs to be that the vessel and cargo are neutral property, seized only because of a design and attempt by the vessel to violate the blockade of the port of Beaufort, and that the blockade was at the time an efficient one, the question arises whether the conduct of the captors after the capture was of a character to destroy the legality of the arrest, and to subject the captors, personally, to punishment for the infringement of the laws of maritime warfare. If this was so, it will be immaterial to inquire into the reality of the neutral ownership set up, because such misconduct, if established, operates with equal force against the libellants, though the property seized belongs wholly to the enemy; for the right of seizure by the belligerent captors is dependent upon the lawful use of that power by the captors at sea, when made under the authority of the general prize law alone. The first object will, therefore, be, to fix the character of the misconduct ascribed to the libellants, and see whether it was accompanied by circumstances of excuse or mitigation. The evidence as to these charges comes wholly from the claimants. No testimony is furnished on the part of the libellants, nor do they ask permission to put in further proofs in denial or extenuation of the misconduct charged against them in the claim and the proofs thereon. The claim, filed under oath by the claimant, and supported by the preparatory proofs, alleges, that when the schooner was arrested by the United States ship-of-war State of Georgia, her papers were examined by the boarding officer, and pronounced to be all right; that the schooner was then towed to the anchorage of the United States squadron, to be furnished the repairs she needed; that her cargo was also examined, and the crew of the seizing vessel permitted to help themselves to anything they could get; that the captain of the Albatross, (another United States ship-of-war in company,) in the presence and with the assent of the prize master, took from the prize schooner eight muskets, with cartridges and caps, the private property of the claimant, carried on board of the schooner for her protection, none of which have ever been restored to the claimant or the vessel; that the claimant, who was on board of the schooner for the voyage, her mate and three seamen, were wrongfully removed from the vessel, without their consent, and were sent by other conveyances to Baltimore, and were there left on shore, without provision or means to reach New York, other than at their own ex-

pense; and that the schooner was sent to that port in charge of a prize-master, who was not capable of navigating the vessel to New York, and had to rely on the seamanship of her master. The claimant also makes his own and the master's public protest, attested to on the 20th of January, 1862, and annexed to the claim as a part thereof. That sets up and avers, that the prize master, in bringing the schooner into the port of New York, when off Barnegat, caused the American flag to be hoisted over the British colors upon her, and the same thing again done when off the Highlands of Neversink, and had these colors so kept up thereafter until she arrived in port at the navy yard at Brooklyn. The burden is always laid upon captors to prove the existence of an overruling necessity justifying the spoliation of property found on the prize, or the separation of the officers or crew from the captured vessel, or the omission to send them into port with the prize, for examination. Arnold v. Del Col [Case No. 556]; S. C. 3 Dall. [3 U. S.] 333. The captors will be made personally responsible for goods so embezzled (The Concordia, 2 C. Rob. Adm. 103), unless they were properly out of the actual possession of the captors at the time of the spoliation. The Maria, 4 C. Rob. Adm. 352. So, also, if a proper place or proper means are not adopted for bringing the captured property in, for prompt trial. The Washington, 6 C. Rob. Adm. 275. The claim or protests cannot be regarded as affirmative proof in the cause against the libellants, especially those who made the capture, but they sufficiently indicate the exceptions which will be urged on the hearing against the validity of the capture, and should have placed the libellants on their diligence to supply other proof enabling the court to understand correctly the facts of the case, if they have been wrongfully stated or disclosed in the preparatory proofs given.

The evidence, as it stands, in my judgment, fastens upon the libellants unjustifiable conduct towards the crew and property on the prize after her arrest, for which misbehavior the captors are responsible in damages to the parties affected thereby, it being in no way excused, or shown to have been reasonably required by any exigencies of the case. The occurrence may very probably become the subject of diplomatic notice between Great Britain and this country, particularly as to the reprehensible treatment of the English flag; but the claimants are entitled personally to compensation through the authority of the court, for injuries sustained by them from unlawful acts of the captors, perpetrated under the seizure, if duly proved on the trial. Although the libellants did not proceed to make the capture of the schooner absolute until seven days after she was in their possession, yet I think the circumstances surrounding her, disclosed in the proof, afforded reasonable grounds of suspicion that the voyage was set on foot and prosecuted with intent to violate the blockade at Beaufort, North Carolina. The officers of the vessel, and the owner of the vessel and cargo, who accompanied the voyage, well knew, before entering upon it, that a blockade had been imposed at that port. Moreover they had been long residents at that place, or engaged in business there. The schooner was American-built, and was purchased and laden at that port, by the claimants, after the war, with a cargo procured there, and immediately after arriving at Liverpool she fitted out, and undertook this voyage, upon which she was arrested. But these grounds of suspicion are virtually displaced by the evidence contained in the papers found on board of the vessel, and gathered orally in the preparatory testimony, showing that the vessel was neutral property, and was pursuing her voyage, on a proper route, to Cuba, until she was compelled by accidents happening at sea, to seek an intermediate port or resource for immediate repairs to render her seaworthy and navigable. The capturing squadron was satisfied of the actual necessity for such repairs, and attempted to supply them at their anchorage; but, on ascertaining the nature of her lading, her own origin, and the antecedent history of her owner, the captors were well justified in arresting her, and referring her to the judicial tribunals to determine whether her original destination was not fraudulently intended for the blockaded port. Had the vessel been captured, at the place of her arrest, in the course of her navigation as documented, and without evidence of a reasonable necessity for her being placed in such vicinity to a blockaded port, here would be cogent reasons for regarding the voyage as concocted and in execution for the purpose of violating the blockade. But the material disasters she had incurred at sea seem to me to remove the force of that suspicion, and to place the case before the court as it appeared to the captors on her giving herself into their charge, namely, that her position was reasonably accounted for by her crippled condition, and her inability to pursue and complete the voyage specified upon her papers. The court, on the proofs before it, must regard the owner as a neutral and the ship and cargo as neutral property, regularly documented and destined to a neutral port, and adapted to the trade and commerce of that port. No application having been made on the part of the libellants, to offer further testimony as to the integrity or culpability of the voyage, the general decree must be entered that the vessel and cargo be restored to the claimants, but without costs, there being probable cause shown on the proofs for her seizure.

The practical method of granting the remedy befitting the case has not been discussed or designated before me. Reparation is demanded by the counsel for the defence

against the captors. My first impression is that no formula de novo need be adopted in order to obtain relief for the wrong, but that the matter may be disposed of as an incident to the suit. All parties entitled to contest the subject are before the court, under its cognizance in the original action. This impression will not be regarded as conclusive of the question in any subsequent case, but for the present purpose I consider it to be at the discretion of the court to order a reference to commissioners or assessors, if prayed for, to ascertain and determine the amount of damages sustained by the claimant and the crew from the alleged illegal acts of the captors after the capture, as an incident to the pending suit, or to admit the parties to proceed by pleadings and proofs anew, and have the charges settled by a more formal method of proceedings. There seems to be no necessity for framing a formal issue, upon allegations and counter allegations, when the matter for relief is, in effect, pleaded in the claim, and thus the case is open alike to both parties. The Maria, Spinks, Prize Cas. 321. If no motion is addressed to the court by either party to require the interposition of pleadings to the point of damages, an order will be entered, if demanded, that the prize commissioners be appointed to ascertain and report to the court the damages sustained by the ship's company, or any of them, by means of the alleged misconduct of the captors towards them or their property after the capture.

March 6, 1862, on motion of the libellants, they were allowed to put in further proof, within twenty days as to the actual intention of the claimant to violate the blockade, and the claimant was permitted to give, within the same period further proof of his honesty of purpose. [See Case No. 7206.]

## Case No. 7,206.

The JANE CAMPBELL.

[Blatchf. Pr. Cas. 130.] [1]

District Court, S. D. New York. March, 1862.

PRIZE—VIOLATION OF BLOCKADE.

The further proof introduced by the libellants, on leave, to show an intent to violate the blockade, *held* not to establish such intent.

In admiralty.

BETTS, District Judge. On the decision of this case upon the preparatory proofs [Case No. 7,205], an order was granted by the court, at the instance of the advocates for the libellants, that they have leave to put in further proofs, "such further proof being limited to evidence tending to show that the voyage in question in this suit was set on foot and prosecuted by the claimant with intent, on his part, to violate the blockade in question in said suit." The district attorney presented in court, and examined orally, under oath, Thomas E. Corsen, John G. Williams, and William R. Hinman, neither of which witnesses, on his direct or cross-examination, testified to any fact within his knowledge, or to any declaration or admission of the claimant, tending to prove any culpable act or guilty knowledge of the claimant in respect to the alleged attempt to violate the blockade inquired about. The testimony of the witnesses was directed to the impeachment or disparagement of the testimony of Captain Harris, of the schooner, given on his examination in preparatorio. Two observations must be applied to the attempt: (1) The impeachment of the witness is not by positive evidence against his general integrity of character for truthfulness or individually, but by testimony which is claimed as evincing, by implication or inference, that he had acted as master of an American vessel, and that he must, therefore, have sworn falsely in asserting that he was a British subject at the time his testimony was given, because, as such, he could not be legally a master of an American vessel.

The testimony of the one witness to the circumstance of Harris having been in command of an American vessel is destitute of certainty or clearness as to time and manner; nor is the fact necessarily incompatible with his sworn assertion, that he was a British subject, so as to require the conclusion that his statement was wilfully false, and destructive to his credibility as a witness in this suit. I perceive nothing in the further proofs that calls for or justifies a rejection of the conclusion adopted by the court on the first hearing of the cause on the merits; and the application on the part of the libellants to recall or vary that decision is denied.

[1] [Reported by Samuel Blatchford, Esq.]

JANE, The ELIZA. See Case No. 4,363.

JANE, The LOUISA. See Case No. 8,532.

JANE, The MARY. See Cases Nos. 9,214 and 9,215.

JANE, The (FREEMAN v.). See Case No. 5,086.

JANE, The SARAH. See Cases Nos. 12,348 and 12,349.

JANE M. HARWARD, The. See Case No. 6,186.

## Case No. 7,206a.

JANES v. BUZZARD.

[Hempst. 240.] [1]

Superior Court, Territory of Arkansas. July, 1834.

RECORD OF SUIT BETWEEN SAME PARTIES — ADMISSIBILITY AS EVIDENCE — HIRE OF SLAVES — RUNNING AWAY — PAROL AGREEMENT TO PURCHASE—TORTIOUS POSSESSION—WAIVER OF TORT.

1. The record of a suit between the same parties is admissible in evidence.

[1] [Reported by Samuel H. Hempstead, Esq.]

2. A person who obtains the possession of the slave of another is responsible for hire, although the negro may run away before the expiration of the time.

3. Nor can the fact that the possessor may be responsible for the value of the slave, in the event of running away, at all diminish the claim to hire.

4. A purchase of negroes by parol agreement is as valid as by bill of sale, whether a full consideration is given or not.

5. Where one gets possession of chattels tortiously, the real owner may waive the tort, and sue in assumpsit for the value or the proceeds.

[Cited in Collins v. Johnson, Case No. 3,015a.]

6. And where they have been returned by the trespasser, the real owner may waive the trespass, and recover in assumpsit for the time of their detention.

Error to Lafayette circuit court.

Before JOHNSON and YELL, JJ.

JOHNSON, Judge. This is an action of indebitatus assumpsit, brought by [Jacob] Buzzard against [Massack H.] Janes, in the Lafayette circuit court, for the work and labor of six negroes, slaves, the servants of the plaintiff. The cause was tried on the general issue, and a judgment and verdict rendered for the plaintiff below for the sum of one hundred and eight dollars and costs of suit, to reverse which this writ of error is prosecuted.

The first assignment of error questions the sufficiency of the declaration, in not setting out any consideration for the promises therein mentioned, and in not averring that the plaintiff performed the work and labor either by himself or his servants. The plaintiff, in his declaration, avers, that "the defendant was indebted to the plaintiff in the sum of three hundred dollars, for work and labor of certain negro slaves, servants of the plaintiff, namely, one negro named Jacob, and before that time done and performed for the defendant, and at his special instance and request." The plaintiff in the court below alleges that the work and labor was done and performed by his servants at the request of the defendant, and there can surely be no doubt that he has a right to recover for the work and labor of his servants, as though they were his slaves for life.

The next error assigned is, that the court permitted improper testimony to go to the jury. From a bill of exceptions filed in this cause, it appears that the plaintiff in the court below produced the record of a suit in the Lafayette circuit court by the plaintiff in error, against the defendant in error and others, and offered to read as evidence a part of it, from which it appeared that Janes had, by a decretal order of the Lafayette circuit court, caused the negroes in this suit to be taken from the possession of Buzzard and delivered to him, and at a subsequent term of the court, the negroes were again ordered by the court to be restored to Buzzard. To this evidence, Janes, by his counsel, objected; but the court overruled his objection, and permitted the evidence to go to the jury.

We can see no error in the decision of the court in permitting the evidence to go to the jury. The plaintiff and defendant were parties to the suit, the record of which was adduced as evidence, and if it conduced to prove any fact material to the issue then before the court, either party had a right to use it. That it conduced to prove, and did establish beyond controversy, the length of time Janes had possession of the negroes, cannot admit of a doubt. This was a material inquiry, and on that ground the record was properly received as evidence.

The next assignment of error is, "that the court rejected proper testimony when offered by the defendant." The first evidence offered by Janes, and rejected by the court, is as follows: Janes, by his counsel, asked a witness, "if the negro Jacob was taken subject to the condition that if he ran away and could not be returned at the expiration of three or six months, the person taking him should be liable to pay the value of him, what would be the value of his services per month?" The court, in our judgment, correctly rejected the testimony. If Janes, by obtaining, as he did, the possession of the negro of Buzzard, incurred the responsibility of paying his value in the event of his running away, it was a liability voluntarily assumed, and cannot diminish the claim of Buzzard for the value of his services, especially when it does not appear that the negro did in fact run away. The remaining evidence rejected by the court is the following: The plaintiff in the court below introduced Morris May as a witness, and proved by him that he (May) sold and delivered the negro to the plaintiff, and that he (the witness) purchased the negro of one Samuel Farney. The defendant then asked the witness by what title he held the negroes, and what consideration he gave for them; to which the plaintiff objected, and the court sustained the objection. We think the evidence was inadmissible. The witness had already answered that he held them by the title of purchase from Farney, and it was equally valid whether it was made by a parol agreement or by a bill of sale, and it was not material whether he gave the full value for them or not.

The counsel for the plaintiff in error has insisted that the present action is misconceived, and that from the facts disclosed by the defendant in error on the trial of the cause, he was not entitled to recover in this form of action. A conclusive answer to the argument is, that all the facts of this case, as they were detailed in evidence to the court below, are not presented to this court. The bills of exception do not state that all the evidence given in the case is contained in them. Admitting, however, that it does appear from the evidence spread upon the record, that Janes obtained posses-

sion of Buzzard's negroes by an unjust proceeding in a suit in chancery, still we think that the present action is maintainable by Buzzard. It is no doubt true that Buzzard might have brought an action founded upon the tortious acts of Janes, and recovered damages for the wrongful taking, as well as the illegal detention of his servants. But it was competent for him, and he had the election to waive the tort and to bring an action ex quasi contractu. There is abundant authority to sustain this position. In the case of Stockett v. Watkins, 2 Gill & J. 326, it was held that where one gets possession of chattels tortiously, and converts them into money, the real owner may waive the tort and sue in assumpsit for the proceeds; and that action has been sustained in some instances where the trespasser has not parted with the chattels. Where they have been returned to the owner, he may still waive the tort, and then recover their value for the time of their detention in assumpsit. 1 Saund. Pl. & Ev. 133; 1 Chit. Pl. 94; 1 Mo. 643. Judgment affirmed.

## Case No. 7,206b.

JANES v. BUZZARD.

[Hempst. 259.] [1]

Superior Court, Territory of Arkansas. July, 1834.

APPEAL—FAILURE TO FILE AFFIDAVIT—DISMISSAL.

1. An appeal taken without the affidavit prescribed by law, must be dismissed.

2. The legislature of the territory had power to prescribe the conditions upon which an appeal might be taken.

Appeal from the Lafayette circuit court.

Before JOHNSON, ESKRIDGE, and LACY, JJ.

JOHNSON, Judge. This is a motion to dismiss the appeal made by the appellee [Jacob Buzzard], the plaintiff in the court below, on the ground that the appellant [Massack H. Janes], the defendant in the court below, failed by himself or agent to make the affidavit required by law at the time of taking the appeal. The fifty-fourth section of the statute under the title "Judicial Proceedings," in Geyer's Digest, 261, provides that, "if any person shall feel himself aggrieved by the final decree or judgment given in any of the circuit courts in any cause wherein the matter in dispute exceeds, exclusive of costs, the sum or value of one hundred dollars, it shall and may be lawful for such person at the term in which judgment is given, to enter his or her appeal to the superior court; provided that no appeal shall be granted to any defendant in actions of debt or in actions upon the case, for note, bill, book account, or assumpsit, unless the defendant or his agent shall make affidavit or affirmation stating that he does not appeal for the purpose of delay or vexation, but that he believes himself aggrieved by the judgment of the inferior court." If the proviso just recited be in force, the motion to dismiss this appeal must prevail, as the appellant made no affidavit or affirmation in the circuit court at the time he prayed the appeal. But it is contended that the proviso requiring the affidavit is repealed by subsequent legislation. Mr. Geyer, the compiler of the Digest, has marked it as repealed by the fifty-fifth section of the same title, and in this he was no doubt correct. But the fifty-fifth section has been subsequently repealed by the fifth section of an act supplementary to the several acts establishing courts of justice, and regulating judicial proceedings, passed December 23, 1818. Pamph. Acts, 36. By the repeal of the fifty-fifth section, all the fifty-fourth section was thereby revived. By the repeal of a repealing statute, the original statute is revived. This principle of the common law is to be found in its earliest records, and is undisputed. The Bishops' Case, 12 Coke, 7; 1 Bl. Comm. 90.

The organic laws of Missouri and this territory have been referred to for the purpose of showing that an appeal is given by these laws, and that it is not competent to the local legislature to restrict the right of appeal. We think it is within the power of the legislature of the territory to prescribe the conditions upon which an appeal may be taken, provided they are not manifestly unreasonable. The condition required in the proviso of the fifty-fourth section, is far from being unreasonable or improper; but, on the contrary, is consistent with the soundest policy.

It is further contended by the counsel for the appellant, that an appeal without affidavit is given by the second section of an act in addition to an act, entitled "An act to amend an act regulating the mode of judicial proceedings in certain cases, and extending certain powers to the general court, passed 21st December, 1818." We are clearly of opinion, after attentive consideration of this act, that it is applicable to chancery suits alone, and not to actions or suits at law. It is the opinion of the court that this appeal must be dismissed, on the grounds of a failure of the appellant to make by himself or his agent the affidavit required by law at the time of praying the appeal. Appeal dismissed.

[1] [Reported by Samuel H. Hempstead, Esq.]

## Case No. 7,206c.

JANES v. MAY.

[Hempst. 288.] [1]

Superior Court, Territory of Arkansas. July, 1835.

WRIT OF ERROR—NON PROS.

If a term intervenes between the issuing of the writ of error and filing the record and writ, the plaintiff in error will be non-prossed.

Error to Lafayette circuit court.

Before JOHNSON and YELL, JJ.

YELL, Judge. This was an action of assumpsit upon promises by [Morris] May against [Massack H.] Janes, in the Lafayette circuit court. At the October term of that court, 1832, the plaintiff recovered a judgment against Janes for the sum of eighty-four dollars, besides costs. Upon this judgment, execution issued, and a supersedeas was granted, and on the 4th November, 1833, a writ of error was sued out returnable to the January term of the superior court, and on the 15th of July is indorsed filed by the clerk.

The only question in the cause which the court is now disposed to consider is, did the writ of error abate, by one term of the superior court intervening between the issuing of the writ of error and the filing of the record. This court is clearly of opinion that the cause should have been returned to the January term of the superior court, 1834; that it is in the nature of an original writ, and must be returned to the next term after it has been issued. The failure to return to the proper term cannot be cured by an amendment, there being no clerical error or error in fact to amend, as the writ bears date when issued, and when filed in the office. According to the decision of the supreme court of the United States in the case of Hamilton v. Moore, 1 Pet. Cond. 168, 3 Dall. [3 U. S.] 371, the plaintiff in the writ of error must be non-prossed. Ordered accordingly.

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JANES (WILSON v.). See Case No. 17,811.

JANESVILLE (CLARKE v.). See Case No. 2,854.

JANESVILLE GAZETTE (WHITNEY v.). See Case No. 17,590.

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## Case No. 7,207.

In re JANEWAY et al.

[8 Ben. 267.] [2]

District Court, S. D. New York. Dec., 1875.

BANKRUPTCY—COMPOSITION.

Terms of composition offered by a bankrupt firm to its creditors, and confirmed by the requisite number and amount of creditors, were, that the firm was to pay 75 per cent. of its debts in instalments, evidenced by notes of the firm for such instalments, but unsecured and unendorsed; that the individual members of the firm were to pay their individual debts in full, by instalments, evidenced by their individual notes, unsecured and unendorsed; that the notes should be deliverable within ten days after the date of the order of the court confirming the resolution of composition; that, immediately on the recording of the resolutions of composition, all the property of the bankrupts should be restored to them and the bankruptcy proceedings discontinued or perpetually stayed, at the option of the debtors: *Held*, that this was no composition whatever, and was not for the best interests of all concerned, and that the court would refuse to call the second meeting of creditors.

[Cited in Re Wilson, Case No. 17,781.]

In bankruptcy.

Carter & Eaton, for the composition.

W. A. Coursen, in opposition.

BLATCHFORD, District Judge. The terms of the composition in this case, as confirmed by the required number and amount of creditors, are, that the firm of [William R.] Janeway & Co. is to pay 75 per cent. of its debts, in 5 equal instalments of 15 per cent. each, in 12, 18, 24, 30 and 36 months, evidenced by the notes of the firm for like amounts and on like times, bearing interest, but unsecured and unendorsed, and the individual members of the firm are to pay their individual debts in full, in 5 equal instalments of 20 per cent. each, in 12, 18, 24, 30 and 36 months, evidenced by their respective individual notes for like amounts and on like times, bearing interest, but unsecured and unendorsed. The composition further provides, that the notes shall be deliverable within 10 days after the date of the order of the court confirming the resolutions of composition. It also provides, that, immediately upon the recording of the resolutions by the order of the court, all the property, books and estate of all the debtors shall be restored to them and revert to them, the same as if no proceedings in view of their recent insolvency had taken place, and the proceedings in bankruptcy shall be discontinued or perpetually stayed, at the option of the debtors, and an order to that effect may be entered, without further notice to the creditors.

This may truly be said to be no composition whatever. The creditors, after instituting proceedings in involuntary bankruptcy against the debtors, agree to a composition which provides, that, as soon as the resolution confirming the composition shall be recorded, all the property of the debtors shall revert to them the same as if no bankruptcy proceedings had taken place, and an order discontinuing such proceedings may be entered, at the option of the debtors, without further notice to the creditors. All this is to be done before any money is paid or any notes are given, and, ten days after the bankruptcy proceedings may be discontinued and put out of court, the notes are to be given. The

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[1] [Reported by Samuel H. Hempstead, Esq.]

[2] [Reported by Robert D. Benedict, Esq., and Benj. Lincoln Benedict, Esq., and here reprinted by permission.]

court will have lost all power to enforce even the giving of the notes, because the whole matter will be out of court. The creditors will be no better off than if they were to discontinue themselves the proceedings they have commenced, without asking the court to confirm the resolution of composition, and then treat with the debtors for a settlement. I certainly cannot say that I am satisfied that this so-called composition is for the best interest of all concerned. I must, therefore, refuse to order a second meeting of creditors.

## Case No. 7,208.

In re JANEWAY.

[4 N. B. R. 100 (Quarto, 26);[1] 18 Pittsb. Leg. J. 67; 4 Brewst. 250.]

District Court, D. New Jersey. Oct. 18, 1870.

BANKRUPTCY—TRUST PROPERTY—FOLLOWING.

M. A. C. and M. C. placed in the hands of J. L. J. money to be invested by J. L. J. in trust for their benefit. J. L. J. failed to so invest the money, but used it in his speculations. He afterwards became bankrupt, and M. A. C. and M. C. petitioned to have the assignee ordered to refund the money to them under the 14th section of the bankrupt act [14 Stat. 522]. *Held*, the prayer of the petition must be denied. Property held in trust does not pass to the assignee by the proceedings in bankruptcy, but it must be property that can be followed or distinguished. When the trust property does not remain in specie, but has been made way with by the trustee, the cestui que trusts have no longer a specific remedy against the estate, and must come in pari passu with the other creditors.

[Cited in Hosmer v. Jewett, Case No. 6,713; Illinois Trust & Savings Bank v. First Nat. Bank, 15 Fed. 860.]

[Cited in Halle v. National Park Bank, 140 Ill. 418; Neely v. Rood, 54 Mich. 137, 19 N. W. 921; Edson v. Angell, 58 Mich. 337. Distinguished in Wisconsin, M. & F. Ins. Co. Bank v. Manistee Salt & Lumber Co., 77 Mich. 81, 43 N. W. 909.]

In bankruptcy.

NIXON, District Judge. Application is made to the court on behalf of Mary Ann and Margaret Cool, creditors of John L. Janeway, bankrupt, for a rule to show cause why the assignee should not pay in full to these creditors, out of the assets of the bankrupt's estate, the sum of about two thousand five hundred dollars, which the said Janeway received of them in trust for investment, before his bankruptcy, but which he failed to invest, either in their names or in his own name, for their benefit. The evidences of his indebtedness, as well as the character of the debt, are found in three several memoranda given by the bankrupt to these creditors, as follows:

"Flemington, March 1, 1869. Received from Mary Ann and Margaret Cool, four hundred dollars and fifty-eight cents, to be invested for them. John L. Janeway."

"Flemington, April 2, 1869. I have in my hands fourteen hundred and ninety-five dollars and eighty cents, of Mary Ann and Margaret Cool, which I hold to invest for them. John L. Janeway."

"Flemington, June 7, 1869. Due Mary Ann and Margaret Cool, four hundred and thirteen dollars, which I hold to invest for them. John L. Janeway."

It is claimed, on the part of the creditors applying for the rule, that these sums were not a loan to the bankrupt, but a deposit in his hands as trustee, and that they are entitled to be paid in full from the assets in the hands of the assignee, under the clause of the 14th section of the bankrupt act, which provides that no property held by the bankrupt in trust shall pass by the assignment. It is not pretended that the money deposited with the bankrupt for investment can be identified. It is assumed that it has gone into his general estate, and that the trustee, instead of making the promised investment, has used it in his speculations.

The principles which govern the case here presented are too well settled to be disturbed. It is true that no trust property is allowed to pass by the commission of bankruptcy from the bankrupt to the assignee; but it must be property that can be followed or distinguished. There must be some ear mark by which it can be recognized. As, for instance, where goods are sent to a factor to be disposed of, and the factor becomes a bankrupt, and the goods, yet in his possession, can be distinguished from the general mass of his property, the principal may recover them in specie, and is not obliged to prove his debt under the commission; and, even where the bankrupt has sold the goods, if he has kept the money received in the sale, in separate bags, the principal has been permitted to claim and hold the money against the assignee.

The supreme court of New York, in Kip v. Bank of New York, 10 Johns. 65, went a step further, and held, that where the trust property had been sold, and the money deposited in bank in the individual name of one of the trustees, but kept separate from his other property, there was not such a blending of the proceeds of the sale with the private effects of the bankrupt, as to deprive the cestui que trust of his right to the same, against the claim of the creditors at large. To bring the present case within these principles, it will be necessary for the applying creditors to point out the specific assets in the hands of the assignee, which is their property, and which they propose to appropriate to the payment of their claims; until this is done, the court feels constrained to adopt the rule as laid down by Hill, in his work on Trustees, to wit: "Where the trust property does not remain in specie, but has been made way with by the trustee, the cestui que trusts have no longer any specific remedy against any part of his estate in his bankruptcy or insol-

[1] [Reprinted from 4 N. B. R. 100 (Quarto 26), by permission.]

vency, but they must come in pari passu with the other creditors, and prove against the trustee's estate for the amount due them." The application must be denied.

JANISCH (TRACY v.). See Case No. 14,125.

## Case No. 7,209.

In re JANNEY.

[1 MacA. Pat. Cas. 86; Cranch, Pat. Dec. 143.]

Circuit Court, District of Columbia. Dec. 13, 1847.

PATENT OFFICE APPEALS—JURISDICTION OF JUDGE—REFUSAL OF COMMISSIONER TO REVIEW DECISIONS OF PREDECESSOR.

[The decision of the commissioner that he will not review or revise the action of his predecessor in rejecting an application, is not a ground of appeal to the judge under the acts of 1836 and 1839 (5 Stat. 117, 353), and such an appeal must be dismissed.]

[Cited in Greenough v. Clark, Case No. 5,784.]

Appeal from refusal to grant patent.

This is an appeal from the decision of the commissioner of patents, in the following words, contained in a letter from him to Mr. Janney, dated patent office, October 28th, 1847:

"Sir: It appears by the records of this office that your application for letters-patent for alleged improvement in machinery for sawing stones [1] was examined and rejected, for reasons assigned, on the 3d of August, 1843; that on the 7th of September following the case was reconsidered, and the decision was again revised and affirmed. All these actions took place under the administration of the late Commissioner Ellsworth. Under these circumstances the decision heretofore made cannot be disturbed, and your application must stand rejected. Respectfully, yours, Edmund Burke.

"Edward Janney, Esq., care J. J. Greenough, Washington, D. C."

From the commissioner's answer:

1. I decline to entertain the request to again take up and examine the application, on the ground that it had been solemnly adjudicated and settled by my predecessor. The principle upon which I determined to settle the practice of the patent office in such cases is, that when it shall satisfactorily appear that my predecessor had upon mature and serious consideration decided upon the merits of an application for a patent adversely to the claim of the applicant, the decision should not be disturbed, and the question should be considered as finally settled. And as a general rule of evidence in such cases, I further determined that the proof of such final decision should be two rejections of the same case. Of course any other proof sufficient to show the fact would be equally satisfactory.

2. The only matter decided (if it can be called a decision) is, that I will not take up and reopen the application for any purpose whatever. I have made no decisions on the merits of the case, i. e., whether or not the applicant is entitled to a patent as originally claimed by him nor as set forth in his proposed new claim, which has never been properly before me for decision.

3. This official act, from which this appeal has been taken, is not a judicial but an executive act. It is not an act of which the honorable chief justice has jurisdiction, but it is an act for which I am only amenable to the supreme executive power of the government. The appeal must not be dismissed for want of jurisdiction.

4. The right to establish reasonable rules of practice, not inconsistent with law, to regulate and facilitate the transaction of business is incident to every court and public officer. The reasonableness of the rule laid down by me in this case is apparent when it is considered that without some such rule rejected applications would never be considered as finally settled, and would be liable to be brought up for reconsideration at any time, however remote in time, to the great and continued prejudice of the regular business of the office.

5. Assuming, however, that the court has jurisdiction, yet, according to the practice of the executive officers and of other departments of the government, which have been decided by several attorneys-general to be in conformity with the true intent and meaning of the constitution, the commissioner is right in refusing to re-examine applications which have been solemnly adjudicated and settled by his predecessor. 2 Op. Attys. Gen. 8; 3 Op. Attys. Gen. 1.

6. Other grounds failing, the appeal must be dismissed for the reason that no patent has been refused Mr. Janney. Pomeroy v. Connison [Case No. 11,259].

7. The applicant's remedy is by filing a new application.

J. J. Greenough, for appellant.

W. P. N. Fitzgerald, for commissioner.

CRANCH, Chief Judge. The last application for a patent was made on the 27th of October, 1847, some small amendment having been made in the specification not affecting the merits of the claim, so that it was, in effect, an application to the present commissioner to revise and revoke the two decisions made by Mr. Ellsworth, the former commissioner. His refusal so to revise and revoke these decisions is not a ground of appeal under the acts of 1836 and 1839. The act of 1839 gives the right of appeal to the judge only in cases where an appeal was by the previous act allowed from the decision of the commissioner to a board of examiners, and then only when a patent was refused. In the present case he has not refused a patent. He decides only that

[1] [Cranch, Pat. Dec. 143, gives "stoves."]

he will not examine the merits of the claim, which has been twice rejected after a full examination by his predecessor in office. This refusal was not a ground for appeal to examiners under the seventh section of the act of 1836, and therefore is not a ground of appeal to the judge.

Having no jurisdiction of such an appeal, it is not for me to say whether the refusal under the circumstances of the case was right or wrong. There is no limit of time as to the appeal, and I do not perceive any reason why Mr. Janney may not now appeal from the decision of Mr. Ellsworth, and have the merits of his invention decided. I understand the merits of both applications are alike. Having no jurisdiction of this appeal, I suppose it must be considered as dismissed.

## Case No. 7,210.

JANNEY v. BAGGOT.

[1 Cranch, C. C. 503.] [1]

Circuit Court, District of Columbia. July Term, 1808.

SET-OFF.

An account in bar or set-off, must be filed one term before trial.

Assumpsit for goods sold and delivered. At the trial the defendant offered to prove an account in set-off. The plaintiff objected, and relied on the rule of the court at last term, that no account shall be given in evidence as a set-off, unless it be filed one term before trial. The defendant proved that a few days ago, the account had been presented to the plaintiff, who acknowledged it to be just and that it ought to be set off. But THE COURT adhered to the rule. If the defendant had filed it at the last term, the plaintiff might have then dismissed his suit and prevented the costs of this term.

## Case No. 7,211.

JANNEY v. The BELLE LEE.

[12 Int. Rev. Rec. 123; 2 Chi. Leg. News, 405.]

District Court, S. D. Mississippi. June Term, 1870.

VESSEL—LIEN—FOREIGN PORT—WHEN ALLOWABLE.

1. *Held*, that the master of a vessel in a foreign port may create a lien upon the vessel for necessary repairs, or supplies, or for any other purpose necessary to enable him to continue and complete his voyage, provided the same cannot be procured by other means within the control of the master.

2. That ordinarily this can only be done by the master in command, as he is the confidential agent of the owners.

3. A lien may be created to release a vessel from an actual, but not from a threatened seizure.

[In admiralty. Suit by John Janney against the steamer Belle Lee.]

Harris & Harris and W. & J. R. Yerger, for libellant.

Pitman & Featheree, for respondent.

HILL, District Judge. This libel is prosecuted to recover the sum of $2,918 41, alleged to be balance due libellant of a sum advanced to the clerk of the Belle Lee to prevent her seizure in the port of New Orleans, for the payment of a debt due by the former owners of the boat, for funds advanced to finish and furnish said boat when first launched. There is no controversy as to the sum due, or the liabilities of the boat when the advance was made; the only question being whether or not it created such a maritime lien on the boat as entitles the libellant to seizure and sale for the satisfaction of his demand. It is admitted that the Belle Lee, at the time this advance was made, was subject to all the rules of maritime law of a vessel in a foreign port. The master of a vessel in a foreign port may create a lien upon the vessel for necessary repairs or supplies, or for any other purpose necessary to enable him to continue and complete his voyage, provided the same cannot be procured by other means within the control of the master. Ordinarily this can only be done by the master in command, as he is the confidential agent of the owners; but, if some other officer is intrusted with the financial affairs of the vessel, I can see no reason why he may not create this liability, and whatever contract may be made by the clerk or other officer, with the knowledge and consent of the master, it must be held as his act, and the owners bound thereby.

It is insisted by the respondent, that this advance, being made to the clerk and not to the master, did not create a lien upon the vessel. The funds were procured by the consent of the master, and so far as this defence is concerned, it, is not well taken; neither do I think is the objection of staleness well taken, under the facts as proven in this case, however it might be against persons acquiring rights against the vessel bona fide and without notice of libellant's claim. But it is unnecessary to consider these questions further, as the case must turn upon another point. In the case of Thomas v. Osborn, 18 How. [59 U. S.] 22, it is held that by the marine law, it does not matter whether the repairs and supplies are furnished, or the money is furnished for their purchase, the lien is equally created. A lien may be created to release the vessel from an actual but not from a threatened seizure, as held in the case of The Aurora, 1 Wheat. [14 U. S.] 96; also, in the case of The Boston [Case No. 1,669]. This was only a threatened seizure. Had the Belle Lee, at the time the advance was made, been actually seized for the payment of the debt due

[1] [Reported by Hon. William Cranch, Chief Judge.]

to Kennet & Bell, although an antecedent debt, and one which did not create a lien, it would nevertheless, in the absence of other means to satisfy the same, have been a necessary advance, to enable the boat to pursue her voyage, and would have created the lien; but there having been no such actual seizure, the lien was not created, and the libellant must look to the party to whom he made the advance, and to the then owners of the Belle Lee, for payment. The libel must be dismissed at the cost of the libellant.

JANNEY (BOONE v.). See Case No. 1,642.

## Case No. 7,212.

JANNEY et al. v. GEIGER et al.

[1 Cranch, C. C. 547.] [1]

Circuit Court, District of Columbia. July Term, 1809.

PROMISSORY NOTE—ACTION ON — INDORSEMENT—AVERMENT OF CONSIDERATION—INSUFFICIENT PLEA.

1. A count upon the indorsement of a promissory note not payable to order, without averring a consideration for the indorsement, is bad in Virginia.

[Cited in McComber v. Clarke, Case No. 8,711.]

2. A plea that the maker of the note had, at the date of the writ, goods and chattels to a greater amount than the plaintiffs' claim, is no answer to an averment of insolvency.

Assumpsit. The declaration had three counts.

1. The first count stated a promissory note made by G. N. Lyles, to Amos Allison and Jacob Geiger, for four hundred and seventy-nine dollars and eighty-nine cents, at ninety days, dated 17th July, 1804, for value received, "negotiable at the Bank of Alexandria," but not payable to order, and avers that it was assigned by indorsement by Allison and Geiger, to the plaintiffs [Aquila Janney and Elisha Janney], whereby the plaintiffs were entitled to demand the money from Lyles; but that when payable, he refused to pay it, and was insolvent, of which the defendants had notice, whereby they became liable to pay, &c., and being liable, in consideration thereof promised to pay, &c.

2. The second count stated that the defendants, in order to give a credit to the said note, and to induce some person or persons to receive the same for the full amount and value thereof, and to enable the said Lyles to pass the same for its full value, indorsed the same, and delivered it to Lyles to be negotiated by him for value received, who passed it to the plaintiffs for value received, by means whereof the plaintiffs became entitled to demand of Lyles, the amount thereof; that when payable they demanded payment of Lyles, who refused; of which the defendants had notice; that Lyles was insolvent, by means whereof the defendants became liable, &c.

The third count was for money had and received.

The defendants pleaded,—1. Non assumpserunt. 2. That on the day of suing out the writ (January 3, 1805,) Lyles had property in his possession, of his own proper goods and chattels, far exceeding the amount claimed by the plaintiffs. 3. That the defendants never received any value, or consideration of any kind of or from the plaintiffs, or any other person, for the note, or for their indorsement. To the second plea there was a general demurrer and joinder. To the third, the plaintiffs replied, that the defendants indorsed the note to give it credit. That after its indorsement it was assigned and delivered to the plaintiffs for a full and valuable consideration; and that the plaintiffs received it upon the credit of the defendants as well as that of the said Lyles. To this replication there was a general demurrer and joinder.

Mr. Youngs, for defendants, upon the argument on the demurrers, contended that the first fault was in the declaration which did not aver any consideration for the defendants' indorsement. That if the plaintiffs can recover at all it must be upon the principles of the common law, for the statute of Virginia of the 4th of December, 1786, p. 36, § 4, which makes promissory notes assignable, only authorizes the assignee to sue in his own name, but gives no right of action against the assignor. By the common law the assignor is only liable to refund what he has received for the note, and if he has received nothing is not liable at all. Mandeville v. Riddle, 1 Cranch [5 U. S.] 298; Norton v. Rose, 2 Wash. [Va.] 233; Picket v. Morris, Id. 255; Lee v. Love, 1 Call, 497; Mackie v. Davis, 2 Wash. [Va.] 219. It is necessary, therefore, in a declaration by the assignee against the assignor, to state the consideration.

Mr. Swann, contra. In Vowell v. Lyles [Case No. 17,021], this court decided that if the defendant indorsed the note to give it credit, no other consideration is necessary to support the action. The like instruction was given to the jury by this court in Patton v. Violett [Id. 10,839], at November term, 1807.

THE COURT was of opinion that the first count (upon the mere indorsement of a promissory note not payable to order, without stating any consideration) was bad, but gave the plaintiffs leave to amend.

At July term, 1809, THE COURT (Duckett, Circuit Judge, absent) was of opinion that the second plea was bad.

Judgment for the plaintiffs.

JANNEY (LUPTON v.). See Case No. 8,607.

[1] [Reported by Hon. William Cranch, Chief Judge.]

## Case No. 7,213.

JANNEY v. MANDEVILLE.

[2 Cranch, C. C. 31.] [1]

Circuit Court, District of Columbia. Nov. Term, 1811.

WRIT OF INQUIRY — DEATH OF DEFENDANT AFTER — WHAT PLEAS ALLOWABLE TO ADMINISTRATOR.

If the defendant die after office judgment and writ of inquiry awarded, his administrator cannot plead plene administravit; nor any other plea which the original defendant himself could not have pleaded.

A writ of inquiry had been awarded in the lifetime of the defendant's intestate. The defendant [Jonathan Mandeville's administrator] offered to plead plene administravit; but THE COURT refused to receive the plea, on the authority of McKnight v. Craig's Adm'r (decided at the last term of the supreme court of the United States, in February, 1811) 6 Cranch [10 U. S.] 183, where it was ruled that after an office judgment in the lifetime of the intestate, the defendant cannot plead any plea which the intestate could not have pleaded.

JANNEY (NEALE v.). See Case No. 10,069.

JANNEY (PATTON v.). See Case No. 10,836.

JANNEY (PHILIPS v.). See Case No. 11,095.

## Case No. 7,214.

JANNEY et al. v. SMITH.

[2 Cranch, C. C. 499.] [1]

Circuit Court, District of Columbia. Nov. Term, 1824.

OFFER OF SET-OFF—REJECTION BY JURY—BAR TO FURTHER ACTION.

A claim, which has been pleaded or offered in evidence as a set-off, and rejected by the verdict of the jury, will not maintain an action.

Assumpsit, for the defendant's proportion of one Johnson's expenses in Tennessee, upon a certain business. Plea, non assumpsit, and issue.

The defendant showed that the plaintiffs had offered and submitted this claim to the jury in bar of a former action brought by this defendant [Joseph] Smith, against these plaintiffs, Thomas Janney & Co., and that the jury did not allow it.

Mr. Swann, for defendant, contended that the plaintiffs are bound by that verdict, and cannot set up the claim again as a substantive cause of action.

Mr. Hewitt, contrà. In the case of Scott v. English in this court [unreported], after the jury had rejected Scott's claim of set-off, he brought a suit upon it and recovered. The principle that multiplicity of action is to be prevented does not apply; for no former suit has been brought upon it.

Mr. Swann, in reply. In the case of Scott v. English, the objection was not taken.

THE COURT (THRUSTON, Circuit Judge, absent) decided, and instructed the jury that if they should be satisfied by the evidence, that the present claim of the plaintiffs had been set up and insisted upon by the present plaintiffs as a set-off in the former action of Smith against them, and that it was not afterwards withdrawn by them from the consideration of the jury, before they retired to consider of their verdict, and they gave a verdict upon the whole matter; that verdict was conclusive against the plaintiffs in the present action.

[1] [Reported by Hon. William Cranch, Chief Judge.]

## Case No. 7,215.

JANSEN et al. v. The THEODOR HEINRICH.

BANG et al. v. The SAME.

[Crabbe, 226.] [1]

District Court, E. D. Pennsylvania. Nov. 9, 1838.

SEAMEN — WAGES — SHIPPING CONTRACT — HOW CONSTRUED — ENTRY ON VOYAGE WITHOUT ARTICLES—IMPLIED CONTRACT—WHEN AT LIBERTY TO LEAVE.

1. If there is any ambiguity, uncertainty, or obscurity, in the shipping contract, especially in the description of the voyage, the construction most favorable to the seamen will be adopted.

[Cited in Goodrich v. The Domingo, Case No. 5,543.]

2. Where seamen enter upon a voyage, without signing shipping articles, an implied contract is presumed, which binds them to remain with the ship till the voyage is terminated.

[Cited in Longstreet v. The R. R. Springer, 4 Fed. 672.]

3. Where seamen ship for an indefinite period, they are at liberty to leave the ship, after the termination of any particular voyage, and the discharge of cargo at the port of delivery.

These were libels for wages [filed by Peter Jansen and Hans Caspern, and by Lorenzo Andreas Bang, Peter Christianson, and Dominicus Hiord, Danish seamen, against the Russian ship Theodor Heinrich (Poulsen, master)].

It appeared that Jansen and Caspern shipped on board the Heinrich, at Liverpool, on the 25th August, 1837, and that the other libellants shipped on board the same ship, at Hamburg, on the 30th September, 1837, all of them at 10.25 roubles, or $7 68 per month, and all without signing shipping articles; that, after the libellants Jansen and Caspern shipped, the Heinrich sailed to Riga, thence to Hamburg, where the other libellants shipped, thence back to Riga, thence to Londonderry, thence to Belfast, thence to Thoone in Scotland, thence to Constantinople, thence to Odessa, and thence to Philadelphia, where she arrived on 29th September, 1838; that

[1] [Reported by William H. Crabbe, Esq.]

the libellants demanded their discharge, and were refused by the captain; that on the 16th October, 1838, at nine o'clock in the morning, they left the ship; and that the cargo was not wholly discharged till the 19th October, at midday. At the trial a muster-roll was produced, dated at Riga on the first visit, and to which the libellants' names were attached, but it was not alleged that the signatures were theirs. To this roll was attached a supplemental sheet, dated at Riga on the second visit, and on which was the following certificate. "This sheet of paper belongs to the muster-roll of the ship Theodor Heinrich, Captain Poulsen, in consequence whereof the following constitutes the roll of equipage of the ship Theodor Heinrich." This certificate was admitted to be signed by the harbor master at Riga. Immediately under the certificate was written: "After dismission of the former crew, were engaged," and then followed the names of the same crew as before, but it was not attempted to be proved that the libellants had signed this paper. After the names were the certificates of the proper officers of the various ports which the Heinrich had visited.

Mr. Kane, for libellants.

Two questions arise in these cases, which must be decided. 1st. Are the libellants entitled to their discharge? 2d. Are they entitled to their wages? The only contract into which they entered, was that at Riga; even this contract they never signed, but, supposing that they were bound by it, their duty was finished, and the contract at an end, so soon as the ship arrived at Riga a second time, or at any other port of discharge. From the moment of such arrival, up to this time, the libellants were entitled to their discharge whenever they demanded it in a legal manner. We are relieved from the consideration of the Russian law, because the libellants never made themselves amenable to it, and never signed a contract which was to be interpreted by the Russian law. The contract is under the law of the port from whence the seaman sails. Babbel v. Gardner [Case No. 692]. There is no proof of any renewal of the original contract. A renewal must be according to some form; but there was no renewal here by the Russian form. Russian Code, § 124, requires the signature of the seamen in the presence of witnesses; there was nothing of this kind here; there was no signature whatever. But suppose that the libellants did renew the original contract, and were bound by its terms, what was it? It was for a voyage to Liverpool and back to Riga, or to some other port where freight could be obtained. This contract has been fully discharged; they have been to Belfast, Londonderry, and Thoone; a cargo of hemp has been discharged, another has been taken in; freight has been obtained to Constantinople and Odessa, and has there been discharged; a third cargo has been taken on board, and the ship has sailed to Philadelphia; on this last voyage, most assuredly, the libellants have been totally released from any former contract. Abb. Shipp. 608, note 1.

The libellants are entitled, at least, to the wages mentioned on the muster-roll, although these are less than the amount paid at Constantinople when they sailed thence. But, it is alleged, that they have forfeited their wages, by their refusal to unload, and by their leaving the ship. As to the first. When they left the ship, out of 16,180 bushels of rye, which composed the cargo, 15,274 bushels were discharged. The captain had said, that the consignee had obtained all he was entitled to, and the eighteen days allowed by the charter-party, in which to discharge, had expired. Of course, then, they were entitled to leave the ship. Abb. Shipp. 644, 645; Swift v. The Happy Return [Case No. 13,697]; The Countess of Harcourt, 1 Hagg. Adm. 248; The Minerva, Id. 347; The George Home, Id. 371; Babbel v. Gardner [supra]. There is no doubt about the jurisdiction of the court. The Courtney, Edw. Adm. 240; The Wilhelm Frederick, 1 Hagg. Adm. 140; Weiberg v. The St. Oloff [Case No. 17,357].

Mr. Read, for respondent.

The Russian law must decide here, not the lex loci, or the general maritime law. This is a Russian vessel; the men entered according to the Russian law; and it is of no consequence whether they are Russians or no. Any individual who enters on board of a ship is liable to the laws of the country to which she belongs. Every country claims and exercises the right to regulate the service in its own marine. Story, Confl. Laws, 201, 233. The original muster-roll is authenticated by the proper officer; and if it does not, in all respects, comply with the Russian Code, there must be a usage therefor. We admit that the original voyage ended at Riga. But the second instrument is an extension of the first, and commences a new voyage only to be ended by a return to Riga, and this additional sheet is authenticated by the harbor master at Riga. But, at all events, if the voyage was terminable at any port of delivery, the libellants were bound to remain on board till the cargo was wholly unloaded. Abb. Shipp. 635.

Mr. Kane, for libellants, in conclusion.

It has not been shown what the power of the harbor master is under the Russian Code; that Code requires that the seamen shall sign, in the presence of witnesses, and no power appears in the harbor master to dispense with this.

HOPKINSON, District Judge. It seems to be admitted that the first voyage of the ship, from Riga to Liverpool, and back to Riga or some other port, was finished and ended

by the return to Riga; and that the contract made by the libellants, whether at Liverpool or at Hamburg, was fulfilled on their arrival at Riga. Both parties were then at liberty; the captain to dismiss the men, and the men to leave the ship. If, then, the captain has any claim to the further service of these men, it must be by virtue of a new agreement. We enter upon the inquiry whether any such new agreement was made, and what it was; with the preliminary remark, that it is incumbent upon the captain who claims the service, to show his title to it; to prove the contract by which he claims it. He must support his claim. It is his duty to see that the contract is clear and explicit, at least in two essential particulars, first, the description of the voyage, and, second, the rate of wages. If there is any ambiguity, uncertainty, or obscurity in it, especially in the description of the voyage, the construction most favorable to the seamen will be adopted. The instrument is prepared by the captain; the seamen sign whatever is put before them, having their eye principally on the rate of wages. They are generally ignorant, illiterate, and imprudent, and it is often necessary to protect them against themselves and their own thoughtless acts. When, therefore, the description of the voyage is not precise, but general terms are used, they will be limited by a reasonable interpretation, by the rules of natural justice, in order to save the seamen from hard and oppressive conditions, arising from a harsh construction of general terms. It is on this principle that courts of admiralty, both in England and in this country, have set a reasonable limitation upon the words "or elsewhere," in the description of a voyage. The obligations of the libellants to this ship must be collected from the proceedings at Riga, in October, 1837; and as we have written documents of what occurred there, they will be chiefly relied upon. The writing is found on a sheet attached to the original muster-roll, which is headed—"This sheet belongs to the muster-roll of the ship Theodor Heinrich. Captain J. D. Poulsen. Riga, Oct. 26, 1837." It is not easy to understand what is meant by this heading. How could this sheet belong to a former muster-roll, or contract, which was defunct, the voyage described in it ended, the contract performed, and all the parties to it—that is, the seamen—declared to be dismissed? This sheet, if it have any force as a contract, must have it as creating a new agreement, between new parties, and for a new object. We must then inquire, first, has it been so executed as to make a contract according to the regulations of Russia? and, second, to what does it bind these men?

The Russian Code expressly requires that these contracts shall be signed by the mariners, in the presence of witnesses. As regards the Russian seamen on board the ship, this was done, at least so far as to have their signatures in the presence of one witness; but as to the libellants, they signed nothing, were required to sign nothing, on the contrary, they were told by the harbor master that he had nothing to do with them, as they were not Russians. Their names were put down by somebody else, although they could write; but by whom this was done, or by what authority, we do not know; the libellants never assented to it, or even knew that it was done. A usage has been conjectured, but there is no evidence of it; and we can hardly believe that, under such a government as that of Russia, a harbor master has authority to dispense with the law, and substitute his own act for the signatures of the seamen, and the attestation of witnesses. But if we should grant that the names of these men were put down on the muster-roll by their own consent, or even by their own hands, what do we gain by it? Our only question is, what did the men undertake to perform? We look in vain to the second sheet for the answer. No voyage is there described, either in precise or general terms. It is declared that "This sheet of paper belongs to the muster-roll of the ship Theodor Heinrich, Captain J. D. Poulsen. Riga, Oct. 26, 1837. In consequence whereof the following constitutes the roll of equipage of the ship Theodor Heinrich. Berent." Then follows a list containing the names of the crew. It goes on thus: "After dismission of the former crew, were engaged:" and then we have a list with the same names as before; but not the least allusion to the voyage to be performed. Nothing but the names and rate of wages. The names of the four Russian sailors, or their marks, are written by their own hands. The libellants did not sign. At Constantinople, the legation of Russia at that port certify the roll, and insert the names of the libellants on it several months after they had shipped. This certificate has no binding force on these men; it is not probable that they ever saw or heard of it. If it was otherwise, what does it certify as to the voyage? That the ship was "bound to Philadelphia;" thus making Philadelphia the terminus of the voyage. To get over this difficulty, it is alleged by the respondent that this second sheet, declared to belong to the first muster-roll, was a renewal, or readoption, of the original contract, as found in that muster-roll. How will this serve the respondent, in the only object of our inquiry, the description of the voyage for which the libellants bound themselves, and from which service it is now alleged they absconded or deserted, in violation of their contract? Let us grant that they did adopt, or renew, the original contract. What was it? "To sail for Liverpool, and thence back again to Riga, or some other port for which freight might be obtained." Here is a clear, explicit, and lawful description of the voyage. Perfectly reasonable, and easy to be understood. Will

the respondent contend that this was the voyage of the second contract? Was it so explained to these men? Did they ever know what were the terms of that original contract? There is no evidence of any such thing. Did the captain so understand it? If he did, he has been in the gross and continued violation of his contract. On an agreement for a voyage from Riga to Liverpool, and back to Riga, or to some other port, what has he done? He has never gone to Liverpool at all, which was the first port of his destination, but he has taken these men to Londonderry, to Belfast, to Thoone, to Constantinople, to Odessa, back to Constantinople, to Philadelphia; and now claims the right to take them to Richmond, to Rotterdam, and wherever further he may find it convenient or profitable. And all this is to be done under a contract for a voyage from Riga to Liverpool, and back again! Having no evidence, either such as is required by the Russian law, or even by parol, of the character of this contract in relation to the voyage to be performed, but merely the fact that these men did enter into the service of the ship, at certain stipulated wages, what shall we believe was the contract, judging from the acts of the parties, and what will the law imply from those acts? The libellants went on board the ship at Riga; their monthly wages were fixed; they sailed for Londonderry without objection or complaint. Must we not say that they agreed to that voyage? I cannot doubt it. They received wages for that service. They might there have left the vessel, as there was nothing to bind them to her. The same observation applies to the voyages to Belfast, to Scotland, to Constantinople, to Odessa, to Philadelphia. They were at liberty to terminate the connexion with the ship, at any of these places; or to continue in the service, and receive the stipulated compensation. Both parties were equally at liberty at these points. But when the ship sailed from Constantinople, for Philadelphia, I consider that the obligation was mutual to continue their contract until their arrival at Philadelphia. It was an implied contract. The seamen could not have left the ship, to go on board of another, on the broad ocean; nor could the captain have so dismissed them; nor at any intermediate port, for, when they sailed for Philadelphia, they agreed to go to Philadelphia. This is my construction of the implied contract, or understanding, between the parties, drawn from their acts; and this contract is the only one we have to resort to.

Upon this view of the case, the libellants, on the arrival of the ship at Philadelphia, were no longer bound to continue with her; but, if the next voyage proposed was disagreeable to them, they might terminate their engagement here. This, however, will not acquit them of the duty of obedience they owed to the ship and her master, while at Philadelphia, such as they would have owed, if Philadelphia had been the terminus of the voyage, by regular written articles of agreement. What are the facts on this part of the case? On the 16th October, the ship not being then discharged, these men left the ship, without leave. The ship did not complete her unloading for three days after. It is said, first, that this is a forfeiture of the wages, and second, that, at least, they are liable for damages. As to the first, I have explained my views of the law in Magee v. The Moss [Case No. 8,944]. I think the principles I adopted in that case are applicable to this, and that there is no ground for forfeiture. As to the question of damages. By the general maritime law, as well as by the Russian maritime code, seamen are answerable for any damage sustained by, or because of a violation of, their duty. Where the precise damage can be proved, that will be the measure of damages; when it cannot, the court must make the assessment, according to the circumstances of the case. The libellants left this vessel before she was discharged of her cargo. They did so suddenly, without any notice of such an intention. They did so, it is true, under the belief that they had a right so to do; and I have given them credit for this belief in refusing the prayer for a forfeiture of their wages. As I have said, we have no specific evidence of damage, but it is not possible that four or five able-bodied seamen—more than half of the whole crew—could have left the ship, at such a time, without loss and inconvenience, which has been followed up by expenses and delays. If the libellants had made out a clear right for leaving the ship, at the time and in the manner they did, they certainly would not have been responsible for these consequences. But, although their absenting themselves was not an aggravated desertion of duty, there was enough of wrong in it to entitle the captain to some redress. In estimating it, I can not put out of the case that these men have no cause of complaint on board; they have been sailing in the vessel for more than a year, without the least complaint against the master or his officers, from any one of them. Nor can I hesitate to believe that, although the captain did not secure himself for their services until the return of the ship to her home, yet that he honestly believed they would remain with him. Such, I doubt not, was his expectation, but it does not make a contract. The conduct of these men, in continuing in the ship, without a word of discontent, or an intimation of any intention or desire to leave her, until their arrival at Philadelphia, warrants me also in the belief, that it was their expectation and intention to return to Russia in the ship. They hardly expected either to be discharged, or to quit the vessel, at a port so distant from their own home, among a strange people, whose language was unknown to them. In the absence of any ill treatment in the ship, I must look for a mo-

tive for quitting her, and I find it in the information they must have received, that the wages given to seamen here are much higher than they are earning. Imputing this motive to them, I shall be more liberal in my estimate of compensation to the ship, than I would have been under other circumstances. The increase of wages they will get, will enable them, without any hardship, to meet a liberal compensation to the captain, for his losses and difficulties arising from their leaving his service.

Decree. That the contract between the libellants and the master terminated with the arrival of the ship at Philadelphia, and the discharge of her cargo, and that the master has no lawful claim upon their service after that time; that $20 be deducted from the amount appearing to be due to each libellant respectively; and that the suits be consolidated and single costs, only, taxed and allowed.

JANSEN (The UNION v.). See Case No. 14,348.

## Case No. 7,216.

JANSEN v. The VROW CHRISTINA MAGDALENA.

[Bee 11.] [1]

District Court, D. South Carolina. Aug. 6, 1794.[2]

BREACH OF NEUTRALITY—RIGHT OF EXPATRIATION.

What equipments in our ports amount to breach of neutrality. Under what circumstances an American citizen may acquire a new national character.

[Cited in Salderondo v. Nostra Senora Del Camino, Case No. 12,247; U. S. v. New Bedford Bridge, Id. 15,867.]

[See note at end of case.]

The libel in this case states that the said brigantine is the property of Western and Ehrman of Amsterdam; and that the cargo on board is owned by other citizens of the United Netherlands, between whom and the United States of America there is peace and amity, and also a treaty of amity and commerce now in full force, dated 8th October, 1782. That the said vessel sailed from the island of Curracoa, on the first day of April last, bound to Amsterdam with a valuable cargo, belonging, as appears by the manifest, to divers citizens of the United Netherlands, in company with other merchant ships, under convoy of the Dolphin frigate, and an armed schooner called the Flora. That the fleet touched at Jamaica, and sailed from thence on the 27th of April. That the brigantine having parted with the convoy, through accident, near the island of Cuba, was, on the 16th of May, fired at, and captured as prize by the armed schooner, L'Ami de la Liberté, Captain Edward Ballard, who took out part of the crew, put on board a prizemaster and a new crew, and ordered the prize to Charleston, in the state of South Carolina. That the captain and most of the men on board the armed schooner were Americans, citizens of the United States of America. That the next day, they met with another armed schooner called L'Ami de la Point-à-Petre, commanded by Captain William Talbot, who took the mate and four hands out of the brig, and proceeded, in company with her and the other schooner, to Charleston, where she arrived on the 25th day of May last. That the said Edward Ballard is and was, on the 16th May last, a citizen and inhabitant of the United States, and a native and resident of the state of Virginia, between whom and the states general of the United Netherlands there exist, and then existed, peace and amity. That the schooner called L'Ami de la Liberté is American built, and owned by citizens of America, and was equipped for war in the Bay of Chesapeake, in Virginia, and at Charleston in South Carolina, by the said Edward Ballard and other citizens of the United States, contrary to, and in violation of the proclamations of neutrality published by the president of the United States, and the governors of Virginia and South Carolina, and also contrary to the laws of neutrality and of nations. That the said schooner is owned by John Sinclair and Solomon Wilson, citizens and inhabitants of Virginia and Maryland, and by the said Edward Ballard, or by some or one of them; and was fitted as aforesaid in violation of the treaties and laws of the United States, of the proclamations of neutrality aforesaid, founded on such laws, and also contrary to the laws of nations. That the said Edward Ballard hath not, nor can, by the laws of the United States, and by treaties which the constitution of the said states declares to be the supreme law of the land, legally have any commission, power, or authority whatsoever, to seize, arrest, or take a vessel belonging to the United Netherlands. That the seizure and capture aforesaid was contrary to, and in direct violation of the article of a treaty of amity now in force between the United States and the United Netherlands, by force of which, such capture can vest no property in the captors, nor divest the original owners of their property in said vessel and cargo: for which reason they demand restitution of the same, and damages for the arrest, spoliation and detention thereof. Two exhibits and a manifest of the cargo were filed, with the libel, on the 20th day of June last, and a monition was issued in the usual form, calling upon the said Edward Ballard and all others having or claiming any right or title to bring forward the same on pain of having the libel taken pro confesso. Captain

[1] [Reported by Hon. Thomas Bee, District Judge.]

[2] [Affirmed by the circuit court (case unreported). Decree of the circuit court affirmed in 3 Dall. (3 U. S.) 133.]

Ballard declining to appear to the usual proclamations, or the monition on the return of the same, his third and last default was pronounced and recorded in the usual form.

At this period a claim was interposed by Captain William Talbot, on behalf of himself, and the owners, officers and seamen of a private vessel of war, called L'Ami de la Point-à-Petre, duly commissioned, armed, equipped, and appointed under the French republic, which said owners, officers and seamen, are stated to be, all of them, citizens of the said republic. The claim sets forth that, on the 28th day of December 1793, Captain Talbot was regularly admitted a citizen of the republic of France, by the municipality of Point-à-Petre, in the island of Guadaloupe, under a decree of the national assembly of the French republic, and hath continued and acted as such, and against the enemies thereof, ever since. That he is captain and commander of the said schooner L'Ami de la Point-à-Petre, by virtue of a commission under the authority of the French republic, and as a citizen thereof, and that his commission bears date the 2d day of January 1794. That the said vessel was fitted out, armed and equipped as a privateer at Point-à-Petre, under the sanction and authority of the French government; and that Samuel Reddick, a lawful citizen of the French republic, and resident in Point-à-Petre, is the owner of her, and has been so since the 31st day of December 1793. That being on a cruize at sea in the said schooner, under the above commission, on or about the 16th day of May last, he discovered a vessel at sea, about ten leagues distant from the island of Cuba, which proved to be the brigantine Vrow Christina Magdalena aforesaid. That finding her to be Dutch property, and navigated by Dutchmen, enemies to the French republic, and liable to capture, he caused a party to board her as lawful prize; when, finding she had been previously boarded by a party of men from a certain armed vessel called L'Ami de la Liberté, commanded by Edward Ballard, and that they shewed no commission authorizing them to do so, he ordered the party from his vessel to bring the brigantine aforesaid to Charleston, as lawful prize. That as his prize, and not as prize to L'Ami de la Liberté, the brigantine was brought into Charleston by John Remsen, as prizemaster, and others of the crew of L'Ami de la Point-à-Petre, who had a copy of his (Talbot's) commission with them, and who continued on board until taken into custody of the marshal, by process of this court, at the suit of Joost Jansen, on behalf of himself and the owners of the said brigantine, citizens of the United Netherlands and enemies at open war with France.

Claimant contends and insists that he is a lawful citizen of the French republic, and accountable only to the laws of said republic for acts done without the limits or jurisdiction of any other power or nation. That he is duly commissioned as a French citizen; that his vessel was duly armed and equipped under the authority of France, and is the property of a citizen of that republic. That the said brigantine being the property of citizens of the United Netherlands, is a lawful prize; and being captured as aforesaid, not within the distance of a marine league from the coasts or shores of the United States, must, as well by the law of nations, as by treaty, remain unmolested in the hands of the claimant and his crew, as lawful prize. That he, therefore, protests against the illegality of the said suit, instituted in this court, and against the jurisdiction of the court, and their right to take cognizance of this matter.

A special replication to this claim and plea has been filed, introduced with the usual protests, in the first place, and then propounding against the said William Talbot, that he, on the 16th of May aforesaid was, and that he now is a citizen and inhabitant of the United States of America, between whom and the United Netherlands there is peace and amity. That he is a native of Virginia and lately resident at Norfolk in that state, and was master of a private merchant vessel trading from Norfolk to parts beyond the seas. That the schooner L'Ami de la Point-à-Petre is American built, and owned by divers citizens and inhabitants of the United States, and was armed with eight cannon, furnished with powder and ball, equipped and fitted for war in the state of Virginia by the said William Talbot, and other citizens and inhabitants of the United States, contrary, as aforesaid, to proclamation, and to the laws of neutrality and nations. That the said schooner, formerly called the "Fairplay," is owned in the whole, or in part by John Sinclair, of Virginia, and Solomon Nelson of Smithfield, in Virginia, citizens and inhabitants of the United States, and Samuel Reddick, also a citizen and inhabitant of Virginia, (though lately collusively removed to Point-à-Petre, in Guadaloupe, for the purpose of privateering) and by the said William Talbot, or some or one of them, or by other citizens or inhabitants of the United States; and that the said vessel was fitted and equipped by order of them or some of them, in Virginia aforesaid. That the said John Sinclair hath received lately, in Charleston or Savannah, divers large sums of money, and other property from the said William Talbot, as his share of prizes heretofore captured by the said schooner; and that the said William Talbot hath paid over the shares of the other owners to their respective orders, or to themselves. That the said William Talbot neither hath, nor, by law and treaty, can have any commission or authority whatever to seize, arrest, or take any vessel belonging to the United Netherlands. That the pretended commission to said William Talbot was issued and accepted when he was a citizen or inhabitant

of the United States, is contrary to the laws of nations and of neutrality, and therefore void; and that any capture under pretence of such commission is in violation of the 13th and 19th articles of the treaty with the United Netherlands, and cannot vest in any captor any right to such pretended prize; nor divest the original owner of his just right: but that such owner has good grounds to demand, in this court, restitution of vessel and cargo so captured, and damages for arrest, spoliation, and detention. That the said William Talbot, in collusion with Edward Ballard and others, hath broken open the hatches of the said brigantine, landed part of her cargo, broken open divers packages, and consumed and wasted the stores of the vessel; and would have sold the cargo, if he had not been prevented by process of this court. That there is fraud and collusion between the said William Talbot and Edward Ballard; that the two armed vessels are owned in part, or wholly, by the same persons, all of whom are citizens or inhabitants of the United States of America. That the two vessels sailed in company from Charleston, on or about the 5th day of May last, were consorts, and cruized together, and together attacked divers vessels of powers in amity and treaty with the United States. The replication further alleges that this court, having jurisdiction both as an instance and prize court, is competent to determine this cause, notwithstanding any treaty, the constitution of the United States, or the late act of congress, which gives jurisdiction to the district courts, in certain cases, only after the 5th June; but contains no clause limiting or prohibiting the jurisdiction, or preventing an appeal: it appears too that the brigantine was captured and brought within the jurisdiction of the court before the 5th June, viz. on 25th May. That, therefore, the plea should not be sustained.

A duplicate to this replication has been exhibited and filed, which states and avers that the brigantine was taken on the 16th May, on the high and open seas; that William Talbot is not a citizen of the United States, nor was he such on the 16th May aforesaid, but is and then was, a citizen of France. That his vessel was not fitted out, or armed as charged by the actor in his replication, but was legally armed and fitted out at Point-à-Petre aforesaid. That she is solely the property of Samuel Reddick, a citizen of France resident at Point-à-Petre, and is in nowise owned by any American citizen. That his commission is legal, and the capture of the brigantine by virtue thereof is also legal, and not in violation of any treaty; and that as the capture was made beyond a marine league from the shores or coasts of the United States, this court is, by the late act of congress, deprived of jurisdiction herein. That if there were any fraud or collusion, as was pretended, but which he denies, (though he insists that such would be lawful on the high seas, as stratagem of war) yet the distance of the place of capture from the shores of the United States precludes all cognizance of the same by this court. And he avers that John Sinclair is not concerned or interested in the said privateer, L'Ami de la Point-à-Petre, nor was he so at the time of the capture; nor has he ever remitted any sum or sums of money on account of prizes taken by her, but that she belongs wholly to the aforesaid Samuel Reddick. To this a triplicate or surrejoinder has been exhibited and filed in the usual style of the court, protesting against the aforesaid acts of the claimants, saving right of appeal, and relying on his libel and replication as good and valid in law, and praying as before for restitution and damages.

BEE, District Judge. This is a cause of great importance, involving the law of nations, the faith of treaties, the rights of sovereignty and neutrality, the private rights of individuals, and the honour and justice of the United States. I have considered it maturely, and am prepared to give my judgment according to my best ability, faithfully, impartially, and agreeably to my view of the constitution and laws of the United States. In doing so, I am much relieved by the consideration that my judgment will not be final; for both parties have claimed that right of appeal wisely provided for them, and to which, no doubt, they will have recourse. The advocates on each side have, in the course of this investigation, entered into a vast field of argument; have contended for their clients, respectively, on a variety of grounds; and have displayed great ingenuity and legal knowledge. To repeat these arguments would be unnecessary; I shall only allude to such of them as appear most material.

The principal points for the decision of the court appear to be: 1st. Whether this court has any and what jurisdiction relative to matters arising on the high seas. 2dly. Whether the 17th article of the treaty with France restrain such jurisdiction; or whether the act of the 5th of June last controls it. By the third section of the judiciary act of congress [1 Stat. 73] it is declared that there shall be a district court in each district to consist of one judge, who shall hold four sessions annually, and special courts at his discretion. By the ninth section, the powers of the district courts are expressed, 1st, as to criminal, 2d, as to civil causes. The court shall have exclusive original cognizance in all civil causes of admiralty and maritime jurisdiction; and concurrent jurisdiction with the courts of the several states, or the circuit courts of the United States (as the case may be) where an alien sues for a tort only in violation of the law of nations, or a treaty of the United States. By the 2d section of

the 3d article of the constitution of the United States, it is declared, that the judicial power of the United States shall extend to all cases arising under the constitution and laws of the United States, and treaties made, or to be made. To all cases affecting ambassadors, other public ministers and consuls, and to all cases of admiralty and maritime jurisdiction. In all cases affecting ambassadors, other public ministers and consuls, and those in which a state shall be a party, the supreme court shall have original jurisdiction; in all other cases, appellate jurisdiction under such regulations as congress shall make. The circuit court has no original jurisdiction; but has appellate jurisdiction in causes of admiralty and maritime jurisdiction; in which the district court alone has original jurisdiction. Redress must be had there, or nowhere. Suitors, however injured, would look in vain to the laws of this country for redress. They would be stopped in limine, and the appellate jurisdiction of the circuit and of the supreme courts would be virtually annihilated; since there would be no terminus à quo, no fixed point from which they might commence their procedure.

In addition to the clauses already recited from the judiciary act, the judges of the supreme court have by their decree in Glass v. The Betsey, 3 Dall. [3 U. S.] 6, decided that the several district courts throughout the United States possess all the powers of courts of admiralty, whether considered as instance or prize courts. That case was elaborately argued, and with great ability. The judges of the supreme court held it under advisement for some days, and then decided it so fully as to leave the jurisdiction of this court no longer doubtful. The question was considered as well with respect to the law of nations, as to the 17th article of the treaty with France; and, was fully set at rest on both grounds. But it is said that the act of congress of June, 1794 [1 Stat. 384], by declaring that the district courts shall take cognizance of complaints, by whomsoever instituted, in cases of captures made within the waters of the United States or within a marine league of the coasts or shores thereof, intended to oust them of all other jurisdiction. But the argument has no sort of force. Glass's Case [supra], had established the jurisdiction of the court in cases of neutral or American property captured on the high seas and brought infra praesidia of our courts. It was there determined that, under such circumstances, the American citizen, or neutral, might institute his suit in the district court, and obtain redress from it. But the act of congress now relied on goes farther, and enacts that, if our jurisdictional limits are violated, restitution shall be made even to a party belligerent who shall complain to the court, and prove his case to come within the provisions of that act. The sixth and seventh articles of the treaty with France assert and recognize the same right. Holland, Prussia, and Sweden have done so by their several treaties with us. No state could maintain its peace or sovereignty, if it were otherwise. I have no hesitation, therefore, in pronouncing that the district court has full jurisdiction upon the present occasion.

I shall proceed to examine the claim and answer of Talbot upon the other grounds stated therein. This claim is filed on behalf of the owners, officers, and mariners of the private vessel of war L'Ami de la Point-à-Petre, duly commissioned, armed, and equipped under the French republic; and all the above-mentioned persons are stated to be French citizens. The replication denies this; and we must examine the evidence to determine the fact. The exhibit C., by the claimant, proves that the said vessel was, on the 31st day of December last, called the "Fair-play," of Norfolk, in Virginia; was owned by John Sinclair and Solomon Wilson; was equipped by them with eight guns, one hundred weight of gunpowder, some shot, and sundry stores. That she was sold at Point-à-Petre by William Talbot, as agent or attorney to Sinclair and Wilson, to Samuel Reddick, a native of the United States, who purchased her as having a right to do so, being a naturalized French citizen, made such by the municipality at the above place, three days before. The American register was then cancelled, to be returned to the department that granted it, for the purpose of avoiding any penalty under our revenue laws. The exhibit A. is a certificate from the municipality of Guadaloupe, stating that William Talbot, a native of North America, was, on the 28th day of December, admitted a citizen of France. Exhibit E. is a like certificate that Samuel Reddick, a native of North America, was, on the same day, admitted a citizen of France. Exhibit B. is the commission of the governor-general of Gaudaloupe, authorizing Samuel Reddick, living at Point-à-Petre, to fit out for war, under the command of Captain Talbot, the said schooner called L'Ami de la Point-à-Petre. It bears date 2d January 1794. The power of attorney from Sinclair and Wilson to Talbot, authorizing him to sell their vessel, is dated 24th November 1793. From these different exhibits it appears beyond a doubt that this vessel was fitted in the United States, with guns and powder. That she sailed after the 24th November, because the power of attorney is dated on that day. That Captain Talbot, and the new owner, Reddick, were made citizens on the 28th December. That on the 31st the bill of sale was executed, and that, on the 2d of January, she was commissioned as a privateer. It has been insisted on that Talbot's answer must be taken as evidence, unless contradicted by more than one witness; because the oath of a party is equal to that of any other single person This is only to be understood of cases where a party is made a defendant; but does not hold so strongly

where a voluntary claimant comes forward to swear in support of his claim. In Gilbert's Law of Evidence (56) there is said to be a great difference between the evidence of an answer and a voluntary affidavit. Talbot could not have been examined as a witness in this case, because he is interested. Shall he then avail himself of the rule of law by being a voluntary claimant?

Laying aside, however, for the present, any examination as to the ownership of the vessel, which does not seem material, we will proceed to the question of expatriation, which has been brought forward in support of Talbot's right. I have perused with attention the cases cited on both sides as to the right of expatriation and emigration in the general manner there laid down, where no legal prohibition exists, and no prejudice is done thereby. The act of naturalization of congress, and the constitution of this state concur to sanction this doctrine: and we should with an ill grace refuse to our own citizens what we thus hold out to others. The proclamation of the president of the United States tacitly acknowledges the right contended for. It announces that no protection would be granted to such citizens as should by their own acts render themselves liable to punishment or forfeiture under the law of nations; and threatens prosecution against such as should, within the cognizance of our courts, violate the law of nations with respect to any of the powers at war. Much time was taken up in inquiring whether the certificate of Talbot's citizenship was agreeable or not to the laws of France. If the question turned on that point, I should have no doubt that the certificate from the municipality of Guadaloupe, as it is duly authenticated, ought to be received in evidence. We have no right to inquire whether the governor conformed to their constitution or not. We know that the national convention has suspended many of the articles of the new constitution for the present; and who is to question their power to do so? But, while I admit this evidence so far, I think it incumbent upon me in this place to notice a variety of certificates, that have been made exhibits in this cause, from the French consul, and his chancery. The 5th article of the consular convention with France fixes the right of the consul as to what acts he may receive in his chancery; and declares that copies of such acts, duly certified under the seal of the consulate shall have such evidence, in the courts of the United States, as their originals would. Of the certificates before me, not one conforms to this regulation; and the consul of France must have been induced to give them either from ignorance of our modes of practice and rules of evidence, or to get rid of the importunity of the applicants.

Admitting, however, the validity of the certificate from the governor of Guadaloupe, the question occurs: had Talbot, a citizen and native of the United States, any right to accept a commission to cruize against the subjects of the United Netherlands, who are under treaty of amity and commerce with us, even if his vessel had been altogether fitted in a foreign port? The 19th article of the treaty with Holland expressly says, that such persons shall be punished as pirates. The 15th article of the same treaty declares that all vessels and merchandize which may be rescued out of the hands of pirates and robbers, on the high seas, without the requisite commissions, shall be restored to the true proprietor. The 16th and 21st articles of our treaty with France are exactly conformable to the preceding article of the treaty with Holland. Now if a native and citizen of the United States, acting under a British or Dutch commission, had captured a French ship and brought her infra praesidia of our courts, we should have been required to restore, and must have restored her. The Dutch owners are equally entitled to our justice.

It is contended that the 22d article of the treaty with Holland says, that nothing therein contained shall derogate from the 9th, 10th, 17th and 22d articles of the treaty with France. If the 16th and 21st articles had been added to the above, this might have been strong ground; but it cannot be maintained that the 17th article (which gives permission to the ships of war or privateers of France to carry their prizes where they please, without being subject to arrest in our ports,) is in any manner derogated from, when, on production of their commissions, which they are bound to shew, it appears that the captain and crew have, from their connexion with the United States, violated another treaty, for the due performance of which we are equally bound; especially when that treaty is in strict conformity with the 16th and 21st articles of our treaty with France, under which we may, hereafter, be called on to furnish redress in cases similar to the present. If a native and citizen of the United States, guilty of treason against them, should, in order to divest himself of his allegiance, and get rid of the consequences of his crime, expatriate himself, and, within three days after, take a commission to act against us, such a step would not, I conceive, exculpate him, or save him, if taken again, from the punishment he would justly merit. That one of our citizens should expatriate himself solely with a view to make war against those with whom we are in treaty of peace and friendship, cannot amount to treason against the United States; but involves consequences not much less important, and can never be sanctioned by our courts, or our private judgments. The quo animo must enter largely into all considerations upon this delicate question. For my own part, I do not deny, generally, Talbot's right to expatriate himself, and become a citizen of another country. But I assert that he has no right,

in his new character, to injure the country of his first and native allegiance, by open violation of her treaties with friendly powers. If he does this, he makes himself amenable to the justice of that country; and, if found within her jurisdiction, will be liable to the penalties established by her laws.

As to Ballard, all the facts stated against him in the libel are admitted by his default, and proved by the evidence before the court. The commission from Admiral Vanstable to John Sinclair appears to have been granted for special purposes; first, to prevent the sailing from Norfolk, of some vessels supposed to be fitting out there, with a view to give intelligence of the sailing of the French fleet: but, that having been previously done by the inhabitants of Norfolk, she was next employed as a lookout vessel, to prevent any surprise to the fleet in Hampton Road, or the carrying of intelligence by vessels out of the Chesapeake. The commission is dated on board the Tigre, on the 3d of April. The French fleet was then lying in Hampton Road, but sailed from thence on the 17th, and this vessel accompanied them. On the 20th she arrived in Charleston, not in distress, not armed: the embargo was then in existence. Sinclair, to whom the commission had been granted, having stated to the French consul his inability to go to sea, the consul appointed Ballard in his stead. But, in so doing, he exceeded the powers given him by the consular convention, which relates altogether to acts of a civil nature, and to ships of a civil character. But the substitution in this case is of a military sort, and so the consul himself understood it; for, he states, in his letter to the collector, that the vessel is commissioned by Admiral Vanstable, is destined by him to a secret service of importance, and must be allowed to go to sea, the embargo not relating to vessels so circumstanced. But the embargo comprehended all vessels not military; and the consul's power is restricted by the convention to those of a civil character. Ballard was, of course, substituted for Sinclair without due authority.

The consul's application to the collector bears date on the 3d of May. The brigantine was taken on the 16th. In the interval, it has been proved that Ballard's vessel went into the river Savanna, and there took on board guns and ammunition. She has since come into the port of Charleston with her prize. If she ever was charged with secret despatches, or sent on a secret expedition, by Admiral Vanstable, she has never executed her commission. There is not a tittle of evidence to show that Ballard ever became a French citizen, or went into a French port. The admiral's commission to Sinclair was, as appears in evidence, no way improper; it does not authorize a fitting for war, or the capture of prizes. Such commissions, given in our ports, had lately been declared void by proclamation of Fauchet, the French minister. Such as had been previously issued, were by that authority, recalled; and the admiral knew his duty too well to contravene the same, in a few weeks thereafter, and in breach of the laws of neutrality, and of nations. Ballard, therefore, had no authority to capture. The claim put into the libel acknowledges this, and at the same time confirms what his silence had before shewn, viz. that the prize was taken from him, because he could shew no commission. Had the matter rested here, and had Talbot been duly authorized, this capture, unless collusion had been proved, might have been good. But the evidence before the court proves that they cruized in concert. That, on the following day, they captured another vessel, and manned the prize with a party from each vessel. When they were threatened with recapture, Ballard took back his men; and returned them on board the prize as soon as the fear of recapture had vanished. And though Talbot has sworn that he took the prize from Ballard, because the latter had no commission, yet the prizemaster and crews of both vessels remained on board, till her arrival in Charleston. It appears, too, that the capturing vessels were in company, and did not separate till two nights before.

From such a mass of positive and circumstantial evidence I feel myself compelled to conclude that Talbot and Ballard cruized together by a concerted plan. That the prize was taken by Ballard, and collusively resigned to Talbot, because Ballard had no commission, and had armed and equipped his vessel in a port of the United States. I do not call in question the general right of France to capture the ships and property of her enemies on the high seas, and to refer the question of prize or no prize to her own tribunals. But if France has belligerent rights, the United States have a neutral character to maintain, and neutral duties to discharge. I am influenced by that consideration, by respect for our own sovereignty, and by regard to the law of nations, in decreeing, and I do, accordingly, judge, order and decree that the claim of the above named William Talbot, and his plea to the jurisdiction of this court be dismissed with costs. And I do further order and decree, that the brigantine Vrow Christina Magdalena, with her furniture and apparel, and the cargo on board at the time of her seizure and detention, be delivered over to the actor in this cause on behalf of the original owners of the same.

[NOTE. This decree was affirmed by the circuit court. The claimants then appealed to the supreme court, where the decree of the court below was affirmed, the justices delivering their opinions seriatim. Mr. Justice Paterson said that Ballard was still a citizen of the United States, although he had renounced his allegiance to Virginia. The ship he sailed on was built in

this country, and owned by citizens of Virginia. His commission, if it attempted to authorize him to cruise as a privateer, was of no validity, because granted to an American citizen, by a foreign officer, within the jurisdiction of the United States. Therefore we have the case of an American vessel, commanded by an American, capturing a vessel belonging to citizens of a country at peace with the United States. This cannot be countenanced. The whole transaction is a fraud. Mr. Chief Justice Rutledge said that there was no evidence that Talbot's admission as a citizen of the French republic was with a view to relinquish his native country. A man may at the same time enjoy the rights of citizenship under two governments. 3 Dall. (3 U. S.) 133.]

JANSSEN (BIXBY v.). See Case No. 1,452.

JANSTOFF, The. See Case No. 1,686.

## Case No. 7,217.

JANUARY v. DUNCAN.

[3 McLean, 19.] [1]

Circuit Court, D. Illinois. June Term, 1842.

GUARANTOR OF A NOTE — ACTION AGAINST — DEMAND ON DRAWER AT MATURITY.

1. In an action against the assignor or guarantor of a note, the declaration must allege a demand on the drawer of the note when it became due.

2. In all cases where the undertaking is collateral, a demand and notice are essential.

At law.

Logan & Lincoln, for plaintiff.

Mr. Chickering, for defendant.

OPINION OF THE COURT. This action is brought upon a note given by W. B. Archer to Joseph Duncan, for four thousand dollars, payable five years from the 5th of January, 1837. This note the defendant assigned to the plaintiff, the 12th of July, 1839, and guarantied the payment thereof. The declaration alleged no demand on the drawer at the maturity of the note, and on this ground the defendant's counsel demurred. There is nothing in the guaranty of this assignment which excuses a demand on the drawer of the note when due. The undertaking of Duncan was collateral, to pay the money when due, if Archer, the drawer of the note, should fail to pay it; and in all such cases a demand and notice are essential to the maintenance of the action against the assignor or guarantor. Where there is a special guaranty in the note, it is a special contract between the guarantor and guarantee, and it does not pass to the assignee of the note; in such case, the action must be brought between the parties to the guaranty. The demurrer is sustained; but leave is given to amend the declaration.

[1] [Reported by Hon. John McLean, Circuit Justice.]

## Case No. 7,218.

JANUARY v. JOHNSON COUNTY.

[3 Dill. 392, note.] [1]

Circuit Court, D. Kansas. 1874.

REGISTRATION ACT—MUNICIPAL SECURITIES.

The act of the state of Kansas of March 2, 1872, providing for the registration of municipal and county bonds, is not a curative act in the sense that it takes away any valid defence which the city or county would otherwise have to bonds theretofore issued.

Grant & Smith, for plaintiff.

Mr. Cobb, for the county.

Before MILLER, Circuit Justice.

[In 3 Dill. 392, this case is published as a note to Thayer v. Montgomery County, Case No. 13,870.]

## Case No. 7,219.

JANUARY v. JOHNSON COUNTY.

[3 Dill. 402.] [1]

Circuit Court, D. Kansas. 1874.

MUNICIPAL BONDS—STATUTE AS TO LEVYING TAXES TO PAY SUCH BONDS CONSTRUED.

The act of the Kansas legislature approved March 9, 1874 (Laws 1874, p. 45, § 7), was intended to change the mode of levying and collecting taxes to pay municipal bonds and not to validate or make binding upon municipalities bonds which would otherwise be void.

Action [by D. A. January] on county bonds issued in aid of a railroad company. Answer, setting up a sufficient defence as against the company and alleging notice thereof to the plaintiff. On demurrer to the answer it was contended by the plaintiff that the bonds in suit had been validated by section 7 of chapter 39 of the Laws of Kansas, approved March 9, 1874, (Laws 1874, p. 45), amendatory of chapter 68 of the Laws of 1872. The language of section 7 is as follows: "It shall be the duty of the proper officers of any county, city or township, in which bonds have been heretofore issued, for any of the purposes mentioned in the act to which this is amendatory, annually, at the time when other taxes are levied, to levy and cause to be collected a sufficient tax to pay the interest on all such bonds as the same shall become due, and also for the purpose of creating a sinking fund for the final redemption of such bonds."

Grant & Smith, for plaintiff.

Cobb & Cook, for the county.

DILLON, Circuit Judge. As the act in which this section is found does not profess in its title or body to be a curative act, and as when comparing this act with the act of 1872 which it amended, it appears to have

[1] [Reported by Hon. John F. Dillon, Circuit Judge, and here reprinted by permission.]

been the purpose of section 7 to change the mode of levying and collecting the taxes, it is my opinion that it was not intended to have, and does not have, the effect to make binding upon the county, bonds which would otherwise be void. Demurrer overruled.

See Thayer v. Montgomery Co. [Case No. 13,870], and cases there stated in note.

## Case No. 7,220.

JANVRIN v. SMITH.

[1 Spr. 13.] [1]

District Court, D. Massachusetts. Jan., 1842.

ADMIRALTY—POWER OF COURT TO GRANT A REVIEW.

The power of granting a review, by a court of admiralty, is not limited to the term at which the original decree was passed.

[Cited in Re Dupee, Case No. 4,183; Snow v. Edwards, Id. 13,145; Jackson v. Munks, 58 Fed. 599.]

In admiralty.

C. P. Curtis and B. R. Curtis, for petitioner.

E. Smith, Jr., for respondent.

SPRAGUE, District Judge. This is a libel of review by which the court is asked to open for a re-hearing a final decree of this court, made in June, 1841. It has been frequently asserted that a court of admiralty has no power to review its own decree, after the expiration of the term at which it was passed. This assertion is rested upon some of the doctrines of the civil law, which regards courts, like arbitrators, as functi officio, after a final decree has been made and the tribunal has adjourned. But a court, unlike arbitrators, is a permanent tribunal, with continuing powers; one of which is to give to the prevailing party the fruits of his decree, by execution or other process. Hence it has been sometimes admitted that the court has power over the decree itself, so long as it remains unexecuted, but that when completely carried into effect, the power of revision ceases. This doctrine annuls the technical and arbitrary restriction, which prohibits the court from touching its decree after an adjournment. The new limitation which it introduces has no rational foundation, except upon the idea that after a complete execution of the decree, the court has no means of granting relief, however erroneous or unjust it may be; and this is sometimes true, and in such cases the court certainly will not exercise the power of revision, because a re-examination would be nugatory. But there are cases in which the remedial power of the court, in a libel of review, would be complete, notwithstanding the execution of the original decree. Thus, in a possessory or petitory suit for a ship, a decree in favor of the libellant may have been carried into effect by actual delivery of the ship to him; and yet, upon the revision of that decree, a redelivery may be ordered and made to the party from whom she was originally taken. However it may have been under the modes of procedure in the civil law, it is certain that under our practice the power to grant reviews is essential to the due administration of justice. Cases may arise, not only in proceedings in rem, but even in suits in personam, in which decrees may have been rendered disposing of, or affecting property to a large amount, without personal notice to the owner thereof. By the supreme court admiralty rules, No. 2, the process in suits in personam may be a simple warrant to arrest, * * * or a warrant to arrest the person of the defendant, with a clause therein, if he cannot be found, to attach his goods and chattels to the amount sued for; or, if such property cannot be found, to attach his credits and effects to the amount sued for, in the hands of the garnishees named therein; or, a simple monition. Besides the errors which may intervene, where the party in interest has had no notice which will enable him to protect his rights, others may arise from honest mistake or actual fraud. Even an appearance may be entered by mistake or design, where no authority has been given, and a final decree rendered upon the acts or omissions of the supposed proctor. If, in these and other cases of clear injustice, relief cannot be had by review in this court, the party is remediless; for no other tribunal can revise the decree, except upon appeal, and that is restricted to the next term of the circuit court. It is certainly of great importance that judicial determination should not be disturbed, except for very grave and urgent reasons. "Interest reipublicae ut sit finis litium," and the repose of rights and titles is a matter of public, as well as private concernment. But to attain this, let us not adopt a rule so rigid as to secure also the repose of fraud and injustice. Litigation is indeed an evil; but courts are established to entertain suits for the redress of wrongs, and there may be as high reasons for a second suit as for an original one.

Under some systems of jurisprudence no decree is made, until after such personal notice as insures the party in interest an opportunity to defend his rights. But under our system such personal notice is not in all cases given, and if for want thereof injustice has been done, surely there should be a power lodged somewhere to relieve against it. But although that class of cases may be the strongest, I think that the power of review is not limited to them, but must rest in the judicial discretion of the court, guided by

[1] [Reported by F. E. Parker, Esq., assisted by Charles Francis Adams, Jr., Esq., and here reprinted by permission.]

such rules of decision as sound principles of justice and policy dictate.

Lord Stowell, in the case of The Fortitudo, 2 Dod. 70, says, the court "might, perhaps, * * * deem it not improper, in some cases, to suffer a cause to be reopened." But "that mere negligence or oversight would not be a sufficient ground for such an extraordinary interposition of the authority of the court." "A direct case of fraud, or something equivalent to it, must be made out, before I can suffer such a step to be taken."

Mr. Justice Story, in the case of The New England [Case No. 10,151], after stating that he has not been able to satisfy his mind whether the district court possesses any jurisdiction after the term is passed, proceeds to say, that if it has the power to entertain a libel of review in any case, it must be in very special cases, which he proceeds to enumerate. One of them is stated in the following words: "Or where new facts, changing the entire merits, have been discovered since the decree was passed, and there has been not only the highest good faith, (uberrima fides,) but also the highest diligence and an entire absence of just imputations of negligence."

The language used by these eminent admiralty judges, indicates a strong conviction of the necessity of the existence of this power, and at the same time a consciousness that its exercise is not sanctioned by precedent. But the want of known precedents is of less force in admiralty, than in the exercise of almost any other jurisdiction; for of the proceedings of the admiralty courts in this country before the Revolution, we have no reports, and very few reports of those since that time; while in England, the courts of common law, greedy of power, and acting upon the maxim "ampliare jurisdictionem." wielded the power of prohibition with such narrow jealousy of the admiralty, as to divest it of many of its original attributes, which, in later and more liberal times, have been restored by acts of parliament.

Upon principle, the court ought to possess the power of review. With the countenance of such names of Lord Stowell and Mr. Justice Story, I shall entertain this application, and proceed to investigate the facts upon which it is founded.

(The court then went into an examination of the evidence, and refused the application, on the ground that it did not present a case for the exercise of the power of revision.)

Acc. The Monarch, 1 W. Rob. Adm. 21; 2 Conk. Adm. (2d Ed.) 360–367. Contra, The Martha [Case No. 9,144]; U. S. v. The Glamorgan [Id. 15,214]; The Caithneshire [Id. 2,294].

JAQUES (JOLLIE v.). See Case No. 7,437.

JAQUES (RANDALL v.). See Case No. 11,553.

JAQUES (WELLS v.). See Case No. 17,400.

## Case No. 7,221.

JARMAN v. ST. LOUIS MUT. LIFE INS. CO.

[1 Flip. 548;[1] 5 Ins. Law J. 504; 22 Int. Rev. Rec. 162; 3 Cent. Law J. 303; 1 Cin. Law Bul. 123.]

Circuit Court, W. D. Tennessee. May 8, 1876.

LIFE INSURANCE—FORFEITURE FOR NON-PAYMENT OF INTEREST ON PREMIUM NOTE—DAYS OF GRACE.

1. Premium note, when negotiable, is entitled to grace as other commercial paper.

[Cited in Pendleton v. Knickerbocker Life Ins. Co., 7 Fed. 179.]

2. A tender of interest on the note, within the days of grace, will prevent a forfeiture for non-payment of interest at maturity of note.

Action on a policy of insurance. The contract was made December 19, 1867. It was agreed that for an annual premium of $339.36, to be paid for ten successive years, to insure the life of Robert F. Jarman for the use of plaintiff [Rosanna Jarman], in the sum of $5,000. This was to be paid to plaintiff on said Robert attaining seventy years, or at his death, should he die before the happening of such event. The policy was subject to the two following provisos: (1) That if default should be made in the payment of any of the annual premiums, such default should not work a forfeiture, but the amount insured should be commuted or reduced to such proportional part of the whole sum insured as the sum of the annual payments should bear to the sum of the ten annual payments agreed to be paid. (2) If the insured should fail to pay annually, in advance, the interest on any unpaid note or loans which might be owing to the company on account of any of the above mentioned premiums, the company should not be liable for the payment of the sum assured, or any part thereof, and the policy should cease and determine. The assured paid the two first annual premiums, and then allowed his policy to be commuted. It was reduced to $1,000, one-half having been paid in cash, the balance by note. The last settlement with the company was had December 19, 1871, when the following note was given: "St. Louis, December 19, 1871. Twelve months after date, for value received, I promise to pay to the St. Louis Mutual Life Insurance Company $291.55, being for part premium due on policy No. 9,378 of said company, on the life of Robert F. Jarman, dated December 19, 1867, which policy and all payments or profits which may become due thereon, are hereby pledged and hypothecated to said company for the payment of this note. (Signed) R. F. Jarman." On the 21st of December, 1872, the insured telegraphed his friends in Washington to tender the company another year's interest upon his note. The tender was made before the close of office

[1] [Reported by William Searcy Flippin, Esq., and here reprinted by permission.]

hours, but was refused upon the ground that the policy was lapsed, and that the forfeiture could not be waived without a new examination. The assured died upon the next day, which was Sunday. The parties having waived a forfeiture, the case was argued and submitted to the court upon the facts above stated.

Gantt, Patterson & Lowe, for plaintiff.
Kortrecht & Craft, for defendant.

BROWN, District Judge. The first two annual premiums were paid, one-half in cash and one-half by note. After the policy was commuted, the outstanding notes were consolidated into one, upon which interest was paid annually in advance, and the policy thus kept alive for the reduced sum. There appears also to have been a small credit upon the note, either of cash or dividend. The interest was paid in advance upon the note of December 19, 1871. This note was negotiable, and the maker was entitled to grace. It matured December 21, 1872, the 22d being Sunday. Had the assured elected to pay the note in cash, he might have done so on that day. He could not have been considered in default for failing to pay interest on the 19th; for, as the interest had been paid in advance, it must be presumed to have been paid in full up to the maturity of the note. I understand it to be the universal custom at the banks, in discounting commercial paper, to reckon interest upon the days of grace as well as upon the sixty or ninety days for which the bill may be discounted. When interest is paid in advance, that is the legal inference, as the paper does not begin to draw interest again until maturity; that is, until the last day of grace. 2 Pars. Notes & B. 398. But a tender of principal and interest on the 21st could have effect only upon the theory that no forfeiture had taken place by non-payment of interest on the 19th; for nothing less than the assent of the company could waive such forfeiture. But if no forfeiture had taken place on the 19th, the tender of interest on the 21st was good.

But the course of dealing had been such as to authorize the insured to infer that the company would not demand payment of the note. The policy expressly provides against a forfeiture for non-payment of the premium, for part of which a note was given, and, as matter of fact, the tender was not objected to upon the ground that it did not include principal as well as interest, but solely because it was not made upon the 19th. As before suggested, I think the maker was entitled to the same time to pay the interest as he would have had to pay the principal, and that defendant was bound to accept the tender. The amount of policy was commuted to $1,000. Deducting the note—$291.55—there remained $708.45, for which amount, with interest from March 22, 1873, or ninety days after notice of proof of death, the plaintiff is entitled to judgment. Judgment accordingly.

NOTE [from original report in 3 Cent. Law J. 303]. This case presents a novel phase of the question now so frequently occurring in life insurance cases, of attempted forfeiture for non-payment of interest on a premium note. The policy contained the same two provisions, apparently conflicting, which existed in the cases of St. Louis Mut. Life Ins. Co. v. Grigsby [10 Bush, 310]; Russum v. St. Louis Mut. Life Ins. Co. [1 Mo. App. 229]; and Yerger v. Same [3 Cent. Law J. 436]. It will be remembered that in the Grigsby Case the Kentucky court of appeals granted equitable relief against the attempted forfeiture, while in the other two cases it was held that in courts of law these two provisions may well stand together, even to the extent of forfeiture of the commuted policy, in case the interest on the premium note remains unpaid. In the case now reported, the same court which in the Yerger Case supported the forfeiture has relieved against it on the ingenious theory that the interest was not due and payable at the hour arbitrarily fixed by the policy for the payment of premium, but might be paid within the customary days of grace allowed for the payment of the principal; the premium note being negotiable, and therefore entitled to grace. The note in question was not in form negotiable under the law merchant; but it was claimed and conceded at the trial that it was, in fact, made at Memphis, and was therefore governed by the statutes of Tennessee, which make all notes for the payment of money negotiable.

It is difficult to read this opinion without seeing in it another evidence of the inclination of all courts, even those of law, to relieve against forfeitures, when it can be done without disregarding the right of parties to make their own contracts.

## Case No. 7,222.

JARRELL v. HARRELL et al.

[1 Woods, 476; 7 N. B. R. 400.] [1]

Circuit Court, S. D. Georgia. April Term, 1871.[2]

BANKRUPTCY—FRAUDULENT CONVEYANCE IN CONTEMPLATION OF—PURCHASE BY THIRD PARTY WITHOUT NOTICE—VALIDITY.

A person contemplating insolvency conveyed his property to another, in fraud of the bankrupt act [of 1867 (14 Stat. 517)], the grantee having notice of and participating in the fraud. After the appointment of an assignee in bankruptcy, the grantee conveyed the same property to a third person: *Held*, that if such third person were a bona fide purchaser, without notice of the fraud, his title was good as against the assignee.

[Cited in Paddock v. Fish, 10 Fed. 129; Myers v. Hazzard, 50 Fed. 162, 163.]

This bill was filed by [Elisha H. Beall] the assignee in bankruptcy of one [William L.] Jarrell, to have declared void certain sales and conveyances of the bankrupt's property alleged to have been made in fraud of the bankrupt act, and for the purpose of defrauding the creditors of the bankrupt, amongst others, a sheriff's deed to one Echols for a lot of 1,640 acres, known as the

[1] [Reported by Hon. William B. Woods, Circuit Judge, and here reprinted by permission.]

[2] [Affirmed in 17 Wall. (84 U. S.) 590.]

"Snelling Place," and a deed from the bankrupt to the said Echols for another lot of 680 acres, called the "Perry Place." The sheriff's sale took place October 1, 1867, and the conveyance of the Perry place October 7, 1867. The evidence clearly established the facts that the conveyances to Echols were fraudulent, and that Echols had knowledge of the insolvency of Jarrell and of his fraudulent purpose in making the conveyance. The defendant [David B.] Harrell purchased the property from Echols about a year after the conveyance to the latter, and after the complainant had been appointed assignee of the bankrupt. Harrell claimed that whatever might have been the character of the original sales, he was a bona fide purchaser, without notice of the fraud, and this claim of Harrell presented the only real question in the case.

R. F. Lyon, for plaintiff.

H. R. Jackson and Willis A. Hawkins, for defendant.

BRADLEY, Circuit Justice. It is contended on behalf of the complainant, that this plea cannot avail the defendant, however well sustained by proof; that the assignee, as soon as he was appointed, became entitled to the property, and no subsequent conveyance of it by Echols could give a title as against the assignee. I cannot yield to this suggestion. An assignee has no better right than any judgment creditor would have, to take the property out of the hands of a bona fide purchaser without notice. The real question is, was Harrell a bona fide purchaser without notice? The court then went into an elaborate examination of the evidence on this point, and reached the conclusion that the facts known to Harrell were sufficient to put him on notice of the fraudulent character of the title of Echols. A decree was therefore rendered for complainant.

[NOTE. An appeal was then taken by Harrell to the supreme court, where the decree was affirmed in an opinion by Mr. Justice Miller, who said the sale to Echols was a bare-faced fraud, and, if Harrell did not know it when he purchased of Echols, it was because he intentionally shut his eyes to the truth. Mr. Justice Davis dissented. 17 Wall. (84 U. S.) 590.]

## Case No. 7,223.

### JARROTT v. MOBERLY.

[5 Dill. 253; 10 Chi. Leg. News, 258; 5 Reporter, 583.] [1]

Circuit Court, W. D. Missouri. April, 1878.[2]

MUNICIPAL BONDS FOR MACHINE SHOP PURPOSES —PUBLIC PURPOSE—CONST. MO. ART. 11, § 14, AS TO "LOAN OF CREDIT" TO RAILWAY CORPORATIONS, CONSTRUED.

1. Municipal bonds must be issued for a public purpose, or they are void.

2. Bonds issued under legislative authority in Missouri to aid a railroad company in erecting "machine shops" are, it seems, bonds issued for a public purpose.

3. But the act authorizing such bonds must comply with section 14 of article 11 of the constitution, which requires the sanction of a two-thirds vote. As the act of March 18, 1870, authorized the issue of "machine shop bonds" in aid of a railroad company on the sanction of a majority vote, it is, in this respect, unconstitutional. Krekel, J., dissenting.

[See note at end of case.]

4. Constitutional provision as to "loan of credit" by municipalities to railway corporations (article 11, § 14, Const. Mo. 1865), construed.

This is an action [by Vital Jarrott] upon coupons from bonds issued by the defendant. The bonds, styled "Moberly Machine Shop Bonds," are dated May 1, 1872, and contain the recitals hereinafter appearing. They were issued under the act of March 18, 1870 (Laws 1870, p. 163), entitled, "An act to authorize cities and towns to purchase lands, and to donate, lease, or sell the same to railroad companies;" and the bonds recite this act as the authority for their issue, and, also, that at the election two hundred and twenty-eight votes were cast in favor of the proposition, and only one vote was cast against it. The defendant demurred to the petition, on the ground that the act of March 18, 1870, under which the bonds were issued, was unconstitutional.

John D. Stevenson, for plaintiff.

Broadhead & Overall, for defendant.

Before DILLON, Circuit Judge, and KREKEL, District Judge.

DILLON, Circuit Judge. This case presents a new question in respect to municipal bonds. The bonds recite that they were issued under the act of March 18, 1870 (Laws 1870, p. 163), in pursuance of an election held March 26, 1872, which was prior to the act of March 29, 1872 (Laws 1872, p. 176), amending the first-mentioned act. This last-named act, of March 29, 1872, has, therefore, no application to the bonds now in suit, and is immaterial, except in so far as it may be regarded as a legislative confession that the original act, authorizing a majority of the qualified voters to create such a debt as the act contemplated, was in conflict with the constitutional provision requiring the assent of two-thirds of the qualified voters. Const. 1865, art. 11, § 14.

The bonds in question recite that they are "issued in pursuance of an election held in said town on the 26th day of March, 1872, to decide whether the said town should purchase and donate to the St. Louis, Kansas City, and Northern Railway Company two hundred acres of land for machine shop purposes," etc., in accordance with the said act of March 18, 1870.

The purchasers of the bonds are, of course, charged with notice of the facts

[1] [Reported by Hon. John F. Dillon, Circuit Judge, and here reprinted by permission. 10 Chi. Leg. News, 258, and 5 Reporter, 583, contain only partial reports.]

[2] [Affirmed in 103 U. S. 580.]

therein stated. Harshman v. Bates Co., 92 U. S. 569. They knew, therefore, the date of the election, the act under which and the purpose for which the bonds were issued.

The demurrer presents two questions:

1st. The first question is, whether the particular purpose for which these bonds were issued, viz., for "the purpose of assisting and inducing the railroad company to locate and build machine shops upon the land" purchased by the city and donated to the company, is a public purpose in such a sense as to justify compulsory taxation to pay the debt thus incurred.

If such aid had been given to an individual or to a private company proposing to erect shops for manufacturing or repairing machinery, the act would fall within the principles declared and established by the supreme court of the United States in the Iola and Topeka Cases, and would be void. Loan Ass'n v. Topeka, 20 Wall. [87 U. S.] 655; Commercial Nat. Bank v. Iola [Case No. 3,061]; Savings Ass'n v. Topeka [Id. 2,734]. The supreme court there hold that a statute which authorizes the issue of bonds, to be paid by taxation, to aid individuals or private corporations to establish or carry on manufacturing enterprises, is void, because the taxation is not for a public purpose, although, in a remote or collateral way, the local public may be benefited thereby. Same principle: Lowell v. Boston, 111 Mass. 454; Allen v. Jay, 60 Me. 124.

But, as it is settled law in Missouri that aid of this character can be constitutionally given to railroad companies, it would seem to follow that if machine shops are an integral or essential part of a railroad, or necessary for its convenient use and operation (as on this demurrer we ought to assume them to be), then the act of March 18, 1870, under which the bonds in question were issued, is not void within the doctrine of the Iola and Topeka Cases.

2d. The next question is whether the act of March 18, 1870, is in conflict with section 14 of article 11 of the state constitution of 1865. That section provides that "the general assembly shall not authorize any county, city, or town to become a stockholder in or to loan its credit to any company, association, or corporation, unless two-thirds of the qualified voters of such county, city, or town, at a regular or special election to be held therein, shall assent thereto."

The act of March 18, 1870, under which these bonds were issued, authorized the municipalities therein mentioned to purchase lands and donate, lease, or sell the same to a railroad company as a means of inducing it to locate and build its machine shops on the lands, and assisting it to do so, and for this purpose, to issue its bonds, to be paid by taxation, on the sanction of a majority vote. In the present suit, the bonds recite that the lands were to be purchased by the city and paid for in bonds, and donated to the railroad company; and this, the case of a purchase on credit and a donation, is the precise case now presented for judgment.

If this is a "loan of the credit" of the town to the railroad company, the bonds are void, because the act which authorizes this to be done on a majority vote is in conflict with the constitution, which, in such a case, expressly requires the sanction of a two-thirds vote. What, then, is a "loan of municipal credit" to a railroad company within the meaning of this provision of the constitution?

The provision of the constitution confessedly had its origin in the abuses and frauds which had, prior to 1865, been seen to grow out of the unlimited power of the legislature over the subject. Literally, scores of charters and acts had been passed, authorizing county justices and municipal bodies to subscribe for stock in railways, and to issue bonds without limit as to amount, and without the sanction of the people to be affected.

The plain purpose of the constitution was to prevent or check this in the future, by the provision that municipalities shall not be permitted to incur debts in aid of railways, to be paid by taxation, unless two-thirds of the qualified voters of the municipality should formally assent thereto. The constitution enumerates cities, counties, and towns (the only incorporated public or municipal bodies known to the laws of Missouri), and extended the prohibition to all of them; and it has been held to extend to townships, although not named in the constitutional provision. Harshman v. Bates Co., 92 U. S. 568; Jordan v. Cass County [Case No. 7,517].

As counties, cities, and towns had and could have no considerable funds applicable to such purposes, unless procured on credit, the convention doubtless supposed that a provision that they should not become stockholders in any corporation, or loan their credit to any corporation, without a two-thirds vote, would effectually accomplish the purpose in view, viz., to prevent public debts from being created for the benefit of railway corporations without the previous approval of two-thirds of the voters on whom the consequent taxation would fall.

Constitutional provisions are usually expressed in general terms, and do not descend to the detail often necessary in legislative enactments, and they are intended to secure some essential right, or to prevent wrongs or injuries or abuses. Such provisions are protective and remedial, and are not to be construed with the strictness of penal statutes, but with reference to the public ends sought to be protected or secured. The mischief felt by the constitu-

tional convention of 1865 was that, in the absence of constitutional restriction, the legislature had conferred upon public and municipal officers unguarded powers of dangerous extent, the sting of the evil being the creation of burdensome debts to be paid by taxation. The remedy applied was that for the future municipalities should not be allowed to become stockholders in private corporations (which involves the necessity of paying for the stock), or to loan their credit to such corporations (which involves the creating of a debt for the benefit of such corporations), and both involve the necessity of taxation, unless two-thirds of the qualified voters should assent thereto. If the act of March 18, 1870, which only requires the assent of a majority, is valid, it would have been equally valid if the like power had been conferred without requiring any vote whatever. So that the real question is, whether what was done by the defendant city, as recited in the bonds, was the loan of its credit to the railway corporation within the meaning of the constitutional provision in this regard.

If the bonds in suit had been executed and delivered directly to the railroad company, as the consideration for its agreement to locate its machine shops within the town, then, on the only assumption on which the bonds can be sustained, viz., that such shops are part of the railroad, or necessary for its use, would not the execution and delivery of such bonds to the railway company be the loaning by the town of its credit to the company?

It is not different in essence, and particularly in view of the object of the constitution, viz., to prevent taxing the people without the required consent, that the town sells its own bonds and gives to the company the proceeds, instead of the bonds themselves.

The bonds in question, if valid, create a debt against the defendant city for the benefit of a railroad corporation, and are thus within the mischief or evil which the constitution aimed to remedy. Why, then, should not the constitutional provision be held applicable to these bonds? It cannot be maintained on solid grounds that the barrier of a two-thirds vote, weak and ineffectual as it has proved to be, can be evaded by a mere change of the form of the aid—that is, by giving the aid in the shape of a donation of the proceeds of credit, instead of a subscription for stock, or, instead, giving the bonds directly to the company which the municipality desires to assist.

In my judgment, a municipality "loans its credit" to a railway company, within the meaning of the constitutional provision here involved, whenever it issues its bonds to assist such company in building its road, or any part of it, or to assist it in erecting shops which are necessary or useful in operating its road. Taylor v. Ross Co., 23 Ohio St. 22, 76, 79; Pennsylvania R. Co. v. Philadelphia, 47 Pa. St. 189, 194.

This view has a direct and strong support in the judgment of the supreme court of the state in the Phelps Co. Case, construing this constitutional provision. State v. Curators of State University, 57 Mo. 178. It was there held that the legislature could not authorize a county to issue its bonds to secure the establishment of a public school of mines within its limits, unless the proposition was assented to by a vote of two-thirds of the voters. Napton, J., delivering the opinion of the court, inquires: "What was the object of the (constitutional) restriction on county courts, city and town municipalities?" And he answers: "The object was plainly to prevent them from taxing the people without their consent." The subsequent case, in relation to Forest Park (County Court v. Griswold, 58 Mo. 175), is not considered by the supreme court as inconsistent with the Phelps Co. Case, above referred to.

It is my judgment that the act under which the bonds in question were issued is in conflict with the constitution, and, hence, that the bonds are void, in whosesoever hands they may be. I should have so declared without much hesitation if the question had arisen on an application to enjoin the issue of the bonds. I feel the increased difficulty of so holding in a case where the bonds have been issued upon a vote almost unanimous and afterwards negotiated for value, and where purchasers in actual good faith will be the sufferers if my view is sustained. I desire to add that I am not insensible to the force of the argument so fully presented by Judge Krekel in support of the opposite conclusion, and I cannot but feel more than the usual distrust of my own judgment when it differs from his on a question of local law, and particularly on a question as to the meaning of a provision of the constitution of the state which he, as the president of the convention, assisted to frame.

Fortunately, the result of this difference of opinion is that it will enable the judgment of this court to go for revision to the supreme court, which could not otherwise be done, in consequence of the amount involved not being sufficient. The demurrer will be sustained, and judgment will be entered for the defendant. If desired, we will join in a certificate of division to the supreme court. Judgment accordingly.

KREKEL, District Judge (dissenting). Plaintiff, Jarrott, brings this action against defendant, the city of Moberly, to recover judgment on interest coupons detached from what are termed "Moberly Machine Shop Bonds." The petition sets out a copy of the bonds, showing that the city of Moberly acknowledges itself indebted to W. F. Barrows or bearer in the sum of $500, in current

funds, at the Bank of America, in the city of New York, ten years after date, with interest at ten per cent, payable annually, on presentation of coupons, with option on part of the inhabitants of the town of Moberly to pay the bonds after three years, and payable only by a special tax. The bonds on their face recite that they were issued in pursuance of an election held on the 6th day of March, 1872, to decide whether said town should purchase and donate to the St. Louis, Kansas City, and Northern Railway Company two hundred acres of land for machine shop purposes, the result of said election being two hundred and twenty-eight votes for and one vote against the purchase and donation; and in pursuance to the order of the board of trustees, made on the 18th day of April, 1872, which order was made in accordance with an act of the general assembly of the state of Missouri, entitled "An act authorizing cities and towns to purchase land, and to donate, lease, or sell the same to railroad companies," approved March 18th, 1870. The interest coupons are in the usual form.

The petition is demurred to, setting out for causes that from the petition it appears that the city council of Moberly had no authority in law to issue the bonds, the pretended act of the legislature under authority of which the bonds issued being unconstitutional, and because it appears that the legislature of Missouri exceeded its authority in the passage of said law.

The act, the constitutionality of which is thus brought in question, provides:

"Section 1. It shall be lawful for the council of any city, or the trustees of any incorporated town, to purchase lands, and to donate, lease, or sell the same to any railroad company, upon such terms and conditions as such board may deem proper, for the use of assisting and inducing such railroad company to locate and build machine shops or other improvements upon such lands, and for such purpose to levy taxes upon the taxable property of such city or town, and to borrow money and to issue the bonds of such city or town for such purpose: provided, a majority of the qualified voters of such town or city, at a regular or special election to be held therein, shall assent to such purchase and donation.

"Sec. 2. At such election the poll-books shall be opened, and the ballots headed and styled 'For the Purchase and Donation' and 'Against the Purchase and Donation,' and if a majority of the votes cast shall be 'For the Purchase and Donation,' the proposition shall be deemed to be carried, and in that case the chairman of the board of trustees of any town, or the mayor of any town or city, is hereby authorized to receive and convey, on behalf of said town or city, said land as aforesaid."

The 3d section provides for the giving of notice "for at least two weeks before the terms of the contract to be so submitted as agreed upon between said railroad company and such common council or board of trustees."

It has been agreed that, for the purpose of this demurrer, all the requirements of the law had been complied with before the issuing of the bonds.

The constitutional provision, in violation of which the law quoted is claimed to have been passed, is found in paragraph 14, art. 9, Const. Mo. 1865, and is in these words:

"Sec. 14. The general assembly shall not authorize any county, city, or town to become a stockholder in or to loan its credit to any company, association, or corporation, unless two-thirds of the qualified voters of such county, city, or town, at a regular or special election to be held therein, shall assent thereto."

This constitutional provision came up for consideration in the supreme court of Missouri in State v. Curators of State University, 57 Mo. 178, in which the legality of certain bonds issued by the county of Phelps to obtain the location of the school of mines was contested, and it was held that the provision cited applied, and the issuing of the bonds was enjoined, because no vote had been taken. Napton, J., closes his opinion as follows: "It will be observed that this is a case in which the issue of bonds not authorized by the constitution is proposed to be arrested. When the proposed issue is not sanctioned by the requisite vote, we think it a suitable time to prevent the issue. After such bonds have been put upon the market, and purchasers have invested in them, the question of their validity depends upon essentially different principles." In the case before the court, we have a vote taken, the bonds have been put upon the market, and plaintiff is a purchaser of them for value. With these important differences between the cases, I feel free to consider the case before the court without that embarrassment which a difference of opinion with a court of such high standing, passing upon its own constitution, would create. The constitutional provision under consideration has a legislative history commencing with the act of January 27, 1837, incorporating the Louisiana and Columbia Railroad. By the 16th section of that act, county courts were authorized to subscribe stock to the company and issue the notes of the county for such subscriptions, to be signed by all the justices and attested by the clerk, payable at such times and places as might be agreed on. After such subscription, the justices had the right to vote the stock in elections of the company. In the charters afterwards granted to railroad companies, from time to time, by the legislature, this power to subscribe was embodied. No general railroad law was passed until 1853. The act of February 24th, of that year, in its 29th section, granted to the county court of any county, and the city council of any city, the power to subscribe to the capital stock

of any railroad company organized under the act: "Provided, that the county court or city council subscribing or proposing to subscribe to such capital stock may, for information, cause an election to be held to ascertain the sense of the tax-payers of such county or such city as to such subscription, and as to whether the same shall be paid by issues of county or city bonds." The act authorizes the collection of taxes to pay subscriptions and the interest on bonds which may be issued.

These provisions, with the body of the law, passed into the revision of the Missouri statutes of 1855. In the Platte Co. Case, 42 Mo. 171, the supreme court of Missouri decided that this word "may" was obligatory, and must be read as "shall," holding bonds issued without submission void. The legislature soon after passed an amendatory act, by which the word "shall" is substituted for "may."

The only constitutional provisions regarding internal improvements up to 1865 are found in the constitution of 1825, adopted soon after the admission of the state, and are as follows:

"Art. 7. Internal improvements shall forever be encouraged by the government of this state; and it shall be the duty of the general assembly, as soon as may be, to make provision by law for ascertaining the most proper objects of improvement, in relation both to roads and navigable waters; and it shall be their duty to provide by law for a systematic and economical application of the funds appropriated to those objects."

In 1846 a convention framed a constitution, which, on submission to the people for ratification, was rejected. This instrument made no mention of internal improvements. The general corporation act of 1855, regarding the building of plank and macadamized roads, in its 34th section, authorized county courts to subscribe stock to the extent of one-half of the cost of constructing such roads. In no Missouri law or charter, not pertaining to rail, plank, or macadamized roads, is any authority found authorizing municipalities to subscribe stock, with or without submission.

The laws authorizing county courts to subscribe stock in the improvements mentioned remained dormant until the building of railroads, about the year 1850, actually began. The provisions were soon made available by the companies needing funds for their purposes. Desiring railroads, the people quietly stood by and acquiesced in the exercise of the power by the county courts in subscribing stock. The legislative mind first perceived the danger; the requirement of submission in the acts of 1853 and 1855, the change of "may" into "shall" in 1860, the provision of the constitution of 1865 requiring a two-thirds vote, followed. These provisions undertook to keep pace with the rising railroad mania in Missouri.

Congress had made land grants, the state had aided certain railroads liberally, reserving for its security liens on the roads aided, which liens the companies interested sought to remove or subordinate to others. This was the condition of things in Missouri when the convention of 1865 framed the provision in alleged violation of which the act under which the "Moberly Machine Shop Bonds" issued was passed. Let us now examine the provision itself, and seek from its language and import to ascertain whether applicable to the act claimed to be unconstitutional and void. The act, by its terms, seeks to enable cities and towns to purchase lands and donate, lease, or sell them to railroad companies for the purpose of inducing them to build machine shops, or other improvements, upon such lands, requiring a majority vote for sanction. The language of the constitution is: "The general assembly shall not authorize any county, city, or town to become a stockholder in or loan its credit to any company, association, or corporation, unless two-thirds of the qualified voters of such county, city, or town, at a regular or special election to be held therein, shall assent thereto." Did the city of Moberly, by the purchase of lands and donating them to the railroad company, become a stockholder in such company, or loan its credit to it? A stockholder in a railroad company may be said to be one who is interested in the funds of the company, and who assumes the liabilities of a stockholder. The city of Moberly, by virtue of its donation, certainly did not become interested in the funds of the company, nor did it assume any liability of the company—hence, did not partake of the character of a stockholder in any way. It cannot, by any possibility, be brought within the prohibitory language of the constitution, "shall not become a stockholder in any company."

Did it loan its credit to the railroad company? By making a donation it certainly did not loan its credit. But it is said that money was obtained on its bonds, in order to make the purchase of the land. Can this fairly be said to be a loan of credit to the company? I think not. Again, it is said that the constitutional provision is directed against the mischief, and that this case falls within it. And here is the real point in issue—what was, in the light of the legislation of Missouri and the condition of the state, the mischief at which the constitution aimed? Looking at the legislative history and the attending circumstances, the conclusion is, the improvident employment of community credit in railroad enterprises, in which they could have no other than a common interest, and could exercise, if any, but a very limited control.

The Phelps Co. Case, 57 Mo. 178, and the St. Louis Co. Court Case, 58 Mo. 175, may be said, so far as the case under consideration is concerned, to fairly neutralize each other—the first with a leaning adverse to the view here taken, the latter favorable to it.

The constitutional provision under consideration is found in connection with and preceded by a prohibition regarding the state, as follows: "The credit of the state shall not be given or loaned in aid of any association or corporation; nor shall the state hereafter become a stockholder in any corporation or association." The credit of the state had before that time been given or loaned to various railroads, and the state was, in fact, at the time a stockholder in a bank, both of which connections had proven unprofitable, and against them the constitutional provision regarding the state was directed. Following this constitutional provision is found the one in reference to counties, cities, and towns, identical in language, adding the requirement of a two-thirds vote under which they might act in reference to the object named. Next comes the provision denying the legislature power to release the liens which the state had reserved on the railroads when providing for the loan of its credit to them; so that the loan of credit and becoming stockholders, both as affecting the state as well as local communities, was before the mind of the convention. No other matters, except those regarding internal improvements in the larger and extended sense, seem to have been thought of and considered. If the purchasing of property and the donation thereof for the purpose of inducing the location of machine shops, thereby securing a local benefit, had been intended to be prohibited, the word "donation" could easily have been added, as in the constitution of Illinois, which, with this exception, is identical regarding the subject matter. How the legislative mind of Missouri had run on this subject up to 1865, we have seen from what has been stated; how it has since run, the amendment of the act of 1870, requiring a majority only, and its change in 1872, making two-thirds the vote required, and the constitution of 1875, altogether prohibitory, would indicate. This prohibitory clause is as follows (section 6, art. 9): "No county, township, city, or other municipality shall hereafter become a subscriber to the capital stock of any railroad or other corporation or association, or make appropriation or donation, or loan its credit in aid," etc. Thus, by apt words, appropriations or donations are prohibited. The conclusion reached is, that the law under which the "Moberly Machine Shop Bonds" were issued does not conflict with the constitution of 1865, and is a valid act; that the prohibitions of the constitution were not directed against the purchase and donation of property for the purpose mentioned in the act. This being so, the legislature had the power to authorize the city of Moberly to issue its bonds on a majority vote.

Another objection to the validity of the "Machine Shop Bonds" is, that they were not issued for a public purpose. In the Fort Scott Case, 92 U. S. 503, bonds for similar improvements were held valid. The case of Burlington Tp. v. Beasley, 94 U. S. 310, seems to extend and enlarge municipal power. Neither conflicts with the Topeka Case, in which bonds were held void because issued to a private corporation, carrying on its own and exclusively private business. As remarked in one of the decisions of the supreme court of the United States, nearly all of the states have so legislated regarding railroads as to make them public corporations in the essential particulars affecting the interest of the community. State and federal courts have followed in the wake legislation has marked out. Machine shops are a legitimate and necessary part of a railroad, and partake with it of its public character; though they may be locally aided and established, this does not infringe upon or destroy their public character. In parenthesis, I may remark that this case presents, in some aspects, curious features as to legislative and judicial interpretations. The legislature passed the act of 1870, requiring a majority vote in case of donation, then amended it in 1872, requiring a two-thirds vote. The bonds in question upon their face recite that two hundred and twenty-eight votes were cast for and only one against the proposition, thus showing more than a full compliance with the acts of 1870 and of 1872, as well as with the constitutional provision requiring a two-thirds vote. To declare the law under which the bonds issued unconstitutional makes the bonds void, notwithstanding the recital of facts on the face of the bonds that more than the two-thirds required had voted for the issue. Thus the spirit of the law is crushed in the form, and the law made to favor dishonesty rather than honesty. When such is the condition of things, I prefer resolving doubts in favor of the constitutionality of the act giving force to the law enacted by the legislature. On the whole, I am of opinion the demurrer to the declaration should be overruled.

[NOTE. The question was then certified to the supreme court, where the judgment was affirmed in an opinion by Mr. Justice Field, who said that the act of March 18, 1870, was unconstitutional in permitting the use of a city's credit with the assent of only a majority of its qualified voters. The act of February 16, 1872, gives no authority to create an indebtedness. It is merely prohibitory in its character, and further legislation is needed. Mr. Justice Harlan dissented. 103 U. S. 580.]

## Case No. 7,224.

JARVIES v. The STATE OF MAINE.

[36 Hunt, Mer. Mag. 326.]

District Court, N. D. New York. 1857.

COLLISION IN HELL GATE — STEAMER AND SAIL — MUTUAL FAULT.

[Steamer and schooner colliding in Hell Gate both *held* in fault; the steamer for proceeding, without special caution, at a speed which would necessarily cause the vessels to pass at a point where the strong ebb tide created currents difficult to calculate, and the schooner for so maneuvering as to give the steamer no clear

notice of the side she intended to take in passing.]

[Cited in The Comet, Case No. 3,050.]

[This was a libel by William Jarvies against the steamboat State of Maine, for damages occasioned by a collision.]

HALL, District Judge. My examination of this case has confirmed the impression, received at the hearing, that both vessels were in fault. The collision occurred in the daytime, and those in charge of the colliding vessels ought to have known that if they continued to approach each other with unabated speed they would necessarily pass at a point where both vessels would be subject to the powerful action of a strong ebb-tide, which, from the course and changes of the current at and near that point, would change suddenly and very considerably the course and position of the schooner, and affect to a greater or less extent the direction and progress of the steamer. Neither the one nor the other could be wholly under control, but both would be necessarily more or less driven out of the track which it was deemed most desirable to pursue. To pass safely under such circumstances in the most difficult and dangerous portion of the narrow channel of Hell Gate, required very extraordinary care, and a competent degree of skill, on the part of those in charge of their respective vessels.

Although the evidence is in many respects conflicting and unsatisfactory, I am of the opinion that the requisite diligence, care, and skill were not exerted on board the schooner, and that the steamer—which should either have slackened her speed and waited in comparatively still water until the schooner had passed the point of danger, or have proceeded with the utmost care and caution, and if necessary at less speed until the danger was over—was likewise in fault. Having, with a full knowledge of the danger, elected to proceed, the steamer must be held in fault, unless it appears that those to whose management she was intrusted managed her with the requisite skill, and with the utmost care, and that the fault of those in charge of the schooner was solely the cause of the collision. I cannot say the schooner alone was in fault. The course and management of the steamer were not such as to give the pilot of the schooner clear and unmistakeable notice of the side the master of the steamer intended to take in passing, and the helm of the schooner may have been, and probably was, ported a moment before the collision—either intentionally or instinctively, and involuntarily—in consequence of the uncertainty in regard to the steamer's intention, and the feeling of danger which this uncertainty was so well calculated to excite. It is also clear that there was no sufficient look-out kept upon the schooner, and her course and management were not such as to indicate distinctly which side of the steamer, or what part of the channel, the pilot of the schooner intended to take; and it is almost certain (although it was sworn that a careful look-out was kept on the steamer) that both vessels proceeded in fancied security, or at least without any just conception of the danger impending,—the schooner without shortening sail, and the steamer without checking her speed, until it was too late to prevent the collision which ensued.

I repeat that the testimony, upon which I have formed these conclusions, is in many respects conflicting and unsatisfactory, but the case is certainly one of mutual fault, or else one of inscrutable fault,—and in either case the rule of the admiralty is to divide the damages. There must be a reference to a commissioner to ascertain the damages occasioned by the collision, which will be apportioned between the parties, and neither party is to be entitled to costs as against the other.

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JARVIS, The WILLIAM. See Case No. 17,697.

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## Case No. 7,225.

JARVIS v. The CLAIBORNE.

[Bee, 248.] [1]

District Court, D. South Carolina. Jan. 11, 1808.

CORRECTION OF SEAMAN BY CAPTAIN—USE OF DEADLY WEAPONS.

1. Moderate correction on board ship is justifiable; but deadly weapons, such as a cutlass, should only be used when a mutiny exists, or is threatened.

[Cited in Butler v. McLellan, Case No. 2,242; Fuller v. Colby, Id. 5,149.]

2. A captain who encourages disorderly behaviour in his ship is the less excusable for inflicting unusual punishment for conduct arising, in some measure, out of that disorder.

In admiralty.

BEE, District Judge. Upon a careful consideration of the evidence in this case, there appear to have been great faults on both sides. At the time the fray happened, the whole ship's company seems to have been more or less intoxicated; nothing else could have occasioned the captain and mate to make a ring on board, and permit two men to fight a battle on deck. Such a circumstance is sufficient to account for the insubordination of the crew, who ought rather to have been put in irons until they recovered their sober senses. At any rate nothing could justify Captain Sherwood in drawing a cutlass; much less in using it to inflict a severe wound upon the actor [John Jarvis], especially as he was then in irons. The law justifies moderate correction, and more than that had previously been inflicted by the mate, with his fist: from his apparent

[1] [Reported by Hon. Thomas Bee, District Judge.]

strength, the blows must have been severe. But the use of a weapon so deadly as a cutlass can be justified only by reasonable apprehension, or the actual existence of mutiny. Nothing of the sort appears here; the actor is charged only with disobedience of the captain's order to go forward; and the tumultuous scene that had so lately occurred on board, under the sanction of the captain himself, might, in a degree, excuse the sailor's inattention, and noncompliance. An attempt was made to prove that the wound was received by an effort to seize the cutlass; but the whole account of the transaction renders this highly improbable; and the confinement in irons of the actor makes it almost impossible. It appears, indeed, both from the evidence and a view of the wounded hand, that the actor will lose three of his fingers.

Upon the whole, I consider the captain as highly blamable in every stage of the business, and I decree accordingly that he pay this sailor one hundred and fifty dollars, with all the expenses of the suit. As to the mate, I shall not adjudge damages against him, as he punished only with his fist. Moderate correction is often necessary towards seamen; the fist is generally used for the purpose of inflicting it; and bad consequences seldom follow. I have however, known one instance in which a blow with the fist occasioned death.

## Case No. 7,226.

JARVIS v. CONNECTICUT MUT. LIFE INS. CO.

[8 Chi. Leg. News, 227; 5 Ins. Law J. 507; 6 Ins. Law J. 311.]

Circuit Court, N. D. Illinois. March, 1876.

LIFE POLICY—SUICIDE — BURDEN OF PROOF—EFFECT OF INTEMPERANCE—INSANITY AS AN EXCUSE.

1. The court states the law as laid down by the supreme court in such cases, stating when a recovery may be had, although the party insured takes his own life, and when not.

2. Self-destruction renders the policy void. The burden of proof is on the plaintiff to show such kind and degree of insanity as will relieve the act of that consequence.

3. The court instructed the jury, that if they found that the assured had impaired his health by intemperance, then the policy was void; that this was sufficient of itself to defeat a recovery. He agreed that he should not impair his health by intemperance, and if he broke that provision a recovery cannot be had on the policy.

4. If the mental condition, which would otherwise avoid the effect of the self-destruction clause, was produced by intemperance, the plaintiff cannot recover. Insanity induced by violation of one condition of the policy cannot be set up as an excuse for the violation of another condition.

[This was an action at law by Lydia A. Jarvis against the Connecticut Mutual Life Insurance Company.]

R. L. Divine and Hunter & Page, for plaintiff.

Isham & Lincoln, for defendant.

HOPKINS, District Judge (charging jury). This is an action upon a life policy for $2,000 dated May, 1866, on the life of one Jarvis, issued by the defendant, payable to the plaintiff. He died December 4, 1871. The proof of death is admitted to have been made December 23d, 1871. This entitles the plaintiff to a verdict, unless it is shown that the deceased violated some of the conditions of the policy. The provisions claimed to have been broken are first, that the insured became intemperate so as to impair his health, and second, that the party came to his death by his own hand. The plaintiff has admitted that the insured came to his death by his own hand. This entitles the defendant to a verdict, unless the plaintiff has shown that the deceased was insane so as to be incapable of committing the act in the sense these words are used in the policy, that is to such an extent as to relieve the act of the character of self-destruction. The plaintiff on this point has the burden of proof upon him. I will read and adopt the charge of Judge Dillon, which has been approved by the supreme court, with reference to the meaning of these words in the policy, and as to what must be shown to avoid the act of self-destruction. "It is not every kind or degree of insanity which will so far excuse the party taking his own life, as to make the company insuring liable. To do this, the act of self-destruction must have been the consequence of the insanity, and the mind of the decedent must have been so far deranged as to have made him incapable of using a rational judgment in regard to the act which he was committing. If he was impelled to the act by an insane impulse, which the reason that was left him did not enable him to resist, or if his reasoning powers were so far overthrown by his mental condition that he could not exercise his reasoning faculties on the act he was about to do, the company is liable. On the other hand, there is no presumption of law, prima facie, or otherwise, that self-destruction arises from insanity; and if you believe from the evidence, that the decedent, although excited, or angry, or distressed in mind, formed the determination to take his own life, because in the exercise of his usual reasoning faculties, he preferred death to life, then the company is not liable, because he died by his own hand, within the meaning of the policy." The supreme court summed up the rule in this language: "We hold the rule on the question before us, to be this: If the assured, being in the possession of his ordinary reasoning faculties, from anger, pride, jealousy, or a desire to escape from the ills of life, intentionally takes his own life, the proviso attaches, and there can be no recovery. If the death is caused by the volun-

tary act of the assured, he knowing and intending that his death shall be the result of his act; but when his reasoning faculties are so impaired that he is not able to understand the moral character, the general nature, consequences and effect of the act he is about to commit, or when he is impelled thereto by an insane impulse which he has not the power to resist, such death is not within the contemplation of the parties to the contract, and the insurer is liable." This construction of these words in the policy, and the quantity of evidence to avoid them, is binding upon this court, and the testimony must be considered with reference to that construction.

If you find that the testimony brings the insured's condition of mind within this doctrine thus laid down by the supreme court, the defense of self-destruction is answered. Upon this point, you will look at the evidence as to his usual habits, his condition, his circumstances, and all the surroundings and influences tending to such an act, and bearing upon his mental condition, and determine whether, or not, the insured was in the condition mentioned in the foregoing instructions. If he was, then he was not morally responsible for the act, and, in a legal sense, there was no self-destruction. If he was in the enjoyment of his faculties to the extent hereinbefore mentioned, the condition of the policy was broken, and the defendant is not liable.

There is still the question of intemperance. If you should find that the insured had impaired his health by intemperance, then the policy is void. This is sufficient of itself to defeat a recovery. He agreed that he should not impair his health by intemperance, and if he broke that provision, he cannot recover. If the evidence shows you that such is the case, the policy is void; but the burden of proof upon that point, is upon the defendant. The defendant must show, to your satisfaction, that after the policy was issued, the insured did impair his health by habits of intemperance. If the evidence shows that, it avoids the policy. You must find it, however, upon the evidence. If you should find that his intemperance produced the mental condition relied upon to avoid the effect of the self-destruction clause in the policy, then the plaintiff cannot recover. If the insanity was produced by habits prohibited by the policy, then it cannot be set up in avoidance of a breach of another condition. Intemperance avoids the policy, and if intemperance produced the insanity, this insanity cannot be set up as an excuse for the violation of the self-destruction clause. The weight of the testimony is for you to settle, and it is for you to draw conclusions from it. Opinions of witnesses are admissible in some cases, and when admissible, it is the duty of the jury to give them such weight as they deem them entitled to. They are not absolutely binding upon you, but you may reject or receive them, as you think them worthy. If you find for the plaintiff, you will find the sum mentioned in the policy, with interest at six per cent., after ninety days from December 23, 1871,—that is, from March 23, 1872.

In this case, the jury failed to agree.

JARVIS (ELLIS v.). See Case No. 4,403.

## Case No. 7,227.

JARVIS et al. v. KENDALL.

[1 Hayw. & H. 237.] [1]

Circuit Court, District of Columbia. April 18, 1846.

TREASURY NOTES—ENDORSEMENT—FORGERY—BONA FIDE PURCHASER.

An innocent purchaser of a treasury note for a full and valuable consideration, even if the endorsee's name is forged and the name of the endorsor is erased, is entitled to receive the amount of the note from the treasury.

Action of trover.

In the matter of Nathan Jarvis and John Winthrop Andrews, merchants, trading in New Orleans in the state of Louisiana under and in the name, style and firm of Jarvis & Andrews, v. John E. Kendall, a citizen and resident of the city and county of Washington, D. C., it is agreed to docket and try said case on the following statement of facts for the purpose of ascertaining which of the parties aforesaid be entitled to receive from the treasury department, United States, the amount of the treasury note hereto annexed of $100. Case stated.

On or about the 9th of September, 1842, Jarvis & Andrews, then the lawful owners and holders of said note, enclosed said note in a letter directed to A. W. Ely, at Charlottesville, Va., put said letter with the note enclosed into the mail at New Orleans, La. In the course of transmission said note was stolen or lost from the mail. The endorsement of A. W. Ely on said note and the erasure of the endorsement of Jarvis & Andrews thereon are forgeries. That on or about the 28th of September, 1842, after the said forgeries and erasure were made, and while said note was in circulation, the said note was, in the city and state of New York, innocently purchased by said John E. Kendall for a full and valuable consideration.

P. R. Fendall, for plaintiff.
H. H. Dent, for defendant.

This cause coming on to be heard on the within statement of facts, and after argument of counsel and mature deliberation, it is this 18th day of April, 1846, ordered by THE COURT that the defendant is entitled

[1] [Reported by John A. Hayward, Esq., and Geo. C. Hazleton, Esq.]

to receive the amount of the note thereon referred to from the treasury of the United States.

JARVIS (UNITED STATES v.). See Cases Nos. 15,468 and 15,469.

JARVIS (VAN WINKLE v.). See Case No. 16,883.

JASON, The (UNITED STATES v.). See Case No. 15,470.

## Case No. 7,228.

The JASPER.

[3 Ware, 296.] [1]

District Court, D. Maine. April, 1862.

SEAMEN—WAGES—EFFECT OF INTEMPERANCE.

1. Wages allowed on the facts.

2. Intemperance, if it wholly disqualifies a seaman from performing his duties, is a forfeiture of all wages, but, if occasional only, it is marked by a deduction of wages according to circumstances, or by the courts entirely overlooked.

In admiralty.

Mr. Sewall, for libellants.
Mr. Dana, for respondents.

WARE, District Judge. This is a proceeding in rem for seamen's wages. Call, the libellant, has united, with a claim for wages, one for other services, during seventeen days on one occasion, and twenty-two days on another, arising before the period in which he claims wages. These relate to a care of the vessel when she was undergoing some repairs, or when she was blocked up by ice. At that time he was master, and took the vessel on shares, he to have a certain portion of the earnings, to victual and man her, and the owners to keep her in repair. His relation to the vessel, the nature of the services, and the evidence offered in support of them, all conspire to induce me to lay these claims out of the case. If he has any title to pay for these services, it may more equitably be adjusted in another action pending on this subject in another tribunal. In this case I consider only his claim for wages. The statute of the United States of 1790 [1 Stat., 134], suspending process against the vessel for ten days after the voyage is ended and the delivery of the cargo, if there were no other objections to the defence, does not apply to a case of this kind. The law itself is not of easy construction, and the courts have varied much in the interpretation of its meaning. Three-eighths of this vessel were originally bought by the proceeds of a farm, given to Call's wife, with an understanding that he was to go in her as master, and in this capacity he entered on board September 29, 1858, and continued as master till May 21, 1859. At that time, either because some of the part owners became dissatisfied with him, or because he, being in embarrassed circumstances, was fearful that the freight due to him would be seized by his creditors, the papers of the vessel were indorsed to Hamlin, who was a hand on board. This was at Bangor. From this time Hamlin signed the bills of lading and collected the freight, beginning at Bangor and Providence, where she was then bound. Call went in her as a hand from that time, as long as he continued in the vessel. No shipping articles were signed, and there was nothing in writing to prove the nature of the contract. Everything was left to the uncertainty of a verbal understanding, and even the rate at which Call was to be paid was not agreed. The whole matter was left in that way that, unless there was the greatest good faith on both sides, a controversy would be likely to arise when the parties came to a final settlement. Whatever might have been the private understanding between the parties, Hamlin, after that change of the papers, became legally master and known as such to all who dealt with the vessel. Call was only a seaman, whether he occupied the place of mate or only foremast hand. His claim for wages, if any, commenced at that time, and depends on the character in which he went, whether as master or not. The record proof, certainly, about which there can be no dispute, is that he was not master. Hamlin's testimony has been taken by the owners, and from this it appears that he himself performed all the duties of master. He signed the bills of lading, collected the freight, paid the crew, and in all respects appeared as master to strangers. He, indeed, says that he collected the freight as agent for Call, and paid it over to him. But all this was done verbally, and he has no written voucher to show to affect Call, neither for the freight paid over nor for Call's wages. As Call signed no shipping paper, this is the least that is to be expected. And even to this day Hamlin has had no settlement with the owners, nor do we know how he took the vessel, either on shares or for monthly wages. Even if he stood before the court as an unimpeachable witness, his testimony alone would be hardly sufficient to meet Call's claim for wages. But even the admissibility of that part of his testimony is, to say the least, very doubtful, as he would be personally liable for the wages. In such a case written proof of payment ought to be required. If he paid freight to Call, it is to be remembered that Call's wife was part owner, and, as such, entitled to a part of it, and cannot be allowed on the evidence offered in this case, as part payment of wages. These I allow from the time of the change of the papers, so long as Call served in the vessel, which, according to his statement in the libel, was to the 8th of October. As no particular sum was agreed upon, I allow them at $20 per month.

[1] [Reported by George F. Emery, Esq.]

But to this change the claimants set up a forfeiture on account of habitual intemperance. This is the besetting sin of seamen, and, if fully proved, is a just ground of forfeiture, because it disqualifies a man from performing his duty. But when the offence is only occasional, the courts have not been in the habit of inflicting the highest penalty. It may be marked only by diminished wages. Though the evidence proves that Call was not so prudent in the use of intoxicating drink as he ought to be, it entirely fails of proving him incapable of duty at any time when he was called on.

An offset is also offered of a sail furtively taken from the vessel. If it was originally taken animo furandi, it was given up. What is the true value of this sail is not to be determined from the evidence. Some of the witnesses say it was of greater and some of less value, varying singularly in their estimate. It was a square sail and not constantly used. In 1856 this sail was repaired as an old sail. It was of thin cotton duck, and kept in use until 1859, about three years. I say this sail, for it has not been pretended that a new sail was provided, and it could not, at that time, have been of any value except for paper. If five dollars are allowed for this, I think it enough.

| | |
|---|---|
| Wages, at $20 per month, for four months and nine days..... | $87 00 |
| For the sail deduction..... | 5 00 |
| | $92 00 |

## Case No. 7,229.

JASPER et al. v. PORTER et al.

[2 McLean, 579.] [1]

Circuit Court, D. Michigan. Oct. Term, 1841.

PRACTICE—DEPOSITIONS—ADMINISTRATION OF STATE LAWS BY FEDERAL COURTS.

1. The courts of the United States are presumed to know the laws of the respective states, and they will determine who, under the laws of the state, have a right, by the act of congress, to take depositions.

[Cited in U. S. v. Tilden, Case No. 16,520.]

2. The official character of the person taking a deposition will be presumed, without further proof.

[Cited in Crane v. Thayer, 18 Vt. 167.]

[This was an action at law by Jasper and Tibbits against Porter and others.]

OPINION OF THE COURT. In this case an objection being made to the admission of certain depositions, on the ground that it did not appear that the officer, taking the same, was authorized to do so. The courts of the United States are presumed to know the laws of the several states. It is, therefore, unnecessary to set them out in a plea, as foreign laws; but the court will notice them without plea, and can determine whether the person taking the depositions, under the laws of the state, comes within the act of congress, which authorizes depositions to be taken. The court will receive the certificate of such person, as prima facie evidence of his right to take the depositions, without the certificate of the clerk and seal of court, or any other evidence of his official character. Under the 61st rule, all objections to the form of taking depositions are waived, unless indorsed on the depositions before the cause, in which they were taken, shall be called for trial.

[1] [Reported by Hon. John McLean, Circuit Justice.]

JASPER, The (WINTERPORT GRANITE & BRICK CO. v.). See Case No. 17,898.

JASPER COUNTY (ANTHONY v.). See Case No. 488.

J. A. TRAVIS, The (WHITTAKER v.). See Case No. 17,599.

## Case No. 7,230.

JAUDON v. NATIONAL CITY BANK.

[8 Blatchf. 430.] [1]

Circuit Court, S. D. New York. May 10, 1871[2]

BREACH OF TRUST—LOANS TO TRUSTEE ON PROPERTY HELD IN TRUST — LIABILITY OF LENDERS WITH NOTICE — ORDINARY COURSE OF BUSINESS —TRUSTEES.

1. In this case, persons who made loans of money to a trustee, on certificates of stock, and afterwards sold the shares of stock to repay the loans, were held liable to the cestui que trust for the proceeds of the shares, it appearing that the certificates stated that the holder, naming him, held them in trust, and gave the name of the cestui que trust; that the transactions of loan indicated that the trustee was not selling the shares in the ordinary course of his business, as trustee, but that he was borrowing money, for his private use, on a pledge of what was in his hands as trust property; that the sales of stock were made by the lenders, with the knowledge that the proceeds were to be applied to pay the private debts of the trustee to the lenders; and that the lenders applied the proceeds to pay such private debts.

[Cited in Fifth National Bank v. Village of Hyde Park, 101 Ill. 608; Prall v. Tilt, 28 N. J. Eq. 481; Harbison v. James, 90 Mo. 414, 2 S. W. 292.]

[See note at end of case.]

2. A trustee stands on a different footing from an executor, or an administrator, or even a guardian, in many respects. He presumptively holds his trust property for administration, and not for sale.

[See note at end of case.]

[This was a bill in equity by Mary T. B. Jaudon against the National City Bank, William B. Duncan, and others for breach of trust.]

Theron R. Strong, for plaintiff.

William W. McFarland, for Duncan, Sherman & Co.

William H. Arnoux, for the National City Bank.

[1] [Reported by Hon. Samuel Blatchford, District Judge, and here reprinted by permission.]

[2] [Affirmed in 15 Wall. (82 U. S.) 165.]

BLATCHFORD, District Judge. The plaintiff is the wife of the defendant Charles B. Jaudon. She is a daughter of the late Commodore William Bainbridge, who died in 1833, leaving a will, under the provisions of which she has a separate estate of her own, placed by the will in trust for administration. By the will, the testator, after making certain legacies, directed that all his real estate should be sold, and appointed William Lynch and Hugh Colhoun to be trustees, to receive all the residue of his estate, "and to invest the same in the stocks of the United States, or the stocks or funds of any individual state, and to hold the same in trust for the following purposes:" (1) $28,000 to be invested, and the interest of it to be paid to his wife for her life, and at her death such stocks or funds to be equally divided among his four daughters, (the plaintiff being one), "the trust to remain the same for their sole use and benefit." (2) Enough to be invested to create an annual interest of $150, to be paid to his sister Mary during her life, and, at her death, the invested amount "to be, in trust, equally divided" between his said four daughters. (3) In respect to each one of said four daughters, an equal one-fourth part of his remaining estate to be invested in the funds or stocks before mentioned, in trust, the interest whereof to be paid to the daughter, for her sole use and benefit during her life, and, at her death, the amount so invested to be equally divided among her children. By a codicil, he directed that the loan which he held of the city of Philadelphia, and the Southwark loan, and the ground rents, be not sold, but be considered by the trustees as equal to the stocks or funds before mentioned. The trustees named in the will were, in May, 1835, on their own petition, discharged from their trust by the court of common pleas for the city and county of Philadelphia, and the defendant Samuel Jaudon was, at the same time, appointed by that court trustee, under said will, for the widow, the sister and the four daughters, and, in June, 1835, he received from the outgoing trustees all the trust estate held by them. At the death of the testator, a considerable portion of his estate consisted of stock of the state of Pennsylvania, paying an interest of five per cent. per annum. The trustees named in the will made no change, while they continued to be trustees, in any of the investments, but left them as they were at the death of the testator. Soon after Samuel Jaudon was appointed trustee, he sold the Pennsylvania stock and invested its proceeds in stock of the Delaware and Raritan Canal Company. This stock he apportioned among the trusts created by the will, allotting to the trust for the plaintiff 93 shares. Although this was an investment not authorized by the will, the plaintiff approved of it, and, from time to time, received from the trustee the dividends made on the 93 shares. In 1857, the widow died, and the Delaware and Raritan Canal stock, which belonged to the trust for her, was divided by the trustee among the trusts for the four daughters, 28 shares of it going to the trust for the plaintiff. Thus the trust for the plaintiff embraced 121 shares of Delaware and Raritan Canal stock, and the plaintiff thereafter received, from time to time, from the trustee, the dividends made on the 121 shares, knowing of the investment. Afterwards, some property which had belonged to the testator was sold, and, from that source and other sources, the trustee came to hold under the trust for the plaintiff, in addition to the 121 shares of canal stock, $5,600 in United States stock, known as "five-twenty bonds."

The bill seeks to make the trustee, Samuel Jaudon, responsible for the value of the $5,600 of United States stock, and of 117 shares of the canal stock, as having been disposed of by him in breach of his trust, and to have him removed from his trust and another trustee appointed in his place. It also seeks to make the defendants, the National City Bank, responsible for the value of 47 shares of the canal stock, and to make the defendants, Duncan and others, who compose the firm of Duncan, Sherman & Co., responsible for the value of 70 shares of the canal stock, as having been received by them respectively from the trustee, and sold, and appropriated to their use respectively, under circumstances which make them liable equally with the trustee, to the plaintiff, for the breach of trust committed by such trustee.

On the 16th of October, 1865, Samuel Jaudon applied to the National City Bank for a loan of $6,000, on a pledge or hypothecation of 47 shares of the stock of the Delaware and Raritan Canal Company, evidenced by two certificates of stock, one for 19 shares and one for 28 shares. The $6,000 was loaned to him by the bank, October 16th, 1865, on that security, he giving to the bank no obligation note or due bill for the loan, but merely depositing with it the two certificates, the loan being regarded as a loan strictly on demand, but practically as one for three months. The certificate for the 19 shares was dated January 27th, 1852, and certified that "S. Jaudon, trustee for Mrs. Mary T. B. Jaudon," was entitled to that number of shares in the capital stock of the company, transferable on the books of the company and on surrender of such certificate, only by him or his legal representative. The certificate for the 28 shares was dated April 14th, 1864, and certified that "S. Jaudon, trustee of Mrs. Mary T. B. Jaudon," was entitled to that number of shares in the capital stock of the company, transferable on the books of the company only by him or his legal representative. Accompanying the two certificates when they were so deposited with the bank, but on a separate piece of paper, was an instrument dated April 18th, 1864, signed "S. Jaudon, Tr. of M. T. B. Jaudon," and stating

that "Sam'l Jaudon, trustee of M. T. B. Jaudon," thereby sold unto —— 47 shares "of the joint stock of the Delaware and Raritan Canal Co., and Camden & Amboy Railroad and Transportation Co." standing in his name on the books of the said companies, and appointed —— his attorney to transfer such stock. On the 27th of November, 1865, the bank loaned to Samuel Jaudon the further sum of $3,500 on a pledge of the same 47 shares of stock with other securities. He repaid this loan of $9,500, with interest, on the 17th of January, 1866. He borrowed from the bank the like sum of $9,500, on a pledge of the same securities, on the 19th of January, 1866. This transaction of the borrowing by him from the bank the like sum of $9,500, on a pledge of the same securities, was repeated seven times more, namely, on the 18th of April, 1866, the 19th of July, 1866, the 13th of October, 1866, the 19th of January, 1867, the 13th of April, 1867, the 6th of July, 1867, and the 12th of October, 1867. Such loan on the 19th of January, 1866, was repaid, with interest, on the 11th of April, 1866. The first six of the remaining seven loans were repaid, with interest, severally, on the 16th of July, 1866, the 10th of October, 1866, the 14th of January, 1867, the 10th of April, 1867, the 29th of June, 1867, and the 10th of October, 1867. The loan of the 12th of October, 1867, not being paid on demand, the bank, on the 10th of December, 1867, sold the 47 shares of stock, at the request of Mr. Jaudon, for the net sum of $5,897.90, which was applied on account of the loan on the 11th of December, 1867. The securities were returned to Mr. Jaudon every time he paid up the amount of a loan, and redelivered to the bank by him every time a new loan was made to him.

On the 18th of July, 1867, Samuel Jaudon applied to the defendants, Duncan, Sherman & Co., for a loan of $7,000, which was made to him by them on that day, on the pledge or hypothecation of 70 shares of the stock of the Delaware and Raritan Canal Company, evidenced by one certificate of stock, for 70 shares. The amount was loaned on that security alone. It was a loan at 90 days. Whether a note was given for it, or not, is not certain. The certificate was deposited with Duncan, Sherman & Co., at the time the loan was made. The certificate was dated December 13th, 1851, and certified that "S. Jaudon, trustee for Mrs. Mary T. B. Jaudon," was entitled to 70 shares in the capital stock of the company, transferable on the books of the company, and on surrender of such certificate, only by him or his legal representative. Accompanying the certificate, when it was so deposited with Duncan, Sherman & Co., but on a separate piece of paper, was an instrument signed, "S. Jaudon, trustee of M. T. B. Jaudon," and stating that "S. Jaudon, trustee of M. T. B. Jaudon," thereby sold unto —— 70 shares "of the joint stock of the Delaware and Raritan Canal, and Camden & Amboy Railroad & Transportation Compys.," standing in his name on the books of the said companies, and appointed —— his attorney to transfer the stock. On the 16th of October, 1867, when the 90 days expired, Mr. Jaudon obtained from Duncan, Sherman & Co., on the same stock, a further loan of $600, and at the same time gave directions to them to sell the stock. Between the 16th of October, 1867, and the 21st of October, 1867, the 70 shares were sold by Duncan, Sherman & Co., for the net sum of $8,699.12. On the last-named day, the loans, with interest, amounted to $7,729.88, and, on that day, Duncan, Sherman & Co. applied that amount, from the proceeds of the sale, to the payment of the loans and interest, and paid over to Mr. Jaudon the remainder of the proceeds, amounting to $969.24. The power of attorney, accompanying the certificate for the 70 shares, is dated October 16th, 1807, (a mistake for 1867,) and that date was probably filled in October 16th, 1867, and it bears the signature, as a witness to its execution, of Mr. J. C. Hull, the cashier of Duncan, Sherman & Co., who, at the direction of Mr. William B. Duncan, of that firm, transacted the business of receiving the certificate, and transfer, and power of attorney, from Mr. Jaudon, and furnishing him with the money loaned.

The sales of the 117 shares were made under the powers of attorney before named, the blanks therein having been filled up at the office of the company, when, under the powers, the shares were transferred on its books, and the certificates were surrendered. Notwithstanding the sale of the shares, Mr. Jaudon, in February, 1868, paid to the plaintiff an amount of money equal to the amount of the dividend then paid on the 117 shares, and in August, 1868, he paid to her the sum of $205, as on account of the dividend then paid on such shares. Since that time, she has not received anything on account of the income of the shares, nor have they been restored to the trust. The plaintiff did not know of any of the loans, or of any of the pledges of the shares, or of the sale of any of the shares, until December, 1868. She never authorized or ratified any of the transactions. Mr. Jaudon used the moneys obtained by him from the bank, and from Duncan, Sherman & Co., on the loans, to pay which the stocks were sold, to discharge indebtedness incurred by him individually in making investments in stock of the Broad Top Coal and Iron Company, which he anticipated would be remunerative, and, if they were, he had the intention of offering to the plaintiff shares in such company to replace the 117 shares. Such investments were made by him in his individual name. The plaintiff had no knowledge of such use of the moneys, or of such investments, or of such intention. The investments turned out to be worthless, and the stock was never offered to her. Mr. Jaudon is insolvent, and

the trust has never received any of the proceeds of the stock, or any moneys, in replacement thereof. The evidence shows, that when Mr. Jaudon applied to Duncan, Sherman & Co., for the original loan, he informed Mr. Duncan about his having made investments in the Broad Top Company, and made known to him his expectation of being able to repay the loan from the fruits of such investments.

There is no foundation in the evidence for the proposition that Mr. Jaudon had any authority from the plaintiff, either specific or general, to sell or dispose of the 117 shares, or to pledge the same, or borrow money on them. The stock was a valuable stock. The 47 shares sold for over 25 per cent. net above par, and the 70 shares for over 24 per cent. net above par. The semi-annual dividends upon it had averaged five per cent., in money, and it had occasionally made dividends in stock, besides.

On these facts, there can be but one conclusion, and that is, that not only Mr. Jaudon, the trustee, but the bank and Duncan, Sherman & Co., must respond to the trust for these shares of stock—the bank for the 47 shares, and Duncan, Sherman & Co. for the 70 shares. The certificates, on their face, not only stated that Mr. Jaudon held the shares in trust, but gave the name of the plaintiff as the cestui que trust. The powers of attorney indicated that he was transferring the shares so held by him in trust. The transactions of loan indicated, not that he was selling the shares in the ordinary course of his business, as trustee, but that he was borrowing money for his private use, on a pledge of what was in his hands as trust property. The sales of the stock, when they were made by the pledgees, were made by them with knowledge that the proceeds were to be applied to pay the private debts of the trustee to the pledgees, and the pledgees applied the proceeds to pay such private debts. In regard to Mr. Duncan, he was informed that the loan was to be repaid by Mr. Jaudon out of the fruits of investments which he had made in the stock of a company which was named. That stock was a stock which Mr. Duncan was bound to know was a security in which it was unlawful, by the general principles of law, and, in the absence of special authority, for a trustee to invest trust funds. He must, therefore, be held chargeable with knowledge that the loan was to be repaid from sources with which the trust could have no connection, and, therefore, from sources altogether private to the borrower. In regard to the bank, the making of ten separate loans to Mr. Jaudon, running through a period of two years, upon the pledge of the stock, evidenced by such certificates, must be held as charging the bank with notice that Mr. Jaudon was borrowing the money for his private uses, on a pledge of trust property. The circumstances were such as to put the parties on inquiry. Inquiry would have directed them to the cestui que trust, and the unlawfulness of the transactions would have been disclosed. They made no inquiry, even of Mr. Jaudon, as to how it was that he was borrowing money on a pledge of shares held by him as trustee. The case is not even one of a sale of the shares directly, which might presumably be within the scope of the authority of a trustee, with a view to a re-investment within such authority. A trustee, however, stands on a different footing from an executor or an administrator, or even a guardian, in many respects. A trustee presumptively holds his trust property for administration, and not for sale; and, according to the well settled principles of equity, a pledge by him of certificates of stock like those in this case, as security for loans of money made to him under circumstances like those in this case, entitles the cestui que trust to follow the property into the hands of the pledgee and reclaim it from him, where he has received the fruits of it, and there was in fact a breach of trust in making the pledge. The transactions with the pledgees in this case negatived the idea that Mr. Jaudon had any purpose, in borrowing the money, of selling the stock, and, therefore, negatived the idea that his action could be that of a trustee selling the stock. He said plainly, by the transactions, that he did not wish to sell the stocks; that, as between him and the trust, no such thing as a sale of the stocks was the purpose of the transactions; and that he intended to repay the borrowed money and reclaim the stocks.

The pledgees had reasonable ground for believing, when they made the loans, to pay which the stock was sold, that Mr. Jaudon intended to apply the money loaned to his private uses. They enabled him to commit the breach of trust which he committed. What he did was accomplished by their cooperation. The law implies notice to them of the terms of the trust, whose existence the certificates disclosed. It was negligence in them to take the certificates in pledge for the loans without inquiry. Such inquiry of the plaintiff would have shown that the borrowing of the money was for no purposes of the trust. They must bear the consequences of their negligence. McLeod v. Drummond, 17 Ves. 152; Field v. Schieffelin, 7 Johns. Ch. 150; Lowry v. Commercial & Farmers' Bank [Case No. 8,581]; Pendleton v. Fay, 2 Paige, 202, 205; Shaw v. Spencer, 100 Mass. 382, 389–392; Bayard v. Farmers' & Mechanics' Bank, 52 Pa. St. 232; Baker v. Bliss, 39 N. Y. 70, 73, 76; Carr v. Hilton [Case No. 2,437].

The bill has been taken as confessed against the defendant Samuel Jaudon. There must be a decree that he account for the United States stock appropriated by him to his own use, with the interest that would have been received thereon, and for the 117 shares of the stock of the canal company, and for the dividends thereon, and that he

restore such property to the trust or pay its value into court. There must also be a decree against the bank and Duncan, Sherman & Co. severally, that they account severally, the former for the 47 shares, and the latter for the 70 shares, of the stock of the canal company, pledged with them severally and sold, and for all dividends thereon since made, and restore such shares and property to the trust or pay its value into court. It will be referred to a master to take and state such accounts, allowing the proper credits. All other questions are reserved until the coming in of the report of the master.

[NOTE. Both Duncan, Sherman & Co. and the National City Bank appealed. The supreme court, in an opinion delivered by Mr. Justice Davis, citing Case No. 8,581 and Shaw v. Spencer, 100 Mass. 389, affirmed the decree below, holding that it was out of the common course of business to take corporate stock, held in trust, as security for the trustee's own debt, and that the party taking such stock dealt with it at his peril, "for there is no presumption of a right to sell it, as there is in the case of an executor." 15 Wall. (82 U. S.) 165.]

## Case No. 7,231.

JAUREKHE et al. v. The S. G. TROOP.

[N. Y. Times, Aug. 2, 1865.]

District Court, E. D. New York. 1865.

PRACTICE IN ADMIRALTY — JOINDER OF CAUSES — SEAMEN.

[Seamen suing for wages cannot be colibelants with the holders of a bottomry bond. Their remedy is by a separate libel.]

This was an application by seamen to be made colibelants. The libel was filed [by Peter Jaurekhe and others] to enforce a bottomry bond; process was issued in the cause and the vessel arrested, and on the return of the process, no one appearing, the default of all persons interested was entered, and an order of condemnation and sale granted. The petitioners, who were seamen on board the vessel, thereupon presented this petition, praying that they might be made colibelants in the cause, and that out of the proceeds of the vessel their claim might be first paid.

W. W. Goodrich, for petitioners.
Isaac L. Miller, for libelants.

BENEDICT, District Judge. The application of the petitioners to be made colibelants must be denied, for the reason that they are in no way jointly interested with the libelants, nor do the facts set forth in the petition raise any questions similar to those raised in the libel. The proper practice on the part of the petitioners is to file their libel in the usual manner, and, when the proceeds have come into court, raise the question of priority by a motion for an order of distribution. Let the default entered herein be opened so far only as to allow the petitioners to file a libel and proceed to enforce their claims against the vessel in the usual manner, the libelants to have leave to proceed in this cause, such proceedings in no way to affect the question of priority, which is reserved for the further order of this court.

## Case No. 7,232.

The JAVA.

[6 Ben. 245; 6 Alb. Law J. 421.] [1]

District Court, S. D. New York. Nov., 1872.[2]

COLLISION AT SEA—STEAMER AND BARQUE—SPEED—LIGHTS—LOOKOUT—EVIDENCE.

1. On the night of August 25th, 1871, the Norwegian barque Anitas was sunk by a collision with the steamer Java, at sea. Of the twelve persons on board of her, only one was saved, and he was below, and did not come on deck till after the collision. The steamer was going at the rate of ten knots an hour, and the night was dark, with a drizzling rain. The weight of the evidence for the claimant, however, was, that the hull of a vessel could be seen a quarter of a mile. The lookout on the steamer saw a white light about a point on her starboard bow, which, he said, disappeared, and he then saw a good red light. The engine of the steamer was stopped and reversed, but she struck the barque stem on, on her port side, a square blow: *Held*, that, if the night was a thick night, with a drizzling rain, the speed of the steamer was too great; and if, on the other hand, the hull of a vessel could have been seen a quarter of a mile, and the steamer could be stopped in less than a quarter of a mile, then the steamer failed to see the barque as soon as she ought to have been seen.

[Cited in The City of Panama, Case No. 2,764; The State of Alabama, 17 Fed. 853.]

2. The steamer had failed to establish that the barque did not have a red light set, or changed her course improperly, which was the only fault she alleged against the barque, and she was, therefore, solely liable for the collision.

3. Where a vessel is found to have been in fault in a collision, especially where, as here, the effect of the collision was to destroy all the persons on the other vessel who could have given evidence as to her lights, clear and satisfactory proof is required of the absence of such lights, to inculpate such other vessel in reference to the lights.

In admiralty.

Beebe, Donohue & Cooke, for libellants.
Daniel D. Lord, for claimants.

BLATCHFORD, District Judge. On the night of the 25th of August, 1871, shortly before half past 10 o'clock, the steamer Java, while on a voyage from Liverpool to New York, came into collision, in the Atlantic Ocean, with the Norwegian barque Anitas, striking, with her stem, the port side of the barque, a square blow, and cutting her into two parts, so that the steamer passed between such two parts, and they sank almost instantly. The barque was in ballast, on a voyage from Portsmouth, England, to

[1] [Reported by Robert D. Benedict, Esq., and here reprinted by permission. 6 Alb. Law J. 421, contains only a partial report.]

[2] [Affirmed in Case No. 7,233.]

Miramichi, New Brunswick. Of the twelve persons composing her crew, eleven were lost. The survivor was asleep below, and was awakened by the noise of shouting from the deck of the barque, and hurried on deck, only to arrive there after the blow, and to find the vessel sinking under him. He was saved by swimming, and was picked up by a boat from the Java. He is a witness for the libellants, and their only witness. All he can tell is what is told above. The night was dark, there was a drizzling rain, the wind was southwest, or more westerly, and the Java was heading west northwest, with the wind and sea on her port bow, and a cross sea from the northwest, the remnant of a wind from that quarter. The sea was heavy, and the Java was pitching a great deal. The barque was on her starboard tack, and was crossing the course of the Java. The speed of the Java at the time was about ten knots an hour. The libel alleges fault in the Java, in not keeping a proper lookout, in not seeing the barque and her lights, in proceeding at too great a rate of speed, and in not in time taking steps to avoid the barque. The answer alleges, that the Java had two proper lookouts, properly stationed, and attentive to their duties, but that the barque was not visible until less than a minute before the collision, when one of the lookouts discovered and reported a faint white light nearly right ahead; that such light almost immediately disappeared, and a red light was seen in its place; that thereupon the helm of the Java was put hard aport, and her engines were stopped and reversed, but she struck the barque; that the barque was sailing without any colored lights; that, just before the collision, she improperly changed her course, to cross that of the Java; that she did not discover the Java until just before the accident, when she first exhibited the white light, and then the red light, which were seen by the Java as soon as they were exhibited; and that the collision was caused exclusively by the want of good management of the barque.

It was the duty of the steamer to avoid the barque, or to show a satisfactory excuse for not doing so. It is in proof that the steamer was being driven against the wind and the sea, and at as great a speed, it is clear, as she could make against them. Some of the witnesses say that there was a drizzling rain, and one of the lookouts says that it was misty, a pretty thick night, small thick rain. If this were so, her speed was too great, as, at a less speed, there would have been more time, after her discovery of the barque, to take steps to avoid a collision. If, on the other hand, as is the weight of the evidence on the part of the claimants, the hull of a vessel could be seen a quarter of a mile, on that night, irrespective of any lights on her, so as to make the speed of the steamer not excessive, and if, as the testimony is, the steamer could, at her then speed, and with the sea as it was, be stopped in less than a quarter of a mile, it follows inevitably, that the steamer failed, for want of a proper lookout, to see the barque as soon as the barque could and should have been seen.

Was the barque in fault? It is claimed that she had no red light set, and that, just before the collision, and on discovering the steamer, she exhibited first a white light and then a red light. Only two persons on the steamer saw any light on the barque. One of them, Groom, a lookout, says, that the first he saw of the barque was "a small dim light, a common white light," bearing about a point on the starboard bow of the steamer; that he reported this light as soon as he saw it; and that the white light disappeared, and then he saw a red light, "a good red light." The second officer heard the report of the light, and looking, saw a red light, "clear and distinct," bearing "nearly right ahead, a little on the starboard bow." He says, that, after that, and before the collision he say the barque, but the light was not visible; and that it was less than three-quarters of a minute from the time he discovered the light until the collision. On this evidence the court is asked to hold that the barque had no red light set and burning. The man who was saved from the barque gives no testimony as to the presence or absence of lights on the barque at or before the collision, and does not appear to have been interrogated on the subject by either side.

Where a vessel is found to have been in fault, in a collision, especially where, as here, the effect of the collision was to destroy all the persons on the other vessel who could give testimony as to the condition of the lights on such other vessel, clear and satisfactory proof is required of the absence of such lights, if the want of them is relied on as inculpating such other vessel. That the barque showed a red light, a good red light, clear and distinct, is proved. It is supposed that she first showed a white light, and that the red light she showed disappeared before the collision, and hence it is argued that she had no red light set on her port side. But the evidence is not sufficient to show that what the single witness thought to be a white light was not the red light, at a greater distance, and that it did not disappear with the movements of the two vessels in the heavy sea, and then reappear, to be seen by both men as a good, clear, distinct red light. It is not testified that the two lights were seen at the same time. As to the final disappearance of the red light before the collision, which fact the second officer alone testifies to, when it is considered that, from the time he first saw it until the collision was less than three-quarters of a minute, and that, during that interval, he telegraphed to stop the engine, and also telegraphed to port the helm, and gave a verbal order to port, and

that there must have been excitement and alarm, the conclusion that what he saw was not a set red light is not warranted. When to all this is added the fact that the persons observing this light were on the bridge, some distance in rear of the bows of the steamer, with the two vessels approaching each other, and the possibility of the interception of the view from the position on the bridge, it is not satisfactorily established that the red light seen was not the properly set red light of the barque. It was not sooner seen, either because the lookout was inattentive, or was in an improper place for good observation, being on the bridge, or, if in a proper place for observation, did not see it soon enough, because, in view of the weather, the steamer was going too fast.

As to the allegation that the barque changed her course to cross the course of the steamer, there is no evidence to support it. There is nothing to show that she was not sailing as close as she could to the wind, while beating, and pursuing her voyage.

There must be a decree for the libellants, with costs, and a reference to a commissioner to ascertain the damages.

[The libellees appealed, and the decree of the district court was affirmed. Case No. 7,233.]

## Case No. 7,233.

The JAVA.

[14 Blatchf. 524.] [1]

Circuit Court, S. D. New York. June 21, 1878.[2]

COLLISION BETWEEN A STEAMER AND A SAILING VESSEL—BURDEN OF PROOF—NEGLIGENCE.

1. In the case of a collision between a steamer and a sailing vessel, the burden is upon the steamer to show a sufficient reason for not keeping out of the way of the sailing vessel.

[Cited in Perkins v. The Hercules, 1 Fed. 928.]

2. Where, in such a collision, all on the sailing vessel who knew anything of the occurrences which immediately preceded the collision, were lost, it is incumbent on the steamer to make out, by clear and satisfactory proof, any faults charged on the sailing vessel.

3. A steamer, in mid-ocean, on a dark night, had no lookout on her forecastle, but had two lookouts on the bridge, one at each end of it. She had her fore-trysail set, which obstructed the view ahead from the bridge, and she was going at her utmost speed against a heavy sea. Under the circumstances, the lookouts could not reasonably have been required to remain on the forecastle. The steamer having collided with a sailing vessel: *Held*, that, with the speed of the steamer, and the fore-trysail set, the lookout was insufficient, and the steamer was in fault therefor.

[Cited in The Ancon, Case No. 348.]

This was an appeal from a decree of the district court, in favor of the libellants [Case No. 7,232], in a suit in rem in admiralty.

William Allen Butler, for libellants.

Daniel D. Lord, for claimants.

WAITE, Circuit Justice. On the 7th of July, 1871, the Swedish bark Anitas, of about 455 tons burthen, left the harbor of Portsmouth, England, bound on a voyage to Miramichi, New Brunswick, in ballast, and with a crew of twelve men, all told. At a little before half past ten at night, on the 25th of August, she was run down and instantly sunk by the steamship Java, in mid-ocean, near latitude 48° 49′ north and longitude 45° 42′ west. Only one of those on board was saved. The night was dark and cloudy, with a fresh wind from the southwest, occasional showers, and some mist. A light could be seen from two to three miles away, and the hull of a vessel a quarter of a mile. The sea was heavy, though below the average of stormy seas, and confused, as a portion was running from the northwest and a portion from the southwest, the wind having changed four or five hours before from the northwest to the southwest. The Anitas was on her starboard tack, under short sail and headed to the eastward of south. The Java was headed west-northwest, and proceeding under full steam, about ten knots an hour, but pitching and rolling heavily in the head sea. She was going as fast as she could be driven against the sea, though her usual speed was fourteen knots an hour. With the speed at which she was going, she could be stopped in a distance of one-quarter of a mile. According to the rules prescribed by the master for the navigation of the Java, two lookouts are kept on the forecastle at night, when they can stay there with safety to themselves, and the forecastle is the best position on her from which to discover approaching lights and vessels. Owing to the wind, which drove inboard the rain and spray that was being constantly created by the waves beating against her bows, it was difficult for the lookouts to see ahead from the forecastle. It was also a dangerous position for them to occupy at the speed the ship was going, on account of her rolling and plunging in the head sea. For these reasons, before the collision occurred, the lookouts were withdrawn from the forecastle and placed at each end of the bridge. If the speed of the vessel had been sufficiently reduced they might have remained with safety on the forecastle. The bridge was about forty feet abaft the foremast and one hundred feet from the stem. It is eight feet higher than the forecastle and about forty feet long, extending nearly all the way across the ship. It was protected in front from the weather by a canvas screen about four and a half feet high. The fore-trysail was set, extending nearly all the way from the foremast to the bridge. There were no other sails set. The range of vision for each lookout was confined to the side of the ship on which he was stationed, reaching ahead only about a point and a half over the bow. The foremast is about forty

[1] [Reported by Hon. Samuel Blatchford, Circuit Judge, and here reprinted by permission.]

[2] [Affirming Case No. 7,232.]

feet forward of the bridge. The Anitas was not discovered from the Java until less than a minute before the collision, when the starboard lookout saw a dim white light about a point on the starboard bow, and directly thereafter a bright, clear red light. As soon as he discovered it he reported to the second officer, who was at the port end of the bridge. The officer went instantly to the starboard end of the bridge, where he saw only the red light. He immediately stepped to the telegraph, signalled to stop the engine, calling out, at the same time, to put the wheel hard a-port, and repeated the order by telegraph. Both these orders were promptly obeyed, but, before the course of the steamer could be changed, or the heading at all stopped, the collision occurred. The master of the Java was in his room on the saloon deck, not more than forty feet from the bridge, when he heard the call to port the wheel. He was awake and dressed. As soon as he heard the call he rushed to the bridge, but, by the time he reached the steps which led to it from the saloon deck, the two vessels came together, and the bark was sunk by the time he reached the bridge. The bark was struck a square blow on her port side, a little forward of her mainmast. The only person saved from her was wakened from his sleep in the forecastle by the singing out of the men on her deck. He jumped from his bunk, and without stopping to dress, went on deck, where he arrived just as the vessels came together. He went below at eight o'clock, and knew nothing of what transpired after that until the collision. The starboard lookout man on the steamer did not see the white light after the red light appeared, and he did not see the red light all the time until the collision. The port lookout man, while he saw the hull of the bark before the two vesesls came together, did not see any light, and the second officer did not see the red light after he telegraphed to stop the engine and port the wheel. The bark and her cargo were a total loss, and both belonged to the libellants. The value of the bark and her cargo was 15,894 55 dollars, as of December 31st, 1874.

The Java, being a steamer, was bound to keep out of the way of the bark, a sailing vessel, and the burden is upon her to show a sufficient reason for not doing so. As all on board the bark who knew anything of the occurrences which immediately preceded the collision, were lost at the time, it is incumbent upon the steamer to make out the faults charged upon the bark by clear and satisfactory proof. This has not been done.

A good, clear and bright red light, on the port side of the bark, was actually seen from the steamer before the collision. It may also fairly be inferred from the evidence, that, when discovered, it was fixed and in its proper place. It was certainly on the side of the vessel where it belonged, and neither the second officer nor the lookout, who alone saw it, intimate that it was not in its proper position. They both saw the hull of the vessel, and, if the light had been simply held out from the deck, in the emergency of the moment, as was claimed in the argument, that fact would certainly have attracted attention at the time, and would not have been forgotten. It could not have been displayed after the white light was seen, because that would have involved a change of its position, and the lookout does not say that it was moved after he first saw it. He does not remember seeing it all the time until the collision, but it was stationary so long as he had it in view. Neither was the red light changed for the white one which was first noticed. That would have involved some change of position, and all the lookout says upon the subject is, that he first saw a dim white light, and directly after a red one, clear and distinct. From the time the white light was first discovered until the collision, all concede was less than a minute, and, judging from the attending circumstances, it could not have exceeded thirty seconds. It would not have been possible, in that length of time, to have substituted one light for another, or to have displayed a new one, without some movement which must have attracted the attention of those who were watching from the Java.

All the testimony necessarily comes from the men on the steamer. Those on the bark were all lost, except one. He went below at eight o'clock, when, perhaps, the lights ought to have been set; but no inquiries were made of him upon that subject. Coming, as he did, upon deck at the very moment of the collision, it cannot be supposed that he would know anything of the condition of the lights then.

It matters not that no green light was seen, for, situated as the two vessels were, that light would necessarily be out of sight upon the Java, even though it had been brightly burning. Neither does it signify that the red light was not noticed until the moment of the collision. The testimony shows that the hull of a vessel could have been seen, that night, a quarter of a mile away; but the hull of this vessel was not discovered until attention was attracted to it by the lights, although her sails were set. When the light was seen, it was burning brightly and in its proper place. It must, therefore, have been put in position before it was in fact discovered. The fair inference, from all the circumstances, is, that it was properly displayed, and that it was not seen because of an insufficient lookout upon the steamer.

No rule is better established than that a sufficient and competent lookout is indispensable to the safety of navigation. As much depends upon the care and attention of those who watch for danger, and report to the officer in command, as upon the officer who directs what shall be done when the report is made.

A powerful steamer, at full speed, on a dark night, although in mid-ocean, has no right to omit any duty which belongs to such a situation. She must almost necessarily destroy any small vessel with which she comes in collision. Her duty is to keep out of the way of any sailing vessel she may meet. It is of the utmost importance, therefore, that she keep a constant and vigilant watch for their appearance. Having the greater power to destroy, she should be the more watchful to preserve. The highest skill is required from her, both in respect to her officers and responsible men. The greater the responsibility, the greater the diligence required.

It cannot, for a moment, be doubted, that two faithful and competent men upon the forecastle of the Java, with their view unobstructed by sails, would be more likely to discover approaching lights and vessels, than if stationed at the ends of the bridge, with the lower sails set upon the foremast. The general orders of the master were, that there should be two lookouts on the forecastle, on any night when they could be there with safety to themselves, and one during the day. They are not to be stationed there when it would unnecessarily endanger their lives; but, clearly, under ordinary circumstances, that is the best place for observation, and, if they are withdrawn to another position, care must be taken that the loss of advantage which arises from the change is made up, as far as possible, in some other way. The best watch that can be secured must in some form be maintained.

On this occasion, the lookouts were withdrawn to the bridge. At the speed the steamer was going, they could not reasonably have been required to remain upon the forecastle forward of the mast. Upon the bridge, with the fore-trysail set, it must have been obvious to all that their view was obstructed. If it was necessary to keep the sail up, to steady the ship, something should have been done to compensate for the loss its maintenance in that position entailed. Sometimes, when a man cannot be stationed upon the forecastle forward of the mast, he may, with propriety, be kept at the mast. It matters not that this may require the employment of additional force upon that duty. If needed, it should be supplied. But, if that cannot be done, or something else reasonably sufficient for the accomplishment of the object in view, the speed must be slackened. In all cases, speed must yield to safety, when required.

In this case, nothing was done upon the Java to make up for the loss in the position of the lookout. The sail was not taken in, no attempt was made to keep a lookout at the foremast, and the speed was not slackened. On the contrary, the vessel was driven at her utmost speed, under the circumstances. The lookouts either did not or could not perform their duty, and the loss occurred. In my opinion, the steamer was solely in fault, and should make good the damages.

The testimony taken since the hearing in the district court does not materially affect the case. I do not place the most implicit confidence in all that is said by some of the witnesses, but, were it all true, the result would not be changed. It is of no consequence that the bark did set out upon her voyage with a short supply of oil, if, as I think is fully established, she was sailing with the proper lights on the night when the collision occurred. With proper and vigilant lookouts, stationed where they ought to have been, upon the steamer, and performing their duty, it is probable the accident would not have happened.

A decree should be rendered in favor of the libelants, for the agreed damages, $15,894 55, and interest from December 31st, 1874, with costs.

## Case No. 7,234.

The JAVA.

[1 Lowell, 165.] [1]

District Court, D. Massachusetts. Oct., 1867.[2]

COLLISION—INEVITABLE ACCIDENT—CROWDED HARBOR.

1. A collision occurring in the daytime may possibly be an inevitable accident.

[See note at end of case.]

2. Where a steamer in navigating a crowded harbor at a very slow rate and with a sufficient lookout, ran into a small schooner which could not be seen in time to avoid her by reason of the hull of a large ship behind which the schooner was getting under way without her sails being yet up, and the channel was a part of the fair-way of the harbor: *Held*, the steamer was not in fault.

[See note at end of case.]

[This was a libel in rem by the Judd Linseed & Sperm Oil Company against the steamship Java, to recover for damages received by the cargo of the schooner James McCloskey in collision with the Java.]

R. H. Dana, Jr., for libellants.

W. G. Russell, for claimants.

LOWELL, District Judge. The libellants were the owners of a valuable cargo of linseed which was shipped on board the schooner James McCloskey, bound from Boston to New York. The schooner was towed from one of the wharves in East Boston into the stream, and was getting under way near the schoolship George M. Barnard, and had only a part of her foresail hoisted, when her master saw the large Cunard propeller steamer Java coming round the stern of the schoolship and

[1] [Reported by Hon. John Lowell, LL. D., District Judge, and here reprinted by permission.]

[2] [Reversed in Case No. 7,559. Decree of circuit court reversed in 14 Wall. (81 U. S.) 189.]

making directly for the schooner. The schooner's helm was put hard astarboard, but the steamer struck her abaft the main rigging and knocked a hole through her, and the linseed was damaged to the amount of some seven thousand dollars.

There is no doubt or question concerning most of the facts of the case. The weather was clear and fine, with a good breeze, the precise direction of which is not important; the time about one o'clock in the afternoon, the tide an early ebb, and neither vessel was seen from the other until just before the collision. The questions which arise are, whether, under the circumstances, either or both vessels were guilty of any negligence which caused or aided in causing the collision.

The burden of proof is on the steamer. And the first question is, whether her lookout was sufficient. It is shown that she had three persons properly stationed forward on the lookout, and the evidence is, on the whole, clear and decisive that they were vigilant and discovered the schooner, not only as soon as she discovered the steamer, but as soon as with reasonable diligence they could have discovered her. It appears, too, that the steamer was proceeding very slowly, having stopped her engines some little time before to make sure of clearing another vessel, and that upon the schooner being seen, prompt and efficient measures were taken to clear her, but that it was too late.

The allegation to which most of the evidence and arguments have been addressed is, that the Java was in the wrong in attempting to pass on the inner or East Boston side of the schoolship when and as she did. It appears that the George M. Barnard is a large vessel, high out of water, which is kept constantly moored during the winter months near the edge of the channel, leaving as much room as possible on the outside between her and Boston, and only a narrow passage on the other side, so that a vessel of the size of the Java could not pass there excepting at or near high-water. There was evidence tending to show that the Cunard steamers rarely do take this passage, though other vessels nearly as large do so not unfrequently, and that it would not be considered prudent for so large a vessel to attempt it when it was much obstructed. The fact that vessels of large size do or do not frequent the place is of little importance compared with more direct and pertinent evidence concerning the safety of the passage itself. That Cunard steamers rarely go there might be material in ascertaining whether the schooner in getting under way in that part of the channel had any reason to expect to meet the steamer there, and so bear upon the diligence or want of it on the schooner's part, and upon that ground I admitted this testimony; but it has not become material to the decision of the cause. Upon the whole evidence I am satisfied that a prudent and skilful navigator would not hesitate to take the Java through that passage at that state of the tide, if he saw no obstructions, as of vessels at anchor, or the like.

It is said that if the steamer had taken a course more nearly parallel with that in which the schoolship was lying, she would have seen the schooner earlier, and might have avoided her; and this is true. But whatever direction she had taken the schoolship would have shut out some points of the compass, and there was no reason to apprehend danger from one point more than from another. The case is simply one of running under the stern of a vessel at anchor at a somewhat acute angle, and I am not prepared to say that this is bad navigation, if it be done as slowly and with as much vigilance as is shown in this case. A man may drive round the corner of a road if that is the most convenient way home, though he ought to do it slowly and with more than ordinary care if he cannot see what is on the other side. The failure to see the schooner probably arose from the fact that her sails were not set. I am not prepared to say that this was a fault on her part; but it was her misfortune.

A consideration of a good deal of weight with my mind in one aspect of the case is this: That the collision does not appear to have been affected in any degree by the narrowness of the channel. The steamer was simply coming out from behind the schoolship in one direction and the schooner in another, and however wide the channel might have been, the former could have done no more than she did. She took the proper measures promptly and without the slightest embarrassment from the narrowness of the passage between the ship and the flats, which in fact she had scarcely reached. So that I cannot see that the propriety of the steamer's course, considered with reference to the peculiarities of this passage, has much importance in the case. Nor is the fact that she intended to go to the Cunard dock very important, because she was not heading for the dock when the collision happened. It seems that the accident might and would have happened just as it did if the steamer had been going to any other dock, and the schoolship had been anchored in mid-channel, provided the relative position of the three vessels had been the same. So that it comes back, as I have said, merely to the question of running under the stern of a vessel at anchor at an acute angle. And I cannot say that any negligence has been shown on the part of the officers of the steamer, but must hold that this accident, though occurring in broad day, was what the law terms an inevitable misfortune. The distinction between this case and Crockett v. Newton, 18

How. [59 U. S.] 581, is precisely in the sails of the schooner not being visible over the schoolship. Decree for the claimants.

[NOTE. The libellants, the Judd Linseed & Sperm Oil Company, appealed, and the decree of the district court was reversed in the circuit court. Case No. 7,559.

[Subsequently, an appeal was taken from the decree of the circuit court to the supreme court, which reversed the decree of the circuit court, and affirmed that of the district court. Mr. Justice Bradley delivered the opinion of the court, and held that "if this was not an inevitable accident, so far as the Java was concerned, it would be very difficult to imagine a case of inevitable accident not caused by external force, as of winds and waves." 14 Wall. (81 U. S.) 189.]

JAVA, The (JUDD LINSEED, ETC., CO. v.). See Case No. 7,559.

JAY, The JOHN. See Case No. 7,352.

## Case No. 7,235.

JAY v. ALLEN et al.

[1 Spr. 130.] [1]

District Court, D. Massachusetts. March 13, 1846.[2]

SEAMEN—LIMITATIONS IN ADMIRALTY—EMBEZZLEMENT BY MASTER—LIABILITY OF OWNERS—INTEREST—"WHALING" SHIP.

1. Statute of limitations, or stale claim in the admiralty.

[Cited in Smith v. Sturgis, Case No. 13,111; Southard v. Brady, 36 Fed. 562.]

2. In the whaling business, the owner is bound to provide a suitable vessel to bring home the oil.

3. If a whaling ship be condemned, and sold abroad, and the master sells the oil and embezzles the proceeds the owners are liable to the seamen for their lay.

[Cited in The Antelope, Case No. 484.]

4. From what time interest will be allowed.

This was a libel promoted by the mate of the ship Victoria, against her owners, claiming $2,103.37 as his lay or share of the earnings of a whaling voyage. It appeared that the Victoria sailed from New Bedford in 1836; in July, 1838, she had taken 1700 barrels of oil, and at that date was condemned and sold at the island of Tahiti. The master shipped home to the respondents, 15,235 gallons of oil, which they sold for $15,749.10. The proceeds of the remainder of the cargo were fraudulently converted by the master to his own use. The libellant was discharged on the 19th of January, 1838, at which time, as he alleged, the vessel had taken 1250 barrels of oil, and he now claimed his full lay up to the time of his discharge; amounting to one twenty-eighth of the whole amount then taken. The respondents insisted that more than six years had elapsed since the claim accrued; that the libellant had not been discharged, but had deserted; and that they were responsible only for the proceeds of the oil which came to their hands. There was evidence, however, of a correspondence between the parties on the subject of the claim, in the year 1837; and the allegation of desertion was not supported by evidence.

F. C. Crowningshield, for libellant.

T. G. Coffin, for respondents.

SPRAGUE, District Judge. The first question is, whether this is a stale claim. The last communication proved to have taken place between the owners and the libellant, in relation thereto, was in October, 1839. This libel was filed within six years therefrom, viz., in May, 1845. The last letter from the respondents' attorney requests the libellant to wait for the adjustment of his share, until the insurance had been settled. At what time the insurance was settled, or abandoned, does not appear.

It is generally true, that "courts of admiralty, like courts of equity, govern themselves in the maintenance of suits, by the analogy of common law limitations." The acknowledgment made by the correspondence would be sufficient to take the case out of the statute at common law. Brown v. Jones [Case No. 2,017]; Willard v. Dorr [Id. 17,679]; The Rebecca, 5 C. Rob. Adm. 102; The Sarah Ann [Case No. 12,342].

It is further urged, that the delay of the libellant in enforcing his claim, may have deprived the respondents of the means of proving that he was incompetent, or had deserted; it is not, however, even alleged that he was incompetent, and it is not proved that he deserted; and no such presumption of desertion can arise, any more than of payment.

It is not, therefore, to be deemed a stale claim. In regard to the other defence set up by the respondents, it appears that 1250 barrels of oil had been taken before the libellant was discharged, and the ship was afterwards condemned at Tahiti, as unseaworthy. A small part of the oil was sent home by another vessel, the residue sold by the captain, and the proceeds fraudulently appropriated to his own use.

The question is, whether the owners are responsible to the libellant, for his share of the oil sold by the captain. By the shipping articles, the contract is made between the libellant, as one party, and the master and owners. The seaman never had any ownership of the oil. The amount of his compensation was to depend upon the quantity taken; and payment was to be made as soon after the arrival of the vessel at her home-port, as the oil could be sold, and an adjustment made.

The respondents were bound to furnish a seaworthy ship to take and bring home the oil, and they were in default in not doing so. Upon the condemnation of the vessel, the custody and care of the oil devolved upon the master, who must be deemed the agent

[1] [Reported by F. E. Parker, Esq., assisted by Charles Francis Adams, Jr., Esq., and here reprinted by permission.]

[2] [Affirmed in Case No. 7,552.]

of the owners; the seamen having had no power to appoint, or remove a master, or to prevent his disposing of the oil. It was the duty of the master, as agent of the owners, to send it home, free of expense to the mariners, and as this was not done, the libellant is entitled to recover the same share, as if it had been. Baxter v. Rodman, 3 Pick. 439; Bishop v. Shepherd, 23 Pick. 494; Abb. Shipp. 606, note; The Frederick, 5 C. Rob. Adm. 8; Wilkinson v. Frasier, 4 Esp. 182.

A superficial view of the shipping articles, has sometimes created the impression, that there is a partnership between the mariners and owners; but that notion has long since been corrected by the courts. The contract clearly gives no ownership of the oil to the seamen. It is to be brought home, delivered to the owner, sold by him, the accounts adjusted, and then the seaman has a right to a certain share of the money, as compensation for his services. In this mode, the amount of his wages is ascertained. It is true, his right to them is contingent upon success, and so also it is in the merchant service, to the true extent of the maxim, "that freight is the mother of wages." The relation in which the crew stand to the owners in the whaling business, is that of seamen to their employers. They have no voice in the appointment of their officers, or the conduct of the voyage, and are bound to implicit obedience. They are liable for desertion, or other neglect or violation of duty, to the same punishment and penalties as other seamen. This being the relation which has been established between them and the owners, while they are subjected to its evils, they ought to be entitled to its benefits; and the master should no more be deemed their agent, when he sells the oil which they have taken, and squanders the proceeds, than when he embezzles the freight-money, which he has received in the merchant service. His neglect to preserve and send home the oil is the neglect of the owner, so far, at least, as the mariners are concerned.

As to interest, it is to be allowed after sufficient time had elapsed for the arrival of the oil and sale thereof, and adjustment of the voyage, and after demand made by the libellant. Decree for the libellant with costs.

[This decree was affirmed by the circuit court on appeal. Case No. 7,552.]

## Case No. 7,236.

JAY v. ALMY.

[1 Woodb. & M. 262.][1]

Circuit Court, D. Massachusetts. May Term, 1846.

SEAMEN—LOST VESSEL—PRACTICE IN ADMIRALTY—IMPRISONMENT OF SEAMEN—MEASURE OF DAMAGES—EVIDENCE—NONSUIT.

1. Where a whaling vessel has been lost abroad, and the cargo sent home to the owners, a seaman cannot recover wages of the captain, but must resort to the owners for his share in "the catchings," in conformity with the contract.

[Cited in The Atlantic, Case No. 620.]

2. A captain of a vessel is not justified in imprisoning a seaman merely on suspicion that he is a dangerous man, or on the request of the crew, unless some facts are shown, rendering the truth of the charge probable; and if he detain him in custody till his effects on board are lost or sold, the captain is answerable for their value.

[Cited in Wilkes v. Dinsman, 7 How. (48 U. S.) 128; Jordan v. Williams, Case No. 7,528.]

3. The allegations of one of the parties in a libel are not evidence for him, unless called for by the other side, and are then to be weighed as they deserve, without requiring in all cases more than one witness to overcome them.

[Cited in Hutson v. Jordan, Case No. 6,959.]

4. Damages for such imprisonment will not be vindictive, unless perhaps where the motives of the master appear to have been bad. But compensation for the time of the imprisonment, the value of his articles lost or sold, and interest on the amount and passage home, are the just measure of damages, usually.

[Cited in Castro v. De Uriarte, 12 Fed. 253.]

5. The cases where the crew should be consulted with, considered.

6. A nonsuit not the result of a judgment of the court, is no bar to a subsequent libel for the same cause of complaint.

[Appeal from the district court of the United States for the district of Massachusetts.]

This was an appeal from a decree in the district court, made by Judge Sprague, January 24th, 1845, and directing the libellee [Holden Almy] to pay to the libellant [Isaac R. Jay] the sum of $270, damages and costs. [Case unreported.] From this decree an appeal was taken by the respondent, and the material facts of the case, on being opened here at this term, appeared to be as follows: In September, 1841, Almy, as master of the vessel Mary Ann, of New Bedford, and Jay, as cook on board, sailed to the Pacific on a whaling voyage, and in February, 1842, Jay was put under arrest and heavily ironed by order of the master, and after some days set on shore at Copang, on the island of Tima, in the Indian Ocean, and confined there in a fort several weeks, till a Dutch vessel of war carried him, by agreement with the captain, to Batavia, where, with the charges against him, he was delivered into the care of the American consul. On examination of the case, the consul discharged Jay, and he was left to find his way home at his own expense, and without any of his clothing, or boxes of medicine, tobacco, and other articles, which were on board the Mary Ann, when he was arrested, and when he was set on shore at Copang. The claim now set up was for compensation for the imprisonment of his body, damages to his person, the loss of his property, and the expenses and time of his passage home. The master undertook to justify the imprisonment on the ground, that he and the crew entertained just fears

[1] [Reported by Charles L. Woodbury, Esq., and George Minot, Esq.]

of a mutiny by Jay and others, or great bodily injury by his poisoning the crew; and that no more damage was done to Jay's person, and no longer detention of him, than were necessary to protect the crew, and bring him to trial. As to the clothing and other property of Jay, which was lost, the master contended, that the wreck of the vessel, two days after reaching Copang, was the cause of the loss, and not any misfeasance on his part. There was some contradictory evidence as to the circumstances, which preceded and accompanied the arrest, and the manner of the treatment of Jay while confined, as well as the conduct of the master in taking a part of the effects of Jay on shore and selling them, without their being lost in the wreck of the vessel, or being stolen by the natives of the island. But the portions of the testimony, material to the decision of the court, were much alike on both sides, and being given in the opinion of the court, need not be repeated here.

Messrs. Sewall and Mead, for libellant.
Mr. Clifford, for libellee.

WOODBURY, Circuit Justice. Most of the important averments in this case are either admitted or proved beyond controversy. Among them is the sailing of the libellant under the libellee, the former as cook, and therefore bound to obedience and subordination on his part; and the other as master, and hence equally bound to exercise kindness, humanity, and protection, rather than cruelty or oppression, to those under his command. So it is admitted or proved clearly, that the master caused the cook to be confined with heavy irons, and thus to be detained in the vessel and fort in a hot climate, for a long time, and made no provision for his return home, if he should be discharged, and did not deliver to him, and send on shore with him, his clothes and other property, when he was removed from the vessel. It is also established, that the cook was discharged by the consul at Batavia, and has never been tried or convicted since returning home of any offence committed on board the Mary Ann, nor have any portion of his effects, or the earnings of the vessel been restored to him, or accounted for.

These leading facts, none of which are now in doubt, would certainly be sufficient to charge the respondent with very heavy damages, unless he shows satisfactorily a justification for this extraordinary conduct towards the cook. But where he proceeds to prove a justification, we at once encounter contradictory evidence, and omissions to make out satisfactorily several of the component facts indispensable to a thorough justification. Thus the grounds set up in defence in the answer, are: That Jay had assisted a seaman called Pedro in his assault on the mate, and also in the argument and evidence they are, that there was danger of Jay's poisoning the crew; and, lastly, that the crew requested that he should be confined. But there is no testimony that he rendered any assistance whatever to Pedro, but, on the contrary, he was in the caboose at the time. Nor when Pedro called for help in Spanish, is there any proof, that the call was directed to Jay, rather than to any of the rest of the crew, or that Jay understood Spanish better than the others, or responded at all to the call. Nor is there any proof of a particular intimacy existing between him and Pedro, or any previous concert between them to injure the mate, or any previous ill-will on his part towards the mate. On the contrary, Pedro's attack seems to have been in sudden irritation at a blow from the mate, and without premeditation or conference on the subject with any one; and Jay's relations were so friendly with the mate, that he was called on after the injury to wait upon him, and assist to heal his wounds; showing no suspicion then, in either the mate or the captain, of his having assisted to cause those wounds. There would be, also, no little absurdity in supposing a combination between only two persons out of twenty-three on board, to assault one of the officers, and create a mutiny or revolt endangering the rest. This confidence and trust in Jay prove, also, that no suspicion then existed in either of their minds, in support of the second ground of defence; viz., that Jay was likely to poison them. Nor is there the slightest evidence that Jay had said or done any thing at any time, before his arrest, to justify a belief in the crew of an intention to poison them, except some suspicions flung out against him by Turner, who was his enemy, and who has not appeared here or elsewhere as a witness to verify them under oath. On the contrary, all the witnesses, as well as the captain, concede, that Jay was a good and orderly man on board, and at all times protested his innocence of any such intent; and out of all the seamen, who testified in this case on either side, not one, not even the mate, who was stabbed, swears to a single fact sustaining either of these grounds of justification. And there is an absence of all motive for Jay to have been guilty of either charge, no difficulty being proved to have existed between him and the mate, or captain, or any of the crew, except Turner. And against Turner, there is no legal evidence, that he ever made any threats, or committed any outrage before his arrest.

In respect to the next and last justification set up, it is, that Jay was imprisoned in consequence of the fears and at the request of the crew. There is some proof from several of them of such a request having been made. But there is no evidence that those fears were well founded, or that the captain instituted any official inquiry in to their correctness, formal or informal, or gave notice to Jay of any examination into them beforehand, so that Jay might excul-

pate himself; which last circumstance at least distinguishes this case from that of The Somers [unreported], to which the captain's counsel have likened it. On the contrary, there is some testimony that the captain himself instigated the crew to make such a request, and that after the paper which they signed, requesting Jay's confinement, had been destroyed, the captain made, or caused to be made, another, affixing their names, all in one hand-writing, and stating the charge to be against Isaac Bay rather than Isaac Jay, and making the same person a signer to it, and thus joining with the rest in asking for his own confinement. The absurdity, if not forgery, involved in this, caused the consul to discharge Jay at once from custody, on his arrival at Batavia. A commander of a vessel should be a firm man, tenax propositi, and should not act on the groundless fears of his crew, much less excite them. Much less should he do this against one placed under his protection as a sort of ward, in a distant country, and one whose previous conduct, for aught which is proved, had been throughout obedient and exemplary. The captain must be humane no less than firm. I place out of the case, of course, the mere hearsay declarations of Turner, and the captain's own answer, as affecting Jay; because it is not competent evidence against him, coming from a party, and not having been called for under oath by Jay, or read by him as a part of the testimony in the cause. The David Pratt [Case No. 3,597]. Each party in admiralty has a right, if he chooses, to the answer under oath of the other; and if not so answering when requested, he may take the fact pro confesso. If an answer be given when asked for, it is evidence for either side. But the court then is not bound to require two witnesses as in equity, to overcome an answer. Hutson v. Jordan [Id. 6,959]. As all the justifications for the imprisonment fail, the captain is liable for the injury caused by it. But he is not shown to have entertained any previous antipathy or grudge against Jay, and manifestly acted in some degree from the wishes of his crew. It is probably not therefore a suitable case for smart money or vindictive damages, should the last ever be proper when a criminal prosecution can also, as here, be instituted. See cases in Allen v. Blunt [Id. 217]; Taylor v. Carpenter [Id. 13,785]. Again, it is difficult to discover any but an honest motive, however erring in judgment, for the captain, when punishing Jay, though with such severity. Because Jay's conduct had excited no previous grudge or quarrel, but had won confidence. Notwithstanding this should prevent any aggravation in the amount of damages awarded, yet the captain should pay a full indemnity, having, without sufficient cause shown, confined the libellant in a close room, in a hot climate, with heavy irons, and continued this substantially for near fifty days. He might be prosecuted for this criminally, perhaps as an assault and false imprisonment; and if malice existed, could be indicted for putting Jay ashore abroad in such a destitute condition. Act 1825, c. 65, § 10 [4 Stat. 117]; U. S. v. Netcher [Case No. 15,866].

Several adjudged cases tend to sustain these views in all material respects. Thus, a master is not excused for imprisonment of a seaman abroad, although ordered by a consul. The William Harris [Case No. 17,695]; Wilson v. The Mary [Id. 17,823]. Nor excused for improperly discharging a seaman abroad, by the consul's approbation. Hutchinson v. Coombs [Id. 6,955]. The master has sole and exclusive command, and all owe obedience to lawful orders, who are under him, crew and officers. Butler v. McLellan [Id. 2,242]. And hence the crew have no right to order the captain, or restrain him as to the punishment of any one, although if one offends or injures the crew, the captain may pardon him, if the crew do it. Butler v. McLellan [supra]. It is prudent in the master to consult his subordinate officers in case of doubt, but no requirement exists to consult his crew, or to follow their wishes. Abb. Shipp. 136, 137. The crew may, in certain cases, demand a survey of the vessel, if supposed not seaworthy. Act July 20, 1790 [1 Stat. 131]. And be consulted in a storm, as to throwing the cargo overboard for safety. Butler v. McLellan; The William Harris [supra]. But it is not to be flung over without the master's consent or orders. The Nimrod. [Case No. 10,267]. Only in extreme cases, can the master imprison a seaman abroad in a foreign prison. The William Harris, Wilson v. The Mary, The Nimrod [supra]. Even if a seaman becomes dangerous, he must be so dangerous as not to be able to be brought home safely. Otherwise, the captain cannot imprison him abroad, or discharge him there. The Nimrod [supra]. And if the advice of crew as to throwing property over, does not bind the master, much less will it as to the imprisonment of one of them. If a seaman is improperly discharged, he is entitled to expenses of return, and to wages till able to return, as a measure of damages. The Nimrod [supra]; Lane v. Townsend [Case No. 8,054]. But this means a case where the seaman hired for wages, and where the vessel has not been wrecked.

Again, Jay claims of him compensation for the loss of his clothing, medicine, and chest of goods on board the vessel. The captain admits he had collected these together to take them on shore before the vessel was wrecked, but contends they were lost with the vessel, or plundered by the natives. But some witnesses on both sides testify to their being partly taken on shore, and though the natives plundered some, the Dutch fort and officers at Copang are presumed to have yielded at least a semi-civilized protection to person and property. Some testify that the

captain actually sold most of the articles on shore, and pocketed the money for them.

My own view of this part of the case is, that when taking Jay on shore he should have taken with him and delivered to him his clothes and other property, and that not doing this, when the articles were in his charge, and Jay imprisoned so as to be unable to look after them himself, was a conversion of them, and the captain ought to respond for their value, and the more especially so, as it is probable he sold a portion of them. That value, however, I would not swell beyond the clear proof, as to its extent, which is the evidence of the person at New Bedford, who aided in the outfit of Jay.

Finally, the captain should have supported his charges against Jay at Batavia, and had him punished there or since his return home, or at least have shown probable and reasonable grounds for suspicion against him, on a hearing there or in this country. And not doing any of these, he cannot escape another ground of damage to Jay, by the consequential injury to him in being left abroad, and having no passage home provided. As the vessel was wrecked, and the voyage broken up, he could not ask pay for his time after being discharged; but he was entitled to some means for returning to this country. See, as before cited, The Nimrod and Lane v. Townsend. And though Jay is not justified in claiming wages of the captain, as he entered on board the vessel upon shares, yet, under the contract in such cases, he is entitled to his portion of the oil and bone then on board and saved from the wreck. And the owners, to whom the proceeds of it were remitted by the captain, must probably indemnify him for it.

It will be seen that my opinion is not founded entirely on any part of the evidence which has been contradicted, or attempted, like Hart's, to be discredited; and hence, though there is something to be censured in the attempts made in favor of either side, by its friends, to influence some of the witnesses, and some cloud is cast over their veracity, it has no essential bearing on facts which govern the merits.

On footing up the sums, to which Jay is entitled here, if only a dollar a day for fifty days' imprisonment is allowed, and the clothes and goods of his outfit are valued at $175, those two items will constitute $225. Allowing for interest, passage home, and old clothing, not included in the outfit, $45, and we have $270, the sum allowed in the court below. I think that aggregate not too high; and so far as doubting its correctness, it would rather be, that the damages given in the court below were too small instead of being too large. I entertain no doubt of my power to increase them, as in appeals at common law. Anonymous [Case No. 444]; Yeaton v. United States, 5 Cranch [9 U. S.] 281. But I am not certain that an increase is proper, unless as vindictive or exemplary, and that is in a case like this, if in any, not clearly justifiable. See Allen v. Blunt [Case No. 217]; Taylor v. Carpenter [Id. 13,785]. Counsel fees, in some cases, are a proper charge. [The Apollon] 9 Wheat. [22 U. S.] 379, and Allen v. Blunt, just cited. But as they were not allowed to the respondent, where the libellant at a former term became nonsuit, they are disallowed here.

Nor is there any foundation for the objection that the former nonsuit is a bar to another libel, it having been voluntary, and not on a judgment of the court. 2 Mass. 113; 1 Metc. (Mass.) 274; 1 Pick. 371; 3 Wils. 153; and Greely v. Smith [Case No. 5,749]. It often is not after any trial of the merits, and arises from inability to command the attendance of witnesses, as is stated to have been the present case. Let the judgment below be affirmed, with cost and interest since the appeal.

## Case No. 7,237.

In re JAYCOX et al.

[12 Blatchf. 209;[1] 13 N. B. R. 122.]

Circuit Court, N. D. New York. June 16, 1874.

BANKRUPTCY—PROOF OF DEBTS—APPEAL—PRACTICE—CORPORATIONS—ACTS ULTRA VIRES—DISCOUNTING NOTES.

1. When a proof of debt is presented to a district court, in bankruptcy, and is disallowed, and an appeal is taken to the circuit court, under section 24 of the act [of 1867 (14 Stat. 528)], the cause of action prosecuted in that court must be the same one that was rejected by the district court.

[Cited in Thistle v. Hamilton, Case No. 13,884.]

2. The district court rejected certain promissory notes, made by a bankrupt, as proof of debts, without prejudice to the right of the creditor to prove a claim for money loaned to the bankrupt, or any other claim except one on the notes, as received in violation of statutes of the state. The creditor made no new proof of any claim, in the district court, but appealed to this court, and set out here, in his statement of claim, under section 24 of the act, a claim for money lent upon the notes. This court, however, passed upon the question whether the latter claim could be sustained, as well as upon the question whether the claim on the notes was valid.

3. The People's Safe Deposit and Savings Institution of the State of New York, incorporated by special act (Laws N. Y. 1868, c. 816), opened an office for banking, at which it conducted a regular banking business, not being authorized by its charter to do so, and the doing so being forbidden by the constitution and laws of the state, under heavy penalties. In the course of such business, it discounted for the bankrupt certain notes, which were not paid, and which it proved, in the district court, as claims against them: *Held*, that the notes were void.

4. A claim for the money loaned, on the discount of the notes, was not a valid claim, because the transaction was illegal, and the corporation had no power to loan money on personal security, and its charter prescribed how its funds should be invested.

[1] [Reported by Hon. Samuel Blatchford, District Judge, and here reprinted by permission.]

[Appeal from the district court of the United States for the Northern district of New York.]

[This was an appeal from the decision of the district court (Case No. 7,241), on an application to expunge the proof of debt made by the assignees of the People's Safe Deposit and Savings Institution of the State of New York in the matter of John M. Jaycox and John A. Green in bankruptcy.]

Daniel Pratt, for appellants.

Frank Hiscock, for assignee in bankruptcy.

William C. Ruger, for creditors.

WOODRUFF, Circuit Judge. 1. It is impossible to discover, from the papers submitted herein, that the circuit court has any jurisdiction, or of what proceeding. It was stated by counsel, on the argument, and is assumed in the briefs, that an appeal has been taken to this court by the assignees of the People's Safe Deposit and Savings Institution of the State of New York, from an order of the district court disallowing their proof of debt against the estate of the bankrupts [Case No. 7,241]; and there are among the papers a statement of claim, and an answer thereto, intended to conform to the 24th section of the bankrupt law, relating to such appeals. On the trial which that 24th section provides for, the parties waived a jury, and gave in evidence a part only of the proceedings in the district court relating to such claim. Probably, the defects in the papers would be supplied, so far as the case is susceptible of supplement, and I will, therefore, deal with the case according to the information I have of its nature and condition.

2. But I cannot omit to observe, that this court has no original jurisdiction to receive and allow debts against the estate of a bankrupt. The claims of creditors must first be presented in the district court; and it is not proper to present one claim in the district court, and, under cover of an appeal to this court, transform the claim into a new and distinct cause of action. In other words, this court ought not, on appeal, to be called upon to decide questions, either of law or fact, that were not raised or involved in the decision of the district court. The same cause of action is to be pursued in this court, though it may happen that new or further proofs in support of that cause of action may here establish facts not proved below, and new questions of law may arise thereupon. The cause of action, however, must be the same; otherwise, this court would assume to allow or reject a debt which had been neither allowed nor rejected in the district court. To do this, I am of opinion this court has no jurisdiction.

3. The only order which I find among the papers submitted, and the only order which, so far as I have any information, the district court has made rejecting the claim of the assignees, (the appellants,) is an order which rejects certain promissory notes set forth as proof of debts due from the bankrupts to the People's Safe Deposit and Savings Institution. The ground of such rejection, appearing in the opinion of the court, is, that those notes are void and constitute no cause of action. But, the order expunging the proof of those notes, and rejecting that proof, is declared, in the order itself, to be without prejudice to any right of the creditors so claiming to make proof of a debt or claim for money loaned to said bankrupts, or had and received by them to the use of the said corporation or its assignees, or proof of any other debt or claim, other than upon the notes or security taken or received on the making of discounts in violation of the restraining acts, or other statutes, of the state of New York. Instead of acting upon the suggestion of the court thus given, and amending their claim and proof of debt, so that it should not depend upon the question of the validity of those notes, the alleged creditors have, it would seem from the papers, come into this court and here set out or stated, for the first time, a cause of action for money lent and advanced upon these notes, and for money lent and advanced generally to the bankrupts, and for money had and received by the bankrupts to the use of the claimants. They thus present here a cause or causes of action never presented to the district court, and seek to establish a debt which that court has not rejected. I think, therefore, that this court would perform its whole duty by considering the only question which was decided in the district court, namely, whether the promissory notes, which were alone stated as constituting the cause of action or debt presented below, were or were not void.

4. I have, however, no wish to avoid the examination of the whole case, or the expression of my opinion thereon, by suggesting embarrassments which counsel or parties may deem technical. Very able counsel have discussed the case in this court, assuming that both of the questions which arise out of the transactions between the bankrupts and the safe deposit and savings institution were properly before me. The fact that proofs of debt in the district court are not formal, and that promissory notes are themselves treated as evidence of money had and received by the promissor, gives some color to the claim that the district court might have received them as such proof, and ought not only to have passed upon their validity, but upon the evidence taken by the register that the said corporation did advance money to the bankrupts thereon, by discounting the notes. I, therefore, state my conclusions upon both questions, and, if counsel can make my decision useful in the case, as it has been conducted and is now urged, it will save time and expense.

5. I find, then, the facts to be as stated in the report of the register, and as recited in the opinion of the district judge. The principal

and important of them are, that the People's Safe Deposit and Savings Institution was incorporated by act of the legislature of the state of New York, passed May 14th, 1868, and its charter (2 Laws N. Y. 1868, p. 1839, c. 816), must, for any purposes for which my finding is material, be taken as part and parcel thereof; that such corporation opened offices for banking in Utica and Syracuse, and at such offices conducted a regular banking business, employing its capital and deposits therein; that it kept a large number of accounts, not only for deposit of savings, but merchants' accounts, for discounts and deposits, after the usual custom of banks of discount and deposit in this state; that, in such banking business, it, prior to its failure and assignment to the appellants, had discounted, in the ordinary course of business, promissory notes and other commercial paper, at the banking office in Syracuse, to the amount of more than six hundred thousand dollars; that it so discounted, from time to time, several hundred thousand dollars in all, for the firm of Jaycox & Green, (the bankrupts;) that, of such commercial paper, so discounted for Jaycox & Green, promissory notes to the amount of over thirty-five thousand dollars remain unpaid, and are held by the said corporation or the appellants, the receivers of such corporation, of which notes, the promissory notes made by Jaycox & Green, now in question, to the amount of $27,772.50, were presented and claimed as a debt against the bankrupts, in the district court; and that the proceeds of the discounts thereof were paid to Jaycox & Green by checks or drafts on New York, less a charge of one-half of one per cent., charged as exchange on New York.

Upon these facts, 1st, I concur fully in the opinion of the late lamented and learned district judge, that the said notes were wholly void, and, neither as contracts or securities, constituted any ground of claim or debt against the bankrupts. I do not deem it necessary to repeat the discussion embodied in that opinion. It may be taken as the opinion of this court upon the question. The charter of the corporation in no wise authorized the carrying on of that business. The constitution and the statutes of the state of New York forbade it. Heavy penalties were declared by statute against the corporation and its officers, for carrying it on. The acts by which the notes were received by the corporation were illegal; and the statutes, in express terms, declare such notes void. The decision of the district court was, upon this point, as I think, beyond all question, correct.

2d. The said corporation, thus violating the laws of the state, can no more allege an implied contract to pay the money mentioned in the notes, than it could set up and rely upon the express promise of Jaycox & Green to do so. To say, that, when a statute declares that all notes and other securities for the payment of any money, made or given to secure the payment of any money loaned or discounted by any incorporated company, or its officers, contrary to the provisions of the statute, shall be void, the courts may, nevertheless, imply a contract to pay it, is practically to repeal the statute. Such a holding throws open the business of unauthorized banking to be fearlessly conducted and without danger of loss. Such a holding makes the stringent provisions of the constitution and statutes have this effect and no more—the mode of pleading in an action to recover the money is altered. Unauthorized corporations may discount notes without limit; but, if a note should be protested, they must sue for its amount as for so much money lent, or had and received, and will recover. Nearly all of the efficiency of the statutes, as a restraint, is eliminated by such a holding.

I shall not enter upon an examination of all the cases which have been referred to as bearing upon this subject. It is proper, however, to notice what are commonly spoken of as the Utica Ins. Co. Cases, 15 Johns. 358, 19 Johns. 1, 8 Cow. 20, 3 Wend. 296, Id. 369, and 4 Wend. 652. It was undoubtedly held, in reference to notes taken by that company, that, although the notes were void, the money advanced on discounting the same could be recovered, as money lent; and the court go so far even as to say that the void notes could be used as evidence of money lent, and so be made, as evidence, the effective means of a recovery of the amount thereof. As to these cases I have two observations to make:

First. They have long been the subject of criticism, and doubts of their correctness have been freely expressed, both at the bar and on the bench. In New Hope & Delaware Bridge Co. v. Poughkeepsie Silk Co., 25 Wend. 650, Mr. Justice Nelson, lately the venerable and distinguished justice of the supreme court of the United States assigned to this circuit, then in the supreme court of this state, says: "Whether the doctrine of these cases is well founded, and may be upheld upon established principles, or not, or whether the result was not materially influenced by the peculiar phraseology and powers of the charter of the Utica Insurance Company, in respect to which they arose, it is not necessary at present to examine. I am free to say, in either aspect I should have great difficulty in assenting to them." In Tracy v. Talmage, in the court of appeals of this state (14 N. Y. 162, 189), Mr. Justice Samuel L. Selden says: "These cases have never been overruled; and yet, I think I may say, they have generally been regarded with some suspicion as to their soundness. * * * There is undoubtedly great difficulty in reconciling these cases with the settled rules in regard to illegal contracts."

Second. Those cases are distinguished from the present; and in a particular which has

been referred to as constituting the possible ground upon which the decisions there made could be upheld, or, as I should better say, in the feature which was deemed to furnish the ground on which those cases proceeded, namely, that that company had a general power to lend money, and, therefore, though it received therefor a void security, it could reclaim the loan. Without assenting to the reasoning by which this result was reached, it is sufficient to say, that the premises are wanting in the present case. In Beach v. Fulton Bank, 3 Wend. 573, 583, contemporaneously with some of those decisions, Chief Justice Savage states their ground as above indicated, and declares, that, as the Hudson Insurance Company had no such power, those cases do not apply.

The charter of the People's Safe Deposit and Savings Institution declares in what that corporation may invest its funds. This is fully discussed and made clear in the opinion of the district judge. It has no power to loan money on personal security; and the very ground on which the court placed their decision in the Utica Insurance Company Cases, therefore, fails. In accordance with this view, the supreme court of this state, in Life & Fire Ins. Co. v. Mechanic Fire Ins. Co., 7 Wend. 31, where the action was assumpsit, and the plaintiff claimed to recover for money lent, held, that, as the plaintiff had no power, by its charter, to loan money except on bond and mortgage, any other contract of loan was void, and could not be the foundation of an action; and, in the case of Gillet v. Phillips, in the court of appeals (13 N. Y. 114, 119), the court say, of a contract in violation of our banking acts: "The contract was not only unauthorized, but illegel. No action could be sustained upon it, if executory, in his favor, nor to set it aside, if executed. Nor could it become the foundation of an implied assumpsit in behalf of the offending party." The cases of Brady v. Mayor, etc., of New York City, 2 Bosw. 173, 20 N. Y. 312, and Donovan v. Mayor, etc., of New York City, 33 N. Y. 291, by analogy, affirm the same doctrine. My conclusion is, that the appellants have established no debt against the bankrupts, and a judgment for the assignee must be entered.

[See Case No. 7,238.]

## Case No. 7,238.

In re JAYCOX et al.

[13 Blatchf. 70.] [1]

Circuit Court, N. D. New York. July 1, 1875.

BANKRUPTCY—PROOF OF DEBT — CORPORATIONS—ULTRA VIRES—DISCOUNTING COMMERCIAL PAPER.

1. A corporation, created by the state of New York as a savings bank, and authorized to do the ordinary business of a savings bank, and also to receive on deposit, as bailee, articles of value, but having no authority to discount commercial paper, carried on habitually the business of discounting such paper. It discounted notes made by J., who afterwards was adjudged a bankrupt. The corporation was also adjudged a bankrupt. The assignee in bankruptcy of the corporation put in against the estate of J., in bankruptcy, a proof of debt for the amount of the money paid by the corporation to J. on discounting such notes: *Held*, that such proof of debt must be expunged.

2. Not only do the statutes of New York forbid the contract and make void the notes, but the money loaned or paid on the discount of the notes cannot be recovered back by the lender.

3. The corporation retained no title to the money loaned, and its assignee in bankruptcy acquired no title to it and no right to recover it back.

[For former proceedings, see Cases Nos. 7,241 and 7,237.]

George Doheny, for assignees in bankruptcy.

William M. Brown, for creditor.

HUNT, Circuit Justice. Upon an application to expunge the proof of debt made by the assignees of the People's Safe Deposit and Savings Institution of the State of New York, the register reports that he has taken the evidence offered, and that the facts following are established by said evidence: (1.) That no claim is made by the assignees of said People's Safe Deposit and Savings Institution of the State of New York against the estate of Jaycox & Green, except the notes set out in schedule "A" annexed to the proof of debt, filed April 23d, 1873, amounting, of principal, to $35,272.20. (2.) That the People's Safe Deposit and Savings Institution of the State of New York was a corporation organized under and by virtue of the provisions of chapter 816 of the Session Laws of the State of New York for 1868, the capital stock of which corporation was $300,000, owned by divers individuals. (3.) That said corporation had a banking office in Utica and one in Syracuse. (4.) That, from April, 1871, until the bankruptcy of Jaycox & Green, in May, 1872, the corporation, in its office at Syracuse, discounted the paper of Jaycox & Green, to the amount of several hundred thousand dollars, and that, at the time of their bankruptcy, said corporation held their discounted paper, which paper is particularly described in the schedule annexed to the amended or supplemental proof of debt, filed September 15th, 1874. (5.) That, from April, 1871, until the bankruptcy of said corporation, it carried on a regular banking business, except that it did not issue circulation of its own, discounting, during that period, a large amount of paper, selling exchange, and doing, in fact, the ordinary business of a bank of discount and deposit, and doing a large business of that character for a city like Syracuse, so

[1] [Reported by Hon. Samuel Blatchford, District Judge, and here reprinted by permission.]

that, at the bankruptcy of said corporation, it had between $600,000 and $700,000 of discounted commercial paper standing out; and that, during the period referred to, the corporation kept a regular office for discounts and deposits in Syracuse, kept a large number of mercantile accounts, and made large discounts for merchants. (6.) That Jaycox & Green were wholesale grocers at the time the notes set out in the proofs of debt were discounted; that these notes were discounted at about their respective dates, and their proceeds were applied to the payment of other commercial paper of Jaycox & Green, which had been discounted for them; and that the line of accommodation paper discounted by said corporation for Jaycox & Green, for a year previous to their failure, amounted to $35,000 and upwards. (7.) That there were fifteen trustees and directors of said corporation, and of these some resided in Syracuse or its vicinity, but they were not at the banking room very frequently. (8.) That the stock ledger of the corporation shows that, at the time of its bankruptcy, the trustees and directors held $193,000 of its capital stock. (9.) That the corporation, besides discounting notes, made loans on bonds and mortgages and stocks, and received deposits, and issued pass-books therefor in the same form as those of savings banks; and that, at the time of its suspension, the entire deposits in the corporation at Utica and Syracuse, was between $1,300,000 and $1,400,000. (10.) That the capital stock paid in at the time of the suspension of said corporation, was $75,000, and the residue of the money used by the corporation in discounting paper consisted of deposits and accumulations, and such accumulations amounted to $40,000. (11.) That the office of the corporation at Syracuse commenced discounting commercial paper and keeping commercial accounts soon after April 1st, 1871, and this was done by a resolution of the board of directors. (12.) That, at the time of the suspension of the corporation, pretty much all of the deposits in it at Utica were of the character of savings bank deposits, and upwards of $1,000,000 of the deposits were of that character. The register reported that said proof of debt should be expunged. The matter came on to be heard before Judge Wallace, the district judge, and he having been of counsel in the matter, declined to hear it, and ordered that fact to be entered of record. It was, therefore, ordered that the proceedings be certified to, and transferred into this court.

The findings of the register are sustained by the proof, and present a clear and succinct statement of the facts of the case. Whether, upon these facts, a claim exists in favor of the Deposit Savings Bank, against the estate of Jaycox & Green, is the question to be decided.

For the purpose of brevity and convenience, the institution described in the petition in this case as "The People's Safe Deposit and Savings Institution of the State of New York," will be termed the "Safe Deposit Company." This company was organized under and by virtue of the provisions of the act of the legislature of New York, passed May 14th, 1868 (chapter 816, p. 1839, Laws 1868). By the first section of that act the persons named were created a corporation, by the name and style above given, to be located outside of the cities of New York and Brooklyn, and, by the second section, the persons named were to constitute its board of directors for the first year. The provisions of the chapter are peculiar in many respects, but, for the purpose before us, it will only be necessary to notice the following: Section five provides that "the business and general object of the said corporation shall be to take and receive on deposit, as bailee, for safe keeping and storage, coin, bullion, gold and silver plate, jewelry, United States bonds, &c., and to receive money from any estate * * * or persons on deposit and give a book, receipt, or certificate therefor, * * * and any rate of interest not exceeding that by law allowed for deposits." By the eleventh section, the board was required to "invest its capital in good securities, * * * in bonds and mortgages, public securities or stocks of any state or of the United States, or in the stocks or bonds of any city, county or town, corporation or association, or otherwise, of any state, or the United States, in manner and form as the directors and officers might think proper." By section fourteen, it was declared to possess the powers, and be subject to the restrictions, contained in title third of chapter eighteen of the first part of the Revised Statutes, so far as applicable. That title enumerated the general powers of corporations, of suing and being sued, succession and the ordinary powers of incorporations. It contained also the following: Section 3: "In addition to the powers enumerated * * * no corporation shall possess or exercise any corporate powers except such as shall be necessary to the exercise of the powers so enumerated and given." Section 4: "No corporation, * * * not expressly incorporated for banking purposes, shall, by any implication or construction, be deemed to possess the power of discounting bills * * * receiving deposits * * * buying and selling bills of exchange," &c. 1 Rev. St. p. 600.

The constitution of the state of New York, of 1846, contained the following provision: "Corporations may be formed under general laws, but shall not be created by special act, except for municipal purposes, and in cases when, in the judgment of the legislature, the objects of the corporation cannot be attained under general laws." Article 8, § 1. Under this authority, the legislature had passed a general banking

law, providing that any persons might "establish offices of discount, deposit and circulation, upon the terms and conditions, and subject to the liabilities, prescribed in the act." Act April 18, 1838 (Laws 1838, c. 260). There was not at that time, nor until the year 1875, any general system for the incorporation of savings banks. In each case it was necessary to apply to the legislature for an act of incorporation. What is familiarly called the restraining act of the state of New York, contains the following provisions: "No person unauthorized by law shall subscribe to, or become a member of, or be in any way interested in, any association, institution or company, formed or to be formed for the purpose of receiving deposits, making discounts or issuing notes or other evidences of debt to be loaned or put in circulation as money; nor shall any person unauthorized by law subscribe to, or become in any way interested in, any bank or fund created or to be created for the like purposes or either of them." 1 Rev. St. p. 712, § 1. "No incorporated company, without being authorized by law, shall employ any part of its effects * * * for the purpose of receiving deposits, making discounts, or issuing notes or other evidences of debt, to be loaned or put into circulation as money." Id. § 3. "All notes and other securities for the payment of any money, or the delivery of any property, made or given to any such association, institution or company, that shall be formed for the purpose expressed in the first section of this title, or made or given to secure the payment of any money loaned or discounted by any incorporated company, or its officers, contrary to the provisions of the third section of this title, shall be void." Id. § 5. By an act passed February 4th, 1837 (Laws 1837, p. 14, § 1), the provisions of the above act, so far as they prohibited persons not incorporated from keeping offices for the purpose of receiving deposits, or discounting notes or bills, were repealed. As to incorporated companies, the act yet remains in force, as above set forth. With these references to the constitution and laws, we are prepared to decide without difficulty some of the preliminary questions of the case.

1. The safe deposit company was not a bank of discount and deposit, authorized to do the ordinary banking business of receiving current deposits, paying dealers' checks and discounting commercial paper. It was a savings bank, authorized to do the ordinary business of a savings bank, and authorized to receive on deposit, as bailee, and for safe keeping, the articles of value and securities mentioned in its charter. The legislature did not intend and had no power under the constitution, to organize by special charter a bank of discount and deposit. If those obtaining the charter had such an intention, it was a dishonest and a furtive one. There is no language in the charter that confers powers other than those conferred on ordinary savings banks, except in relation to its capacity to receive, as bailee, the valuable articles referred to.

2. The directors and managers of the bank intentionally and habitually violated the law in carrying on an ordinary banking business, including that of making discounts of notes. The proof shows, that, at the time of bankruptcy, it had more than $600,000 of discounted commercial paper outstanding, and that this business was done by the express direction of its board of directors, and by the sanction of the stockholders.

3. The notes in controversy, amounting to $35,272.20, were thus discounted by the safe deposit company, in known violation of the laws of the state. Jaycox & Green, the borrowers, are in bankruptcy, and the safe deposit company is in bankruptcy. The estate of the borrowers, ordinarily, should stand indebted for money actually received as a loan by its principals. This is the ordinary rule of law, and the enquiry is, whether other and counteracting principles must in this case prevail against it.

The objection to the right of recovery by the safe deposit company while in existence, and by its assignees after its bankruptcy, is based upon the provisions of the Revised Statutes and of the restraining act. By the third section of this latter act, already quoted, every incorporated company not authorized by law is forbidden to make discounts of commercial paper. By the fifth section, it is enacted, that every note or other security made in contravention of the preceding section "shall be void." It is plain, from what has been said, (1st,) that the safe deposit company is an incorporated company; (2d,) that it had not the authority of law to discount this paper, (People v. Utica Ins. Co., 15 Johns. 358); and (3d,) that, without such authority, it did discount it. The restraining statute first forbids the transaction, and, secondly, declares that the notes given for such a transaction shall be void. The contract itself is forbidden, and, therefore, illegal, and the security is also declared to be void. It is forbidden, both by section 4 of title 3 of chapter 18, above cited, the company not being "expressly incorporated for banking purposes," within the meaning of that act, and by section three of the restraining act, also herein before referred to.

The illegal character of the contract, and its invalidity, as well as the invalidity of the security given upon it, is not an unusual condition of things under the laws of New York. The loaning of money at a greater rate of interest than seven per cent. per annum is forbidden by law. The contract of loan, when thus made, is illegal, and any security taken in in furtherance of it is void. 1 Rev. St. p. 772, §§ 2, 5. A contract to pay money arising out of a betting or gaming transaction is forbidden by law, and the contract itself, and any security connected with it, are equally void. Id. p. 662, § 8. A con-

tract for the sale or purchase of lottery tickets, or articles by raffle, is in like manner forbidden by law, and the contract itself and all securities arising out of it are void. Id. p. 665, §§ 22, 24, 26, 27, 34, etc.

The argument to sustain the claim of a recovery on the part of the safe deposit company, is based upon the idea that the loan of money by the bank is legal, that its charter authorized the company to make loans, and that it was the form, time and manner of the loan which was objectionable; and that hence, while the security which embodies these objections is illegal and void, and cannot be recovered upon, the loan or the debt may and does remain valid. To support this view are cited what are called the "Utica Insurance Cases": Utica Ins. Co. v. Scott, 19 Johns. 1; Same v. Cadwell, 3 Wend. 296; Same v. Bloodgood, 4 Wend. 652; Same v. Kip, 8 Cow. 20; Same v. Scott, Id. 709.

The case in Johnson's Reports, against Scott, arose upon a demurrer, and simply went to the point adjudged in the "Per Curiam" opinion, that the security was void under the restraining act, and judgment was ordered accordingly. The remark that, although the security was void, the money lent might be recovered, was entirely obiter.

In the case against Kip (8 Cow. 20), the question was presented upon the second plea, which was for money lent, and the court held, that, although the security was void, the loan constituted a valid cause of action, and gave judgment for the plaintiff. The only direct authority cited was the case against Scott, above referred to. The obiter remark of the court in that case is quoted in full.

The case of Scott was carried to the court of errors (8 Cow. 709), where the judgment below was reversed. It was there held, (1st,) that the insurance company had the right to loan their surplus funds, and to take a note as evidence of the debt (page 718); (2d,) that the restraining act did not apply to that company, by reason of the provision of their charter allowing them to invest their funds (page 719). These were the conclusions of Spencer, J., in the only prevailing opinion reported.

In Utica Ins. Co. v. Cadwell, 3 Wend. 296, the decision in Kip's case was adopted without comment or discussion. The court (Sutherland, J.) say, that there is a distinction, as held by the former cases, between the security and the contract of lending; and that, as the lending was not declared to be void, wherever money was lent it might be recovered under the common counts, although no action could be sustained upon the security. The note was held to be competent evidence of money lent, under the common counts.

In relation to these cases I observe:

1. That they are distinguishable from the present in one important feature, viz., that the insurance company had the right to make personal loans of their surplus funds, and whether they made the loan upon the security of a bond or a note, or without either, it was declared, made no practical difference. This was the opinion of Spencer, Senator, in Scott's Case, 8 Cow. 709. The company, in the present case, had no power to make personal loans. Its powers were restricted and limited to those contained in its charter. This is expressly declared in the provision of the Revised Statutes, already cited. Upon turning to the authority to make its loans, we find the subjects specifically set forth, as the stocks of the United States, or of the states, bonds and mortgages, bonds of cities or towns. Personal loans are not mentioned, and are, therefore, by statute, excluded from the class in which the moneys of this company can be invested.

2. The terms of the restraining act now in force, as well as the language of the Revised Statutes, are quite different from the language of the act in force when the Utica Insurance Cases were decided. "No incorporated company, without being authorized by law, shall employ any part of its effects * * * for the purpose of making discounts." 1 Rev. St. p. 712, § 3. Here is a positive prohibition against investing the funds of a corporation in discounted bills. Such a contract is illegal, as being positively forbidden by law. The language of the old act was aimed at the creation of a company and the establishment of an office, like that of section one of the present act, forbidding the becoming members of a company for the purpose of issuing notes, making discounts &c., and not containing the language above quoted. 2 Rev. Laws, 1813, p. 234, § 2. Neither does the old law contain the provision of title 18 of the Revised Statutes, that no corporation not expressly created for banking purposes, shall, by any implication or construction, be deemed to possess the power of discounting bills. Had the Revised Laws of 1813, which were in force when the Utica Insurance Cases were decided, contained these provisions, there is no reason to think they would have been decided as they were.

3. The correctness of the decisions in those cases, has been repeatedly questioned, and their authority much weakened. See New Hope & D. Bridge Co. v. Poughkeepsie Silk Co., 25 Wend. 650, opinion of Mr. Justice Nelson; Tracy v. Talmage, 14 N. Y. 189, opinion of Mr. Justice Selden; and the opinion of Mr. Justice Comstock, in Curtis v. Leavitt, 15 N. Y. 98. To give them the force contended for, will render the restraining act substantially useless. If their holding is as broad as is contended for, they are in direct hostility to an almost endless line of authorities, to the effect that the violator of the law cannot recover upon a contract embracing or founded upon that violation.

4. The Utica Insurance Cases should not be confounded with that class of cases of

which Oneida Bank v. Ontario Bank, 21 N. Y. 490, and Curtis v. Leavitt, 15 N. Y. 9, are instances, in which the plaintiffs recovered for money advanced, although their security was repudiated. In the first of these cases, the statute of New York (Act May 14, 1840; Laws 1840, p. 306, § 4) was involved which declared that "no banking association shall issue or put in circulation any bill or note of such association, unless the same shall be made payable on demand and without interest." Mr. Augustus Perry loaned to the Ontario Bank $14,000 and took its drafts on Duncan & Sherman of New York, for the amount, all being made and delivered about four weeks before their dates. The court held, (1) that these were drafts, within the statute mentioned; (2) that they were not payable on demand; (3) that they were illegal and void; and, (4) that the lender or holder could recover from the bank issuing them the amount of money so loaned. The principle of this decision was this, that Perry had done nothing prohibited by law. He had simply loaned his money to the bank, and the bank had received it. The bank violated a positive provision of the statute in making its security for the loan payable on time, but Perry violated no law. All the cases recognize the distinction between the guilty party to an illegal contract and the innocent party. The bank violated a provision of the statute, in making its drafts payable on time, and was liable to its penalties, but Perry violated no law, statutory or moral, and was subject to no punishment. The cases of Tracy v. Talmage, 14 N. Y. 162, Curtis v. Leavitt, 15 N. Y. 9, and Sackett's Harbor Bank v. Codd, 18 N. Y. 240, involve the same principle. In the case before us it is the guilty party, the violator of the law, the safe deposit company, that seeks to enforce the illegal contract, against a party comparatively innocent.

It is further contended, admitting these loans to be illegal, that no title to the money received by Jaycox & Green passed to them, that the assignees represent stockholders and creditors, and that they have the right to recall the money, in an action for money had and received. The powers and authority of an assignee in bankruptcy are such as are given to him by the statutes of the United States. Every assignee appointed under the bankrupt act possesses the same power, whether the scene of his action is in New York, Illinois or Texas. The statutes of a state cannot take away from him any of his lawful powers, nor, I apprehend, are his powers to be increased by the effect of state statutes. He is strictly and essentially a creation of the United States authority, intended to be subject to the United States jurisdiction, under a system of bankruptcy which shall be uniform throughout the whole country. It is to the statutes of the United States, therefore, and not to the statutes of the state of New York, giving power to local and state trustees, executors or assignees, that we are to look for the solution of the question now under consideration. Curtis v. Leavitt, 15 N. Y. 44.

The powers and the authority of an assignee in bankruptcy are particularly specified in the fourteenth section of the bankrupt act. 14 Stat. 522. The register is, in that section, directed to make a conveyance to the assignee of "all the estate, real and personal, of the bankrupt," and thereupon, "the title to all such property and estate, both real and personal, shall vest in said assignee." It is further declared, "that all the property conveyed by the bankrupt in fraud of his creditors, all rights in equity, choses in action, * * * all debts due him or any person for his use, * * * all his rights of action for property or estate, real or personal, and for any cause of action which the bankrupt had against any person, arising from contract or from the unlawful taking or detention of, or injury to, the property of the bankrupt * * * shall * * * be at once vested in such assignee." It is further declared, that the assignee "may sue for and recover the said estate, debts and effects, and may prosecute and defend all suits at law or in equity pending at the time of the adjudication in bankruptcy, in the same manner and with the like effect" as the bankrupt could have done. There are numerous provisions scattered through the act to carry out these powers, but the powers enumerated above, it is believed, embrace every authority that can bear upon the point under consideration. In substance, the statute gives authority to the assignee, (1st,) to seize, sue for and recover any and all property, estate or rights belonging to the assignee at the time of the commencement of the proceedings in bankruptcy; and, (2d), to sue for and recover any property conveyed by the bankrupt in fraud of his creditors. If the property belonged to the bankrupt at the time specified, or he then had an interest in it, legal or equitable, whatever might be its form, a right at once vested in the assignee. If the bankrupt had no such right or interest, but would have had, except that he had previously made a conveyance of his property for the purpose of defrauding his creditors, the assignee was authorized to attack such fraudulent conveyance and recover the property which had passed under it. As against the bankrupt, that conveyance was good, but, as representing his creditors, who, under certain circumstances, could attack it, the assignee was authorized to take measures to set it aside.

The claim against Jaycox & Green does not fall within either branch of this authority. The money loaned by the safe deposit company to Jaycox & Green became the property of the latter, was taken by them into their possession, and became mixed with, and a part of, their general funds. It was, for this

purpose, the case of an ordinary loan of money, by which the lender parts absolutely with his money and all right and interest in it, and receives in return the note or other security of the borrower. The lender has no rights in law or equity to the money loaned, or any lien or claim upon the same. The present loan, although forbidden to be made by the safe deposit company, and illegal on their part, was nevertheless, made in fact. It was an accomplished fact, and the money and all interest in it passed beyond the control of the company, more completely, if possible, than in the ordinary case of money loaned.

Nor can the transaction come under the head of a conveyance by the bankrupt of his property "in fraud of his creditors." That is a case of one who, for his own benefit or that of his family, conveys property in which he secretly reserves an interest for his own benefit, or by which he intends dishonestly to prefer one class of creditors to another. Here, the safe deposit company intended no reserved benefit to itself. Jaycox & Green were parties to no such intention. Nor was it intended to prefer one creditor or class to another.

The safe deposit company, in violation of law, entered upon a general banking business. As a part of that business, it loaned the money in question. It was an illegal contract. It was made, however, by the corporation, under a formal resolution of its board of directors, and sanctioned by the acquiescence of its stockholders at its annual meetings. It has been already shown that the company could not recover either upon the security received or for money loaned. If it is possible for a corporation itself to make a contract so that the question of an excess of power on the part of its agents cannot arise, this is such a case.

The point under consideration is not well taken, and, upon the whole case, I am of the opinion that the claim of the assignees against the estate of Jaycox & Green cannot be sustained, and that the proof of the debt of the safe deposit company must be expunged.

## Case No. 7,239.

In re JAYCOX et al.

[7 N. B. R. (1873) 140.][1]

District Court, N. D. New York.

ATTORNEYS—BANKRUPTCY—ALLOWANCE FOR SERVICES—PROOF OF DEBT.

The attorneys of bankrupt petitioned to be allowed for services rendered prior to adjudication and up to the time of the choice of an assignee. *Held*, That they were general creditors of the bankrupt, and must prove their debt in the usual form, for all services rendered prior to the adjudication, that the proof as to the other alleged services was unsatisfactory, and before the assignee could be required to pay for such services, it must be clearly shown that they were properly and necessarily rendered, for the purpose of benefiting or preserving the estate of the bankrupts, in the interest of the general creditors. Petition dismissed, without any prejudice as to any proof of claim they might hereafter make.

[Cited in Re Hope Mining Co., Case No. 6,682; Re Handell, Id. 6,017.]

[This was a petition by Hunt, Green, and Weaver, attorneys, for an allowance for services in the matter of John M. Jaycox and John A. Green, in bankruptcy.]

HALL, District Judge. The attorneys and counsel who prepared and filed the petition of Jaycox & Green for their adjudication as voluntary bankrupts, having applied by petition for an order directing the assignee to pay their charges for such services, and for other services rendered as the attorneys and counsel of the bankrupts up to the time of the approval of the choice of the assignee herein, it was referred to register Gott to take proof in regard to said claim and petition, (after due notice to the assignee,) and to report the facts, and what compensation the petitioners were entitled to for services rendered before the filing of the petition and schedules, and what after such filing down to the appointment of assignee, and what rights they had for payment against the estate in bankruptcy;—and he was directed to annex to his report an account in detail of the services rendered, and to report his opinion upon the facts and the law of the case. This order of reference has been but partially and very unsatisfactorily executed. The assignee, though served with notice of the hearing, wholly neglected to appear upon the reference, and the only testimony taken was that of the two claimants, in which they stated their services in general terms and their opinion of the value of such services. No account in detail of the services rendered is returned, but the account returned consists of one item of seven hundred and fifty dollars for services rendered in "consulting concerning the proceedings in bankruptcy," preparation of the petition and schedules and filing the same and attending upon the adjudication of bankruptcy; with a reference to the testimony given by the claimants, which, though general in its terms, gives some further details;—and another item of two hundred and fifty dollars for services after the adjudication, and up to the confirmation of the assignee, with a similar reference to the testimony of the claimants. The estate was a large one, and it is perhaps possible that the sums charged are no more than a just compensation for the services rendered; but, before any such sums should be allowed, more satisfactory evidence should be given of the character and extent of the services and the amount proper to be allowed therefor; and the assignee should see that only the amount that the parties are entitled to claim should, in any form, be charged upon the estate. The register reports that he

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had supposed that such services were not a charge against the estate in the hands of the assignee, but that Case of Comstock [Case No. 3,074], seemed to decide the matter in favor of the validity of claims for such services, and that he supposed he was bound by such decision until it was overruled; and he therefore reported that the assignee should pay the petitioners the amount they claimed. The register's report must be overruled. In respect to the services rendered prior to the adjudication in bankruptcy, the petitioners are general creditors of the bankrupt, and must prove their debt in the usual form, and take their dividend in concurrence with the other creditors of the bankrupt. In re Hirschberg [Id. 6,530]; In re Evans [Id. 4,552]; In re Rosenfeld [Id. 12,057]; In re New York Mail Steamship Co. [Id. 10,211]; In re Bigelow [Id. 1,397]. In respect to the other charge the proof is unsatisfactory and insufficient. In order to justify an order that the assignee pay such claim, it must be clearly shown that the alleged services were properly and necessarily rendered for the purpose of benefiting or preserving the estate of the bankrupts, in the interest of the general creditors, and not in the interest of any creditor or class of creditors. It was the duty of the bankrupts to see that their property was preserved until the appointment of an assignee, and if it was necessary that other persons should render similar services, and the petitioners actually rendered valuable service in respect to the bankrupt's property, and to the advantage of the general creditors, the extent and value and necessity of such services should be clearly established. There is no satisfactory proof upon which the court can fix and allow any specific sum for such services, and the petition of Hunt, Green & Weaver is therefore dismissed, but without prejudice to any proof of claim which they may hereafter make in the usual form, or to any application for payment for any services necessarily rendered in protecting the estate of the bankrupts. In re Bigelow [supra]; Bump, Bankr. (5th Ed.) 428; 1 and 2 Am. & Eng. Bankr. Dig.

## Case No. 7,240.

In re JAYCOX et al.

[7 N. B. R. 303;[1] 7 West. Jur. 18.]

District Court, N. D. New York. Sept. 21, 1872.

PRACTICE IN BANKRUPTCY—CONTESTED PROOF OF DEBTS—POWER OF REGISTER—CREDITORS HOLDING SECURITY—DIVIDENDS—TRUSTS.

1. Where a creditor who has security upon the bankrupt's property, has made due proof of his debt, and his proof of claim is contested, the better, if not the only proper mode, of submitting the question in controversy, is to move the court to expunge the proofs made by the secured creditor, or to apply for a re-examination of the claim, under general order No. 30.

2. The register having no power to expunge such proofs or to reject the claims, he cannot refuse to permit the claimants to vote at a second meeting of creditors, nor can he exclude them from a dividend.

3. Creditors holding notes or bills secured by a mortgage to an accommodation indorser, can, if necessary, obtain control of such security by making the proper appeal to a court of equity.

4. Under what circumstances a dividend may be stayed.

5. It makes no difference in equity whether a trust is written out by the parties, or is a creation of law. A creditor holding security is only entitled to a dividend upon the balance of his claim after deducting the proceeds of securities in his hands.

6. Registers in bankruptcy, when habitually careless and negligent, should be removed.

7. The practice of signing and furnishing blank certificates by registers is severely condemned.

[In the matter of John M. Jaycox and John A. Green in bankruptcy.]

HALL, District Judge. At the second meeting of the creditors of the bankrupts, sundry creditors who had proved their debts, objected to the proof of debts made by sundry other creditors, at or prior to the first meeting, and to their right to vote upon a motion to declare a dividend, upon the ground that such debts were secured by a mortgage given by said bankrupts, upon their real estate, to George F. Comstock, and also by a pledge to him of one hundred shares of the stock of the Delano Iron Works, of the par value of $10,000. The question raised by such objections was thereupon certified into this court, by the register, for decision. The debts in respect to which such objections were made amount to more than $85,000. They are secured to the creditors proving the same by the endorsement of the Hon. George F. Comstock, who holds, as his security against loss by reason of such endorsements, a "grant" or mortgage of real estate of the bankrupts. The grant or mortgage referred to declares: "This grant is intended as a security that the said John M. Jaycox and John A. Green, their executors and administrators, shall well and truly pay or cause to be paid all the notes, bills and drafts made by the firm of Jaycox & Green, heretofore endorsed by said Comstock, or which shall be hereafter endorsed by him, as the said notes, bills, or drafts are or shall become due, to the holders thereof; and shall also well and truly pay unto said Comstock, his executors, administrators and assigns all sums of money which he shall be obliged to pay, or shall pay, on account of any liability whatsoever for the said firm of Jaycox & Green; and shall indemnify him," etc. The amount of such liability not to "exceed at any one time $75,000." The indebtedness of the bankrupts, to the proof of which such objections were made, accrued after the ex-

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ecution of such mortgage, and is, to the extent of $75,000, mentioned in such mortgage, embraced within its provisions; and stock of the Delano Iron Works, of the nominal value of $10,000, is also held by said Comstock, as a further security or indemnity against loss by reason of his endorsement of such notes, or some part thereof. These general facts, most of which appear upon the papers before me, were substantially admitted by the assignee, and by the counsel of the creditors whose rights to vote and receive a dividend upon the claims presented by them were brought into controversy, as well as by the counsel for the creditors who oppose the allowance of such claims.

On the presentation of the register's certificate the contending creditors appeared by their counsel. The assignee appeared in his own proper person and stated the facts as understood by him, and submitted the question presented for the decision of the court, leaving the argument in regard to the rights of the contending parties to the counsel appearing in their behalf. There being no allegation of insufficiency or informality in the proofs of debt filed and no motion having been made by the assignee or any creditor for an order expunging such proofs or rejecting such claims, it was suggested by the court that the proper formal proofs of the debts in controversy having been made, and the objection against the right of the creditors to vote and receive dividends thereon being urged on the sole ground that the evidence produced by the contesting creditors showed that the creditors whose claims were opposed had security for such debts upon the bankrupt's property, the better, if not the only proper mode of presenting the question in controversy, would be to move to expunge such proofs; such suggestion being made upon the assumption that the proofs of debt being sufficient, prima facie, and the register having no power to expunge such proofs or to reject such claims, he had no authority to refuse the votes of the claimants or to exclude them from the benefit of a dividend. Upon this suggestion it was agreed that the objecting creditors should move, on the papers sent up by the register and upon his certificate, for an order that the creditors whose claims were opposed should show cause, on some subsequent day, why the proofs of their debts should not be expunged; and that the counsel should argue the motion upon such certificate and papers. Under this agreement the counsel proceeded to argue the question whether the creditors, whose claims were so opposed, were, under the provisions of the 20th section of the bankrupt act [of 1867 (14 Stat. 526)], precluded from making proof of the whole amount of their debts, and receiving dividends thereon, upon the ground that they had a mortgage or pledge of real or personal property of the bankrupts', or a lien thereon, for securing the payment of their debts.

The question presented is an important one, and which it would seem must often arise; but it is believed that it has not been decided in any reported case, arising under our present bankrupt act. It was, therefore, deemed proper to examine the papers upon which the question was presented, in order to understand, if possible, the precise facts upon which the questions in controversy in this case should be determined. These papers have been examined, and they furnish a considerable addition to the already formidable and shameful mass of evidence on file in the clerk's office, of the careless and disgraceful manner in which the proceedings in bankruptcy are conducted by and before registers in bankruptcy. The register in charge of this case has been regarded as one of the ablest and best of the registers of this judicial district; and from the loose and careless manner in which the proceedings in this case have been conducted, there is much reason to fear that the gross and culpable negligence and carelessness of many registers, whose annual compensation is double, if not much more than treble that of the judges of their judicial districts, will ultimately lead to much litigation and loss. Some of the instances of the looseness of the proceedings, and of want of care in many material and important statements, will be briefly referred to.

The register's certificate states that the question certified "was stated and agreed to by the counsel for the opposing parties, to wit: Mr. Comstock, who appeared for the Syracuse National Bank and other creditors of said bankrupts, and Mr. Ruger, who appeared for Messrs. R. & D. Stewart and other creditors of said bankrupts;"—without stating in either case the names of such other creditors, so that either party desiring to appeal from a decision of this court made under such certificate could know who were proper parties to such appeal, and so that other parties could know who were bound by such decision if not reversed on appeal or review. The certificate, then, after stating that the Syracuse National Bank moved that the assignee divide $40,000 of the money in his hands among the creditors who had proved their debts, states "that Messrs. R. & D. Stewart and other creditors of said bankrupts, by their counsel, objected to the proofs of debts, and to the right of the following named persons and corporations, creditors of said bankrupts, who had filed proofs of their debts for the amounts hereinafter named, as unsecured debts against said bankrupts' estate, to vote upon said motion, viz.: The People's Savings Bank, $35,272.20; the Syracuse National Bank, $7,500; Wilkinson & Co., $12,500; Third National Bank, $17,500; Bank of Skaneateles, $5,000; Merchants' National Bank, $2,500; George N. Hurst, $2,500; W. G. Tracy, $2,500; Mead Belden, $2,500; James J. Belden, $2,500; Ballston Spa National Bank, $2,500; Fourth

National Bank, $2,500; nor upon any question affecting the estate of the bankrupts, or to share in the dividend to be made thereon; upon the ground that the said debts and each of them are secured by a mortgage given by said bankrupts, on their real estate, to one George F. Comstock, a copy of which is hereto annexed, and also by a pledge of one hundred shares of the Delano Iron Works stock, the par value of one thousand dollars per share." The certificate then further states: "Upon these questions Mr. Ruger, as counsel as aforesaid, introduced the evidence herewith returned of George F. Comstock, Patrick Lynch, and Orrin Ballard; also return herewith the proofs of debts of the various persons and corporations above named," etc. After diligent search, I am unable to find any evidence of Patrick Lynch and Orrin Ballard apparently taken after such question arose; but I find among the papers before me (whether taken from the files of the clerk, or returned by the register with a former certificate, I am not able to say) minutes of the testimony of Patrick Lynch and Orrin Ballard, apparently taken before the register, May 1, 1872, and filed with the clerk on the tenth of that month, which may be the evidence of Patrick Lynch and Orrin Ballard, introduced by Mr. Ruger; as it may well have been considered as tending to show that the debts of the Syracuse National Bank, and of the "People's Safe Deposit and Savings Institution of the State of New York," alias "The People's Safe Deposit Company," and alias the "People's Savings Bank," are not provable in these proceedings.

On examining the proofs of debt returned by the register, it appears that the deposition of Patrick Lynch, made before the register, May 4, 1872, is the only deposition which can be assumed as proof of the debt of $35,272.20, stated in the certificate as that of the "People's Savings Bank." This deposition does not, in the body of it, state the amount of the indebtedness claimed, but the deponent swears that he is the cashier of "People's Safe Deposit and Savings Institution of the State of New York, * * * and that the statement of the account between the said corporation and said bankrupt, hereto annexed, is a full, true, and complete statement of account between the said corporation and the said bankrupt; * * * that the debt thereby appearing to be due from the estate of the bankrupt to the said corporation was incurred on or before the first day of April, 1872; and for the consideration therein stated," etc. Annexed to this deposition by an ordinary metal pin thrust through the deposition and the annexed paper so as to make but two holes in each, and leaving it easy to substitute any other paper without any evidence of its substitution, is a paper headed in ink, "Notes of Jaycox & Green, Owned by the People's Savings Bank. Dated, ——; time, ——; due, ——; indorsed by ——; amount ——;" under which is a list of eleven notes for different sums, amounting in the aggregate to $27,272.20. The words, "People's Savings Bank," in such caption, have been crossed out by lead-pencil marks, and the words, "People's Safe Deposit and Savings Institution," written in pencil marks above it. At the bottom, under the list of notes, is written: "The above being all for moneys loaned upon the notes above mentioned. Ex. 1, D. F. Gott." This list is evidently not in the handwriting of Patrick Lynch; it is not attested in any manner by any signature of any officer or book-keeper of the corporation, or otherwise, except by the marking by the register; and how any human being fit to be trusted with the safe-keeping of fifty dollars in money could suppose that such a statement "was a full, true, and complete statement of the account between the said corporation and the bankrupt" (if there was any such account), "and of the consideration of the indebtedness" intended to be sworn to, when it does not state the amount loaned, or to whom, or when, or anything else in the proper form of a full, and complete, and true account, passes my comprehension.

The fourth general rule in bankruptcy, adopted by this court in June, 1867, (a rule which it is believed no judge forty years ago would have deemed it necessary to make), provides that "every register in bankruptcy, or other officer of the court, before administering the proper oaths in verification of any petition, schedule, inventory, deposition, affidavit or other paper, shall see that the different sheets or pieces of paper of which it is composed, and those to which it refers as annexed, are properly fastened together in such manner as to give reasonable security against the separation, loss or change of any part thereof." The papers presented in this case show the necessity of the rule and of its observance; as well as repeated violations of it in very important cases. Continued and flagrant violations of it hereafter, as well as the repetition of the less common, (and it is hoped infrequent) offences of signing and furnishing blank certificates required by the fifth and sixth general rules in bankruptcy, or giving false certificates under the same, will be considered sufficient cause for the removal of a register.

The 22d section of the bankrupt act provides that "to entitle a claimant against the estate of a bankrupt to have his claim allowed, it must be verified by a deposition in writing, on oath or solemn affirmation, before the proper register or commissioner, setting forth the demand, the consideration thereof, whether any and what securities are held therefor, and whether any and what payments have been made thereon; that the sum claimed is justly due from the bankrupt to the claimant; that the claimant has not, nor has any other person for his use, received any security or satisfaction whatever other

than that set forth," etc. In respect to the proof of the very large claim now under consideration, it is clear that these provisions have not been complied with. It does not appear whether the moneys said to be loaned were loaned to the bankrupts, or to the indorser or some other holder of the paper, or when, or to what amount; it does not make the required statement in respect to securities, and only inferentially that there have been no payments. It is not likely that there was any such thing as an indebtedness upon an account between the bankrupts and the corporation, in the proper and ordinary acceptation of the term "account"; and it is reasonably certain that in point of fact the debt was, and should have been proved as, a debt due upon the promissory notes referred to in the list attached; and which notes could not be properly proved and a dividend paid thereon without their production, or proof of their loss. In re Knoepfel [Case No. 7,892].

The deposition in proof of the alleged debt of the Syracuse National Bank is made by Orrin Ballard, cashier. It is in the same form, or nearly the same form, as that above mentioned, made by Patrick Lynch, and it contains, except in regard to the amount and names of parties, substantially the same statements. It sets forth "that the statement of the account * * * hereto annexed is a full, true and complete statement of account between the said corporation and the bankrupt," etc., and it contains the like statement in regard to the consideration of the debt; but no account or statement whatever is annexed, except there are annexed by a single pin, and in precisely the same loose and insecure manner before referred to in respect to the deposition of Lynch, what purport to be copies of three promissory notes for $2,500 each, signed by Jaycox & Green, and indorsed by George F. Comstock. No reference to these copies as such, and no reference whatever except by the words "statement of the account between the said corporation and the said bankrupt" (in the singular number) "hereto annexed," is made in such deposition; no statement in respect to securities for the debt is made therein; nor is it stated that such debt is for moneys loaned;—in short, no consideration for the debt is stated. The deposition in proof of the debt of the Merchants' National Bank is substantially in the form of those already referred to, but at the foot of the deposition is the following: "The account referred to is the notes annexed—four in number.—This proof is to be taken in connection with one heretofore made. Fees $1.30." The papers annexed are not original notes, but on their face purport to be copies of notes, as follows:—One made by Jaycox & Green for $2,500, payable to the order of George F. Comstock, and indorsed by him; one for $50, made by Martin Fitzgerald, and indorsed by Jaycox & Green; one for $65, made by A. B. Russell & John W. Russell, and indorsed by Jaycox & Green; and one for $327.64, made by Hoagland & Stanton, and indorsed by Jaycox & Green. They are pinned to the deposition in precisely the mode before described. The deposition contains no statement in respect to there being any security for the debt, or that Jaycox & Green had been charged as indorsers. The depositions in proof of the debts of the other banks named in the certificate are not objectionable to the same extent as those hereinbefore noticed; but it is believed none of them state what is required in respect to the debt being secured or unsecured, and that all of them are otherwise defective and insufficient. The depositions in proof of the debts of individuals are possibly sufficient in point of form, unless taken after the adoption of the 34th general order in bankruptcy. The parties in some instances swear that they have not had or received any security whatever for the debts claimed, though it appears by the depositions that the notes referred to therein were indorsed by George F. Comstock; nor does it appear in these, or indeed in any of the depositions or papers presented, that he had been duly charged and was liable as such indorser, although the notes indorsed by him are past due. In respect to these individual claims it is, perhaps, necessary to a proper decision of the motion for an order to show cause, that the very grave and doubtful question argued by the counsel for the contesting creditors should be considered.

The main provisions of the bankrupt act which bear directly upon this question are contained in the 20th section, and are as follows, viz.: "When a creditor has a mortgage or pledge of real or personal property of the bankrupt, or a lien thereon, for securing the payment of a debt owing to him from the bankrupt, he shall be admitted as a creditor only for the balance of the debt after deducting the value of such property, to be ascertained by agreement between him and the assignee, or by a sale thereof, to be made in such manner as the court shall direct; or the creditor may release or convey his claim to the assignee upon such property, and be admitted to prove his whole debt. If the value of the property exceeds the sum for which it is so held as security, the assignee may release to the creditor the bankrupt's right of redemption therein on receiving such excess; or he may sell the property subject to the claim of the creditor thereon; and in either case the assignee and creditor respectively shall execute all deeds and writings necessary or proper to consummate the transaction. If the property is not so sold or released and delivered up, the creditor shall not be allowed to prove any part of his debt;"—and the question to be determined is whether the creditors whose debts are primarily secured by the indorsement of Judge Comstock, and are, therefore,

in equity, secured by the mortgage and pledge of the property of the bankrupts, made to him as aforesaid, have "a mortgage or pledge of real or personal property of the bankrupts, or a lien thereon, for securing the payment of such debts" within the true intent and meaning or just construction of the provisions in the bankrupt act which have just been quoted.

It must be conceded that the creditors have not the legal title to any such security or lien as the provision contemplates; but whether they have not, in equity, such a mortgage, pledge, and lien as precludes them from proving their debts, is a very grave question, admitting of serious doubt. In Vail v. Foster, 4 N. Y. 312, 314, Bronson, C. J., in delivering the opinion of the court, said: "It is a settled rule in equity that the creditor shall have the benefit of any counter bonds or collateral security which the principal debtor has given the surety, or persons standing in the situation of a surety, for his indemnity. Such securities are regarded as trusts for the better security of the debt, and chancery will compel the execution of the trusts for the benefit of the creditor." Mr. Justice Story (Story, Eq. Jur. § 638) says: "If a principal has given any securities or other pledges to his surety, the creditor is entitled to all the benefit of such securities or pledges in the hands of the surety, to be applied in payment of his debt." And see Id. §§ 327, 499, 558; Wright v. Morley, 11 Ves. 22; Pratt v. Adams, 7 Paige, 615; Clark v. Ely, 2 Sandf. Ch. 166; Ten Eyck v. Holmes, 3 Sandf. Ch. 428. And this is undoubtedly the acknowledged doctrine of the courts of this state, and of the United States, in exercising their equity jurisdiction.

The creditors holding the paper covered by the mortgage and pledge made by the bankrupts to Comstock, have therefore, in equity and potentially, the lien and security afforded by such mortgage and pledge; and upon proper proceedings in a court of equity can obtain the actual possession and control thereof, if such possession and control are by them deemed necessary for their security. So far as the security of these creditors is concerned, and so far as the effect upon the interests of the general unsecured creditors of the bankrupts is concerned, the equities and real substance of the case are apparently the same now as if the mortgage and pledge had been given to the creditors, or to a trustee, under an express trust, for their benefit and security; and if the provisions of the bankrupt act above referred to can be avoided, in all cases, by giving the security by way of mortgage or other lien upon the bankrupt's property to a trustee or surety, the act certainly needs amendment, if the real equities of the case are fully presented by the argument on behalf of the creditors, in whose interest this motion was made. I confess that I was at first very strongly inclined to the opinion that the case is within the provisions above quoted, and that the creditors were not entitled to prove their debts which were thus secured. Further reflection, and a hasty and imperfect examination of authorities, have induced grave doubts upon the question; and it now being before me only upon the application for an order to show cause, and most of the authorities not having been discussed or even cited by counsel, or examined by myself, I shall certainly give the case a more careful examination and a more deliberate consideration before making any definitive order thereon; for I have not yet learned to dispose of the rights of contesting parties to thousands and tens of thousands of dollars without examination, even though the parties appear to have left them to the chances of a decision upon papers as disgracefully loose and slovenly as those presented in this case.

The argument of the counsel for the opposing creditors in this case, whether founded upon the provisions of the bankrupt act or the general principles of equity, is certainly specious, even though it be unsound. The main objection to it, as founded upon the general principles of equity, is, possibly, that it looks only to the relative equities of the contending creditors, and leaves out of view the equities of the surety or accommodation indorser. As between the surety and his principal, the primary fund for the discharge of their primary and secondary liability to the creditors is the estate of the principal debtor; and the equity of the surety, where he has no security for his indemnity, or so far as the security held by him is insufficient for that purpose, is at least as great as that of the unsecured commercial creditors. If the security held by the surety is more than ample for his indemnity, without regard to the dividend declared in bankruptcy, the general creditors suffer no loss by allowing the secured creditor to prove for his whole debt, for the surety can enforce his mortgage and pledge only so far as is necessary for his indemnity; and if the interests of the unsecured creditors require it, the assignee can retain the property by the payment in full of the debts thus secured. And, in determining the construction of the bankrupt act, especially in view of the fact that the rule which that act prescribes, was, in substance, established by the decisions of the English courts of equity prior to any legislation prescribing it; and that the principle of such decisions had been approved and adopted by the courts of equity in this country, in somewhat similar cases, before it was adopted by statute in Massachusetts prior to its incorporation into the bankrupt act, the decisions of the courts of England and of Massachusetts should be carefully considered. It may be fairly argued that the decisions of the English courts, in cases claimed to be governed by such rule, must be considered as very important if not conclusive authority upon the proper construction and effect to

be given to the rule prescribed by the bankrupt act; and that the decisions of the supreme judicial court of Massachusetts upon the construction and effect of substantially the same language in the insolvent law of that state should have equal weight. The cases of Meed v. Nelson, 9 Gray, 55; Cabot Bank v. Bodman, 11 Gray, 134; and Provident Institution of Savings v. Stetson, 12 Gray, 27, are apparently in direct opposition to the position here taken by the counsel of the opposing creditors; and the case of Midland Banking Co. v. Chambers, L. R. 7 Eq. 179, and S. C., 4 Ch. App. 398, cited by him in support of his argument, appears to me, upon a hasty examination of the opinions reported to have been given in the vice-chancellor's court, and by the lords justices upon the appeal, to be an authority against his position rather than one upon which he can rest in its support. In the cases in Massachusetts the right of the creditor to prove for his whole debt was affirmed, and in the English case the decision was, in effect, in favor of the right; although the right of the surety to have the dividend applied in extinguishment of his liability was denied, for the reason that under the construction given to the contract of guaranty, it was held that the surety had thereby relinquished such right—a right which, it is supposed, would otherwise have been maintained. See, also the cases cited in the case of Midland Banking Co. v. Chambers, ubi supra; and In re Plummer, 1 Phil. Ch. 56.

It does not appear, from the reports of the cases in Massachusetts, that the question whether the creditor, in those cases, had not the security held by the surety, because the surety held such security as a trustee for the benefit of the creditor, was considered by the court; or whether it was supposed that the question was affected by the fact that the courts of Massachusetts exercised only a limited and imperfect equity jurisdiction. Surely, the reason given for the decision in Meed v. Nelson, viz., that "White (who held the security) was a mere accommodation indorser, and might never be called upon, and in that case the mortgage would never become a charge upon the estate of the insolvent," is not a very satisfactory one, as the question arose in a case where the principal debtor had been declared insolvent, and his estate was then being administered by the court of insolvency, and it appeared that the proof was made by the creditor at the request of such accommodation indorser.

As it appears from the papers before me, that the bankrupts' estate will, in any event, pay a very large percentage of their debts; and as it is stated by the brief of the counsel for the opposing creditors that the amount of such debts secured by the indorsement of Judge Comstock is over $95,000, and that unsecured debts to the amount of $97,000 and upwards have been proven, it is not likely that the party against whom this court may ultimately decide the main question will fail to "take the chances of an appeal." And as the defects in the proofs of debt, as the case now stands, would probably prevent a final decision of the most important question in the case until there shall be other papers and facts presented on the part of the opposing creditors, as well as on the part of the claimants, and the parties may, by a proper stipulation and an agreed state of facts, obtain an early decision here, and a review of that decision in the circuit court, at a very moderate expense, I shall now only stay proceedings in respect to a dividend upon such disputed claims, and in respect to any dividend upon the other claims proved which shall interfere with the rights of the claimants if their claims shall be ultimately established, in proper papers on which to found an order to expunge the order to give time to the opposing creditors to present more formal and proper proof of their debts, and more formal and proper proof of the debts in controversy; and also to give to the claimants time and opportunity to take such measures, if any, as they may be advised to take in order to obviate any formal or other objections to the proof of their debts heretofore made, or otherwise establish their rights.

After thus disposing of the pending application, it is proper to say that the cases decided in England and Massachusetts have not convinced me that the debts referred to can be proved. If the security had been given to a trustee, under an express trust for the benefit of such creditors, it would seem that in a court of bankruptcy, which, in the absence of express legal provisions, must, as a general rule, marshal the assets of a bankrupt upon the established principles of equity, as determined by the courts exercising equity jurisdiction, there would be little reason for holding that the case was not within the spirit and intent of the provision alluded to in Re Ruehle [Case No. 12,113]; and in equity it can make no difference that the trust is created and defined by law instead of being written out by the parties. If the surety had paid the debt of his principal before the proceedings in bankruptcy were commenced, or had proved it as a contingent debt and paid it after adjudication, it would seem to be clear that he could only have a dividend upon the balance of his debt after the proper application of the proceeds of his security; and there is no apparent reason why the failure of the surety to fulfill his obligation to the creditor, either in pursuance of an arrangement between them or otherwise, should operate to the prejudice of the unsecured creditors. The whole policy and purpose of the bankrupt act is founded upon the well-established doctrine of the courts of equity, that "equality among creditors is equity;" and the provisions in question should be so construed as to carry into effect such general purpose of the act. It is barely possible that the creditors whose right

to prove their debts is now opposed, may be required to litigate other complicated and difficult questions in case their claims are within the statutory provisions on which their proofs of debt have been opposed. It may, possibly, be insisted that, by proving their debts as unsecured debts, they have released the security which they have under the mortgage and pledge made to Judge Comstock; and, if such is the effect of their proof, they have, of course, thereby released the liability of the accommodation indorser. Indeed, the case is one of such complication and difficulty, that it is passing strange that where such large interests are involved, so little attention has, apparently, been bestowed upon them—especially in the preparation of the papers upon which it has been attempted to present the questions in controversy for decision.

See In re Alexander [Case No. 161]; In re Ellerhorst [Id. 4,381]; Ex parte Farnsworth [Id. 4,672].

[For final decision, see Case No. 7,242.]

## Case No. 7,241.

In re JAYCOX et al.

[7 N. B. R. 578.] [1]

District Court, N. D. New York. Feb. 19, 1873.

BANKRUPTCY—PROOF OF DEBT—APPLICATION TO EXPUNGE—INVALID NOTES.

1. An application was made to expunge the proof of debt of the People's Safe Deposit and Savings Institution, on certain notes discounted for the bankrupts in its regular course of business. *Held*, that the notes in question were not valid, for the reason that the said savings institution was not authorized by law to employ its funds in discounting commercial or accommodation paper, and that the acts of its officers in discounting the notes upon which its claim is based were in direct violation of the provisions of the restraining laws of the state.

2. An order was entered expunging the proof and rejecting the claim as presented, but without prejudice to the right of the assignee in bankruptcy of the said savings institution to make proof of a claim or debt for money loaned to the said bankrupts.

[In the matter of John M. Jaycox and John A. Green, bankrupts.]

HALL, District Judge. This is an application to expunge the claim or proof of debt of the People's Safe Deposit and Savings Institution of the State of New York. Upon a re-examination of such claim, in pursuance of the thirty-fourth general order in bankruptcy, before the register in charge, it appeared to him that the claim ought to be expunged. This was objected to by the claimant, and thereupon an issue was certified into this court for determination. The proof of the claim to the amount of twenty-seven thousand seven hundred and seventy-two dollars and twenty cents, besides interest, is contained in a deposition made on the 4th day of May, 1872, by the then cashier of the claimant. In this deposition it is declared that the statement of the account between the said corporation and the said bankrupt, hereto annexed, is "a full, true and complete statement of account between the said corporation and the said bankrupt;" but there is not, in the body of the deposition, any statement of the amount, character or consideration of the indebtedness. There is no statement of account annexed to the deposition, but the paper annexed contains a list of twelve notes, of five different dates, between the 14th of January and the 2d of April, 1872, amounting, in the aggregate, to the sum of twenty-seven thousand seven hundred and seventy-two dollars and twenty cents. This list shows that notes were due at different times, from seventy-two to eighty-four days after their respective dates, and were all endorsed by one or more endorsers. The list purports in its heading to be a list of "Notes of Jaycox & Green, Owned by the Claimant," and at the bottom of the list is the following: "The above being all for money loaned upon the notes above mentioned." There is nothing in the deposition, or paper annexed, to show how much money was loaned upon such notes, or when, or to whom; nor do they show that the money so loaned was loaned by the claimant, except, as it may possibly be inferred from the statement in the heading of the list, that the notes are owned by the claimant, and the statement above copied, that they were all for money loaned, &c. The register's report of the proceedings before him states, that from the evidence, the following facts were established: (1) The People's Safe Deposit and Savings Institution of the State of New York, is a corporation created under and by virtue of the provisions of an act of the legislature of the state of New York, entitled, "An act to incorporate the People's Safe Deposit Company of the State of New York," passed May 14, 1868. See Sess. Laws 1868, p. 1839. (2) That the People's Safe Deposit and Savings Institution of the State of New York, had one banking office in Syracuse and one in Utica. (3) That from April, 1871, until September, 1872, and until the appointment of a receiver for said corporation, Patrick Lynch was cashier of the banking office of said corporation at Syracuse. (4) That during the time said Lynch was cashier as aforesaid, the People's Safe Deposit and Savings Institution of the State of New York, did a regular banking business, except it did not issue any circulation of its own; and also did a savings bank business. That the entire business of the corporation at Syracuse was kept in one set of books. That during that time, this corporation, at Syracuse, kept a large number of merchants' accounts, discounted largely for merchants; and that, at the time of the appointment of receivers, the corporation held, of discounted commer-

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cial paper, between six and seven hundred thousand dollars, at the Syracuse office. (5) That Jaycox & Green, prior to April 16, 1872, and up to that date, were merchants at Syracuse, doing a very large business, and that during the time Lynch was cashier of the People's Safe Deposit and Savings Institution of the State of New York, discounts to the amount of several hundred thousand dollars were granted Jaycox & Green by this corporation, upon their (Jaycox & Green's) paper. (6) That at the time of the filing of the petition in bankruptcy by Jaycox & Green, the People's Safe Deposit and Savings Institution of the State of New York, held of paper of Jaycox & Green, with Judge Comstock's endorsements, which it had discounted for Jaycox & Green, twenty-seven thousand seven hundred and seventy-two dollars and twenty cents; and it had also procured three notes of Jaycox & Green, with Judge Comstock's endorsement, which it had discounted to be re-discounted by the Albany City Bank, which the People's Safe Deposit and Savings Institution of the State of New York, have since taken up and now own, said notes being for two thousand five hundred dollars each, making the sum of seven thousand five hundred dollars aside from, and in addition to the sum of twenty-seven thousand seven hundred and seventy-two dollars and twenty cents above mentioned. The register further reported, that from the undisputed evidence in the case, it appeared that the People's Safe Deposit and Savings Institution of the State of New York carried on a regular banking business at Syracuse during the time in which Mr. Lynch was cashier, and that all of the paper of Jaycox & Green held by it, was paper discounted by it in its regular course of business.

The conclusions of fact reported by the register, as above stated, are fully supported by the evidence returned, and the issue made between the representatives of the claimant, (now an involuntary bankrupt) of the one part, and the creditors and assignee of Jaycox & Green, of the other part, is purely one of law, depending, to a large extent, upon the provisions of the act incorporating the People's Safe Deposit and Savings Institution of the State of New York, and the laws of the state generally known as the restraining acts. This act of incorporation contains provisions not ordinarily found in the charters of savings banks, or in those of safe deposit companies. Some of them are of doubtful interpretation; possibly because they were hastily and carelessly drawn, or, possibly, because they were deliberately penned with the intention of giving to the corporation, by language, the full force of which was not likely, in the hurry of legislation, to be appreciated by those voting for the bill, extraordinary and unusual powers which would not have been knowingly and deliberately conferred by the legislature. The act of incorporation declares that the capital stock of the corporation shall be two hundred thousand dollars, with power to increase, from time to time, to two million dollars, and it makes other general provisions in respect to the organization of the corporation, and the conduct of its business. Its general purpose, powers and privileges, as well as the liabilities and restrictions to which it was made subject by the express provisions of its charter, will best be shown by giving at length the 5th, 6th, 7th, 11th, 13th, and 14th sections of the act, which are in the following words.

"Sec. 5. The business and general object of the said corporation shall be to take and receive on deposit, as bailee for safe keeping and storage, coin, bullion, gold and silver-plate, jewelry, United States bonds, and other bonds, stocks or securities, specie and other valuables and personal property, upon such terms and for such compensation as may be agreed upon by said corporation and the bailors respectively of any such property as aforesaid. The said corporation shall be authorized to receive money from any estate, company, association, person or persons, on deposit, and give a receipt, certificate or book therefor to the party or parties making such deposits, and which shall be subject to their order only, and any rate of interest, not exceeding that allowed by law, shall be paid for such deposits.

"Sec. 6. The said corporation may make such special regulations in reference to deposits as shall best aid the depositors and parties interested, by accumulating and increasing the same, allowing and receiving such rate of interest therefor, not greater than hereinbefore mentioned, as may be agreed upon. May negotiate United States stocks and bonds, the bonds and stocks of this and other states, also the bonds of cities, counties and towns of the said other states and corporations, and associations legalized by the legislature of this and other states, and the statute laws thereof respectively.

"Sec. 7. The said corporation shall have power to purchase and hold all such real and personal estate as may be necessary and convenient for the accommodation and transaction of its business, to take and hold any real estate as security for, and in payment of loans debts due or to become due to said corporation, and to purchase any real or personal estate at any sale, to enforce its securities, or the payment of debt due, made by virtue of any process, mortgage or deed of trust, and to hold said property, or to sell and convey the same, or any part thereof, at such price and under such conditions as the directors or officers may think proper."

"Sec. 11. It shall be the duty of the board of directors to invest the capital stock of the said corporation, and to keep the same invested in good securities; and it shall be lawful for the same to make such investments of its capital and of the deposits and

funds accumulated by its business, or any part thereof, in bonds and mortgages on unencumbered real estate, worth at least fifty per cent. more than the sum loaned thereon, and also in the public securities or stocks of any state, or of the United States, or in the stocks and bonds of any city, county or town, corporation or association or otherwise, of any state or the United States, in manner and form as the directors and officers of said corporation may think proper. Said directors and officers shall be, and are hereby authorized to conduct the business and affairs of said institution, in such manner and form as in their discretion shall be proper and mutually beneficial to the parties interested and doing business therewith, not inconsistent with the conditions of this state or any state, or of the United States."

"Sec. 13. The stockholders of the said corporation shall be severally liable for all debts and liabilities of the said corporation, to an amount equal to the amount of the stock held and owned by them respectively, which liability shall be in addition to their liability to pay in full the stock subscribed for or purchased by them.

"Sec. 14. Said corporation created under this act shall possess the general powers and privileges, and be subject to the liability and restrictions contained in the title third, of chapter eighteen, of the first part of the Revised Statutes, so far as applicable thereto."

The validity of the notes upon which the claim and proof of debt now in controversy are based, depends upon the question whether the corporation, under the provisions of the act of incorporation hereinbefore stated, was authorized by law to employ its funds in discounting commercial or accommodation paper as a part of its regular business; in other words, to carry on the business of a bank of discount, as well as the proper business of a savings bank, because by the then existing laws of the state, and which are still in force, it was provided (section 3, tit. 20, c. 20, pt. 1, Rev. St.) that "no incorporated company, without being authorized by law, shall employ any part of its effects, or be in any way intrusted in any fund that shall be employed for the purpose of receiving deposits, making discounts, or issuing notes or other evidences of debt to be loaned and put into circulation as money," and by section five of the same title, that "all notes and other securities for the payment of any money, or the delivery of any property, made or given * * * to secure the payment of any money loaned or discounted by any incorporated company or its officers, contrary to the provisions of the third section of this title," (the section just copied) "shall be void." And section 4 of title 3 of chapter 18 of the first part of the Revised Statutes to which the corporation is expressly made subject by the fourteenth section of the act of incorporation, provides that "no corporation created or to be created, and not expressly incorporated for banking purposes, shall, by any implication or construction, be deemed to possess the power of discounting bills or notes, or other evidences of debt," etc.

So far as the validity of the notes referred to in the proof of debt and statement annexed, on which the claim in controversy now rests is concerned, the question is not one of public policy, or of the effect of a statute which simply prohibits the business of discounting, for the legislature has added to the prohibition an express provision that the notes and securities taken in violation of the prohibitory enactment shall be void. It is, therefore, only necessary, in respect to the question of such validity, to determine whether the claimant was authorized by law to carry on the business of discounting bills and notes, and to employ its funds and effects therein, for it was in the regular course of its long continued business of that character that such notes were discounted. In determining the extent of the authority intended to be given by the provisions of the act of incorporation, it must be borne in mind that the constitution of this state provides that "the legislature shall have no power to pass any act granting any special charter for banking purposes," (Act 8, § 4,) and it should not be held, except upon the most conclusive evidence, that the legislature intended to confer, upon the corporation they were about to create, powers which they were prohibited from granting in a special charter. And if such was the intention of the legislature, and such intention could not be carried into execution without a violation of the constitutional provision just referred to, the provisions of the charter, so far as they conflicted with such constitutional provisions would necessarily be held to be void. But no such intention can be imputed to the legislature. Savings banks are not deemed within the constitutional prohibition, and such institutions, as well as the so-called safe deposit companies, have been properly created by special charters.

The arguments in support of the authority, under the act of incorporation, to carry on the business of making discounts, are founded mostly upon the facts that the act requires a capital stock of at least two hundred thousand dollars, while no stock is required in the case of a savings bank proper; that the stockholders are made personally liable for the debts of the corporation to an amount equal to their stock, while no personal liability of that character is ever imposed upon the trustee or officers of a savings bank, and the allegation, that by force of the provisions of the eleventh section of the act, the directors of the corporation have full authority, especially in consequence of the use of the words "or otherwise" in the first clause, and the broad language of the concluding clause of the section, which, it is said, gives them an almost unlimited discre-

tion in respect to the business and affairs of the corporation, to carry on the business of making discount. The business of a safe deposit company, which is given the first, if not the most prominent place, alike in the title and in the body of the act, requires a capital, and renders the personal liability clause entirely appropriate, if not important, to the success of that branch of the business of the corporation; and certainly both the capital and personal liability were properly provided for in view of the brokerage business it was authorized to carry on under the concluding sentence of the sixth section of the act. Very little, if any, weight should therefore be given to the arguments founded upon the provisions for capital and for the personal liability of the stockholders.

It is insisted that by the eleventh section of the charter, the directors are authorized to invest the capital, and deposits, and funds of the corporation in bonds and mortgages, public securities, or otherwise, and the argument in favor of the authority claimed, chiefly rests upon the words "or otherwise," and the language of the next clause which, it is said, gives to the directors a discretion limited only by the constitutions (not the laws) of this state or any state, or of the United States. If the power of the legislature was unlimited by the constitution, and the court was not precluded by the provisions of the Revised Statutes above quoted from holding that the corporation could take banking powers by implication or construction, the language relied upon would not be held to authorize the corporation to engage in the business of discounting bills and notes, with a capital of two millions of dollars, while the provisions of the restraining acts remain in force, or to sell lottery tickets, or do any other act or acts specially prohibited by the laws of the state. To abrogate all prohibitory laws of the state, which might otherwise have been binding upon the corporation and its officers, and to give them power to do everything not prohibited by the constitution of the United States or of one of the states which they might deem it discreet to do in the conduct of their business, even when prohibited by general laws applicable to all other corporations, would require other and different language, and language so unequivocal and so positive as to exclude all possible doubt of the legislative intention.

The argument founded upon the use of the words "or otherwise," in the eleventh section, is entitled to consideration, but is not deemed sufficient to maintain the alleged authority of the claimant. The authority given is to make investments of its capital and of the deposits and funds accumulated by its business "in bonds and mortgages on unencumbered real estate, worth at least fifty per cent. more than the sum loaned thereon; and also in the public securities or stocks of any state, or of the United States, or in the stocks or bonds of any city, county, or town, corporation or association, or otherwise, in manner and form as the directors and officers of said corporation may think proper." To "make investments," in the ordinary and usual acceptation of the term, is a very different thing from the discounting of commercial or accommodation paper having but a short time to run; the first usually denoting the purchase or taking of something of a permanent nature, and the latter being the making of loans upon paper maturing at short dates, and generally the more profitable the sooner the money loaned is to be returned. In addition to this, the character and description of the securities or property in which only the corporation would be entitled to invest, if the words "or otherwise" had been omitted, show that it was to instruments of a permanent character that the provision was intended to apply. If by the words "or otherwise" the legislature intended to give to the directors an entirely unlimited discretion in the disposition of the capital, deposits and funds of the corporation, it was clearly unnecessary to specify, as they had already done, many different classes of securities in which they might invest. Again the words "or otherwise" are so placed that they seem to apply to the parties whose stocks or bonds might be taken, rather than to the nature of the loans or transactions, or the form of the securities. Literally, the words enlarge indefinitely the right to invest in stocks or bonds by not limiting the right to those made by the corporations and associations before named, but extending the right to all stocks and bonds issued by any party who is "of the United States or of any state," in contradistinction to the stocks or bonds of foreign states or their citizens. But aside from all this, it is incredible that the legislature, if it had intended to depart from the settled policy of the state in respect to the business of making discounts by corporations without express authority of the law, which had been rigidly maintained for more than half a century, and to repeal the restraining act, so far as this corporation was concerned, would have expressed such intention in such uncertain and confused language and left the repeal to a doubtful implication lurking in language apparently introduced for other purposes.

The authority given by the general language of the concluding clause of this eleventh section, and the authority given in the sixth section to "make such special regulations in reference to deposits as shall best aid the depositors and parties interested by accumulating and increasing the same, allowing and receiving such rate of interest therefor, &c., may well be held to authorize them to deposit such moneys in banks or trust companies or to loan them in any other form not prohibited by law, but cannot be held to repeal by implication, in respect to this particular corporation, the provisions of the restraining act. In short, it is very clear that

the claimant was not authorized by law to employ any part of its funds or effects for making discounts; that the acts of its officers in discounting the notes upon which its claim is based were in direct violation of the provisions of the restraining laws of the state, and that such notes are therefore void. An order will be made expunging the proof and rejecting the claim as now presented; but, for reasons hereafter stated, it must be without prejudice to the right of the assignees in bankruptcy of the People's Safe Deposit and Savings Institution of the State of New York to make proof of a claim or debt for money loaned to Jaycox & Green, or had and received by them for the use of the corporation or its assignees in bankruptcy, or of any other claim or debt other than upon notes or securities taken or received on the making of discounts in violation of the restraining act.

It appears by the records of this court that such corporation has been adjudicated a bankrupt, and that assignees of its estate have been appointed in bankruptcy proceedings, which are still pending. Upon the argument in this case it was urged that even if the securities taken upon discounts of the notes of Jaycox & Green were void under the restraining acts, the assignees in bankruptcy were entitled to recover the money loaned; and that, therefore, the claim of the corporation should not now be expunged. This view of the case has not been sustained. There is no proof showing the amounts loaned, or the time when the loans were made. The only proof approaching the form of the proof of debts required under the bankrupt act which has been made, is the proof of an indebtedness to the claimant as the owner of negotiable paper; not an indebtedness for money lent and advanced to the bankrupts, or by them had and received to the claimant's use; and, therefore, it has been decided that the proofs heretofore filed must be expunged.

The question of the right to prove a claim for the money loaned or advanced upon the alleged discount is entirely different from the one that has been determined, and the papers and issue upon which the decision has now been made are not in proper form for a final decision of the question which may be presented on proof of a claim for money loaned and advanced to the bankrupts, or by them had and received to the use of the claimants or their assignees in bankruptcy.

In Utica Ins. Co. Cases, 19 Johns. 1, 8 Cow. 20, 3 Wend. 296, and 8 Wend. 652, it was held that under the provisions of the restraining acts, the lending of money was not declared to be void, and that, therefore, whenever money had been lent it might be recovered, although the security itself was void; and there is, to say the least, so much reason to believe that a claim for the money loaned may be sustained by the assignees of the claimant that they ought to be permitted to present the question under proper proofs for a final decision. In addition to the view of the case thus presented, under the authority of the Utica Ins. Co. Cases, there is another ground on which the assignees of the claimant may possibly be entitled to prove a claim, even if the contract and acts of lending the money advanced to the bankrupts are void. The claimant is now in bankruptcy, and its assignees, for all beneficial purposes, represent the corporation and its creditors; and such assignees, like receivers under the state statutes, should be authorized to assert the rights of the creditors and stockholders when affected by the fraudulent or illegal acts of the corporation or of its officers, and to recover the value of the property or money obtained from the corporation by the bankrupts under a void contract through which no title to the property or money obtained could pass to the bankrupts. Gillett v. Moody, 3 Comst. [3 N. Y.] 479. In case of a fraudulent or illegal disposition of the property of a corporation by its directors or officers, its stockholders and creditors should not be confined to their remedy against the directors or officers alone, but the transfer being illegal and void they should be allowed their remedy against the party to whom the transfer has been made. Under the authority of the case just cited and Gillet v. Phillips, 3 Kern. [13 N. Y.] 114; Nathan v. Whitlock, 9 Paige, 152; Talmage v. Pell, 3 Seld. [7 N. Y.] 328; and other similar cases,—the assignees in bankruptcy are entitled, independently of the doctrine of the Utica Ins. Co. Cases, to have the right reserved to present their claim for the moneys advanced to Jaycox & Green in such form as to them shall seem most appropriate, in order that their claim may, in such form, be presented for a final decision.

[The assignees of the bank appealed (Case No. 7,237), and a final decision was rendered (Id. 7,238).]

## Case No. 7,242.

In re JAYCOX et al.

[8 N. B. R. 241.] [1]

District Court, N. D. New York. March 13, 1873.

BANKRUPTCY—PROOF OF DEBT—SECURED CREDITORS—IGNORANCE OF FACT—PRACTICE.

1. A held a mortgage on the property of the bankrupts, to secure him as endorser of their paper, to a large amount. The holders of this paper proved their claims on their respective notes, against the estate of the bankrupts, as debts for which they held no security, they having no knowledge of the mortgage above mentioned to A, when they received the notes bearing his endorsement. *Held*, that the security was not personal to the surety, A, nor intended for his personal indemnity only, for the reason that the mortgage was conditioned for the payment of the endorsed notes as well as for the indemnity of the indorser; that it makes no difference whether the trust is created and defined by law, or written out by the parties; that the

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claimants in this case, before they proved their debts, had such a lien or security as prevented them from proving their claims for the whole amount as unsecured debts, without releasing their equitable interest in the mortgage before referred to. When, however, such proof was made through ignorance or mistake, a creditor ought to be allowed to withdraw his proof and prove as a secured creditor, but after the taking of a dividend upon his whole debt, as an unsecured creditor, to the prejudice of the general creditors, he must be held to his election.

[Cited in Re Holbrook, Case No. 6,588; Re Pierce, Id. 11,140; Ex parte Morris, Id. 9,823; Mathews v. Abbott, Id. 9,275; Re Hyndman, 5 Fed. 709; White v. Crawford, 9 Fed. 372; Curry v. McCauley, 11 Fed. 368, 369; Re Baxter, 12 Fed. 75.]

[Cited in Pauley v. Cauthorn, 101 Ind. 93; Nichols v. Smith, 143 Mass. 462, 9 N. E. 810.]

2. As the questions discussed were not free from difficulty and doubt, no costs will be allowed to either party.

[This was a suit, in which an interlocutory decree was rendered (Case No. 7,240), by R. and D. Stewart and others, unsecured creditors, to expunge the proof of debts made by the Third National Bank of Syracuse and others, secured creditors, in the matter of John M. Jaycox and John A. Green in bankruptcy.]

The question whether the holders of the notes of the bankrupts, endorsed by Judge Comstock, and which are embraced within the terms of the mortgage of the real estate or of the pledge of the personal property of the bankrupts made to the endorser as security to him that such notes should be paid when due, or he be indemnified against loss by reason of their non-payment, are entitled to prove their debts in full as unsecured claims, and which was heretofore, somewhat, discussed in this court [Case No. 7,240], was again argued and submitted upon a special case stated, under the sixth section of the bankrupt act [of 1867 (14 Stat. 520)], which case is as follows, viz.:

"Whereas, R. and D. Stewart and various other parties are general and unsecured creditors of the said bankrupts to a large amount; and whereas, the Third National Bank of Syracuse, and other persons and corporations named in Schedule A, hereto annexed, are also creditors of said bankrupts as the holders of certain promissory notes made by said bankrupts and endorsed by George F. Comstock for their accommodation, the said notes being also set forth in said Schedule A; and whereas, the said persons and corporations owning and holding the said promissory notes, heretofore, in due form, proved the same before the register in bankruptcy, D. F. Gott, Esq., at Syracuse, within the said district, as debts of the said bankrupt firm without allowance or deduction on account of any security held, or supposed, or alleged to be held by them; and whereas, the said R. and D. Stewart and others, unsecured creditors as aforesaid, claim and insist that the said the Third National Bank of Syracuse and others, holders of the said endorsed promissory notes, are not entitled to vote at the meetings of creditors called, or to be called, or held in this matter, or to share in the dividends arising out of the general estate of the bankrupts, and the said the Third National Bank and others holding the said notes insist upon the contrary proposition, and claim that they are so entitled; and whereas, it is intended, on behalf of said unsecured creditors, to make a motion in this court that the proof of debts made by the said Third National Bank and others, holders of said notes, be expunged, the said R. and D. Stewart and other creditors at large being now represented by Wm. C. Ruger, Esq., and the said Third National Bank and others, holders of said notes, being now represented by George F. Comstock, Esq., and this stipulation is made between them for the purpose of presenting the facts upon which the said motion is to be decided: Now, therefore, it is stipulated and agreed, that on the 16th day of April, 1872, the said Jaycox & Green, a wholesale grocery firm in Syracuse, composed of John M. Jaycox and John A. Green, filed their petition, both as a firm and as individuals, to be declared bankrupts, and that on the 18th day of April, 1872, they were, by the order and decree of this court, duly adjudged to be such bankrupts; that the first meeting of creditors was held at the office of D. F. Gott, Esq., of Syracuse, the register in charge of the case, on the 4th day of May, 1872; that at such meeting the creditors voted for assignee; that the said the Third National Bank and some other parties holding the said notes so endorsed by George F. Comstock then proved their full debts as represented in such notes, and as creditors some of them voted for Frank Hiscock to be assignee; that without their votes he would not have had a majority either in numbers or amount of said creditors; that William C. Ruger, Esq., representing the said R. and D. Stewart, unsecured creditors, and others, unsecured creditors, whose debts had been each and every of them duly proved as general creditors of said estate, on that occasion objected to the right of the said holders of the endorsed notes so to prove their debts, and to vote; that such objection was made on the ground that George F. Comstock, the endorser, as aforesaid, of said notes, had taken from the bankrupts and still held, a mortgage on their real estate, which mortgage is hereafter set forth; that the fact that such mortgage had been taken and was still held was then duly proved as the ground for such objection; that the register aforesaid overruled the objection, received the proof of said notes as debts against the bankrupts, and admitted the votes of the corporations and persons holding the same, and that said register, at the close of the canvass, decided that said Frank Hiscock had received the votes of a majority

of the number of creditors, and a majority in the amount of their debts. He, thereupon, certified the proceedings and questions before him to this court, and recommended the said Frank Hiscock to be assignee, and this court confirmed such recommendation. The said Frank Hiscock, as such assignee, thereupon took possession of the estate of the bankrupts and is still in possession. That a second meeting of the creditors of said bankrupts was duly called and was held at the office of said register on the 23d day of August, A. D. 1872, and was attended by the said R. and D. Stewart and others, unsecured creditors, and their counsel Wm. C. Ruger, Esq., also by the said 'the Third National Bank and others, holders of the said notes,' and by George F. Comstock, their counsel; that thereupon Mr. Ruger objected to the right of the corporations and persons, holders of said notes, to vote or to share in any dividend or dividends to be made, which objection was made upon the ground that they had securities for such debts as herein set forth; that such meeting of creditors was then adjourned; that said register certified the proceedings to this court, and this court thereupon, on the 20th day of September, 1872, made an order staying proceedings before the register in order that this motion to expunge the proof of said notes or debts might be made, and that the meeting of creditors so adjourned as aforesaid has not again been reconvened. It is further stipulated and agreed, that Schedule A, hereto annexed, is a true statement of the promissory notes aforesaid made by said bankrupt firm and endorsed as aforesaid by George F. Comstock, for the accommodation of said firm, embracing the date and amount of each note, the place where payable, the time of maturity, and the names of the persons and corporations holding the same. For all the purposes of this motion it is also admitted that said Comstock was duly charged as such endorser. The said notes have not been paid, nor either of them, nor any part thereof, either by the makers or endorser. It is also stipulated and agreed, that before the said notes were made or endorsed, to wit: on or about the fifth day of December, A. D. 1871, the said John M. Jaycox and John A. Green, on the requirement of said George F. Comstock, and in view of his endorsements to be made for them, executed with their wives, and acknowledged and delivered to said Comstock, a mortgage on their partnership and individual real estate, including vacant city lots owned by them as tenants in common in and near Syracuse, a true copy of which mortgage (omitting the part descriptive of said real estate) is hereto annexed, marked "B"; that no bond or other obligation was taken with said mortgage; that such mortgage was taken without the participation or knowledge of any persons or corporations discounting or receiving the notes of said firm with the endorsement of said Comstock; that the same was duly recorded in the office of the clerk of the county where the said real estate is situated on the 13th day of March, 1872, and is still held by the said Comstock. After the giving of said mortgage the said Comstock, from time to time, endorsed and continued to endorse the notes of said bankrupt firm, but the notes mentioned in said Schedule A are the only notes so endorsed which the said bankrupts had not paid at the time of filing their petition in bankruptcy, as aforesaid. The said notes were discounted by the parties now holding the same without knowledge on their part of the existence of said mortgage. It is further stipulated and agreed, that on or about the 15th day of January, 1872, the said George F. Comstock endorsed four notes of the said bankrupt firm of two thousand five hundred dollars each, on the particular security of ten thousand dollars of the stock of the Delano Iron Works Company pledged to him at the same time by the said firm; two of such notes are named in the said Schedule A, as dated January 15th, 1872, and held by Williamson & Co. The other two were taken up by said bankrupts at maturity, but were renewed by two other notes of the same amount also mentioned in said schedule as dated April 1st, 1872, due June 21st and 22d, 1872, and held by the Peoples Savings Bank. The said George F. Comstock still holds the said stock as such security. The pledge of such stock was unknown to the parties discounting said four notes. It is further stipulated and agreed, for the purposes of this motion, and not otherwise, that the real estate so mortgaged is of the value of fifty thousand dollars over and above all prior liens, and that the Delano Iron Works Company's stock so pledged is of the value of five thousand dollars. It it further stipulated and agreed, that the persons and corporations, holders of notes of the said bankrupts endorsed as aforesaid, whose names are mentioned in and subscribed to the instrument of release, a true copy of which is hereto annexed marked 'C,' did, on or about the day of the date thereof, duly execute and deliver to the said Frank Hiscock, assignee in bankruptcy as aforesaid, the said original instrument, the date, tenor, terms and effect of which will appear by the copy so annexed. The counsel for said unsecured creditors, however, objects to the legal admissibility and effect of said instrument. This statement is made and agreed on as a special case under the sixth section of the bankrupt act, and it is further stipulated and agreed that any party to this motion may appeal from the decision to be made thereon. Dated November 12, 1872."

The mortgage mentioned in the case was in the form of a grant, with a condition, in the following words: "This grant is intended as a security that the said John M. Jaycox and John A. Green, their executors and administrators, shall well and truly pay or

cause to be paid all the notes, bills, and drafts made by the firm of Jaycox & Green, heretofore endorsed by the said Comstock, or which shall hereafter be endorsed by him, as the said notes, bills or drafts are or shall become due to the holders thereof, and shall also well and truly pay unto said Comstock, his executors, administrators and assigns all sums of money which he shall be obliged to pay or shall pay on account of any liability whatsoever for the said firm of Jaycox & Green, and shall indemnify him against all such liability, and against all cost, damage and expense arising on account of any such liability, provided, however, that the sum total of any such notes, bills, drafts and liabilities shall not at any one time exceed seventy-five thousand dollars, according to the conditions of a bond this day executed and delivered by the said John M. Jaycox and John A. Green and the said party of the second part, and this conveyance shall be void if such payment be made as herein specified. And in case default shall be made in the payment of the principal sum hereby intended to be secured, or in the payment of the interest thereof, or any part of such principal or interest, as above provided, it shall be lawful for the party of the second part, his executors, administrators or assigns, at any time thereafter, to sell the premises hereby granted, or any part thereof, in the manner prescribed by law, and out of all the moneys arising from such sale to retain the amount then due for principal and interest together with the costs and charges of making such sale, and the overplus, if any there be, shall be paid by the party making such sale on demand to the said John M. Jaycox and John A. Green (in the amount to which they are respectively entitled by ownership of said property) their heirs or assigns."

The release (Schedule C) referred to in the case was in the following terms, (omitting names, &c.,) viz.: "The parties who sign and execute this instrument, to wit, * * * being severally the holders and owners of certain promissory notes made by the firm of Jaycox & Green of Syracuse, bankrupts, which said notes are endorsed by George F. Comstock, and the said several parties claiming severally the right to vote in the proceedings in bankruptcy, and to share the dividends accruing from the estate of said bankrupts, as general creditors in respect to said notes, do, therefore, and in consideration of one dollar to each of them severally paid, release, surrender and convey unto Frank Hiscock of Syracuse, assignee in bankruptcy of the said Jaycox & Green, all special securities, whatsoever, which they, the said parties or either of them, have or ever have had or claimed to have, upon or in any wise affecting the real or personal property of said bankrupts, or either of said bankrupts, or any part thereof, especially any mortgage or mortgages, pledge or pledges, and all liens and trusts of every name and nature upon or in any manner affecting such property or any part or portion thereof, whereby any preference or priority of payment in respect to the said promissory notes or either of them was, or could be, or was intended to be secured, whether any such mortgage, pledge or lien was executed or given directly to the undersigned parties or any of them, or to the said George F. Comstock as endorser for his security or indemnity. It being understood that this release and surrender are not in anywise to operate as a release of the debts represented in and by the said several promissory notes, or against the estate of the said bankrupts, or either of them, and are, moreover, without prejudice to any pledge or security held by any of the undersigned parties for debts against the said bankrupts which are not herein above referred to, and are not represented by the promissory notes endorsed as aforesaid. And it being also further understood that this release and surrender are not in any manner to release or affect the right of the said George F. Comstock to enforce a certain mortgage bearing date the 5th day of December, 1871, on the real estate of the said bankrupts, executed by them to him to secure and indemnify him against the said endorsements, the said mortgage having been given to him without our knowledge."

The questions arising upon this special case were argued at length, and with great ability, by the counsel named below.

Mr. W. C. Ruger, for opposing creditors, and Mr. Hiscock, assignee in person, cited the following authorities: 1 Ves. Sr. 348; 3 Hare & W. Lead. Cas. Eq. 615, and notes; 4 N. Y. 314; 1 Eq. Cas. Abr. 93; 9 Paige, 432; 11 Ves. 22; 18 Johns. 505; 4 Kent, Comm. 307; 1 Story, Eq. Jur. 638; 7 Paige, 615; 2 Sandf. Ch. 166; 3 Sandf. Ch. 428; 8 Metc. [Mass.] 19; 9 Allen, 175; 19 Ves. 345; 3 Mont. & A. 269; Mont. Bankr. Cas. 25; 1 Deacon, 279; L. R. 7 Eq. Cas. 179; L. R. 4 Ch. 398; Ex parte Farnsworth [Case No. 4,672]; 9 Gray, 55; 15 Johns. 358; 15 N. Y. 532; 5 Barb. 156; 13 N. Y. 78; 3 Barb. 429; 4 Gray, 553; 16 Mass. 308; 2 Hare & W. Lead. Cas. Eq. 305; 4 Md. Ch. 75; 18 Ga. 65; 2 Vern. 435; Talb. 220; 2 P. Wms. 416; 3 P. Wms. 323; 1 Dick. 382; 1 Mylne & K. 500; 1 Smale & Giff. 575; 1 Atk. 294; 1 Johns. Ch. 119; 4 Johns. Ch. 619, 651; 3 Paige, 167; 9 Paige, 446; 6 Metc. [Mass.] 305; 28 N. Y. 271; 1 Edw. Ch. 164; 2 N. Y. 352; 2 Edw. Ch. 461; 4 Johns. Ch. 123; 2 Paige, 497; 11 Paige, 265; 3 Sandf. Ch. 579.

Mr. George F. Comstock, in support of the claims sought to be expunged, cited the following authorities: 6 Ohio, 80; 18 Ohio, 35; 7 Conn. 478; 1 Eq. Cas. 93; 1 Paige, 299; 9 Paige, 435, 452; 11 Conn. 119; 2 Sandf. Ch. 166; 7 Cow. 478; 19 Ves. 345; 1 Comst. [1 N. Y.] 550; 1 Gray, 317; 12 Gray, 218; 4

Barn. & Ald. 433; 1 Nev. & M. 303; 5 Mees. & W. 283; 2 Q. B. 859; 1 Exch. 456; 2 Best & S. 11; 7 Dowl. Pr. Cas. 455; 3 Sandf. Ch. 428; 12 Wend. 123; 19 Vt. 403; In re Babcock [Case No. 696]; 3 Madd. 373; 1 Mont. & C. 301; 1 Hem. & M. 525; 2 Glyn & J. 36; 6 Ves. 449, 800; 3 Mont. D. & D. 720; L. R. 7 Ch. 398; 9 Gray, 55; 11 Gray, 134, 261; 4 Cush. 99; 1 Glyn & J. 27; 1 Rose, 76; 3 Jur. 1147; 1 Mont. D. & D. 195; In re Howard [Case No. 5,750].

HALL, District Judge. The main or final question now to be determined—that of the right of the creditors holding notes of the bankrupts endorsed by Judge Comstock and embraced within the terms either of the mortgage of the real estate or the pledge of the personal property of the bankrupts given by them to the endorser to secure the payment of such notes and indemnify him against loss by reason of such endorsements, are entitled to prove and take dividends upon the whole amount of their claims, as unsecured debts—is the same as that presented when the parties to the present controversy were before this court some weeks since,—In re Jaycox [Case No. 7,240],—but the minor or subordinate questions, upon which the determination of the final question must depend, are not in all respects the same. Indeed, one of the most important of the subordinate questions is now, for the first time, distinctly presented for a final decision, while many questions which were then open to discussion have been effectually disposed of by the stipulations of the parties. At that time the holders of such notes might have been allowed to withdraw the proof of their debts as unsecured debts, and then to prove them as partially secured by the mortgage or pledge given by the bankrupts to the endorser, but the execution of the release referred to in the special case, and the persistent assertion of their right, under the proof made, to dividends on the whole amount of their debts, with a full knowledge of the existence of such mortgage and pledge, must be considered as an absolute abandonment and release of all right to the security, if any, which they once "had," (as that term is used in the bankrupt act,) under such pledge and mortgage. On the other hand, all objections to the form or sufficiency of the depositions by which such debts were proved are waived, and the number of subordinate questions is much reduced by the stipulations contained in the special case. Besides, the most material subordinate question formally presented, and the one chiefly discussed by counsel and court on the former application, has, perhaps, been entirely avoided—or it may be but postponed for litigation in a different form—by such release, and the continued prosecution of these claims as unsecured debts entitled to dividends upon the full amount due.

The questions now to be determined have been very ably and elaborately argued by learned and eminent counsel, after a much more careful and thorough preparation than is usual, even in the most important cases, in this court. The citation of numerous authorities, and the elaborate but condensed arguments submitted in the written briefs, attest this, and the court gratefully acknowledges the relief from much labor in searching for authorities, and the great aid to the final decision of the case, thus afforded by the counsel. It has not, however, been deemed necessary to examine all the authorities cited. Many of the books referred to are not found in my own library, and the decisions of the courts of other states, in regard to the rights and remedies of creditors in respect to counter securities given by the debtor to sureties secondarily liable for their debts, have not, as a general rule, been examined, except as they are recited upon the briefs furnished, because the question of the extent and character of the rights and remedies of the creditors whose right to prove for the whole amount of their debts is now contested, as against the surety endorser, and the securities held by him, must depend wholly upon the established doctrines of the courts of this state, which is the domicile of all of such creditors and of the endorser, and in which the lands and property mortgaged or pledged are situated. The decisions of the New York courts upon this question have been, for more than half a century, uniform, distinct and decisive. In 1850, in Vail v. Foster, 4 Comst. [4 N. Y.] 312, Chief Justice Bronson, confessedly one of the ablest and most learned of the eminent jurists who have adorned the bench of the highest courts of the state, in delivering the unanimous opinion of the court of appeals, said: "It is a settled rule in equity, that the creditor shall have the benefit of any counter bonds or collateral securities which the principal debtor has given to the surety, or person standing in the situation of a surety, for his indemnity. Such securities are regarded as trusts for the better security of the debt, and chancery will compel the execution of the trusts for the benefit of the creditor." Again, after stating the facts peculiar to that case, he said: "We have, then, the ordinary case of creditor, principal and surety, to which the rule in question has been applied, and the mortgage which the principal debtor has given to the surety must be considered as a trust for the security of the debt, which a court of equity will enforce for the benefit of the creditor."

The doctrines thus announced by the court of appeals have been repeatedly and fully sanctioned by the courts of this state. And since the case of Moses v. Murgatroyd, 1 Johns. Ch. 119, decided by Chancellor Kent in 1814, if not ever since the case of Neilson v. Blight, 1 Johns. Cas. 205, decided by the supreme court of this state in 1799, those doctrines have been considered part of the well settled law of the state. The case of Moses

v. Murgatroyd was in many of its features much like the present, and Chancellor Kent in his opinion (the endorser having died intestate) said: "The assignment * * * though absolute on the face of it, was intended, by the parties to it, to be a security only to the intestate for his endorsement of the notes in question. This being the case, the plaintiffs, as holders of the notes, are entitled to the benefit of this collateral security given by their principal debtor to his surety, and the case of Maure v. Harrison (Mich. 1692) 1 Eq. Cas. Abr. 93, (K.) 5, is directly to this point. These collateral securities are, in fact, trusts created for the better protection of the debt, and it is the duty of this court to see that they fulfill the design. And whether the plaintiffs were apprized at the time of the creation of this security is not material. The trust was created for their benefit, or for the better security of their debt, and when it came to their knowledge they were entitled to affirm the trust and to enforce its performance. This is the principle assumed in the case of Neilson v. Blight, 1 Johns. Cas. 205." In Haggarty v. Pittman, 1 Paige, 298, 299, Chancellor Walworth said: "Where the assignment is to a surety for his indemnity, the creditor has an equitable claim upon the fund for the payment of his debt, and the surety has no right to divert it to any other object;" and in support of this doctrine he cited, among other cases, Bank of Auburn v. Throop, 18 Johns. 505, decided in 1821. In Pratt v. Adams, 7 Paige, 615, 627, Chancellor Walworth, in respect to a provision in the assignment of Benjamin Rathbun made after the indebtedness had accrued and without the knowledge of the creditor, said that it "was intended as an indemnity to James and other accommodation acceptors and endorsers against their liabilities, and to furnish them with a fund to discharge those debts. And it has been settled by a long course of judicial decisions, that when a person standing in the situation of endorser or surety is furnished or provided, by the principal debtor, with a fund or with collateral security for such a purpose, the creditor is in equity entitled to have it applied in satisfaction of the debt." The same learned chancellor, in Curtis v. Tyler, 9 Paige, 432, declared it was well settled, "that when a surety or person standing in the situation of a surety for the payment of a debt receives a security for his indemnity and to discharge such indebtedness, the principal creditor is in equity entitled to the full benefit of that security, and it makes no difference that such principal creditor did not act upon the credit of such security in the first instance, or even know of its existence." And in Halsey v. Reed, Id. 452, the first of these propositions was again affirmed. See, also, Weston v. Barker, 12 Johns. 276; Shepard v. Shepard, 7 Johns. Ch. 57, 63. The decisions in Phillips v. Thompson, 2 Johns. Ch. 418; Clark v. Ely, 2 Sandf. Ch. 166; and Ten Eyck v. Holmes, 3 Sandf. Ch. 428,—were based upon the same doctrine, though it is true that in the latter case the vice-chancellor speaks of the relation of the surety to the creditor as one of quasi trust.

It is believed that the doctrines established by the cases cited have not been denied in this state in any reported case; and Chancellor Kent in his Commentaries (volume 4, page 307), says: "If a trust be created for the benefit of a third person without his knowledge, he may, when he has notice of it, affirm the trust, and call upon the court to enforce the performance of it. Collateral securities given by a debtor to his surety are considered as trusts for the better security of the creditor's debt, and chancery will see that their intention be fulfilled;" and Story, Eq. Jur. § 638, declares that "if a principal has given any securities or pledges to his surety, the creditor is entitled to all the benefit of such securities or pledges in the hands of the surety, to be applied in payment of his debt." And the proposed Civil Code prepared by Messrs. William C. Noyes, David Dudley Field and Alexander W. Bradford, and reported to the legislature in 1865, gives the rule of law in this state as follows: "Sec. 1572. A creditor is entitled to the benefit of everything which the surety has received from the debtor by way of security for the performance of the obligation, and may, upon the maturity of the obligation, compel the application of such security to its satisfaction." And see the cases of Eastman v. Foster, 8 Metc. [Mass.] 19, and New Bedford Inst. for Savings v. Fairhaven Bank, 9 Allen, 175, hereinafter cited.

In view of the authorities cited, the learned counsel for the claimant very properly said, in the opening sentence of his brief: "We concede at the outset that in all cases where an endorser or other surety has a counter security from the principal debtor, the creditor is entitled to the benefit of it in equity, if necessary to resort to it for the satisfaction of the debt." But this being thus broadly conceded it is insisted that the claimants in this case were never within that provision of the twentieth section of the bankrupt act, which declares that "when a creditor has a mortgage or pledge of real or personal property of the bankrupt, or a lien thereon for securing the payment of a debt owing to him from the bankrupt, he shall be admitted as a creditor only for the balance of the debt after deducting the value of such property * * * or the creditor may release or convey his claim to the assignee upon such property, and be admitted to prove his whole debt."

The term "has" contained in this provision, is or may be of broader signification than the term "holds," and while it must be conceded that the claimants have at no time "had" a legal title or strictly common law right to any mortgage, pledge, or lien upon the property of the bankrupts, which could be directly en-

forced by them under the strict and technical rules of the common law, there is certainly much reason for believing that under the authorities already cited the claimants "have had," and when they appeared to make proof of their debts in this case still "had," in equity and potentially, (by means of the mortgage and pledge held by Judge Comstock,) a mortgage, pledge or lien upon the property of the bankrupts for securing the payment of their debts, within the intent and meaning of the provisions just quoted.

In opposition to this view the learned counsel for the claimants has submitted an ingenious and elaborate argument, some portions of which will next be examined. Immediately following the concession just quoted, he says: "But the foundation of the creditor's right is or may be the important thing to be considered in reference to many collateral questions. In this case the true theory of the right is, or may be, the vital point to be ascertained. And first, if in the creation of the security it is the intention of the principal debtor to place in the hands of his surety a fund for the benefit of the creditor, the principle is plain. We have a technical and strict trust with all the characters which belong to such a relation, the author of the trust, the trustee, and the beneficiary. The right of the creditor, as the beneficiary, to resort directly to the trust fund is so plain as not to need discussion." And it is in respect to such technical and strict trusts thus expressly created that in a subsequent part of his brief he says: "The creditor in such a case may be called the real owner of the trust fund, and, perhaps, may be within the provision of the bankrupt act, which requires a creditor to give up his security before he can prove his debt against the principal." Immediately following this he says: "If, on the other hand, there is no trust, in other words, if the transaction is between the debtor and the surety without any declaration of trust, and the protection of the surety is the real object, then the benefit to the creditor is incidental. He has no right or title in or to the fund, and can only insist that the fund shall be fairly applied (if necessary) to the purpose of paying the surety's (not the principal's) debt. But why can he so insist? In the absence of a trust to pay over, what is the foundation or theory of the creditor's right? We think it is sometimes called a right of substitution or subrogation."

It is, perhaps, a sufficient answer to the first portion of this argument to say that the authorities already cited conclusively prove that even in the case last supposed there is a trust which it is the duty of courts of equity to enforce, although the creditor or beneficiary had no knowledge of the existence of the trust for months after its creation, and only learned its existence just prior to the filing of his bill to enforce the trust; and that the alleged distinction between the two classes of trusts sought to be established has never been deemed material by either of the learned judges of this state who have acted upon the doctrines of the cases which have been cited. Indeed, the cases cited were, it is believed, all, or nearly all, cases of implied trusts, and belonged to the same class with the cases intended to be described by the learned counsel as those in which the transaction is between the debtor and the surety, without any declaration of trust, and the protection of the surety is the real object, and "the benefit to the creditor is incidental." But if such a distinction exists is it not a distinction without a difference, either in substance or effect, even when considered in respect to collateral questions? Is it material whether the parties to the transaction have expressly declared their determination to create a trust, or the law has indelibly impressed upon the transaction the terms of an implied trust of the same character, and with the same consequences, as between the parties interested? The rights of the creditor under either must be enforced in a court of equity, and are not recognized or enforced in strictly common law actions, but in equity the implied trust and the express trust are held to be equally binding upon the surety, and the implied trust will be enforced as readily, as vigorously and as effectually as the other. In equity and, indeed, at law, the rights of the creditor are precisely the same in either case, and for that reason there can be no essential or material difference in the two cases under the provisions of the bankrupt act. Nor is it supposed that it would make any difference in the rights or remedies of the parties now before the court if it were to be conceded that the learned judges of this state have been mistaken in considering these cases as cases of trust, and, therefore, within the jurisdiction of the courts of equity as trusts, instead of assigning them to some other head of jurisdiction, such as fraud or account, or calling the right of the creditor a right of substitution or subrogation. If the end is properly reached by the action of the court it is not material to what head of equity jurisdiction the case properly belongs; but I am unable to perceive that there is any reason for doubting that it is properly assigned to that branch of equity jurisdiction which recognizes and enforces trusts. To what other head of that jurisdiction, unless it be that of fraud, can it be so properly assigned? And is there anything in the rights of creditors, as declared and enforced in the cases referred to, like the right of substitution or of subrogation as recognized in the civil law, or indeed in any other law? I think not.

The whole force of the argument of the learned counsel upon this point appears to me to rest upon an assumption. His proposition, stated in his own language, is as follows: "An endorser or surety having a counter security under no trust to pay over in discharge of the principal's debts, simply holds the security as his own means, or

part of his own means of paying and satisfying his own obligation." This assumption and the argument founded upon it seems to me to be "an inversion of the law and logic of the case, because it assumes a conclusion and then reasons backward to the premises." Besides, the conclusion is assumed in direct opposition to the decisions of our highest courts in the numerous cases cited, and in total disregard of the principle affirmed and acted upon in those cases, and which Assistant Vice-Chancellor Sandford declared, in Ten Eyck v. Holmes, in 1826, was settled a century and a half before.

The assumptions that in the class of cases referred to "the benefit to the creditor is incidental," and that "he has no right or title to or in the fund, and can only insist that the fund shall be fairly applied (if necessary) to the purpose of paying the surety's (not the principal's) debt," are likewise in direct and palpable conflict with the settled law of this state, as shown by the cases cited; and even the learned counsel concedes that the funds thus furnished him cannot be used by the surety in the payment of any debt of his, other than the one for which the principal was primarily liable, and which will necessarily be paid whenever such fund is applied in discharge of the liability of the surety. The assumption that the funds furnished by the principal debtor, and which, when applied by the surety in discharge of his liability, necessarily pays and discharges the debt of the principal and primary debtor, is not applied in discharge of the principal's debt, requires no further answer. The use of the words "if necessary" in this proposition of the counsel, and other portions of his argument, indicates that the creditor's right to the counter securities in the hands of the surety exists only in case of the insolvency of the latter, but no such limitation is recognized in the reported cases, cited in the report of the civil code commissioners, or by Kent or Story; and it would be absurd to require the creditor to wait until he could prove that he had lost a portion of his security by the insolvency of the surety before resorting to the trust fund. If, as the learned counsel concedes, the surety has no right to use the fund except for the discharge of the debt for which he is liable as surety, there can be no reason for allowing him an opportunity to dispose of it in fraud of the creditor's rights, or to hold it against the rights of the creditor, until the principal and the surety himself both become insolvent; perhaps after the fund has been fraudulently used by the surety. By discharging his own liability he can free the fund or securities in his hands from any equitable lien or claim of the creditor, but until he does so it is clear that the creditor has the stronger equity, and one which he should be allowed to enforce.

It is not denied that the cases cited by the learned counsel for the claimants, from the reports of other states, recognize the general rule that the counter securities in the hands of the surety cannot be diverted to any use other than the payment of the debt for which the surety is liable, but it is insisted that these cases do not recognize or suggest the existence of a trust enforceable by the creditor, but are based upon some unnamed equitable right of a different character. But these cases, so far as they have been examined, do not, in my judgment, give much support to the positions assumed by the counsel, either in respect to the non-existence of a trust in cases like the present, or in respect to there being a material distinction between the two classes of cases which have just been mentioned. In nearly all of the reported cases decided in other states the case of Maure v. Harrison, 1 Eq. Cas. Abr. 93, has been cited with approbation as the origin or first reported announcement of the right conceded to the creditor as against the surety, and the very few cases which furnish slight evidence that there was supposed to be a substantial difference or material distinction in this respect between the cases of an express and of an implied trust, or that no trust existed unless created by words expressly declaring such trust as a security to the creditor, are regarded as so far exceptional, and as opposed to the general current of authorities. The three cases mainly relied upon are Homer v. Savings Bank, 7 Conn. 478; Ohio Life Ins. & Trust Co. v. Reeder, 18 Ohio, 35; and Ex parte Waring, 19 Ves. 345.

In the last mentioned case, Bracken & Co. had an account with Brickwood & Co., bankers in London; drawing upon them, and lodging in their hands, from time to time, bills and other securities against their drafts. Brickwood & Co., at the time of their bankruptcy, July 7th, 1810, were under acceptances for Bracken & Co. to the amount of twenty-four thousand pounds and indebted to them in a cash balance of six thousand seven hundred and sixty-six pounds, seven shillings and six pence, having also in their hands, in short bills, twenty-one thousand six hundred and forty-five pounds, ten shillings, and also the title deeds of premises in London, as security against their acceptances, which last produced by sale near two thousand nine hundred and sixty-one pounds. On the 2d of August, 1810, Bracken & Co. also became bankrupt. The holders of the acceptances, with the exception of about six hundred pounds, had proved their debts under both commissions, and dividends thereon had been paid from Brickwood's estate, to the amount of three thousand four hundred and twelve pounds. The holders of the bills and the assignees of Bracken & Co., severally, claimed the cash balance and the securities, or their proceeds. The report seems confused and unsatisfactory, but it apparently shows that Lord Chancellor Eldon decided that "the bill holders must be paid, not as having a de-

mand upon these funds in respect of the acceptances they hold, but as the estate of Brickwood & Co. must be cleared of the demand by their acceptances, and the surplus, after answering that demand, must be made good to Bracken & Co." In this case Brickwood & Co., when they accepted the bills of Bracken & Co. as well as at the time of the bankruptcy, probably had a large cash balance (as well as the other securities) to enable them to meet their acceptances. As between the creditors and Brickwood & Co., the latter were the principal debtors for the full amount, and, to the extent of the cash balance, they were the principal debtors as between the drawers, Bracken & Co., and themselves. The case was mixed and peculiar; there is nothing in the case to show that the doctrines of principal, and surety, and creditor were strictly applicable, because it does not appear to what extent the acceptances were given without cash funds of the drawers in the hands of the acceptors at the time of the acceptances, and yet the right of the bill holders was upheld. It is true it was not done upon the ground of an implied trust, but of the equities of the parties, and the case is not so reported as to show under what arrangement or understanding the short bills referred to were deposited with or transferred to Brickwood & Co. If they were so transferred that the title to them passed, and Bracken & Co. became liable thereon as endorsers to Brickwood & Co., no trust would result or be implied, but Brickwood & Co. would only be liable for the balance of the final account between them and Bracken & Co. In re Boldero, 19 Ves. 25, 33, 47.

The case of Ohio Life Ins. & Trust Co. v. Reeder, 18 Ohio, 35, is a peculiar case, not only in respect to the form in which the question was presented, but in the reasons given for the decision. In the case of Green v. Dodge, 6 Ohio, 80, and other Ohio cases, the general doctrine as announced in Equity Cases Abridged, and fully established in this state and elsewhere, had been acted upon, and the existence of the implied trust in favor of the creditor fully recognized; and the case in 18 Ohio was decided against the complainant, not upon the ground of the existence of any implied trust, but upon the ground that it did not appear, (the suit being in equity) that the plaintiff had not a full and adequate remedy at law. The bill alleged that Henry L. Reeder, the first named defendant, made, to Nathaniel Reeder, two mortgages of his real estate, conditioned, among other things, to secure and save said Nathaniel harmless against certain endorsements that he had made for said Henry L. to several banks in Cincinnati, amongst which were three payable to the plaintiff; that the plaintiff still held two of such notes which had been regularly protested for nonpayment, and the endorser charged, and that both Henry L. and Nathaniel Reeder neglected and refused to pay such notes, and it simply prayed that the mortgaged premises might be sold, and the proceeds applied to the payment of such notes. It does not appear by the report what other parties were made defendants.

It will be seen that the object of the bill was not the enforcement of an implied trust, as against the surety, but the direct foreclosure of a mortgage, the legal title of which still remained in the surety, and it was urged by the defendants that, as the mortgagor, the maker of the notes was in possession, his right might be sold on a judgment at law, as well as that there was a distinction between the case then before the court, and other cases which their counsel stated, as follows, viz.: "When the security is given with the intention that it shall be applied for the payment of the debt, and in exemption of the surety, he (the surety) is a mere trustee for the creditor, and substitution may be decreed, but when the security is to indemnify the surety only against payment of the debt, it is personal to the surety, and there can be no substitution." It was also insisted that Nathaniel Reeder had never been damnified, that for aught that appeared by the bill he might never be; that he even had no claim under the mortgage, because the condition of it had not been broken.

In delivering the opinion of the court Judge Caldwell, apparently recognizes the distinction insisted upon by the defendants. He says: "Now it will be seen that these mortgages are not given for the purpose of securing the complainant's claim, nor for the purpose of raising a fund out of which the debt was to be paid. If so, a court of chancery would hold the mortgagee as trustee of complainants and would subject the property to the accomplishment of the objects of the trust. The mortgages were given to Nathaniel Reeder for his own personal benefit and security to save him harmless from his liability as endorser, and can only be resorted to, either by him or the complainants, when it becomes necessary to effect that object. When the contingent necessity contemplated by their creation has arisen, * * * the endorser remains unharmed from his liability and there is nothing alleged that shows that he will not always remain so. * * * The Ohio Life and Trust Company seek in this case to be substituted to the rights of Nathaniel Reeder in a contract made with him personally for his own benefit; they can only claim such rights as enured to him; he has not been damnified, the conditions of the mortgages are unbroken as to him, he can yet assert no claim under them, nor could the trust company, by being substituted to his rights. * * * But there is no allegation in the bill that shows that the notes held by the complainant could not be collected by the ordinary proceeding at law; * * * that defendants have not sufficient property subject to levy and sale on execu-

tion to satisfy their claim; that a plain and adequate remedy cannot be had at law." The demurrer to the bill was sustained apparently upon the grounds above indicated.

The decision does not aid the claimants in this case except so far as it recognizes the distinction insisted upon by the counsel in the Ohio case; but that distinction, as well as the final decision, is based upon facts which do not exist in the present case. In this case the mortgage to the surety endorser is expressly conditioned for the payment of the notes in question, as well as to save him harmless as endorser; and it was necessarily conceded that he could commence proceedings to enforce his mortgage as soon as the notes became due and he was charged as endorser—without payment of the notes, or judgment against him as endorser. Gilbert v. Wiman, 1 Comst. [1 N. Y.] 550, and cases cited.

The case in 7 Conn. depended mainly upon the construction of the terms of an express trust, and though it assumes that when the security given to a surety was intended to be personal to him, and was given for his protection and indemnity, the creditors' rights are not the same as when the security is given for the better protection or payment of the debt, it is not regarded as affecting the present case; because the security held by the surety in this case was given for the better protection or payment or the debt as much as in the several New York cases which have been cited, and that there is in this case no more reason for saying that the security was personal to the surety and intended for his personal indemnity only than there was in the cases referred to. And in respect to a large portion of them not so much, because in this case the mortgage is conditioned for the payment of the endorsed notes as well as for the indemnity of the endorser, while in many of the cases cited the condition was for indemnity merely.

The question in regard to the equitable rights of creditors to counter securities held by a surety under the circumstances of the present case will be considered as sufficiently discussed, and the question whether these creditors have a right to prove their whole debts in these proceedings without releasing the security which they had, in equity at least, under the mortgage or under the pledge made by the bankrupts to the surety or accommodation endorser, will next be considered.

Assuming that it sufficiently appears that these creditors had, in equity and potentially, the lien and security afforded by such mortgage and pledge, because upon proper proceedings in a court of equity they could obtain the actual possession and control, and full benefit of such security, it would seem to be necessary, under the provisions of the twentieth section of the bankrupt act, that the creditors should release their claims under such mortgage and pledge, so as to relieve the estate of the bankrupts therefrom, before they could legally prove for the whole amount of their debts. The provisions alluded to are as follows, viz.: "When a creditor has a mortgage or pledge of real or personal property of the bankrupt, or a lien thereon for securing the payment of a debt owing to him from the bankrupt, he shall be admitted as a creditor only for the balance of the debt after deducting the value of such property, to be ascertained by agreement between him and the assignee, or by a sale thereof, to be made in such manner as the court shall direct, or the creditor may release or convey his claim to the assignee upon such property, and be admitted to prove his whole debt. If the value of the property exceeds the sum for which it is so held as security, the assignee may release to the creditor the bankrupt's right of redemption therein on receiving such excess; or he may sell the property subject to the claim of the creditor thereon; and in either case the assignee and creditor respectively, shall execute all deeds and writings necessary or proper to consummate the transaction. If the property is not so sold and released, and delivered up, the creditor shall not be allowed to prove any part of his debt."

It must be conceded that the creditors have not now and have not had, the present legal title to any such mortgage, security or lien, as this provision contemplates, but considering the object of this provision, the general principles and purposes of the bankrupt act and the doctrine of the equity courts, "that equality among creditors is equity," which is sought to be carried out by that act, it would seem that it should make no difference in a court of bankruptcy, which is but an offshoot of the court of chancery, that the right of the creditor is not a legal but an equitable right, and that his remedy to enforce the security must therefore be sought in a court of equitable jurisdiction. So far as the security of the creditors in this case, or the effect upon the interests of the general or unsecured creditors of the bankrupts is concerned, the case is not different from what it would have been if the mortgage and pledge had been made directly to them for their security; nor is it perceived that the equity or real substance of the case is in any material respect different from what it would have been if the mortgage or pledge had been given to a trustee under an express trust for the payment of their debts, or even directly to the creditors for their security. Can the interposition between the creditors and the debtor of a trustee or surety, possibly a man of straw, enable debtors and creditors wholly to avoid this provision of the statute? Does it make any difference that the trust is created and defined by law instead of being written out by the parties? I think not.

It was conceded on the argument that the existence of security, by reason of a convey-

ance of the bankrupt's property, with an express trust for the application of it in discharge of the creditor's debt, would, perhaps, bring the case within the provisions of section twenty; and such, it is supposed, was the decision of the learned judge of the Eastern district of Missouri, in Re Ruehle [Case No. 12,113]. See, also, In re Davis [Id. 3,-618]. In the case of an express trust the creditor can only enforce his right in a court of equity, and the creditors in this case could have enforced their rights under the mortgage and pledge to the surety, with as much certainty and with the same facility that they could have enforced their rights if the property mortgaged and pledged had been conveyed and assigned to the surety under an express trust to apply the proceeds, so far as might be necessary, in the payment of their debts. The case, as it originally stood, was, it is believed, within the provisions of the section of the bankrupt act before referred to. The general purpose and policy of that act is to produce equality among the creditors of insolvent debtors, with the exceptions provided for in the act; and to attain that end its provisions should, in cases of extreme doubt, be construed beneficially for the general unsecured creditors. The case of a creditor whose debt is, in equity, secured by a conveyance of the property of the bankrupt to a trustee or surety, is within the mischief intended to be prevented by the provision referred to, and it is believed a fair and just construction of its language embraces that case as well as a case where the security is given directly to the creditor.

A very hasty examination of English and Massachusetts cases, after the question was argued in September last, made me doubt the propriety of deciding it upon my own convictions of the proper construction and effect of the twentieth section of the bankrupt act; but the doubt has been removed by the further consideration of those cases, and the examination of other and later decisions. Though a full discussion of the cases cited by counsel is impracticable, some considerations in respect to the earlier cases, and the decisions in some later cases will be stated.

The cases, then, cited from 9, 11, and 12 Gray's Reports, are not so reported as to show that the question now under discussion was therein carefully considered. The case of Eastman v. Foster, 8 Metc. [Mass.] 19, decided some years afterwards, appears to have been fully argued, and the citation of authorities made by the respective counsel, shows that the case received an elaborate examination. Chief Justice Shaw delivered the judgment of the court, and in a very elaborate opinion declared in substance that "a mortgage deed given by the principal maker of a promissory note to his surety on the note, conditioned that the principal will pay the note and save the surety harmless, creates a trust and an equitable lien for the holder of the note; and the surety holds the mortgaged property subject to such trust and lien, even after the holder's claim on him to pay the note is barred by the statute of limitations, and though the property as between mortgagor and mortgagee may have become absolute by foreclosure; and that where a surety on several notes takes a mortgage from the principal promissor, conditioned to pay the notes and save the surety harmless, and thereby holds the mortgaged property in trust for the holders of the notes, and he remains liable on only one of the notes, and the property of the principal is assigned under the insolvent law of 1838, c. 163, the mortgaged property, if sufficient to pay all the notes, is to be applied to the payment thereof, and the surplus, if any, is to be distributed among the general creditors of the mortgagor. But if the mortgaged property is insufficient to pay all the notes, the surety is first to be indemnified therefrom, and the surplus is to be paid to the holders of the notes pro rata." The mortgage in the case was conditioned to pay the notes, and to save the surety harmless—substantially the same as the condition of the mortgage in the present case—and the case may be considered as fully recognizing and establishing, in Massachusetts, the doctrines in respect to the rights of creditors to counter securities in the hands of a surety, to the same extent that they have been established and recognized in this state; and as thereby furnishing a sufficient reason for holding that a creditor whose debt was thus secured through a mortgage of the debtor, given to a surety liable for the same debt, could not prove for his whole debt without relinquishing his security by the mortgage.

The still later case of New Bedford Inst. for Savings v. Fairhaven Bank, 9 Allen, 175, not only affirms the general doctrine of the New York cases, as was done in Eastman v. Foster, but it goes further and declares that the counter securities held by a surety for his indemnity, without any mention of the payment of the debt, are held in trust for the creditor, the court saying: "It is well settled by the authorities that the creditor has an equitable claim to the security, as well when the mortgage is given for mere indemnity as when the condition is added that the principal shall pay the debt."

These doctrines being fully recognized in these two late cases in Massachusetts, the question of the right of the creditor to prove his claim without releasing his security must thereafter stand upon the same footing in Massachusetts and in this state; and in the case last cited this question was substantially decided. The case in many and indeed in most of its features was like that now under consideration. The creditors whose debts were in equity secured by the mortgage given to the surety for his indemnity had severally proved their debts as unsecured debts, in ignorance of their rights to the security held by the surety, and had voted for and controlled

the election of the assignee in insolvency. It was after this that the creditors thus secured, by their petition, applied for an order that the premises mortgaged to the surety might be sold and the proceeds applied towards the payment of their debts, and that they might then prove against the estates of the insolvent debtors (principal and surety) any balance which might remain. In this state of the case, the judge who delivered the opinion of the court, after referring to the mortgage given to the surety, said: "It was not taken for the general benefit of all his creditors, and its object was to indemnify his estate from the payment of the particular debt. Primarily, therefore, it would seem to be the proper course to apply the security to the payment of that debt, and thus leave the other creditors of the endorser in the same condition as if the endorsement had not been made. The proper course, then, would seem to be, that the creditor should first petition, as he has done, to have this security applied towards the payment of his debt and then make proof of the balance. But it is objected, on the part of the plaintiffs, that the defendants have forfeited their right to have this application made for their especial benefit, because they first proved their debts and then made use of their position as creditors to vote for the discharge of the debtor, and that they have thereby affected the rights of the plaintiffs injuriously. As the claim of the defendants consists of a mere equitable lien, they contend that it ought to be discharged by any conduct of the defendants which thus injuriously affects the plaintiffs. The court are of opinion that this view of the matter is sound and equitable. The defendants had a right to waive their equitable claim to the mortgages; for the mortgages were not made to them, and they had never assented to them. The other creditors could not, therefore, object to the proof of their debts. Upon the proof being made, the amount of their claims enabled them to control the choice of an assignee, as well as the discharge of the debtor. It is the latter fact only which is made the subject of complaint in the plaintiffs' bill, and, therefore, the effect of the proof upon the choice of the assignee is not to be considered in this case though it was alluded to in the argument. But the fact that the defendants thus acquired the power to control the vote of creditors on the question of the debtor's discharge, and actually exercised that power, and procured the discharge, must be considered as a material interference with the rights of the other creditors. The discharge is doubtless valid, because the defendants had rightfully proved their debts, and had a right to vote on the question. After they have done this, on the ground that they had no lien upon the mortgages, it is not equitable to permit them to insist upon the lien, and thus obtain a preference over the other creditors. The equitable considerations which favor the equal distribution of assets among creditors ought not to be set aside in such a case. On the contrary, we think, the defendants should be bound by the position which they have taken. But the defendants contend that the acts referred to were done by them in ignorance of the fact that they had a lien. It would be difficult to maintain the position that they had not, at least, constructive notice of the existence of the mortgages, because the mortgages must have been recorded in order to be made available to them; and the fact that they had not actual knowledge of the existence of the mortgages, or that they did not know what were their legal rights under them, is not material. But whatever their ignorance may have been, if they have ignorantly proceeded in such a manner as to affect the rights of the other parties, the injurious consequences of their acts ought to fall upon themselves, and not be thrown upon others." This is the latest decision in the Massachusetts courts bearing upon this question, which has been brought to my notice; and it seems to sustain the view I was inclined to take when the question now under discussion was first brought before me, and to dispose of the earlier cases which seemed to sanction the opposite view.

The English decisions cited as bearing upon this question are too numerous to be discussed in detail, and it is quite certain that several of them should have no influence upon the decision of the question now under discussion. In others the decision mainly depended upon facts and circumstances essentially different from those of the present case, and in still others, upon technical rules established by the English courts in regard to proofs of joint or separate claims, as against joint or separate estates, when parties owing joint and copartnership debts are in bankruptcy under a joint commission. Under these the English courts seem, in many cases, to have disregarded substantial equities and to have applied in their utmost rigor certain general rules of an extremely technical character; quite as much so as any that find favor in our common law courts. Thus, as a general rule, joint creditors cannot take a dividend from the separate estate of one or two or more bankrupt partners until the creditors of the single partner only are fully paid out of the separate estate of such individual debtor; and the separate creditors of the single partner cannot take a dividend from the joint estate until the joint creditors are fully paid; except that when there is no joint estate and no solvent partner, (and any partner is regarded as solvent who is not bankrupt) the joint creditors may prove and take dividends from the separate estates of the partners. This is carried so far that when there is any joint fund, however small, to resort to, the joint creditors cannot prove in competition with the separate creditors (Ex parte Janson, 3 Madd. 229), and my recollection is that this doctrine has been pressed so far that when the joint fund was produced by the separate creditors bidding

off, for a small sum, entirely worthless demands due the copartnership, for the sole and almost fraudulent purpose of creating a joint fund, the right of joint creditors to take a dividend from the separate estates of the bankrupts was denied. In fact some of these technical rules have been disapproved by the ablest of the lord chancellors of England, though they declined to overthrow what had been established by their predecessors. I think I should hesitate long before avoiding the provisions of the bankrupt act by the adoption of other and further rules as technical as these, and even the English courts are inclined to engraft exceptions upon such technical rules, and to hold that parties who have done what can be considered a waiver of their strict rights, under a misapprehension or in ignorance of the law, shall not be allowed to avoid the effect of such waiver when it tended to produce equality among creditors. Ex parte Davenport, 1 Mont. D. & D. 313.

The examination I have been able to give to the English cases has satisfied me that the equitable doctrines, the existence of which was recognized, perhaps, for the first time by the lord chancellor of England, in Maure v. Harrison, in 1692, have had their most vigorous growth and fullest and most frequent recognition on this side of the Atlantic. If they have ever been strongly insisted upon in the English bankruptcy courts they do not appear to have been elaborately discussed or carefully considered by those courts; though it would seem that in some of the cases they have been either denied or ignored. Some of the later cases are certainly more favorable to the opposing creditors in this case, but only a very few of the English cases which have been cited will be considered.

The first is the case of Ex parte Hope, 3 Mont. D. & D. 720, decided in 1844, and in which it was here insisted by the counsel for the claimants in this case that the very question now before the court was decided. The debt due the creditor was in all seventeen thousand five hundred and sixty-eight pounds. The sureties had given a continuing guaranty for ten thousand pounds, with a special proviso that if the debtors should become bankrupt, all sums received out of the debtor's estate should be applied to pay any excess of the debt over ten thousand pounds. The sureties had a counter security by mortgage and a pledge of stocks (both being of the property of one of the three debtors and not "of the debtors," as stated in the counsel's brief,) and out of these mainly, but with a very small addition from their own money, the sureties paid the ten thousand pounds on their guaranty. The creditors had proved their whole debt of seventeen thousand five hundred and sixty-eight pounds, and had received dividends thereon. The assignee moved to reduce the proof to seven thousand five hundred and sixty-eight pounds. The creditor having received a dividend of two shillings and three pence in the pound on the whole debt, the assignee also moved that the dividend on ten thousand pounds should be paid to him for the benefit of the estate. The court decided that the creditors had rightfully proved their whole debt and were entitled to retain the dividend. The case is not at all like the one now before this court. The security was upon the separate property of one of the bankrupts. The debt and proof was against the bankrupts jointly, affecting their joint estate only, and under the well settled English rule the security by mortgage or pledge of separate property of one of the debtors, even if given directly to the creditor and held by him, not as an equitable but as a strict legal right, would not have prevented the making of proof against the bankrupts jointly, or the taking of a dividend from their joint estate. No proof was made against the separate estate of the partner whose separate property was bound to the surety. The fact that the lien was upon the separate property of one of the bankrupt debtors from whose joint estate alone the dividends were paid was referred to by the judge, in his opinion, as follows: "The debtor was, in truth, a firm of several persons in partnership together, and the mortgaged estate seems to have been the property of one of the firm, a circumstance which appears to me to make no difference, at least in favor of the petitioners. I suppose if it had been made originally to the respondents (the creditors) it would not have affected their right of proof against the firm." The judge also stated as a reason for his decision that the assignees could make no claim against the creditors' dividends; that they could make no claim which the surety could not have made; that he could not have made such claim; and the petition was dismissed. The surety had waived all benefit to a dividend by the very terms of his agreement, and in that case, as in the case of Midland Banking Co. v. Chambers, L. R. 7 Eq. 179, and 4 Ch. App. 398, the surety was, in fact, a surety only for a limited amount of the balance, if any, which might remain after the estate of the bankrupt had been exhausted. The surety not being ultimately or equitably liable in either case for the whole debt proved, but only for the balance, if any, which might remain due after the creditor had exhausted his remedy against the bankrupt's estate, could not claim a return of any dividends paid from that estate until the creditor had received more than twenty shillings in the pound from such surety and the estate.

The earlier case of Ex parte Sherrington, 1 Mont. D. & D. 195, decided in 1840, is, I think, very far from being an authority for the claimants. The surety or guarantor had taken from the bankrupt a deposit of a lease by way of equitable mortgage, for his indemnity against his guaranty for advances

by the creditors, his liability being limited to the amount of seven hundred and fifty pounds. The creditors' whole debt exceeded one thousand four hundred pounds, for which sum they proved their debt in the bankruptcy proceedings against the principal debtor. The surety presented his petition praying that the leasehold premises might be sold and the proceeds applied in payment of what was due from the bankrupt and his surety, or in case the surety should have paid the sum for which he was liable, or any part of it, then in payment of what should be due to the surety. The sale was ordered, with liberty to the creditors to apply to the court for the proceeds, upon their undertaking to expunge so much of their debt proved as the net proceeds received by them should amount to. The case is, in fact, more favorable to the assignee in this case than to the claimants, as it shows that the right of the creditors to the security held by the surety was so far recognized as to allow him to apply for its proceeds, while it, at the same time, recognized the doctrine that the exercise of the right to receive such proceeds would necessarily preclude the creditors from taking a dividend upon any part of their debt except the balance left after the application of the proceeds of the security.

In Ex parte Perfect, 1 Mont. 25, decided in 1830, Neville accepted the bills of Bowes, it being agreed that the acceptor should hold yarn belonging to Bowes, and which was in Neville's hands to be bleached, as security against the bills. Both Bowes and Neville became bankrupts, and the yarns were possessed by the assignees of Neville. The holders of the bills presented a petition praying that the yarns might be sold and the proceeds applied in payment of the bills, and that they might prove for the deficiency, if any, against the estates of Bowes and of Neville. The assignees of Bowes resisted the application and insisted that the creditors having taken the bills without any notice of any agreement between Bowes and Neville about the yarns being held as security, could not have the benefit of the agreement. The vice-chancellor made the order as prayed, deciding that the acceptor was to be indemnified by applying the proceeds of the security in payment of the bills as far as they would go, and that the holders were entitled to prove against both estates for the deficiency, if any.

The case in 3 Mont. & A. 269, decided in 1837, is very much to the same effect. The holders of bills who had already proved their debts for the full amount, were declared entitled to the proceeds of goods held by the acceptor as his security, and to prove for the balance remaining due, although it was declared that the proof must be expunged pro tanto; of course dividends on the balance only were allowed to the holders of the bills.

Taking all of the English cases together they certainly do not sustain the position taken by the counsel for the claimants and the later cases are considered very favorable to the claims of the assignee and unsecured creditors.

It may be useful to refer to a case supposed by the learned counsel for the claimants as illustrating the alleged difficulties of the construction against which he is contending. He puts this case: "A is the maker, B the accommodation endorser, and C the holder of a note; B having a mortgage on A's estate for his protection. Both A and B go into bankruptcy, having, each of them, other and unsecured creditors. Have the creditors of A, or those of B, (if either) the right to exclude C, the holder of the note, from proving his debt unless he gives up his security? Must he surrender his security to the assignee of A, or to the assignee of B?" If he prove against A, he must certainly surrender all right to his security as against the property of A, and by doing it he would discharge the surety from his liability, at least to the extent of the value of the security released, and could, therefore, prove against A's estate for the whole amount, and against B's estate for the balance left due only. If he prove against B alone he would probably release the security, so far as B was concerned, to B's assignee; but B's assignee would not be allowed to use the security except so far as it became necessary to reimburse B's estate the amount of dividends paid from it to the holder of the note. These are probably the rules applicable to such cases, but it will be time enough to consider them with care when they are necessarily in judgment; a condition of things not likely to arise in the present case. Nor is there any difficulty in the case, under the provisions of the bankrupt act, in respect to the release, conveyance or sale of the property mortgaged as security. It may be sold under the direction of the court, given after notice to persons in interest, and certainly the assignee and creditor could not, by fraudulently or even improperly agreeing upon an insufficient valuation of the property and a conveyance or release of it to the creditor without the surety's consent, conclude or defeat the rights of the surety. Indeed, the two English cases last cited indicate very clearly the proper course to be pursued in the case supposed.

On the whole, then, it must be held that the claimants in this case, before they proved their debts, "had" such a lien or security as prevented them from proving their debts for the whole amount as unsecured debts without releasing their equitable interest in the mortgage and pledge before referred to.

The conclusion just stated does not dispose of the case, for other questions, those of the effect of the proof of these debts as unsecured debts, the voting thereon as such and thereby controlling the choice of the assignee, and of the effect of the release referred to in the case, remain to be considered. It is not doubted that the claimants in this case

might release and surrender all mortgages, liens and pledges, for the security of their debts which they "had" before making proof of their debts, and then prove their debts as wholly unsecured. This might be done by a direct and formal release, or by such acts as, either at law or in equity, are equivalent to such express release. As the beneficiaries of the trust created or implied for their sole benefit, they could, like any other sole beneficiary in a simple unrestricted trust to convert property into money and pay over the proceeds to the beneficiary, release and discharge the trust, the trustee and the trust property, without the aid or intervention of a trustee having no interest in the continuance of the trust, and as such release and discharge without the consent of the surety must also release and discharge such surety, at least, to the extent of the full value of the trust property released, the surety trustee has no interest in opposition to the release. And it is supposed that the surety to the making of such release would not prevent the release and discharge of the trust property as between such surety and the general creditors of the bankrupt.

It appears to be well settled in England and in this country that a creditor having a mortgage or other lien upon the property of the bankrupt, who proves his whole debt as unsecured, without disclosing the security, thereby waives and relinquishes his lien. Ex parte Rolfe, 3 Mont. & A. 306; Ex parte Solomon, 1 Glyn & J. 25; Stewart v. Isador [5 Abb. Pr. (U. S.) 68]; In re Bloss [Case No. 1,562]; In re Brand [Id. 1,809]; Wallace v. Conrad, 3 N. B. R. (Quarto, 10) 41; New Bedford Inst. for Savings v. Fairhaven Bank, 9 Allen, 175.

When such proof is made by the creditor in ignorance of the security, and, perhaps, even when made under a mistake in regard to the law of the case, a creditor would be allowed to withdraw such proof, and then prove as a secured creditor, when no injury had resulted to the unsecured creditors by such improper proof; but after the taking of a dividend upon his whole debt as an unsecured creditor, to the prejudice of the general creditors, he would be held to his election. New Bedford Inst. for Savings v. Fairhaven Bank, ubi supra; Ex parte Davenport, 1 Mont. D. & D. 313. And in this case, the creditors, after what has passed and the litigation that has been had in regard to their claims, could hardly ask to withdraw their proofs, even if they had not executed the instrument of release, a copy of which is annexed to the special case.

This instrument is a full release and surrender of all the lien and claim of the creditors under the pledge and mortgage to the surety endorser, unless avoided or restricted by the declaration that the release and surrender are not to affect the right of the surety to enforce his mortgage. Whatever effect that declaration, or any understanding or agreement between the creditor and the surety may have upon their respective rights and interests, it is unnecessary now to inquire. Such a declaration cannot operate to defeat the unconditional release of such rights as these creditors had in the mortgage, and they, at least, have no longer a lien on any portion of the estate of the bankrupts for the security of part of these debts. On this ground, and on the ground that the proof of the debts as unsecured debts was, of itself, a waiver of their security on the bankrupt's property, it is held that the proofs of debt and claims of the creditor-claimants are not to be expunged.

It was stated in the argument of the claimants' counsel, and sufficiently appears in the special case, that part of the real estate mortgaged was partnership property which the bankrupts held as tenants in common, and other parts of it property which each of the bankrupts owned in severalty and held as his separate estate; and it was urged that, in respect to such separate property, if not, also, as to that held by the bankrupts as tenants in common, there would be no claim that the lien of the mortgage thereon should prevent the proof of the creditors joint debts. It would be unnecessary to consider this question now, even if no effect were to be given to the making of the proofs as of unsecured debts, or to the release: because there was confessedly some copartnership property subject to the mortgage, which would necessarily prevent the claims from being wholly unsecured. Whether the copartnership property only, or that and the property held by the bankrupts as tenants in common, would have been regarded as part of the joint estate of the bankrupts, in case the claimants had claimed to be secured creditors, is a question upon which no opinion is expressed. It is apparent that much of this opinion is occupied in the discussion of questions not necessary now to be decided, if the main or final question presented by the case submitted is properly disposed of upon the grounds now relied upon as justifying the decision; but as the questions first discussed herein have been fully argued at the bar, and must ere long again come up for discussion, it was thought best to express an opinion thereon. A decree will be made in accordance with this opinion; and, as the questions first discussed were not free from difficulty and doubt, no costs will be allowed to either party as against the other, and no decree will be entered for some days, that either party may have time to prepare to bring on an appeal.

## Case No. 7,243.

JAYCOX v. CHAPMAN et al.

[10 Ben. 517.] [1]

District Court, S. D. New York. July, 1879.

FOREIGN ATTACHMENT—BOND—SURETY—PRACTICE.

A libel being filed against a man and his wife, and process with a clause of foreign attachment having issued, the marshal attached property. The wife filed a claim to the property and gave a bond under the act of March 3, 1847 [9 Stat. 181]. The libellant examined the sureties as to their sufficiency and they, having justified, the property was discharged. The cause was thereafter tried and resulted in a decree in favor of the libellant against the husband, and a dismissal of the libel against the wife. The libellant moved for a decree that the sureties on the bond pay the decree against the husband, on the ground that it had appeared on the trial that the property attached and delivered up on the giving of the bond, was really the property of the husband: *Held*, that, whether it was irregular practice or not, to file a claim in an action in personam, nevertheless the sureties could not be held beyond the terms of the bond which they had signed; and that by that bond they had only become sureties for the performance by the wife of any decree against her and could not be called on to pay the decree against the husband.

[This was a libel in personam by William E. Jaycox against Alonzo R. Chapman and Sarah E. Chapman.]

E. D. McCarthy, for libelant.

W. R. Beebe, for respondents.

CHOATE, District Judge. In this case a decree having been rendered against the defendant Alonzo R. Chapman and in favor of Sarah E. Chapman, dismissing the libel as against her, it is now insisted that the stipulators upon a bond given by her upon the release of certain vessels attached under the process of foreign attachment, are bound by the terms of their bond to pay the decree against Alonzo R. Chapman. May 28th, 1877, the marshal attached the vessels. May 29th, the defendant, Sarah E. Chapman, filed a claim for the said vessels in the form usual in case of the attachment of vessels by process in rem. She filed, also, a stipulation for costs and a bond, conformably to the requirements of the act of March 3rd, 1847, the condition of the bond being: "That if the above bounden Sarah E. Chapman, claimant, and Francis F. Budd and William E. Chapman, sureties, shall abide by and perform the decree of this court, then this obligation shall be void, otherwise the same shall be and remain in full force and virtue." The libellant had notice of the claim and the bond offered, and the sureties were examined as to their sufficiency, and, they having justified, the property was delivered to the claimant.

It is now insisted that the practice of filing a claim in a suit in personam is irregular and without warrant of any statute or rule of court; that the bond takes the place of the property discharged, and if that was the property, not of Sarah E. Chapman, but of Alonzo R. Chapman, as is now contended by the libellant, the sureties are bound by the bond to pay the decree against him.

It is unnecessary to determine whether the practice which has grown up in such cases is regular or not, because it is very plain that the stipulators cannot be bound on their bond beyond its terms fairly understood. The libellant had notice of the application to bond the property, and made no objection to the method adopted nor challenged the right of Sarah E. Chapman as its owner to bond it. It was understood as well by him as by the sureties who went on the bond that they were becoming bound for Sarah E. Chapman, and not for Alonzo R. Chapman, and upon the release to her of property against which, as all the parties assumed, there was no claim on the part of the libellant, unless he recovered judgment against her. However irregular the form may have been, the position and obligation of the parties are just the same as if she had presented a petition to the court, setting forth that she was the owner of the property and praying leave to substitute a bond in place of it, and upon notice thereof to the libellant and without objection on his part this bond had been given and the property delivered to her. What, then, as applied to this case, did the stipulators agree to? Clearly, they understood that they became bound only for Sarah E. Chapman, and not for Alonzo R. Chapman. Their bond was a substitute for and put in place of her property. All parties must have so understood. Such is the reading of the condition: "If the said Sarah E. Chapman, claimant, and Budd and Chapman, sureties, shall abide by and perform the decree of the court," that is, she, as the principal party who is to have or may have something decreed to be done or performed by her, and they as her sureties for the doing of it. There is no reference here to abiding by and performing anything to be done and performed by Alonzo R. Chapman. There is nothing decreed to be done and performed by Sarah E. Chapman. Therefore, there has been no breach of the bond and can be no liability of the sureties thereunder. To give it any other construction would do violence to its language and be inconsistent with what all the parties, including the libellant, must have understood to be the purpose of the bond, namely, the substituting of something in place of her property which was under attachment.

It is insisted that, by the evidence taken in the case, it appeared that the vessels thus released were really the property of Alonzo R. Chapman, and not of his wife. If this were so, or libellant had a doubt that it might be so, he should have applied to the court to have this question settled before they were delivered up to Sarah E. Chapman, or for such security as the peculiar facts of the case called for. Not having done so,

[1] [Reported by Robert D. Benedict, Esq., and Benj. Lincoln Benedict, Esq., and here reprinted by permission.]

he must be deemed to have acquiesced, as against these sureties, in her claim, that they belonged to her. The sureties had no interest in that question, and were only called on to become bound for her. The libellant had the opportunity to raise the question when it was proposed to bond the property; but to permit him to raise it now as against the sureties would do gross injustice. No decree can be entered against Sarah E. Chapman or her sureties.

## Case No. 7,244.

JAYCOX v. GREEN.

[The case reported under above title in 13 N. B. R. 122, is the same as Case No. 7,237.]

JAYCOX (HISCOCK v.). See Case No. 6,531.

## Case No. 7,245.

The JAY GOULD.

[7 Ben. 566.] [1]

District Court, S. D. New York. Jan., 1875.

COLLISION IN HUDSON RIVER — SCHOONER AND STEAMER—CHANGE OF COURSE—PLEADING.

1. A schooner was bound up the Hudson river to the foot of 31st street, with the wind from the southwest. She began to take in sail, and luffed up into the wind for that purpose. A ferry-boat was coming up the river astern of her, and to the westward, and a collision occurred between the two vessels, the bow of the ferry-boat striking the port side of the schooner, head on. The tide was ebb. The libel alleged, that the schooner was helpless, by reason of her taking in sail and drifting with the tide, and that the collision was caused by the fault of the ferry-boat, in that she did not keep a proper lookout, and did not stop and back in time, and did not change her course so as to pass under the stern of the schooner. The answer set up, that, while the vessels were proceeding on their respective courses, the schooner suddenly luffed up across the course of the ferry-boat, and that thereupon the engine of the ferry-boat was at once stopped and reversed, but the collision could not be avoided: *Held*, that the schooner was in fault in luffing when the steamer was approaching.

2. The claim of the schooner that, after she luffed, there was room enough for the ferry-boat to have avoided her, by porting, was not sustained.

3. Although the answer did not allege that the ferry-boat ported, it could not be taken as an admission that she did not port.

4. On the evidence, her helm was ported and her engine stopped and reversed as soon as the schooner luffed.

5. The ferry-boat was not in fault, and the libel must be dismissed.

In admiralty.

R. D. Benedict, for libellants.

W. R. Beebe, for claimants.

[1] [Reported by Robert D. Benedict, Esq., and B. Lincoln Benedict, Esq., and here reprinted by permission.]

BLATCHFORD, District Judge. The libellants, as owners of the three-masted schooner Sarah J. Fort, bring this suit against the ferry-boat Jay Gould, to recover for the damages sustained by them, by means of a collision which occurred between the two vessels, on the 28th of May, 1873, shortly after three o'clock p. m., in the Hudson river, off the city of New York. The schooner was bound up the river, and so was the ferry-boat, the latter being on a trip from her slip in Jersey City to her slip at the foot of 23d street, New York. The ferry-boat struck the port side of the schooner about at right angles, the schooner being, at the time, headed across the river, and the ferry-boat headed up the river.

The libel alleges that the schooner was bound to the foot of 31st street; that she commenced to take in sail, and, while lying with her head to the westward, the wind blowing a full sail breeze from the southwest, she became helpless, drifting with the tide, which was running ebb strong, and was in plain sight of the ferry-boat, it being daylight and the weather clear, and was run into by the ferry-boat; and that the collision was the fault of those in charge of the ferry-boat, in that, among other things, they did not keep a proper lookout, and did not stop and back the boat in time to avoid the schooner, which they could and should have done, and did not change the course of the boat, so as to pass under the stern of the schooner, which they could easily have done, and in otherwise improperly navigating.

The answer sets forth, that, when the ferry-boat was a short distance below 13th street, the pilot and others in charge of her, she then being to the eastward of the middle of the river, and heading up the river towards 23d street, sighted the schooner heading up the river, on a course nearly parallel with the shore and with the course of the ferry-boat, and somewhat ahead of the ferry-boat; that the same course was continued by both vessels until the schooner was nearly opposite the ferry slip at 23d street, the ferry-boat then being a short distance astern, and further out in the stream, heading for the ferry slip; that, when thus navigating, the schooner, without any warning, suddenly luffed up into the wind, heading on a course across the bows of the ferry-boat; that thereupon the engine of the ferry-boat was immediately stopped and reversed, with a view to avoid the collision which appeared imminent, but, notwithstanding every effort was made to avert a collision, the schooner came afoul of the ferry-boat, damaging the ferry-boat; that the ferry-boat was stopped and backed within as short a time as possible after the schooner had luffed up into the wind; and that the collision was the fault of those in charge of the schooner, in that they did not keep a proper lookout, and in that, without any warning or notice, they suddenly threw their vessel into the wind

and across the bows of the ferry-boat, rendering the schooner helpless to protect herself, and in otherwise improperly navigating the schooner.

It is not denied by the libellants, that, with the wind southwest, and the tide strong ebb, and the schooner and the ferry-boat both going the same way, up the river, the schooner being ahead, and to the eastward of the ferry-boat, the schooner luffed up, so as to head nearly directly across the river, and across the course of the ferry-boat, and, in so doing, shot ahead, and reached the line of the course on which the ferry-boat was proceeding. But it is contended for the libellants, that the master of the schooner, who was at her helm, observed the ferry-boat before and when he starboarded his helm to luff, and that the ferry-boat was then so far off from the schooner in a direct line, that she could, by porting her helm, have gone under the schooner's stern, and avoided the schooner. It is insisted, for the libellants, that, as the libel, in its fourth article, avers that the collision was the result, in part, of the fact that the ferry-boat did not change her course, so as to pass under the stern of the schooner, which she could easily have done, and as the answer says nothing about the ferry-boat's having ported, when she saw the schooner luffing, but only says that thereupon the ferry-boat's engine was stopped and reversed, the court must, although the answer contains a general denial of the allegations in the fourth article of the libel, regard the answer as not denying the allegation of a failure to port, but only as denying that the collision was the result of such failure to port. This criticism is more nice than sound. The evidence is satisfactory to my mind, that the pilot of the ferry-boat, as soon as he saw the movement of the schooner to luff, ported his helm and stopped and reversed his engine with all practicable despatch, but was unable to clear the schooner. The schooner was clearly in fault in luffing and changing her course as she did. She did so suddenly, and when the ferry-boat had no reason to suppose she would do so, and she threw herself across the course on which the ferry-boat was proceeding. The schooner turned very sharply, and, having on good headway, shot ahead across the course of the ferry-boat, and, thus presenting herself broadside to the tide, was carried down with great rapidity upon the ferry-boat, before the ferry-boat could get out of her way, by the use of all the means at the command of the ferry-boat. The fault of the schooner being clear, the only question is whether the ferry-boat was guilty of any fault contributing to the collision. I do not think she was. She was not in any such proximity to the schooner as would have rendered a collision probable, if the schooner had kept her course. Yet she was so near as to make it a fault on the part of the schooner, with the wind and tide such as they were, and the speed and relative positions of the schooner and the ferry-boat such as they were, to luff and throw herself in such a position as to let the tide sweep her down upon the ferry-boat. The evidence is satisfactory, that the pilot of the ferry-boat saw the movement of the schooner to luff as soon as he ought to have seen it; that he immediately put his helm hard a-port, and rang to slow and stop and back, and then to hook on and back strong; that these bells were promptly obeyed; that the engine had made about six revolutions backward, when the vessels collided; and that the headway of the ferry-boat through the water was about stopped by that time. I can see no fault on the part of the ferry-boat, in view of the fault of the schooner, and must dismiss the libel, with costs.

## Case No. 7,246.

The J. B. LUNT.

[11 N. Y. Leg. Obs. 137.]

District Court, S. D. New York. 1853.

POSSESSORY ACTION IN ADMIRALTY — MORTGAGOR AND MORTGAGEE—THIRD PARTY—PURCHASER AT SHERIFF'S SALE — ADJUSTMENT OF ACCOUNTS—COSTS.

1. The legal title and right to immediate possession to a vessel mortgaged is vested in the mortgagee.

2. After condition broken, the mortgagee may take immediate possession of the vessel.

3. A suit in admiralty will lie to reclaim the possession from any third party who may have acquired it.

4. A purchaser of the vessel at a sheriff's sale, under a judgment against the mortgagor, cannot maintain his possession against the mortgagee.

5. A court of admiralty will not adjust the accounts between mortgagor and mortgagee in a possessory action to recover the vessel.

6. Whether the mortgagee shall be entitled to costs in such action will depend upon the fairness and equity of his proceedings in getting the vessel into his possession.

The libellants and claimants are residents of this state. The brig was built in the state of Maine, and was owned by Silas Hardy, a citizen of that state, and had been registered in his name in this port. On the 4th of February, 1851, the owner gave the libellants a bond for twelve thousand dollars, conditioned to pay them on demand five thousand nine hundred and seventy-five dollars with interest; and the same day executed to them an absolute bill of sale of the brig, to which was subjoined the condition that on payment of the sum of money secured by the said bond, pursuant to its condition, the bill of sale was to be void, and otherwise to remain in full force. The mortgage was registered at the custom-house in this port on the day of its date. The debt for which the bond was given, was created by credits given by the libellants to Hardy, as master and owner of the brig, for supplies and repairs to her, and sums of money advanced

him by the libellants for her purchase. The owner being negotiating a sale of the brig, the libellants on acquiring knowledge of it, on the 1st day of March, 1851, demanded of him immediate payment of the said sum of money. This was the afternoon of Saturday. Hardy requested time until the Monday following to make payment, and said he would then obtain the money from his purchaser and pay off the mortgage. The libellants refused to give the delay, and directed a person to go to the vessel and take possession of her in their name. The same day Hardy complained to the libellants that they had taken the brig into their possession. The present claimant was the person negotiating with Hardy for the purchase of the brig. On the 4th of March, 1851, the brig was attached by process issued the same day out of a state court, in favor of Jones and Johnson against Hardy, as a non-resident debtor. The debt on which the attachment was founded, was a promissory note, dated February 20th, 1851, for three thousand seven hundred and seventy-one dollars and sixty-six cents, payable on demand, to the claimant, and by him endorsed to his firm, Jones and Johnson. On the 4th of March, a summons in the action was served on Hardy, and on the 6th he gave his written consent that judgment be entered against him forthwith for the amount claimed with interest. Judgment was perfected and docketed the same day against Hardy for three thousand two hundred and eighteen dollars and eighty-three cents, and execution thereon issued the same day. On the 13th of March the sheriff sold, under the execution, the interest of Hardy in the vessel at public auction to the claimant, he being the highest bidder, and gave him a bill of sale and possession of the vessel. The bill of sale was recorded at the custom-house on the 15th of March. On the 15th of May, 1851, the above judgment was assigned by the plaintiffs therein to the claimant.

G. F. Betts, for libellants.
C. Van Santvord, for claimant.

BETTS, District Judge. 1. As between Hardy and the libellants, the latter, by force of the mortgage, are entitled at law to have possession of the brig against him, and hold it until satisfaction of the debt secured by it (Fuller v. Acker, 1 Hill, 473), and the right of possession is not interrupted by a seizure and sale under execution against the mortgagor while the possession remains with him (Id.). The conveyance of the vessel by way of mortgage, vested the legal title in the libellants, and would be sufficient to carry even the proceeds to them had she been disposed of. De Wolf v. Harris [Case No. 4,221]; 2 Denio, 172; Id. 344; 3 Denio, 33.

2. The legal title vested in the libellants by the bill of sale entitled them to take possession of the vessel against the mortgagor without suit. Every outside equitable interest with which the legal title is opposed, must be left to the cognizance of other courts than the admiralty. The Sisters, 5 C. Rob. Adm. 138; 3 C. Rob. Adm. 176; 4 C. Rob. Adm. 225; Patchin v. Pierce, 12 Wend. 61. The court of admiralty has jurisdiction of actions to reclaim possession of vessels in behalf of the party holding the legal title. Abb. Shipp. 131, note 1. Judge Woodbury, in running over all the cases, admits it to be so when the consideration is of a maritime character. Leland v. The Medora [Case No. 8,237].

3. The claimant proves no tender of the debt on demand of it when the mortgage became forfeited,, nor previous suit brought. The assertion of a willingness to pay, not accompanied by proof of ability to perform, would raise no equity in behalf of the mortgagor, even if the court is permitted to take into consideration a bona fide attempt to satisfy the mortgage debt at such time. 3 Denio, 33; 12 Wend. 61. Although on the question of costs, such attempt would justly have great weight in behalf of the mortgagor or his assignee.

4. This mortgage being given by a foreign owner of the vessel for a maritime consideration, its lien is complete on compliance with the act of congress, and the mortgagee is not compelled to register it also under the state law. But the claimant is not in a position to raise the question of registry, because the sheriff sold him no more than the right and interest of the mortgagor in the vessel, and because he had actual notice of the existence of the mortgage and the consideration for which it was given.

5. The action is not to enforce payment of the money secured by the mortgage, and the court is not therefore required to meet the question which seemed to weigh with Judge Woodbury,—Dean v. Bates [Case No. 3,704]; Leland v. The Medora [supra]; Packard v. The Louisa [Case No. 10,652],—whether a mortgagee can resort to admiralty to foreclose his mortgage. This suit seeks to carry into effect the legal title of the libellants to the possession of the vessel, as against the right of the mortgagor alone, and when the possession is secured, the holders would be subject to the control of the proper judicatory in the exercise of their rights as mortgagees, and the allowance of all equitable interests of the claimant standing in the place of the mortgagor. The possession in point of fact was in the libellants, by admission of the mortgagor, when it was divested by the sheriff under the direction of the claimant.

6. In my opinion, the libellants are entitled to a decree for restoration of possession of the vessel to them. Independent of the legal title to possession, they had it in fact through their agent, Daggett, and, in relation to a vessel, the possession of the master and mortgagor, continuing after it

is demanded by the mortgagees, becomes, as against him and a third party taking his interest with full notice, the possession of the mortgagees. It was not necessary to the protection of their rights against the claimant that they should have displaced the mortgagor from the vessel.

7. The question of costs will be reserved to enable the claimant to satisfy the court that the mortgagor made bona fide effort to satisfy the mortgage debt, and had means to do so before this suit was instituted, or that the libellants were guilty of oppression and inequitable measures in enforcing their legal right.

[NOTE. Subsequently a motion was made before Judge BETTS that the decree of possession of the vessel to the libelants be varied, and the libel dismissed, upon the execution of a bond with sufficient sureties, approved by the district court; the bond to be conditioned to pay the libelants the amount due them. The court held that the proceeding contemplated would contravene the established practice of the court in respect to rectifying a decree, and that, furthermore, it would be changing an act of possession into a proceeding in foreclosure of the mortgage, which last the learned judge held was not within the province of courts of admiralty. Case No. 7,247.]

## Case No. 7,247.

The J. B. LUNT v. MERRITT et al.

[21 Betts, D. C. MS. 85.]

District Court, S. D. New York. May 20, 1853.

MORTGAGE OF VESSEL — MORTGAGEE'S RIGHT TO POSSESSION ON CONDITION BROKEN—ADMIRALTY JURISDICTION—SUIT TO REDEEM.

[1. A mortgage of a vessel, being a mortgage of chattels, stands upon the footing of a mortgage at common law, and on failure to perform the condition the property is vested in the mortgagee, and he becomes entitled to the possession.]

[2. In a petitory suit, brought by the mortgagees of a vessel after forfeiture, a decree was rendered adjudging the title to be in the libellants, and ordering the ship to be delivered to them. Afterwards the claimants, by motion and affidavits, asked that the decree be changed by adding that it should be at their election to give bond with sureties, conditioned to pay whatever was justly due the mortgagees, after deducting all payments, offsets, counterclaims and discounts which in law or in equity should be deducted. *Held*, that this was, in effect, a bill to redeem from a mortgage, which is beyond the admiralty jurisdiction, and the application must therefore be denied.]

[Forfeiture having been made in a chattel mortgage of the brig J. B. Lunt, the mortgagees filed a libel for the purpose of securing a decree of possession of the brig. The decree was entered giving the possession to the libelants. Subsequently William H. Merritt and others, the claimants of the vessel, moved the court that the decree of possession of the vessel to the libelants be varied, so that the libel might be dismissed upon the execution of a bond, with sureties approved by the court, conditioned for the payment of the amount due them. The cause is now heard upon this motion.]

BETTS, District Judge. The original action was a petitory suit, by the mortgagees of the vessel after forfeiture, demanding possession of it as absolute owners, and the decree adjudged the title to be in the libellants, and ordered possession of the ship to be delivered to them. [Case No. 7,246.] A mortgage of chattels stands upon the footing of the common-law mortgage, and on failure by the mortgagor to perform the condition the property is vested in the mortgagee, and he may claim possession of it as his own. 4 Kent, Comm. 137; 2 Bl. Comm. 157; Coote, Mortg. 9. Although the rigor of absolute forfeiture of the estate on nonpayment of the debt secured is relaxed, and the payment of the debt at any time before a legal foreclosure may have the effect of reinstating the mortgagee in his property (4 Kent, Comm. 158), and even if the mortgagor has an equity of redemption which will be protected in equity before it is foreclosed by a public sale of the property by the mortgagee (Charter v. Stevens, 3 Denio, 33), yet a court of equity never interferes to prevent the mortgagee from assuming the possession (Coote, Mortg. 330; Cholmondeley v. Clinton, 2 Mer. 359).

The motion in this instance asks that the decree of possession of the vessel to the libellants be varied by adding that it shall be at the election of the claimant to execute a bond with sufficient sureties, conditioned to pay the libellants the amount justly due to them on the indebtedness and liability for which the mortgage was taken, after deducting all payments made thereon, all moneys received by the libellants from bills of lading of the vessel or otherwise, which should be applied by the libellants thereon, and all offsets, counterclaims or discounts which, according to law or equity, should be deducted therefrom; and that, upon executing such bond, and the approval thereof by the district judge, the libel be dismissed. This application proposes a substantive change of the decree rendered, and independent of the formal objection to it, that it contravenes the established practice of the court in respect to rectifying a decree made on hearing (Ben. Adm. p. 548; Peru v. The North America [Case No. 11,017a]), it proposes that the court should assume a function never yet exercised in admiralty,—that of changing an action of possession founded upon the conveyance of a chattel by a mortgage deed into a proceeding in foreclosure of the mortgage according to the principles of a court of equity.

In my opinion, a court of admiralty is incompetent to entertain a libel merely for the purpose of foreclosing a mortgage, and, had this suit been instituted for that object, the action would have been dismissed; but there is now an additional impediment to the relief asked for, as the order pointed out would be the appropriate conclusion to a bill by the mortgagee, and, if such pro-

ceeding could be maintained in this court, it would be wholly irregular to give the applicant the judgment sued for without permitting the mortgagee to answer and contest his right to it. But, in my opinion, the same objection lies to the maintenance of a libel for redemption of a mortgage as to one for its foreclosure,—both belonging appropriately to a court of chancery, which can control the proper accountings, and the production of necessary witnesses and vouchers. The order prayed for has all the qualities of a libel or bill to redeem, and the claimant cannot entitle himself to the prayer in any mode of procedure which would evade the right of the libellants to put at issue and contest the positions of law or fact upon which the relief is sought. The decree rendered upon the merits must accordingly stand, and the application to substitute the one pointed out be denied.

## Case No. 7,248.

The J. C. GIBBES and The CAPRICCIO.

The E. W. GORGAS.

[4 Ben. 109.] [1]

District Court, S. D. New York. April, 1870.

COLLISION AT THE ATLANTIC BASIN — TUG-BOAT AND TOW—SPEED—PART OWNER.

1. The tug Gibbes was towing the schooner Capriccio by a hawser out of the Atlantic Basin. The tug Gorgas was towing the canal boat Webster, lashed alongside, into the Basin. A collision occurred in the cut leading into the Basin, between the canal boat and the schooner. H., the owner of the Webster, filed a libel against the Gibbes and the schooner, to recover damages for the injury received by the Webster. S., the charterer of the Webster and carrier of her cargo, who was a part owner of the Gorgas, filed a libel against the Gibbes and the schooner, to recover damages for injury to the cargo. Z., the owner of the schooner, filed a libel against the Gorgas, to recover damages for the injury received by the schooner. *Held*, that the collision was caused by fault of the Gorgas in coming into the cut with too great speed, and in turning into it at so short a distance from the pier that she was prevented from seeing into the cut, and that the sound of her whistle was intercepted by the warehouses on the pier, and so was not heard on board of the Gibbes. The first two libels, therefore, must be dismissed, and the libellant in the third action must have a decree.

2. Whether S. could have recovered against the Gorgas, of which he was part owner, if he had libelled her, quere.

In admiralty.

T. C. T. Buckley, for Hurlbert and St. John and the Gorgas.

W. R. Beebe and C. Donohue, for Zadro and the Capriccio.

W. J. Haskett, for the Gibbes.

BLATCHFORD, District Judge. These three libels grow out of a collision which occurred in the cut leading from the Atlantic Basin, at Brooklyn, into the East river, on the 6th of March, 1868, in broad daylight, between nine and ten o'clock in the morning, on a clear day. The steam-tug J. C. Gibbes was towing the schooner Capriccio, by a hawser, out of the Atlantic Basin, through the cut, and the steam-tug E. W. Gorgas was towing the canal boat H. C. Webster into the basin through the cut, the Webster being lashed to the port side of the Gorgas. The Webster had on board over 7,900 bushels of corn. The Gorgas and the Webster were on their way from the iron elevator at the foot of Degraw street, Brooklyn, just above the Hamilton Avenue ferry slip, to a vessel lying at Laimbeer's store in the Atlantic dock. The Webster came into collision with the schooner, the former being struck at a point about sixteen inches abaft her stem, on her starboard bow, by the cutwater of the schooner. The effect of the blow was to crush in the Webster and open her, so that it was necessary, in order to save her from sinking in deep water, to beach her on Governor's Island, which was done. Hurlbert, as owner of the Webster, sues the Gibbes and the schooner for $1,500 damages to the Webster. St. John, as charterer of the Webster at the time, and the carrier of the corn with which she was laden, valued at $11,000, sues the Gibbes and the schooner for $3,500 damages to the corn. Zadro, as owner of the schooner, sues the Gorgas for $500 damages to the schooner. It is to be noted that neither Hurlbert nor St. John sues the Gorgas, nor does Zadro sue the Gibbes. St. John was part owner of the Gorgas. After a careful examination of the evidence, which is very voluminous, I have come to the conclusion that neither the Webster, nor the Gibbes, nor the Capriccio, was at all in fault in this collision, but that it was caused wholly by the fault of the Gorgas. She went down, on a strong ebb tide, at too great a rate of speed, considering the closeness of her proximity to the western pier of the basin and the short turn she would have to make to enter the cut. The warehouses erected on the pier not only prevented her whistles from being heard by the Gibbes, but also prevented her from seeing the Gibbes and the schooner, until it was too late for her to control her course and speed so as to avoid the collision. The same cause that prevented the whistles of the Gorgas from being heard by the Gibbes, would doubtless have prevented any whistle from the Gibbes from being heard by the Gorgas. At all events, on all the evidence, I am unable to hold that the failure on the part of the Gibbes to whistle was a fault that contributed to the collision. The Gibbes was going at a very slow speed, and her tow had barely entered the cut, when the Gorgas came around the upper outer corner of the cut, from the East river, at great speed, swept along by a strong ebb tide, and was carried by her impetus so far over, that, in spite of all her

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efforts by backing her engine, she barely grazed the Gibbes and dashed the starboard bow of the Webster against the stem of the schooner. As the Webster was on the port side of the Gorgas, and the Gorgas herself was not struck by the schooner, she must have carried herself and the Webster in between the Gibbes and the schooner. There is no evidence of any sheering on the part of the schooner. It was very reckless navigation to go down, in such a tide, at such speed, so close to the pier, with the view into the cut and basin obstructed. Prudence, and a due regard to her own safety and that of vessels coming out of the basin, required the Gorgas, with the tide and her speed such as they were, to go out further into the East river and head into the cut from a point where she could have some view into the cut, and could be certain that the sound of her whistles would not be intercepted by the warehouses. As Hurlbert has not sued the Gorgas, and as the Gibbes and the schooner were not in fault, his libel must be dismissed, with costs. St. John has not sued the Gorgas, even if he could have recovered against her, inasmuch as the evidence shows that he was part owner of her and was on board of her at the time. His libel must be dismissed, with costs. There must be a decree in favor of Zadro, with costs, with a reference to compute the damages sustained by him.

## Case No. 7,249.

The JEANNIE CUSHMAN.

[Affirming Case No. 7,250. Nowhere reported; opinion not now accessible.]

## Case No. 7,250.

The JEANNIE CUSHMAN.

[3 Ware, 309.] [1]

District Court, D. Maine. Jan., 1865.

COLLISION—RULE OF DAMAGES—DEMURRAGE.

1. In collision cases the injured vessel is entitled to be put into as good condition as she was in before the injury, and no allowance, as in insurance cases, when new materials are used, is made for new instead of old.

2. Upon the question, whether demurrage should be allowed while the injured vessel is undergoing repairs, no certain and uniform rule is established

[This was a libel in rem against the Jeannie Cushman.]

Rowe, for libellant.

A. A. Strout, C. P. Stetson, for respondent.

WARE, District Judge. The Wm. Nickels, a hermaphrodite brig of about 120 tons burthen, Ames, master, arrived at Bangor, in the Penobscot river, from Baltimore, Sept. 8th, 1865, laden with white oak timber. The timber was consigned to Mr. Tewksbury, who had a ship-yard opposite to Bangor on the Brewer side of the river. She came to anchor, as alleged in the libel, on the Brewer or eastern side of the stream, about opposite to Tewksbury's ship-yard on the flats, where at low tide there was only five feet of water, as near as she could go to the ship-yard until she was lightened by a partial discharge of her cargo, she then drawing ten feet of water. She was subsequently removed by Atwood, the stevedore employed to unload her, and anchored a little lower in the river, but still on the flats and not in the bed of the river. The unloading commenced on Friday the 8th, and was continued till Saturday evening. At this time, the Jeannie Cushman, from Boston, with a cargo of coal, arrived within three miles of Bangor, where she took a steam-tug to carry her into the harbor. The tug took her in tow and, in coming into the harbor, she came in collision with the Wm. Nickels, and the damage was done that is complained of in this libel.

The first question that arises in this case is, whether the Wm. Nickels was anchored and lay on lawful ground. The harbor regulations of Bangor, established by the city government, and authorized by the legislature of the state, provide that, "no vessel, steamboat, or raft shall be allowed to anchor or lay in the channel of the river, between Bangor bridge and the north line of Hampden, in such a manner as to obstruct the free passage of vessels, boats, or rafts up and down the river or stream." "And if any vessel or raft shall anchor or lie contrary to any of these regulations, the harbor master shall forthwith give notice to the masters thereof, or the person having the care of the same to remove the same; and if the said notice is not complied with without delay, the harbor master shall make or cause the said removal at the expense of the said vessel, boat, or raft."

On the question of the position where the Nickels anchored and lay, there is some variance in the testimony. It has been specially labored on both sides. On the eastern or Brewer side, the land from the shore, at high water, runs off shelving to the bed or channel of the river to a considerable distance. Part of the way the land is bare at low water, and part of it is covered, so that the bed of the river is close to the Bangor side, and the middle of the river is different at different times of the tide. Where the flats terminate they suddenly drop about four feet to the bed of the stream, which is rocky. On these flats and out of the bed of the river, she was placed by Atwood, and remained there, according to the libellants, until the collision, so that she was aground for a considerable time during low tide. Parker, the harbor master, and well acquainted with the river, saw her

[1] [Reported by George F. Emery, Esq.]

on Friday and Saturday, and considered her as lying in a safe and suitable place and did not order her to change her position, and, though he did not go on board of her, could easily determine whether she was in the way or would obstruct the safe navigation of the stream. He thought her in a safe place. His testimony is substantially confirmed by that of Atwood, the stevedore, who unloaded her, by that of Tewksbury, at whose ship-yard she discharged her cargo, and by that of Fifield. To meet and overcome this proof, a large number of witnesses have been examined on the part of the claimants. Without going over all their depositions in detail, it may be remarked generally, that they express their opinion that the Nickels lay in the channel of the river so as to obstruct the navigation of vessels coming into the harbor, and this opinion is formed from her position in the stream. But all agree that the bed of the river is on the Bangor side, and that there are no flats there, but the bed of the river comes up quite to the shore. The tide rises from twelve to seventeen feet, and flows considerably on the eastern shore, but more on the western or Bangor side, so that the centre of the stream will be farther from Bangor at high than at low water. She might be in the middle of the stream at high water and still on the Brewer flats. This testimony I do not think sufficient to overcome the positive testimony on the part of the libellants, of Atwood, who chose her position, and of Parker, the harbor master, who saw her Friday and Saturday, whose business it is to see the channel is kept free from obstructions, and who is very positive that she was placed in a proper manner, from the fact that she lay aground during three hours of low tide, which she would not in the bed of the stream. On a comparison of the whole testimony it is, I think, satisfactorily proved that the Wm. Nickels was on the Brewer flats and in a proper place for unlading. The collision must, therefore, be attributed to the Jeannie Cushman, and she be responsible. There may be, possibly, a question when a sailing vessel is in tow of a steamtug and a collision occurs, whether the tug or the vessel is liable, but it does not arise in this case. The libel is against the vessel, and she is undoubtedly liable, whoever may direct her motions. The maritime law treats her as a person, and makes her answerable for all the damage she does. U. S. v. The Malek Adhel, 1 How. [42 U. S.] 233, 234.

The collision took place between eleven and twelve o'clock at night. The crew of the Nickels had part of them left her, so that at that time she had but two men in addition to the captain. These were all abed, but a light was suspended several feet above the deck, and it was a moonlight night, the moon being two hours or more high, and clear starlight or only thin flying clouds. The Cushman, in ascending the river on the Bangor side, struck a scow and glanced from that against the starboard bow of the Nickels, and, in the collision, the two masts of the Nickels were broken and fell overboard, and some damage was done to her rigging. She was repaired at Tewksbury's wharf, and the bills are all rendered in and not objected to. Her repairs are taxed at ordinary prices, and have been paid to the amount of $630.55.

In collision cases the injured vessel is entitled to be put in as good a condition as she was in before the injury, and no allowance, as in insurance cases where new materials are used, is made for new instead of old. But, in this case, as the foremast, where it was broken, had been spliced, was old and evidently weak and rotten at that place, I think it proper that this should be deducted, and as the cost of both masts was $95, from this is deducted $47.50. The libellant also claims for demurrage while the vessel was under repair. On this subject the practice of the courts is curious; in some cases it is allowed and in others not. No certain and uniform rule is established. But it seems, in the present case, some allowance should be made, and is. I allow $62 to be added for this. Decree for libellant for $645.05, damages and costs.

This case was carried by appeal to the circuit court, where the decree of the district court was affirmed, September 3, 1836. [Case No. 7,249.]

JEFFERS (BAKER v.). See Case No. 772.

## Case No. 7,251.

JEFFERS v. FORREST.

[5 Cranch, C. C. 674.] [1]

Circuit Court, District of Columbia. March Term, 1840.

APPEAL BOND—DEATH OF APPELLANT—LIABILITY OF SURETIES.

If the appellant from the judgment of a justice of the peace, die pending the appeal, and no further proceedings are had in the cause for two terms thereafter, the sureties in the appeal-bond are not liable for the appellant's not having prosecuted his appeal with effect.

Debt upon an appeal-bond in the penalty of $100. The breach assigned was in not prosecuting the appeal with effect. The defendant [Joseph Forrest] pleaded that the appellant [Madison Jeffers] died pending the appeal, and that at the third term after the death the appeal was abated and discontinued.

Upon demurrer, judgment was rendered for the defendant.

JEFFERS (GRIFFIN v.). See Case No. 5,817.

[1] [Reported by Hon. William Cranch, Chief Judge.]

JEFFERS (UNITED STATES v.). See Case No. 15,471.

JEFFERSON (LIVINGSTON v.). See Case No. 8,411.

JEFFERSON, The (MOREHOUSE v.). See Case No. 9,793.

JEFFERSON COUNTY (UNITED STATES v.). See Case No. 15,472.

## Case No. 7,252.

Case of JEFFERSON DAVIS.

[See Case No. 3,621a.]

JEFFERSON, The THOMAS. See Case No. 13,923.

## Case No. 7,253.

In re JEFFERSON INS. CO.

[2 Hughes,[1] (1877), 255; 11 N. B. R. 287.]

District Court, E. D. Virginia.

BANKRUPTCY — CORPORATION —VOLUNTARY PETITION—AUTHORITY TO FILE—FAILURE OF STOCKHOLDERS TO OBJECT.

The petition in this case was filed by an officer of the company, by order of the board of directors. One of the corporators filed a petition four years afterwards, alleging that the petition was never authorized by the stockholders as required by law; that the proceedings were null and void from their inception; and praying that all the proceedings in bankruptcy be dismissed for want of jurisdiction. *Held*, that after this lapse of time the court would presume that the stockholders had regularly authorized the petition to be filed; and a stockholder who had remained silent for more than four years would not be heard to impeach the validity of the proceedings. Petition dismissed with costs.

[Cited in Re Collateral Loan & Sav. Bank, Case No. 2,997.]

[In the matter of the Jefferson Insurance Company, a bankrupt.]

The voluntary petition of this company praying to be declared a bankrupt was filed in July, 1870. It was filed by an officer of the company by order of the board of directors. The bankrupt law [of 1867 (14 Stat. 517)] requires that in the case of a joint stock company the petition in bankruptcy must be duly authorized by a vote of a majority of the corporators at any meeting called for the purpose. On the 9th of November, 1874, one of the corporators, James D. Jones, filed a petition alleging that the petition was never authorized by the stockholders as required by law; that the proceedings were null and void from their inception, and praying that all the proceedings in bankruptcy be dismissed for want of jurisdiction.

THE COURT (HUGHES, District Judge), held that after this lapse of time it would presume that the stockholders had regularly authorized the petition in bankruptcy to be filed; and on the authority of the United States supreme court, in Zabriskie v. Cleveland, 23 How. [64 U. S.] 398, and of the district court of Maryland, in the Matter of Baltimore County Dairy Association [Case No. 828], it further held that a stockholder who had remained silent for more than four years would not be heard to impeach the validity of the proceedings in bankruptcy. It was ordered, therefore, that the petition of James D. Jones, stockholder, be dismissed with costs; but that the stockholders have leave to take proper proceedings in this court for adjudicating their mutual rights and obligations touching the contributions required in settlement of the affairs of the bankrupt company.

[1] [Reported by Hon. Robert W. Hughes, District Judge, and here reprinted by permission.]

JEFFERSONVILLE (BISSELL v.). See Case No. 1,449.

JEFFERSONVILLE (BURNLEY v.). See Case No. 2,181.

## Case No. 7,253a.

JEFFREY v. SCHLASINGER et al.

[Hempst. 12.] [1]

Superior Court, Territory of Arkansas. April, 1822.

BOOK OF ORIGINAL ENTRIES — ADMISSIBILITY IN EVIDENCE—PLEA OF NON-ASSUMPSIT—RIGHT TO PROVE PAYMENT.

1. The books of a merchant, although correctly kept, are not admissible in evidence in his favor.

2. Payment may be given in evidence under non-assumpsit without notice.

Appeal before JOHNSON, SCOTT, and SELDEN, JJ.

OPINION OF THE COURT. This is a case brought here by [Jesse Jeffrey, on] appeal, and the following errors are assigned: 1. "The appellees [Schlasinger and Gillett] offered in evidence their original book of entries, having previously proved they were regular merchants and kept a correct book of entries as such, and that the book was in their handwriting, and the court permitted the book to be read in evidence to the jury." We cannot but look upon a proceeding of this character as fraught with the most dangerous consequences, and as tending to encourage fraud and imposition, in the highest degree. 3 Bl. Comm. 368; Owens v. Adams [Case No. 10,633]. It is also unprecedented except in states where allowed by statute, and is then generally limited to small amounts. We are of opinion that it was error to admit such testimony.[2] 2. "The court

[1] [Reported by Samuel H. Hempstead, Esq.]

[2] By the common law of England, shop books are not allowed of themselves to be given in evidence for the owner. But a clerk or servant who made the original entries may have recourse to them to refresh his memory, as to other written memoranda made at the time of the transaction. If the clerk or servant who made the entries be dead, the books may be admitted in evidence to show delivery of the articles on

erred in not permitting the defendant under his plea of non-assumpsit to give evidence of payment." We think the court did err in excluding this testimony, as payment may be given in evidence under the general issue without notice, as decided by this court, in the case of John Smith, T. v. Edmund Hogan, and as the authorities clearly establish. 1 Salk. 394; 6 Com. Dig. "Pleader," E 14; 1 Ld. Raym. 217, 566; 1 Chit. Pl. 511; 12 Mod. 376. Reversed.

JEFFRIES (CAGE v.). See Case No. 2,287.

## Case No. 7,254.

JEFFRIES v. WIESTER et al.

[2 Sawy. 135;[1] 5 Am. Law T. Rep. U. S. Cts. 96.]

Circuit Court, D. California. Dec. 1, 1871.

AGENT PURCHASING OF PRINCIPAL—SALE ANNULLED—VENDOR ENTITLED TO ACCOUNT—COMPENSATION OF AGENT.

1. An agent employed to sell a patent right for the territory embraced in the state of California, purchased the right to the entire territory from his principal, at an agreed sum, upon a representation that he could not sell for a better price, and, concealment of the fact that he had before the purchase actually contracted to sell two counties for the same sum given for the entire territory. The vendee afterwards sold other counties for various sums, a portion of which had not been paid. The vendor filed a bill to set aside the sale, and charge his vendee as trustee and for an account. After which the vendee reacquired portions of the territory so sold, and offered to reconvey in discharge of his liability, in case the sale should be set aside: *Held*, that the principal is entitled to have the sale annulled, and the portion of the territory unsold reconveyed.

2. The vendor is not bound to accept that portion of the territory which his vendee had sold and reacquired after the sale to him, but is entitled to have an account of the entire amount for which the territory sold.

3. The stipulations of the prior contract of agency, do not control the question of compensation, but the actual charges and commissions paid by the vendee in making the sales will, in this case, be allowed.

Bill in equity [by B. F. Jeffries against J. H. Wiester and others] to annul purchase of patent right by agent of his principal, made upon false representations of agent. The facts are stated in the opinion of the court.

Sharpstein & Hastings, for complainant.
Bartlett, Pratt & Tilden, for defendants.

SAWYER, Circuit Judge. Bill in equity to compel a reassignment of a patent right to a vapor-burner for the state of California, and for an account. The following facts satisfactorily appear from the evidence, and admission of the pleadings: In April, 1870, the complainant, a citizen of Missouri, was the owner of the right for several states, including the state of California, to a patent for an improvement in "vapor-burners," granted to one Ward. The respondents, citizens of California, under the name of Wiester & Co., of whom Wiester appears to be the active man, were, at that time, engaged in the business of introducing, and buying and selling on commission, patent rights in the states, west of the Rocky Mountains; and they represented to complainant that they had arrangements, which gave them superior facilities for introducing and disposing of patent rights on the Pacific coast.

Relying upon these representations, the complainant, in April, 1870, entered into a written agreement with the respondents, whereby, "in consideration of the services of Wiester & Co., as agents, in undertaking the sale of the above mentioned patent, and in further consideration of the said firm putting it properly and advantageously before the public, by means of advertising, and otherwise, for the purpose of making it generally known, and securing customers to purchase rights to the same," it was agreed that respondents should have twenty-five per cent. on all sales of territory amounting to one thousand dollars, and fifteen per cent. on sums above one thousand dollars, and should have a power of attorney, authorizing them to sell rights. It was also stipulated that the whole territory, if sold together, should not be sold for less than five thousand dollars. The commissions were to be reserved out of the money received from sales, and the balance remitted to complainant.

The defendants entered upon their duties as agents under the contract, but from a want of proper efforts on the part of defendants, as alleged by complainant, or because the improvement "did not take well," as claimed by defendants, or some other cause,

producing proof of his handwriting. Bull. N. P. 282; 1 Salk. 285; 2 Ld. Raym. 873; 2 Salk. 690. But if the clerk be living, though beyond the jurisdiction of the court, the entries are inadmissible. 1 Esp. 1. Where there are regular dealings between the plaintiff and defendant, and it is proved that the plaintiff keeps fair and honest books of account, and keeps no clerk, his books of account, under the circumstances and from the necessity of the case, are admissible as evidence. Vosburg v. Thayer, 12 Johns. 462; Case v. Potter, 8 Johns. 163. In other states, the suppletory oath of the plaintiff must be added. Poultney v. Ross, 1 Dall. [1 U. S.] 238; Sterrett v. Bull, 1 Bin. 234; Cogswell v. Dolliver, 2 Mass. 217; Prime v. Smith, 4 Mass. 455. In Arkansas, "the regular and fairly kept books of original entries of a deceased merchant, or regular trader, or any person keeping running accounts for goods, wares, merchandise, or other property sold or labor done, accompanied by the affidavit of the executor or administrator of such deceased person, or some creditable person for him, setting forth that they are the books, or accounts of his testator or intestate, shall be evidence to charge the defendant for the sum therein specified, subject to be repelled by other competent testimony." Mansf. Dig. § 7, p. 499. But this is subject to this qualification, that "to entitle the party to introduce such evidence, he must first establish to the satisfaction of the court, that his testator or intestate had the reputation of keeping correct books." Id. § 8, p. 491.

[1] [Reported by L. S. B. Sawyer, Esq., and here reprinted by permission.]

with no success. On the 19th of October, 1870, defendants informed complainant that no rights had been sold, except for the counties of El Dorado, Fresno, Kern, and Tulare, and these had been sold for small sums, and through the personal exertions of the complainant. The complainant was pressed for money, and so informed respondents, and frequently urged them to sell, but was as often informed that the patent "did not take well," and that they could not sell.

On October 19, 1870, after being informed of complainant's necessities, and his earnest desire to have sales made, said respondents stated to complainant, that there was another patent for a similar burner in the field, of which they had a good opinion, and which they thought of taking hold of; that they could sell the complainant's rights to the entire state of California, except the counties before named already sold, for the sum of two hundred and fifty dollars, and this was the best that they could do. The complainant relying upon these statements, that a larger sum could not be obtained, and that another burner was about to be introduced, and, being pressed for money, accepted this proposition, and sold and assigned the right to the entire State except those counties already sold, as aforesaid, for said sum of two hundred and fifty dollars, and thereupon executed a deed of assignment therefor to respondent, Boone, the party designated by Wiester & Co., as the purchaser.

In point of fact, the said defendant, Boone, was at the time a member of the said firm of Wiester & Co., and the purchase money was paid by the said firm, and the purchase made and conveyance taken in the name of said Boone, for the use and benefit of said firm —the respondents in this case—although the fact that said Boone was a member of said firm, and that the purchase was made in his name for the benefit of the firm, was, evidently, unknown to complainant at the time of said sale.

Notwithstanding the said representations of respondents, made October 19, that two hundred and fifty dollars was the best price they could get for the entire State remaining unsold, as aforesaid, the respondents, on October 16, and before the said sale, and making of said representations, had actually made a contract for the sale of the two counties of Sonoma and Napa to one J. H. Coe, for the sum of two hundred and fifty dollars, and had received one hundred dollars of the purchase money from said Coe, which fact respondents concealed from the said complainant. The remaining one hundred and fifty dollars was paid, and the conveyance of the right to said counties in pursuance of said contract, was made on the twenty-seventh of the same month, after said sale to Boone.

Soon after the said sale and conveyance to Boone, said respondents, in the name of Boone, sold the right to said patent for the counties of Contra Costa, San Joaquin, Placer and Nevada, in the state of California, to one Van Doren, for the sum of five hundred dollars; the counties of Marin, Mendocino and Lake, to said Coe, November 14, 1870, for eighty dollars; the county of Solano for one hundred and twenty-five dollars; the county of Colusa for one hundred dollars, and the county of Sacramento for two hundred and twenty dollars.

Upon the discovery of the facts, the complainant, on November 18, 1870, within a month after said sale and conveyance to Boone for the benefit of respondents, filed this bill, and soon thereafter, respondents began to obtain re-conveyances of the rights so sold for said counties. Van Doren's purchase was for two hundred dollars, cash down, and his note on three months' time for three hundred dollars. On the fifteenth of December, he re-assigned the right for the four counties so purchased to respondents, Wiester & Co., the consideration received being a surrender of his said note for three hundred dollars, and the assignment of a right for two counties to another burner, called the "Eureka Burner." So, also Coe, in the month of December, re-assigned to respondents the right purchased by him in exchange for a right for the "Eureka Burner."

Re-assignments to respondents have also been obtained of the rights sold by them for the other counties named, except Colusa and Solano. This case is, clearly, within the principle of the leading case of Fox v. Mackreth, and others cited in the notes to that case, in 1 White & T. Lead. Cas. 125, 148, Indeed, that case goes further than the exigencies of the case now in hand require.

In Fox v. Mackreth, a trustee for the sale of an estate, having himself purchased it from the party for whom he was acting, and shortly afterward sold it at a considerable advance, was decreed to be a trustee for his vendor, as to the surplus realized from the second sale. In the language of the learned authors of the note cited, Fox v. Mackreth "was decided, not upon the ground that Mackreth had purchased the estate at an under value, but that he had purchased it from his cestui que trust, while the relation of trustee and cestui que trust continued to subsist between them, and without having communicated to Fox the knowledge of the value of the estate, which he had acquired as trustee." Id. 148, note.

The case has been followed by numerous others, firmly establishing the principle upon which it rests. "An agent employed to sell cannot purchase from his principal, unless he makes it perfectly clear that he has furnished his employer with all the knowledge which he himself possesses." Id. 152, and cases cited.

It is unnecessary to do more under this head than to refer to the case and note cited. In this case, the respondents accepted the

fiduciary relation of agents to sell for the complainant his right to the patented vapor burner in the state of California, upon the terms expressed in the contract. Having assumed these confidential relations, they were bound to give him the full benefit of the facilities which they professed to have, and of all knowledge acquired in the exercise of their trust, which would tend to promote his interests. For some reason their efforts in the discharge of their trust did not prove successful. But while the trust was still existing, and in the exercise of their agency, the respondents contracted to sell two counties for two hundred and fifty dollars, and receive one hundred dollars on account of the purchase.

Yet, with this fact existing, when urged by the complainant to sell in order to relieve his pressing needs, without paying over the money, or communicating the fact of sale, they told him that the best price they could get for the whole state not sold—some fifty odd counties—was two hundred and fifty dollars, and relying upon these representations, he agreed to accept it, and the right was sold and assigned, ostensibly to respondent, Boone, for that sum. The money was paid by the firm, and the conveyance taken for their use and benefit. There was not a mere concealment, but a positive misrepresentation; for it "was not true that two hundred and fifty dollars was the best price they could get for the whole state, when they had actually contracted to sell two counties only for that sum, and had received one hundred dollars on the purchase money. In fact, the result was, that two counties having been already sold for two hundred and fifty dollars, the purchase money less commissions belonged to complainant, and respondents covertly purchased the rest of the state from him and paid for it in part, at least, out of complainant's own money, received, and to be received for the counties already sold.

So far as the evidence shows the dates of sales made subsequent to the assignment to Boone, they were all made before the filing of the bill, and, immediately after the filing of the bill in November, the respondents began to procure re-assignments of the rights sold. The re-assignments from Coe and Van Doren were acquired in December. Doubtless, on the filing of the bill, all sales ceased, and the respondents began to re-acquire, so as to be ready to reconvey at the smallest cost in case a decree should go against them. If this be so, and I think the evidence and admissions of the pleadings justify the inference—the facts known, leading to that conclusion, and there being nothing to the contrary—the singular state of facts is disclosed, that from April 9 to October 10, not a single sale had been effected by the respondents except three or four remote and small counties for a trifling sum accomplished by the personal aid of complainant, while during the month preceding the filing of this bill, from October 16 to November 18, the respondents sold twelve counties for $1,275, and this immediately after assuring the complainant that the best they could do was to sell the whole state for two hundred and fifty dollars.

For some unexplained cause, the "Ward Burner" "took" much better during the month, while the respondents were acting for themselves, than during the six months immediately preceding, while they were acting for complainant, under a contract requiring extraordinary exertions. I am unable to reconcile the facts disclosed in this case with good faith on the part of the respondents, in their transactions with complainant, and especially in the purchase of the right to the whole state in the name of Boone for the inconsiderable sum of $250, and upon the representations and concealments shown. I am satisfied that the complainant is entitled to have the assignment vacated, and the respondents charged as trustees.

Respondents having re-acquired the rights sold, now insist that they shall be discharged from further liability, upon re-assigning to complainant the right to that part of the state purchased by them. They allege in their answer that the several sales were rescinded on the ground of the worthlessness of the patent. But, clearly, so far as the real transactions are shown, there was no rescinding. The transactions between defendants and Coe and Van Doren are distinctly shown, and they can, in no sense, be regarded as a rescinding of the sales. They are obviously, repurchases, or exchanges upon new and different terms. There is nothing to show how the other rights were reacquired. It is quite manifest, I think, from the general tenor of the facts disclosed, that as soon as the bill in this case was filed, the respondents set themselves at work to re-acquire the rights sold upon the best terms possible under the impression, that these rights could be returned in discharge of their liability, as they now claim.

The complainant, however, declines to accept the rights thus sold, and re-acquired, but prefers to recognize the sales, and receive the proceeds. And this, I think, he is entitled to do. After the fraudulent purchase from their principal, the respondents were acting in their own wrong, wholly without any authority from him. Their power of attorney even, ceased to be operative, for, in the contemplation of the parties, after the assignment to Boone, there was nothing upon which it could operate. But if, otherwise, it contained only a power to sell, and none to purchase, or re-acquire. Respondents had no power to purchase, and complainant was not bound to adopt any of their repurchases. Besides, non constat, but that the vendees during the time the right was held by them had supplied, for the time be-

ing, the market in their respective counties, thereby diminishing the value of the right in those counties, before the re-sale to the respondent. The right re-acquired, therefore, may not have been the same as when sold. In my judgment, the complainant may recognize the sales made by the respondents, and claim the benefit of them, but that he is under no obligation to receive back the rights sold, and re-acquired in the manner indicated. The respondents, therefore, must reconvey the right to all that part of the state remaining unsold, and account to complainant for the proceeds of the portions sold.

It only remains to determine the amount of proceeds to be accounted for. This will be the amount for which sales were made with the deduction of the proper charges. Respondents insist, that since the sale of Solano county was made on credit, and the note has not been paid, they are not to be charged with this item. But it does not appear why it has not been paid. There is nothing to show that it is not good, or that it has even fallen due. But the sale was not made under respondents' contract of agency, but in their own wrong, and whatever the rights of the parties might have been, had the sale been made in the character of agents under the original contract, I think, they are chargeable with the full value for the county sold; and there is no other evidence of the value than the amount for which it sold. Parties acting in violation of the rights of others will be held to a strict responsibility.

This county has not been re-acquired by the respondents, and it cannot be restored. If the respondents are not liable to account to complainant for the value until paid, then the complainant may lose the whole, by the wrongful act of the respondents. So, also, since the sales were not made under the contract of agency, the terms of that contract do not control the amount of commissions and charges to be allowed.

I think, in a case like this, the respondents cannot justly complain, if they are allowed the charges and commissions actually paid by them in the sale and transaction of the business, and as there is nothing to show that the amount is unreasonable, I shall adopt that principle.

If I understand the answer and testimony of the respondents, in addition to other charges actually paid, they paid twenty-five per cent. commissions. But whatever the percentage, their account shows the amount of the sales to be twelve hundred and seventy-five dollars, and the commissions and other expenses of the transactions, five hundred and forty-seven and 29/100 dollars, leaving seven hundred twenty-seven dollars and seventy-one cents to be accounted for; from which sum deduct two hundred and fifty dollars, the amount paid by respondents for the assignment to Boone, and there will remain four hundred seventy-seven dollars and seventy-one cents still due, for which complainant is entitled to a decree.

Let there be a decree annulling the assignment to Boone, and requiring a reconveyance to complainant of all that portion of the territory remaining unsold, and for four hundred seventy-seven dollars and seventy-one cents and costs of this action.

## Case No. 7,255.

JEHNER et al. v. PHILADELPHIA & R. R. CO.

[1 Wkly. Notes Cas. 15.]

District Court, E. D. Pennsylvania. Oct. 2, 1874.

SEAMEN'S WAGES — EMPLOYMENT FOR SPECIFIED TIME—UNJUSTIFIABLE DISCHARGE—MEASURE OF DAMAGES.

[Seamen shipped at Philadelphia for voyages to Boston and return for a term of two months, and discharged at Philadelphia before the expiration thereof, without their consent, and merely because of depressed condition of trade, *held* entitled for the remainder of the term, to the difference between the agreed rate of wages and the current rate at the time of discharge, and, in addition thereto, wages and board for seven days; that being apparently sufficient time to find other employment.]

The libel alleged that plaintiffs were shipped as firemen, etc., on board the defendant's steamer Collier, July 21st, 1874, under shipping articles "from the port of Philadelphia, to *Boston, Mass., and a port or ports on the coast of the United States, for a term of two months,* and return to Philadelphia *as often as practicable in the aforementioned time,* unless sooner discharged." (The words in italics are written in the articles, the rest printed.) That the libellants had performed two voyages, when they were, on the 18th day of August, discharged, without their consent, at the port of Philadelphia, for no cause except that the vessel was laid up on account of the depressed condition of the trade in which she was engaged. The libellants had been paid their wages up to that day, and now claimed pay for the remainder of the two months' term. The answer admitted the facts alleged, and denied the right of action. The cause came on for hearing on libel and answer.

Mr. Boudinot, for libellants.

A. D. Campbell, for respondents.

THE COURT decreed for the libellants, and ordered the amount to be ascertained by computing the difference between the agreed wages for the remainder of the term and the current rate at the time of discharge, and adding thereto the amount of wages and board of men for seven days; that period being apparently sufficient, in the state of the trade, to find other employment.

## Case No. 7,256.

JELISON v. LEE et al.

[3 Woodb. & M. 368; 19 Hunt, Mer. Mag. 78.] [1]

Circuit Court, D. Massachusetts. Oct. Term, 1847.

COMMISSIONS ON FREIGHT—CONSIGNEE OF VESSEL—POUND STERLING—HOW RECKONED.

1. A usage for a consignee of a vessel, who is also owner of the cargo, to charge a commission on the freight paid by himself to the captain is unreasonable, and therefore not binding.

2. An agent shipped a cargo to his principal in England, and in the charter party the vessel was "addressed to" the principal, those words being used to cut off any claim for commissions on the freight. *Held*, that the principal had no right to any such commission, and that in estimating the freight, which was expressed in dollars, the pound sterling was to be reckoned at its mercantile value in dollars at the place where the freight was payable.

[Appeal from the district court of the United States for the district of Massachusetts.]

This was a libel instituted [by Zachariah Jelison], in November, 1846, in the district court, to recover of the respondents the amount of freight stipulated to be paid by them for the use of the barque Canton, on a voyage from Boston, Mass., to Hull in England. It was alleged that she was to carry a load of bones, and was to receive for it $3000 on the discharge of the cargo at Hull; that she arrived there on the 20th of June, 1846, and duly delivered her cargo, and that payment of the freight, as agreed, had not been made. The answer of James Lee, the acting partner in the house in Massachusetts, admits some of the allegations in the libel, but denies that the barque carried out a full load, there having been 11¼ tons in the measurement of the vessel which the respondents were improperly prevented from filling with bones, and equal to $125 in freight. It further averred that William Ward was consignee of the vessel, and hence entitled to deduct 2½ per cent. commission on the freight, which being done, amounting to $75, as well as deducting the premiums for paying these sums, $125, he duly paid over the residue, being $2800, to the captain of the barque, who was the agent of the plaintiff. The answer prayed further, that the libelant be required to swear how much had been paid to him on account of freight, and he admitted that £567, 18s, 6d had been paid by Ward in the manner and at the time specified in the captain's protest. The protest was put in evidence, and appeared to have been made by Hardin, the master of the barque, on the 29th of June, 1846, and for the reason that Ward refused to pay £341, 5s, the balance Hardin considered due for freight, he having received some advances, and being willing to pay some charges. He objected to Ward's claim of £15 commissions and £25 short stowage in room, and £57, 5s, 6d less amount in calculating the pound sterling. The charter party was, also, read in evidence, and corresponded mainly with what is averred about it in the libel and answer, except that certain exceptions, hereafter described in the opinion of the court, were made as to room in the vessel to accommodate the crew, and carry wood and water, and the vessel was "to be addressed to William Ward, Esq., Hull," the term or word "consigned" not being used. On the contrary it was proved in the case, that Jelison, knowing that Ward was the owner of the cargo, and Lee merely his agent in purchasing and forwarding it, objected to the use of the term "consigned," lest it might give rise to some claim for commissions on the freight, which he was unwilling to pay, and hence Jelison and Lee adopted the term "addressed to," Jelison supposing it would exclude such a claim. A great mass of other evidence was put in from merchants in this country and abroad, as to the usage to charge commissions in cases of this character, and in other cases somewhat similar. This will be further explained in the opinion of the court. There was much testimony, also, to show that spaces in the ship were not filled by bones, which are usually occupied by a full cargo, and other evidence explaining that some of these spaces had been caused by a removal of the bulkhead so as to give more room, and by wood and water stowed below in no greater quantities than were necessary for safety against the total loss of them in gales by sweeping the deck of all upon it. The difference in computation between the captain and Ward arose from the former computing the pound sterling at $4.44, and the latter at $4.85. An auditor, appointed by the district court, reported that on the 27th of June, 1846, the pound sterling was worth at Hull $4.80 in specie, and the $3000 there was equal to £625. The payment made by Ward for the balance, as computed by him, was not made in specie, but by a draft for ninety days on London without interest. The decree below was for the libelant, disallowing the commissions claimed on the freight, the deduction for short room or space for the cargo, and computing the value of the pound sterling at Hull at the time of the payment to have been $4.80, and those to have been the time and place its value should be calculated in dollars. The decree was for a balance of $241.11, including $4.49 interest from 27th June to 21st October, 1846. It allowed £61 as disbursements and commissions on those of £1, 10s. 9d. From this decree the libelees appealed to this court.

Andrew & Parsons, for libelant.
Mr. Bolles, for libelees.

WOODBURY, Circuit Justice. The decree below in this case is objected to on several grounds, which are entitled to a separate

[1] [Reported by Charles L. Woodbury, Esq., and George Minot, Esq. 19 Hunt, Mer. Mag. 78, contains only a condensed report.]

consideration, and some to a detailed one, from the importance of them to the commercial community at large. In the argument of these questions, the counsel for the libelees claimed the right to begin and close, on the ground that they set up exceptions to the claim, which they must sustain like a special plea. But adverting to the circumstance that the libelant brings the suit and makes averments and claims first, which the libelees merely contend are too broad, and do not admit what is claimed, I see nothing to alter the right of the libelant to begin and close. But while this may be considered a right of some importance before juries who take few or no written minutes of evidence, it can be of little consequence before a court, and hardly worth the corresponding burthen it imposes of turning the scales in its favor in cases of doubt.

The principal stipulations in the charter party were these: The owner engaged "that the whole of the said vessel, with the exception of the cabin and the necessary room for the accommodation of the crew and the stowage of the sails, cables and provisions, shall be at the sole use and disposal" of the hirer, and "shall receive on board a full cargo of cattle bones to be broken and stowed in the customary manner," "the charter (money) to be paid on the discharge of the cargo at Hull"—$3000.

The first leading objection here is, that all the proper space in the vessel was not allowed so as to entitle the libelant to claim that he earned full freight. Undoubtedly when examined by some of the witnesses, such was the appearance of the vessel. But others, who had good means of knowing the truth, testify positively that the bulk-head was so removed as to leave as much more space than is usual to be occupied by the cargo, as was put elsewhere than on deck, and not in parts of the vessel reserved to be occupied by wood or water. It is not pretended that the owners of the ship or the master wanted any room for any cargo of their own, or any accommodation of the officers personally, or to prevent the vessel being in greater danger by drawing too much, if fully loaded. There was then no selfish motive to injure the hirer of the vessel in this way, and if humanity to the crew, to secure for them below wood and water after a violent storm, was a motive for placing more of those below than ordinary, the captain seems to have been cautious not to do this to the injury of the freighters, but by removing the bulk-head closer, he did it to the injury or inconvenience of those to be benefited, the officers and crew. Such providence and attention to the safety of life, as well as property, are to be encouraged where practicable, and when not exceeding the limits of prudence and the laws. See Weston v. Minot (at this term) [Case No. 17,453].

Having earned full freight, the next question is, whether the owner of the vessel was not entitled to receive it without any reduction for commissions on it by Ward, the real debtor for it, as the owner of the cargo. All know that a debtor cannot be permitted to charge commission for paying over his own debt. Even a mortgagee cannot claim them on the rents of the estate, if he occupied himself, and did not collect them of others. 4 Kent, Comm. 166, note; 14 Pick. 98; 5 Pick. 146; 16 Pick. 46. The only pretence on principle for allowing him commission for paying over his own debt, is that the vessel was "addressed" to him. But this, so far from having been in truth done, in order to justify him in charging commissions on the freight in a case like this, was done avowedly to prevent it, and this, with the full knowledge and seeming acquiescence of his agents. Regarding the agent and the principal as one for this purpose, Jelison had the words changed in the charter from "consigned" to "addressed," by an arrangement with Ward himself, through Lee, with the express view of removing any foundation for a claim like this, to commissions in a case like the present. Looking to the claim as a question of principle, also, it has no service performed in this respect, no duty done, on which it can honestly rest. Commissions are properly paid for services and duties and risks, and not for nothing. When paid on freight to consignees or persons to whom vessels are addressed, it is for the service of collecting that freight from others, and the risk attending the keeping of the money of others till paid over. These services and risks exist in ordinary cases very strongly where the freighters are numerous, and for small quantities each, and to some extent where there is only one hirer of the vessel, but he a person to collect freight from by the consignee, and being a person other than the consignee himself.

The large mass of the testimony on both sides goes to sustain this view, and but for another consideration would dispose of this point entirely, because here Ward was to perform no service in collecting freight of any other person, nor run any risk in respect to money by counterfeit, or by keeping it after collected of others, till paid over to the captain or owner of the vessel. That other consideration is the position taken as to an usage existing, which sustains a charge of commissions on the freight, even where the vessel is addressed to the owner of the cargo. Some of the testimony would seem quite decisive to show that such a usage has grown up in parts of England, if not on the continent, within the last quarter of a century. But this is contradicted by other witnesses, though fewer in number. It is said by others still not to be a settled usage anywhere, but resisted and irregular, and others testify to its being unreasonable and extortionate wherever practiced.

My own opinion on the whole evidence is, that it is by no means proved in cases pre-

cisely like this, that an usage is tolerated to tax commissions. And next, if it was so proved, that it is a bad usage and not to be respected or upheld as reasonable. All usages to be sustained, must not only be proved, but be reasonable. Taylor v. Carpenter [Case No. 13,785]; Case of The Reindeer [Id. 11,679]. They must, also, be uniform and notorious, so as to be presumed to come within the views and intents of these parties to be conformed to when the contract was made. Smith, Merc. Law, 326; 1 Duer, Ins. 258; 2 Bos. & P. 168; Rogers v. Mechanics' Ins. Co., [Case No. 12,016]. Whereas, the facts are that they meant here to act independent of any such usage, if one existed. We have already assigned our reasons why such a usage is not just in a case like this, where neither service, risk nor duty is performed, to earn commissions. A debtor in all cases might as well charge commissions for paying his own debts. We see, likewise, in looking at the testimony, which seems to establish the existence of such a usage, that in no case is it stated in detail that the hirer of the vessel was the agent of the owner of the cargo, and the owner himself was to pay the freight due from himself or his agent. On the contrary, in most of the cases the debtor for the freight may not have been the owner of the cargo, even when he was the consignee, but the vendor of the cargo may have been bound to deliver it to him and to pay the freight. Then in such case it will be seen that the consignee may be owner of the cargo, and still the obligation to pay the freight belong to another person, and a duty and service and risk exist in the consignee, when collecting the freight from another and paying it over to the ship-owner as his captain. Nor does it answer, in cases like the present, to substitute for some service performed to earn commission, an argument, that if the vessel was consigned to another person, he would have a right to charge commissions, and hence it may as properly be consigned to the hirer himself, and let him charge them. As well might a lawyer charge commissions on collecting his own debt, claimed of him by his creditor, because if the creditor had left it to be collected with some other lawyer, commission must be paid to him. But there is another answer to this. The ship-owner, if consigning the vessel to another, might expressly exempt the collection of freight, when due only from a single person, and let his captain receive it from that person. So if he meant to let his captain act in this case, when the charter party was drawn up, then there would have been no necessity to employ and pay another for this service, and hence no ground exists to claim it here on the hypothesis that it would have been otherwise paid to some other person.

Believing, then, that the usage to charge commissions in a case like this in all material respects, not to be proved to exist, and if so proved, that it is not reasonable or uniform, or notorious, I think the captain was entitled to receive full freight, without deduction for those commissions, any more than for the supposed want of full room or stowage. It is somewhat remarkable that this same question in principle has arisen in political science, and been solved in a similar way by the strong mind of Hamilton. The inquiry was whether the United States, as a debtor for its funded stock, could properly impose a tax on its own debt. Though all property in a state is subject to taxation, as a general rule, yet this was a property only in promises, and there might likewise be expressed or implied a condition not to tax it, not to keep back, either by tax or commissions, the full amount promised. "To tax the funds (said he) is manifestly either to take or keep back a portion of the principal or interest stipulated to be paid. To do this, on whatever pretext, is not to do what is expressly promised,—it is not to pay that precise principal or that precise interest which has been engaged to be paid; it is, therefore, to violate the promise given to the lender." Report on Public Credit, 1795. He goes much further into reasoning in support of this conclusion, as may be seen in the report. But enough is cited to show that it is like this case, which is an attempted deduction by the principal debtor, whose agent made the promise to pay the full $3000, and whether it be in the form of commission, or a tax, both amount to a virtual violation of the promise to pay that precise sum.

It must be kept in mind throughout, in order to judge of the cause and parties properly, that this is not a cause of the Messrs. Lees, in their own right, and Ward, a stranger, but, on the contrary, that they are mere agents, acting in the charter and in this suit as Ward's agents. It is virtually his shipment—his charter party—his freight to be paid—his defence to the present suit—his unreasonable claims of commissions, and not theirs, and on him must and should, therefore, rest the consequences. Finally the $3000 being liable to be paid without deduction, how should it have been valued? Certainly not at the old computation by act of congress in 1790, for the custom house, of $4.44 per pound, and which so embarrassingly still prevails in computing the rate of exchange between this country and England, and makes exchange appear in favor of England from nine to nine and a half per cent., when it is only at par. Nor even at the more modern and more correct standard of $4.86, introduced by act of congress in 1837, for the use of the custom house. Nor should it be in any specific kind of dollars and their value, such as Mexican or American, or Spanish "milled" dollars, instead of the old "pieces of eight," which were not milled, but rough on the edge and in octagon form, and often in use till the middle

of the last century. But it should, if not paid in current specie dollars, be liquidated with as many sovereigns, or a bill for as many pounds sterling as $3000 would then buy in Hull. Story, Confl. Law, §§ 281, 309.

The true general rule as to value, is the value at the place agreed for payment, no matter where or how to be remitted. Story, Confl. Law, § 311; 4 Johns. 124; 20 Johns. 102; 8 Pick. 260. The departures from this rule are rather apparent than real, being mostly on a different state of facts, and arise out of reviews under the doubt if payment was not due in places other than the place where the creditor lived. Smith v. Shaw [Case No. 13,107; Lanusse v. Barker], 3 Wheat. [16 U. S.] 101; 3 Johns. Ch. 587; 17 Johns. 511. The value then and there of the pound sterling in dollars has been ascertained by the auditor and the computation in the court below properly graduated on that. I am satisfied that such is the true rule in mercantile contracts, rather than any old or new standard adopted by congress for assessing the revenue or invoices made out in pounds sterling. Whether the payment was made, as it should have been, by giving so long a bill and without interest, may be questionable. But if the captain consented so to receive it, and there is no proof to the contrary, and even his protest does not object to that, I think the owners are now precluded from taking advantage of it.

If the present decree conforms to these views, as is believed to be the fact, judgment must be rendered affirming it with interest since. But if it does not conform to them substantially, let it be corrected, and judgment be entered on it in its amended form. When I say that the $3000 are to be paid as above stated, without deduction for want of room or commissions on the freight, it is not meant that all advances and disbursements by Ward for the vessel before the freight became due after the delivery of the whole cargo, are not to be allowed and the ordinary commissions of 2½ per cent. on them, and this, though the latter were not at the time particularly demanded by Ward. They may have been omitted because the other commissions amounted to so much, or by accident, but they seem fair and proper on a revision of the just rights of the parties. Nor do I think there is sufficient ground for the allowance of the sum to which commission on the freight amounts on another ground, and under another name, that this sum is no more than adequate compensation for the other services actually performed. This argument has not in the evidence sufficient facts to stand on. The services performed did not, as seems to be argued, fill up a whole fortnight's labor by either Ward or any of his clerks. It probably engrossed but a few hours in a few days during that period, and with the other collateral advantages from such a consignment, and the direct commissions on actual disbursements, the owner of the cargo would be amply repaid for all he is shown actually to have done for the libelant or his captain.

We have been asked by the libelees to refuse cost in this case to the libelant, though entitled to more than he has received for the debt or freight. The reason assigned is that the libel demands the whole freight, when a part had been paid by Ward. But the expense or cost has not been increased on that account. Nor does it appear that credit was omitted to be stated in the libel for any sinister object, but by the oversight or haste of a young practitioner who pursued the forms in this respect of the common law, without intending to cause or actually causing thereby any injury to the libelees. It does not, therefore, seem to be a case for interfering with the general principle, giving cost to the prevailing party in admiralty, as well as in common law cases. See Leland v. The Medora [Case No. 8,237]. Let a decree be entered in conformity with these views.

## Case No. 7,256a.

JELLY v. TIDDEMAN.

[14 Betts, D. C. MS. 4.]

District Court, S. D. New York. Nov. 18, 1848.

SEAMEN — LIBEL FOR WAGES — FILING BEFORE TERMINATION OF VOYAGE — SUIT BY FOREIGN SEAMEN — AUTHORIZATION OF CONSUL — PRACTICE.

[1. A seaman who has not been discharged cannot maintain a libel for wages before the termination of the voyage for which he shipped.]

[2. It is the practice of the district court for the Southern district of New York not to entertain a suit by a foreign seaman for wages without the authorization of the consul of the country to which the ship belongs, unless absolute destitution and abandonment in this port is shown.]

[In admiralty. Libel for seaman's wages by Alexander Jelly against Henry Tiddeman, master of the British ship Gambia.]

BETTS, District Judge. The libellant, an English subject, was a seaman on board the British ship Gambia, of which the respondent is master. He signed articles, May 4, 1848, at Rotterdam, for a circuitous voyage to terminate in the United Kingdom or on the Continent, and not to exceed eighteen months duration. This action cannot be maintained on the facts before me. It is not sanctioned by the British consul, nor is there even proof that the libellant is discharged from the ship. The actual attorney of the libellant testifies to a conversation with the respondent, in which he stated his willingness to discharge the libellant if the agents of the ship consented; but no evidence is given of their consent or the assent of the British consul to

the discharge. Two witnesses of the owner testify that the master refused to discharge the libellant, but he declared he would leave the ship, and said his lawyers would compel the master to pay his wages.

This action not only appears groundless on the merits, but is directly against the policy always upheld by the court, that seamen belonging to foreign ships shall not be allowed to institute suits for wages here, without producing the authorization of the commercial agent of the country to which the ship belonged, or showing a case of absolute destitution on their part, and an abandonment by the master of the ship in this port. The libel must accordingly be dismissed, with costs.

## Case No. 7,257.

In re JELSH et al.

[9 N. B. R. 412.] [1]

District Court, E. D. Michigan. Jan., 1874.

BANKRUPTCY—ISSUE BEFORE JURY—NEW TRIAL—CONDUCT OF TRIAL—INSTRUCTIONS TO JURY.

1. On a motion for a new trial on the issue of bankruptcy, on the ground of alleged errors in the admission of testimony, and in the charges of the court to the jury, and that the verdict is against evidence and the charge of the court, *held*, that it was proper to admit evidence as to the negotiations between the petitioning creditors and the respondents, preceding the consummation of a compromise between them, and it was proper to charge the jury that they could use this testimony only as it bore upon the fact whether an assignment was made, and if so, what was its character.

2. The respondents have a right to the opening and closing to the jury, on an issue of this kind.

3. It was not error in the court to submit the question to the jury instead of charging them, as matter of law, that such partnership existed; it is a matter of discretion with the court to take a matter from the jury, whether the point seems undisputed or not.

4. Motion for a new trial denied.

[In the matter of Jelsh and Dunnebacke, bankrupts.]

On motion by petitioning creditor for a new trial on the issue of bankruptcy. The issue was made by the ordinary denial of the truth of the matters alleged in the petition, and the same was tried by a jury and an adverse verdict rendered. The grounds of the motion for a new trial are alleged errors in the admission of testimony, and in the charges of the court to the jury; and also that the verdict is against the evidence and charge of the court. These grounds are stated in the opinion of the court, so far as necessary to a disposition of the motion.

[1] [Reprinted by permission.]

H. M. Duffield, for the motion.

A. Russell, opposed.

LONGYEAR, District Judge. The first ground of motion was, that the court erred in admitting the testimony of the witness, Don. M. Dickinson, as to the negotiations between the petitioning creditor and the respondents, preceding the consummation of a compromise claimed to have been made between them. On the objection being made to this testimony at the trial, the court ruled as follows: "The witness may state the entire negotiations which took place resulting in an arrangement, and the purpose for which it may be used will be decided in the charge to the jury." The court charged the jury that they could use this testimony only as it bore upon the fact as to whether an arrangement was made, and if so, what was its character, and for no other purpose whatever. For this purpose it was, no doubt, competent, and there was, therefore, no error in its admission.

The second ground of motion was, that the respondents were given the opening and closing to the jury. In the case of Stevenson v. Hamilton [Case No. 13,415], tried in the United States circuit court for this district, before myself, in the June term, 1872, this question was very fully examined, and the authorities, English and American, analyzed, and the following conclusions, among others, arrived at: The question as to which has the right to begin must be determined by the record. When by the pleadings the burden is upon the defendant, and the plaintiff need introduce no evidence to be entitled to a verdict, the defendant has the right to begin. Out of a large number of cases examined in the case of Stevenson v. Hamilton [supra], the following are cited as more directly in point here, viz.: Huntington v. Conkey, 33 Barb. 221, 222, and cases there cited; Elwell v. Chamberlin, 31 N. Y. 613; 1 Phil. Ev. 810, 812; 1 Greenl. Ev. § 74, note 3; Mercer v. Whall, 5 Adol. & E. [N. S.] 447, decided in 1844, and in which the rule was settled in England, as above stated. In Re Price [Case No. 11,411] this court decided, that under the bankrupt act [of 1867 (14 Stat. 517)], where there was a simple denial, the burden was upon the respondent to disprove the allegations of the petition, and that, if no evidence were introduced in such case, the petitioning creditor would be entitled to an adjudication of bankruptcy. This brings the case clearly within the rule above stated, under which the defendant has the right to begin and close. There was therefore, no error in allowing the respondents the opening and closing to the jury.

The fourth and sixth grounds of motion relate to the partnership of the respondents, and will be considered together. It is contended that the conceded facts in the

case established a partnership as to the debt of the petitioning creditors, and that it was error for the court to submit the question to the jury instead of charging them, as matter of law, that such partnership existed; and that the jury having found adversely to the petitioning creditor, their verdict is a bar to his ever hereafter maintaining a suit against the respondents, as partners, for the recovery of his debt, in an action at law. While the court may, in a case where the facts are undisputed, take a question from the jury and dispose of it as matter of law, and will generally do so in a case entirely free from doubt, yet whether the court will do so or not, is in all cases a matter of discretion, and it is not error to send it to the jury, however clear the case may be. In this case, however, the court was of opinion that the question was a proper one to go to the jury, on account of one or two facts having a bearing upon it, as to which there was some question. And, I think, the learned counsel is equally in fault as to the effect of the verdict upon the question of partnership. The matter decided is as to the act or acts of bankruptcy alleged, and that is all the verdict determines, either by its terms or legal effect, and it could be pleaded in bar only to a new proceeding in bankruptcy for the same acts. The fact of partnership, while it was essential to the maintaining of a joint proceeding against the two, yet, like the fact of the petitioning creditor's debt, was really but incidental to the main issue. As well might it be said that the debt itself is barred by a verdict adverse to the petitioning creditor, on an issue of bankruptcy. Therefore, even if the court erred in submitting the question of partnership to the jury, and the verdict is against the evidence in this regard, (as to which, however, it cannot be determined from the record what their finding was) no harm has come to the petitioning creditor on account of it, and it therefore constitutes no ground for a new trial.

The remaining grounds of motion (3d and 5th) I have examined with some care, in connection with my minutes of the evidence upon the trial, and in the light of authorities cited; and while there might be some doubt as to the correctness of the rulings of the court in the instances specified, in a strictly technical sense, yet I do not think the doubt is of such a character, or the errors, if they be errors, are such as to authorize the court to grant a new trial and put the parties to the delay, vexation and expense of a protracted litigation. As these last two grounds of motion present no questions of general interest, I shall not protract this opinion by an analysis and discussion of them, and the above brief notice must suffice. It results that the motion for a new trial must be denied, with costs.

## Case No. 7,258.

JENCKS v. COLEMAN.

[2 Sumn. 221.] [1]

Circuit Court, D. Rhode Island. June Term, 1835.

COMMON CARRIERS—DUTY TO RECEIVE PASSENGERS—RIGHT TO EXCLUDE.

1. The proprietors of the steamboats between Providence and New York are common-carriers, and, as such, bound to receive all persons on board, to whose character and conduct there is no reasonable objection, if they have suitable accommodations.

[Cited in Pearson v. Duane, 4 Wall. (71 U. S.) 615; Brown v. Memphis & C. R. Co., 7 Fed. 56.]

[Cited in Fish v. Chapman, 2 Ga. 353; Brown v. Adams Express Co., 15 W. Va. 821; Galena & C. U. R. Co. v. Yarwood, 15 Ill. 472; Harris v. Stevens, 31 Vt. 83; Atwater v. Delaware, L. & W. R. Co., 48 N. J. Law, 60, 2 Atl. 803; American Rapid Tel. Co. v. Connecticut Tel. Co., 49 Conn. 369; Spohn v. Missouri Pac. R. Co., 87 Mo. 78; Vinton v. Middlesex R. Co., 11 Allen, 305.]

2. They may rightfully exclude all persons of bad character or habits—all whose objects are in any way to interfere with their interests, or to disturb their line of patronage, and all who refuse to obey the reasonable regulations, which are made for the government of the steamboat; and they may rightfully inquire into the habits or motives of passengers, who offer themselves.

[Cited in Hall v. De Cuir, 95 U. S. 501; Brown v. Memphis & C. R. Co., 7 Fed. 56.]

[Cited in Atchison, T. & S. F. R. Co. v. Weber (Kan.) 6 Pac. 884; State v. Steele (N. C.) 11 S. E. 483; McKee v. Owen, 15 Mich. 131; Com. v. Power, 7 Metc. (Mass.) 598, 601; Standish v. Narragansett Steamship Co., 111 Mass. 516. Approved in Stephen v. Smith, 29 Vt. 163.]

3. An innkeeper would not be bound to entertain an agent of a rival inn, who sought to decoy away his customers.

[Cited in State v. Steele (N. C.) 11 S. E. 483, 485.]

4. The plaintiff was the known agent of the Tremont line of stage coaches; the proprietors of the steamboat Benjamin Franklin had, as he well knew, entered into a contract with the Citizens' Stage Coach Company, to carry passengers between Boston and Providence, in connection with, and to meet the steamboats. The plaintiff had been in the habit of coming on board the steamboat, at Providence and Newport, for the purpose of soliciting passengers for the Tremont line: *Held*, if the jury should be of opinion, that the above contract was reasonable and bonâ fide, and not entered into for the purpose of an oppressive monopoly, and that the exclusion of the plaintiff was a reasonable regulation, in order to carry this contract into effect, that the proprietors of the steamboat would be justified in refusing to take the plaintiff on board.

[Cited in Barney v. The D. R. Martin, Case No. 1030. Disapproved in Denver & N. O. R. Co. v. Atchison, T. & S. F. R. Co., 15 Fed. 657.]

[Cited in State v. Steele (N. C.) 11 S. E. 483; Post v. Chicago & N. W. R. Co., 14 Neb. 113, 15 N. W. 225; Baker v. Lever, 67 N. Y. 304; Old Colony R. Co. v. Tripp, 147 Mass. 38, 17 N. E. 93.]

Case for refusing to take the plaintiff [Samuel Jencks] on board of the steamboat Benjamin Franklin (of which the defendant

[1] [Reported by Charles Sumner, Esq.]

[Robert B. Coleman,] was commander), as a passenger from Providence to Newport. Plea, the general issue. The facts, as they appeared at the trial, were substantially as follows: That the plaintiff was the agent of the Tremont line of stages, running between Providence and Boston; that his object was to take passage in the boat to Newport, and then go on board the steamboat President, on her passage from New York to Providence, on the next morning, for the purpose of soliciting passengers for the Tremont line of stages for Boston. This the proprietors of the President, and Benjamin Franklin had prohibited, and had given notice that they would not permit agents of that line of stages to take passage in their boats for that purpose. The reason assigned for such prohibition was, that it was important for the proprietors of the steamboats, that the passengers from their boats, for Boston, should find, at all times, on their arrival at Providence, an immediate and expeditious passage to Boston. To insure this object, the Citizens' Coach Company had contracted with the steamboat proprietors, to carry all the passengers, who wished to go, in good carriages, at reasonable expedition and prices; and the commanders of the steamboats were to receive the fare, and make out way-bills of the passengers, for the Citizens' Coach Company. This they continued to perform. And, in order to counteract the effect of this contract,—which had been offered the Tremont line, and declined,—that line placed an agent on board the boats, to solicit passengers for their coaches; and, on being complained to by the Citizens' Coach Company, the proprietors of the steamboats interdicted such agents from coming on board their boats. And in this instance, refused to permit the plaintiff to take passage in the boat for Newport, though he tendered the customary fare.

R. W. Greene and Daniel Webster, for plaintiff.

Rivers & Whipple, for defendants.

For the plaintiff it was contended, that steamboat proprietors were common-carriers, —and every person, conducting himself with propriety, had a right to be carried, unless he had forfeited that right. The plaintiff in this instance did conduct with propriety, and had not forfeited his right to be carried, by any improper misconduct. The steamboat proprietors, and Citizens' Coach Company, had attempted to establish a monopoly, which should not be countenanced, it being against the public interest. Such a monopoly operated to increase the price and prolong the time of passage from Providence to Boston; while open competition promoted the public interest and convenience, by reducing the fare and expediting the passage. The plaintiff, in this instance, requested to be conveyed from Providence to Newport; during which passage, it was well known, no passengers were to be solicited—that was to be done only on the passage from Newport to Providence.

For the defendant, it was contended, that the contract made by the steamboat proprietors and the Citizens' Company, was legal, and subserved the public convenience, and the interest of the proprietors of the boats and stages. It insured to the passengers expeditious passages at reasonable prices; that the regulation, excluding the agents of the Tremont line of stages from the steamboats, was legal and just, because it was necessary to promote the foregoing objects, to wit: the public convenience, and the interests of the proprietors of both the boats and stages. Of this interdiction the plaintiff had received notice, and had no legal right to complain.

STORY, Circuit Justice (charging jury). There is no doubt, that this steamboat is a common-carrier of passengers for hire; and, therefore, the defendant, as commander, was bound to take the plaintiff as a passenger on board, if he had suitable accommodations, and there was no reasonable objection to the character or conduct of the plaintiff. The question, then, really resolves itself into the mere consideration, whether there was, in the present case, upon the facts, a reasonable ground for the refusal. The right of passengers to a passage on board of a steamboat is not an unlimited right. But it is subject to such reasonable regulations as the proprietors may prescribe, for the due accommodation of passengers and for the due arrangements of their business. The proprietors have not only this right, but the farther right to consult and provide for their own interests in the management of such boats, as a common incident to their right of property. They are not bound to admit passengers on board, who refuse to obey the reasonable regulations of the boat, or who are guilty of gross and vulgar habits of conduct; or who make disturbances on board; or whose characters are doubtful or dissolute or suspicious; and, a fortiori, whose characters are unequivocally bad. Nor are they bound to admit passengers on board, whose object it is to interfere with the interests or patronage of the proprietors, so as to make the business less lucrative to them. While, therefore, I agree, that steamboat proprietors, holding themselves out as common-carriers, are bound to receive passengers on board under ordinary circumstances, I at the same time insist, that they may refuse to receive them, if there be a reasonable objection. And as passengers are bound to obey the orders and regulations of the proprietors, unless they are oppressive and grossly unreasonable, whoever goes on board, under ordinary circumstances, impliedly contracts to obey such regulations; and may justly be refused a passage, if he wilfully resists or violates them.

Now, what are the circumstances of the present case? Jencks (the plaintiff) was, at the time, the known agent of the Tremont line of stage coaches. The proprietors of the Benjamin Franklin had, as he well knew, entered into a contract with the owners of another line (the Citizens' Stage Coach Company) to bring passengers from Boston to Providence, and to carry passengers from Providence to Boston, in connection with and to meet the steamboats plying between New York and Providence, and belonging to the proprietors of the Franklin. Such a contract was important, if not indispensable, to secure uniformity, punctuality, and certainty in the carriage of passengers on both routes; and might be material to the interests of the proprietors of those steamboats. Jencks had been in the habit of coming on board these steamboats at Providence, and going therein to Newport; and commonly of coming on board at Newport, and going to Providence, avowedly for the purpose of soliciting passengers for the Tremont line, and thus interfering with the patronage intended to be secured to the Citizens' line by the arrangements made with the steamboat proprietors. He had the fullest notice, that the steamboat proprietors had forbidden any person to come on board for such purposes, as incompatible with their interests. At the time when he came on board, as in the declaration mentioned, there was every reason to presume, that he was on board for his ordinary purposes as agent. It has been said, that the proprietors had no right to inquire into his intent or motives. I cannot admit that point. I think, that the proprietors had a right to inquire into such intent and motives; and to act upon the reasonable presumptions, which arose in regard to them. Suppose a known or suspected thief were to come on board; would they not have a right to refuse him a passage? Might they not justly act upon the presumption, that his object was unlawful? Suppose a person were to come on board, who was habitually drunk, and gross in his behavior, and obscene in his language, so as to be a public annoyance; might not the proprietors refuse to allow him a passage? I think they might, upon the just presumption of what his conduct would be.

It has been said by the learned counsel for the plaintiff, that Jencks was going from Providence to Newport, and not coming back; and that in going down, there would, from the very nature of the object, be no solicitation of passengers. That does not necessarily follow; for he might be engaged in making preliminary engagements for the return of some of them back again. But, supposing there were no such solicitations, actual or intended, I do not think the case is essentially changed. I think, that the proprietors of the steamboats were not bound to take a passenger from Providence to Newport, whose object was, as a stationed agent of the Tremont line, thereby to acquire facilities, to enable him successfully to interfere with the interests of these proprietors, or to do them an injury in their business. Let us take the case of a ferryman. Is he bound to carry a passenger across a ferry, whose object it is to commit a trespass upon his lands? A case, still more strongly in point, and which, in my judgment, completely meets the present, is that of an innkeeper. Suppose passengers are accustomed to breakfast, or dine, or sup at his house; and an agent is employed by a rival house, at the distance of a few miles, to decoy the passengers away, the moment they arrive at the inn; is the innkeeper bound to entertain and lodge such agent, and thereby enable him to accomplish the very objects of his mission, to the injury or ruin of his own interests? I think not. It has been also said, that the steamboat proprietors are bound to carry passengers only between Providence and New York, and not to transport them to Boston. Be it so, that they are not absolutely bound. Yet they have a right to make a contract for this latter purpose, if they choose; and especially if it will facilitate the transportation of passengers, and increase the patronage of their steamboats. I do not say, that they have a right to act oppressively in such cases. But, certainly, they may in good faith make such contracts, to promote their own, as well as the public interests.

The only real question, then, in the present case is, whether the conduct of the steamboat proprietors, has been reasonable and bonâ fide. They have entered into a contract, with the Citizens' line of coaches, to carry all their passengers to and from Boston. Is this contract reasonable in itself; and not designed to create an oppressive and mischievous monopoly? There is no pretence to say, that any passenger in the steamboat is bound to go to or from Boston in the Citizens' line. He may act as he pleases. It has been said by the learned counsel for the plaintiff, that free competition is best for the public. But that is not the question here. Men may reasonably differ from each other on that point. Neither is the question here, whether the contract with the Citizens' line was indispensable, or absolutely necessary, in order to insure the carriage of the passengers to and from Boston. But the true question is, whether the contract is reasonable and proper in itself, and entered into with good faith, and not for the purpose of an oppressive monopoly. If the jury find the contract to be reasonable and proper in itself, and not oppressive, and they believe the purpose of Jencks in going on board was to accomplish the objects of his agency, and in violation of the reasonable regulations of the steamboat proprietors, then their verdict ought to be for the defendant; otherwise, to be for the plaintiff.

Mr. Webster, for plaintiff, then requested the court to charge that the jury must be

satisfied, that this agreement was necessary or clearly expedient for the public interest, and the interest of the proprietors of the boats, or otherwise the captain of the boat could not enforce it, by refusing the plaintiff a passage;—or, that the defendant must show, that the substantial interest of the proprietors, or of the public, required an arrangement, such as that they entered into, in order to justify their refusal to carry the plaintiff for the cause assigned.

THE COURT refused to give instruction in the manner and form as prayed; but did instruct the jury, that it is not necessary for the defendant to prove, that the contract in the case was necessary to accomplish the objects therein stated; but it is sufficient, if it was entered into by the steamboat proprietors bonâ fide and purely for the purpose of their own interest, and the accommodation of the public, from their belief of its necessity, or its utility. If the jury should be of opinion, that under all the circumstances of the case, it was a reasonable contract, and the exclusion of the plaintiff was a reasonable and proper regulation, to carry it into effect on the part of the steamboat proprietors, then their verdict ought to be in favor of the defendant; otherwise, in favor of the plaintiff. Verdict for defendant.

## Case No. 7,259.

Ex parte JENKINS et al. (three cases).

[2 Wall. Jr. 521;[1] 2 Am. Law Reg. 144; 1 Phila. 451; 10 Leg. Int. 166.]

Circuit Court, E. D. Pennsylvania. Oct. 15, 1853.

HABEAS CORPUS — FEDERAL AND STATE JURISDICTION—COUNSEL.

1. On a habeas corpus, in a question of conflict between state and federal process, counsel have no right to appear in defence of the state process, unless in some way authorized by the state or its proper officers; and, after return made, the court refused to hear as counsel a member of the bar, who showed no such authority; nor any authority beyond that of the person executing the state writ.

[Cited in Ex parte Robinson, Case No. 11,934; Taylor v. Taintor, 16 Wall. (83 U. S.) 370; Blake v. Alabama & C. R. Co., Case No. 1,493.]

[Cited in Chapin v. James, 11 R. I. 89.]

2. The court may issue a habeas corpus to bring before it one of its deputy marshals, arrested and put in gaol under state process—whether of a justice of the peace or of the court, or supreme court,—whether criminal or civil—for his conduct in executing a writ issued under the fugitive slave law; may inquire into the cause of commitment, and, if illegal, order a complete discharge. And in the case of an arrest, on state process, of an officer of the United States, for an alleged abuse of his powers, this court will not only hear evidence to disprove the truth of the affidavits upon which the state authorities proceeded, but will, independently of such proof, consider those affidavits; and if, in the judgment of this court, those affidavits do not contain a prima facie ground for arrest, will discharge the federal officer, without hearing any counter-evidence. As a general thing, moreover, in the case of such an officer the court will discharge him unless there be a positive oath of merits from the plaintiff, or a sworn detail of circumstances from others, to supply its place.

[Cited in Ex parte Robinson, Case No. 11,934; Ex parte Sifford, Id. 12,848; Re McDonald, Id. 8,751; Re Farrand, Id. 4,678; U. S. v. Jailor, Id. 15,463; Re Neill, Id. 10,089; Re Bull, Id. 2,119; U. S. v. McClay, Id. 15,660; Ramsey v. Jailer of Warren Co., Id. 11,547; Ex parte Turner, Id. 14,246; Re Neagle, 39 Fed. 849; U. S. v. Fullhart, 47 Fed. 805.]

[Cited in McConologue's Case, 107 Mass. 167.]

[See Ex parte Bennett, Case No. 1,311.]

3. If an officer of the United States has been arrested to answer an indictment found by a state court, for riot, assault and battery, and assault with attempt to kill, the indictment not showing that the alleged offences were committed while the officer was professing to act under a law of the United States, or under some order, process, or decree of some judge or court thereof, this court, on a habeas corpus, where the petition of the officer denies the offence, and avers that what is alleged as offence was done in proper execution of an order, process, or decree of a federal court, will go outside the indictment, and hear evidence to show the truth of the facts set forth by the officer.

[Cited in Case of Electoral College, Case No. 4,336.]

Jenkins, Wynkoop, Crossin, and Keith, deputy-marshals of the United States, in executing, in Luzerne county, Pennsylvania, a warrant regularly issued from this court, to arrest one William Thomas, a negro boy, as "a fugitive from labour," had been obliged to have a violent and bloody encounter with him, in which the negro, being encouraged by certain people in the neighbourhood, proved successful and escaped to the country. Though the negro was roughly handled, it did not appear that the officers had proceeded with more force than was necessary to take him, nor, indeed, as the event showed, with as much. One Gildersleeve being informed by somebody who had seen the struggle, and had taken part with the negro, that a white man had shot a negro and was going to kill him, was induced to go before a county justice of the peace, and swear to the facts necessary to procure a warrant as for an assault and battery, with intent to kill. Such a warrant was accordingly issued in due form by the justice, and delivered to the constable of the borough, who, in pursuance of it, arrested the deputy-marshals and put them in gaol.

On a petition from the prisoners setting out the facts, a habeas corpus from this court was applied for to bring them up: whereupon Mr. David Paul Brown appeared and objected to any action by the court in the case; but he did not make known for whom he thus appeared and objected. The court, desirous to hear any objection from any source which could be made as to the extent of its power in so delicate a matter, allowed Mr. Brown to speak as amicus curiae, without any formal inquiry as to who

[1] [Reported by John William Wallace, Jr., Esq.]

had authorized him to appear: and under this permission he quoted the judiciary act of the United States,—Act Sept. 24, 1789, § 14 [1 Stat. 81],—which, while it gave this court "power to grant writs of habeas corpus for the purpose of an inquiry into the cause of commitment," provides that they "shall in no case extend to prisoners in gaol, unless where they are in custody under or by colour of the authority of the United States, or are committed for trial before some court of the same, or are necessary to be brought into court to testify." And he endeavoured to satisfy the court that, as confessedly, the warrant of commitment would show that the deputy was a prisoner in gaol under legal process from the state magistrate, it was useless to proceed; the return to the warrant being conclusive evidence of the fact and source of commitment.

The writ of habeas corpus having been granted, notwithstanding, and the constable having subsequently made a return to it as above indicated, Mr. Brown, after reading for him the return, was going on to argue as counsel against the discharge; but, being then called upon by the court to state for whom he appeared, said that he appeared for the constable. The court informed him that he had already performed his duty to his client in making that officer's return to the habeas corpus which had issued; and if he had authority from no other source, he could not be further heard as counsel in the matter; but informed him also, as previously on the application for the writ, it had announced very publicly from the bench, that if he or any other gentleman of the bar appeared by authority from the governor or attorney-general of Pennsylvania, or from the attorney-general's deputy for Luzerne, the court would be most desirous and happy to hear him as counsel for the commonwealth, who, in support of its own process, was the party to avow the proceeding and to appear and defend it. But as the court had as yet no reason to believe that any of those officers had shown any countenance to such proceedings, and as the negro who had a right to complain as the injured party (if any one had) had confessed the justice of his arrest by fleeing to the country, it would not permit mere volunteers to interfere for the purpose of embroiling the state of Pennsylvania against her will, with the United States, nor permit that any association, however respectable some of its members might be in private life, should assume to be the guardian of her peace and dignity. Mr. Brown not having any such authority, but being in fact, it was supposed, employed by certain societies in Philadelphia, known as "Friends of Humanity," "Abolitionists," &c., was not permitted to speak. The state of Pennsylvania did not by any of its officers give notice of any wish to be heard. Mr. Ashmead, the district attorney of the United States, appeared for the United States, claiming the discharge of the deputy marshal. Mr. Ashmead stated that the writ had not, as Mr. Brown supposed, been applied for nor granted under the old and general powers given by what is called the judiciary act of the United States; but under a wholly different act of later date (Act March 2, 1833, c. 57, § 7 [4 Stat. 634], "further to provide for the collection of duties on imports"), a memorable and transcendent act—part of which, in its creation at a crisis interesting to the nation, was made but temporary; but of which one section was left perpetual, in view of exigencies like the present. That section enacts, "that either of the justices of the supreme court, or a judge of any district court of the United States, in addition to the authority already conferred by law, shall have power to grant writs of habeas corpus in all cases of a prisoner or prisoners in gaol or confinement, where he or they shall be committed or confined on or by any authority of law for any act done or omitted to be done in pursuance of a law of the United States, or any order, process or decree of any judge or court thereof; anything in any act of congress to the contrary notwithstanding."

GRIER, Circuit Justice. The jurisdiction of the courts of the United States is limited, but within its limits supreme. The state courts have often in many cases, a concurrent jurisdiction over the same subjects and persons. But neither can treat the other as an inferior jurisdiction, except in the cases where the constitution and acts of congress have given such power to the courts of the Union. Where persons or property are liable to seizure or arrest by the process of both, that which first attached should have the preference. Any attempt of either to take them from the legal custody of the officers of the other, would be an unjustifiable exercise of its power, and lead to most deplorable consequences. Therefore, if a person be imprisoned under the civil or criminal proofs of one, the other cannot take him from such custody in order to subject him to punishment for an offence against them. A fugitive cannot be taken from the legal custody of the sheriff by any warrant from the courts of the United States, in order to extradition, under the acts of congress. Neither can such fugitive, when in custody of the marshal, under legal process from a judge or commissioner of the United States, be delivered from such custody by means of a habeas corpus or any other proofs, to answer for an offence against the state, whether felony or misdemeanor, or for any other purpose.

While the act of congress does not forbid the issuing of a habeas corpus by a state judge, it carefully guards against the abuse of it, and makes a certificate of a commissioner or judge of the United States, "conclusive evidence of the right of the person

or persons in whose favour it is granted, to remove such fugitive;" and forbids "all molestation of such person or persons by any process issued by any court, judge, magistrate, or other person whomsoever." This act of congress is the supreme law of the land, and binding on the conscience of state judges as well as those of the United States. Judges of the United States, as well as of state courts, are therefore bound to dismiss a writ of habeas corpus, or to refuse to allow it whenever they are properly informed that the prisoner is held by legal process under this act, and not to suffer it to be abused by mischievous intermeddlers for the purpose of "molestation" of the officer or owner of the fugitive in effecting his extradition.

The laws of the United States give ample remedy by habeas corpus for those illegally imprisoned under colour of their process—and state courts have in many instances exercised a concurrent jurisdiction in similar cases. But state courts or judges have no power under a habeas corpus to review or sit in error upon the judgments or process of the judicial officers of the United States acting within the jurisdiction committed to them, as has sometimes been done.

Passing, however, from these observations of a general kind to the principles which apply to the case immediately before us.

The counsel whom we heard as amicus curiae, suggested to us—quoting the judiciary act of 24th of September, 1789 (section 14), as his argument—that the court had no power to discharge the prisoner, because he was held by a warrant from the state magistrate for an alleged criminal offence against the state of Pennsylvania; and that the warrant was conclusive evidence of the fact. To a habeas corpus issued by this court under the authority conferred on them by the judiciary act, this objection would be conclusive. But this writ was not allowed and issued under the general law, but as the district-attorney of the United States has stated, under special powers conferred by the act of congress of 2nd March, 1833 (chapter 57, § 7), which, so far as material to our present inquiry, is as follows:

"And be it further enacted, that either of the justices of the supreme court, or a judge of any district court of the United States, in addition to the authority already conferred by law, shall have power to grant writs of habeas corpus in all cases of a prisoner or prisoners in jail or confinement, where he or they shall be committed or confined on, or by any authority of law, for any act done or omitted to be done in pursuance of a law of the United States, or any order, process or decree of any judge or court thereof, any thing in any act of congress to the contrary notwithstanding."

The petition states, and the proof shows, that the prisoner has been committed for an act done in executing process issued in pursuance of a law of the United States. It therefore comes within the provisions of this act.

What then have we power to do on the return of the writ? "The writ of habeas corpus is a high prerogative writ known to the common law: the great object of which is the liberation of those who may be imprisoned without sufficient cause. It is in the nature of a writ of error, to examine the legality of the commitment; it brings the body of the prisoner up, together with the cause of his commitment. The court can, undoubtedly, inquire into the sufficiency of that cause." Ex parte Watkins, 3 Pet. [28 U. S.] 201.

A warrant of arrest issued by a justice of the peace has none of the characteristics of a judgment of a court of record, and is therefore not conclusive evidence that the prisoner is rightly deprived of his liberty. It is every day's practice to inquire into its regularity, and whether it has been issued on sufficient grounds to justify the arrest and imprisonment. If this could not be done, the writ of habeas corpus would little deserve the eulogies which it has received as a protection to the liberty of the citizen.

Warrants of arrest issued on the application of private informers, may show on their face a primâ facie charge sufficient to give jurisdiction to the justice; but it may be founded on mistake, ignorance, malice, or perjury. To put a case very similar to the present, A. tells B. that he has seen C. kill D. B. runs off to a justice, swears to the murder boldy, without any knowledge of the fact, and takes out a warrant for C., who is arrested and imprisoned in consequence thereof. C. prays a habeas corpus, and shows that he was the sheriff of the county, and hanged D. in pursuance of a legal warrant. If a court could not discharge a prisoner in such a case, because the warrant was regular on its face, the writ of habeas corpus is of little use. Every arrest of the person is an assault and battery, and attended with force and violence against a resisting party; and if made by three or more persons is a riot, provided the fact be concealed that it was made in execution of a legal warrant.

The authority conferred on the judges of the United States by this act of congress, gives them all the power that any other court could exercise under the writ of habeas corpus, or gives them none at all. If under such a writ they may not discharge their officer when imprisoned "by any authority," for an act done in pursuance of a law of the United States, it would be impossible to discover for what useful purpose the act was passed. Is the prisoner to be brought before them only that they may acknowledge their utter impotence to protect him? This act was passed when a certain state of this Union had threatened to nullify acts of congress, and to treat those as criminals.

who should attempt to execute them; and it was intended as a remedy against such state legislation. If the state of Pennsylvania had, by act of legislature, declared that the fugitive law should not be executed within her borders, and had directed her officers to arrest and imprison those of the United States who should attempt to execute it, would not this court have been bound to treat such act as unconstitutional and void, and discharge their officers from imprisonment under it? And have they no power to do so, when intermeddlers endeavour to abuse state process for the same purpose? If the marshal and his officers may be arrested for serving process, why not the commissioner and judge who issued the process? The extreme advocate of state rights would scarcely contend that in such cases the courts of the United States should be wholly unable to protect themselves or their officers.

Let us look at the consequences. While the marshal's officer in this case is endeavouring to take the prisoner, a person swears to the information on which this warrant was issued, and puts it, we will suppose, into the hands of the sheriff, knowing the person charged to be acting under authority of the laws of the United States. Now, let us suppose the marshal's officers had succeeded in making the arrest, and the sheriff had attempted to execute process, what would have been the consequence? If the marshal resists, a contest ensues, which may be called, in fact, a war between officers, each acting and justifying his conduct under proof from his particular sovereign. If the sheriff succeeds, the fugitive is discharged and the officer of the United States conveyed to prison. If such a state of affairs can be brought about at the instance of any person, who is willing to swear without scruple to that which he does not know to be true, or perhaps knows to be false; then, indeed, has been discovered a safe mode of nullifying the constitution and laws of the United States.

In conclusion, as we find that the prisoners are officers of the United States, in confinement for acts done in pursuance of a law of the United States, and under process from a judge of the same; that they have not exceeded the exigency of the process under which they acted; that this prosecution has not been instituted, nor is now acknowledged by the state of Pennsylvania, but has its origin in some association living at a distance, and ignorant of the transaction which they have volunteered to investigate; that the information on which the warrant to arrest the prisoner is founded, was sworn to by one who did not know whether the matter of the affidavit was true or false, and that by stating but half the truth, it is wholly false. Therefore the order of the court is, that the prisoner be discharged.

The Second Case.

Some time after the prisoners were thus discharged, the negro, Thomas, brought a civil suit in the supreme court of Pennsylvania against Jenkins, Wynkoop, Crossin and Keith, the same deputy marshals. The negro, himself, filed no affidavit of his cause of action, but there were two affidavits filed by other persons. They showed, that on the day of the attempted arrest of the fugitive, Thomas, he came out from a hotel in Wilkesbarre, wounded, bleeding and faint —that he was pursued—that there was a cry of "Shoot him," and the sound of pistol shots —that he made his way to the river, and plunged in, declaring "that he would never be taken,"—that he subsequently came out, but was driven back again to the water's edge, by a presented pistol—that there were many persons on the river bank, some of whom were menacing, and some who are spoken of as the "pursuers" and "the officers;" that among the persons on the bank were three, of whom one witness says he "saw two in the court room—one was Wynkoop, and the other, a big man," he thinks "Crossin,"—and that "soon after the return of the officers to the hotel," the fugitive having gone away in the meanwhile, unrestrained, a colloquy of an excited character took place between two gentlemen at the hotel, in which one of them announced himself as "Judge Collins," and the other as "John Jenkins, U. S. deputy-marshal." Nothing, whatever, was said in them about Keith, the fourth party now arrested. However, on these affidavits, a judge of the supreme court of Pennsylvania allowed a capias ad respondendum in trespass, vi et armis, and with bail in the sum of $5000 specially allowed, to issue, and under this writ, all four officers were arrested by the sheriff of Philadelphia county, and not giving bail, committed to prison. In a suit of the United States, at their relation, against Allen, the sheriff, they now presented their petition for a habeas corpus, setting forth that they were deputy marshals of the United States; that as such, they were charged by a writ duly issued by a commissioner of this court, and indorsed in proper form, with the duty of arresting Thomas, as a fugitive from labour; that having found him, they sought to arrest him, but by great violence were prevented from doing so—setting forth the fact of the capias ad respondendum, &c., and averring that all their acts and doings were done by them as officers of the United States, in pursuance of a law of the United States, and of process issued by a court thereof. The relators having made out a primâ facie case in accordance with their petition, Thomas's counsel presented the affidavits on which the judge of the supreme court had ordered them to be held to bail. The relators then offered evidence in rebuttal, to which the other side objected, on the

ground that the case must rest upon the facts which were before the state judge, when he fixed the bail.

After argument on both sides, the opinion of the court (GRIER, Circuit Justice, being absent) was delivered in substance as follows:

KANE, District Judge. The seventh section of the act of congress of March 2, 1833, c. 57 [4 Stat. 634], under which the action of the court in the present instance is to be regulated, enacts, "that either of the justices of the supreme court or a judge of the district court, shall have power to grant writs of habeas corpus in all cases of prisoners in confinement, where they shall be confined by any authority of law for any act done in pursuance of a law of the United States, or any process of a judge or court thereof."

I will not weaken, by a repetition, that clear and conclusive exposition of this section, given by Judge GRIER, when this case was before us on the arrest, at the suit of the commonwealth, for the assault and battery with intent to kill. But to say that we may issue a habeas corpus to rescue an officer from imprisonment for doing his duty, and yet that we shall shut our eyes to the proofs that he did it—to affirm that a court, called on to inquire whether an imprisonment is tortious, must listen to no evidence but that of the tort feasor himself and his accomplices—to protest that wrong is to be done by truth pertinent to the issue—is to invert the first principles of common sense as well as justice.

What is that issue? Is it whether the learned judge of the supreme court of Pennsylvania had authority to issue this writ: or whether this writ itself is formal? No one has contested either of these positions. Is it whether he has exercised his functions properly? It is no part of my functions to revise his adjudications; he has his own sphere, and I do not share its responsibilities. He was called upon to sanction the arrest of trespassers. Affidavits which he regarded as sufficient, were laid before him, and he granted the arrest. I am called upon to relieve an officer of the United States from a false and tortious imprisonment. He had to decide, I suppose, whether the party who complained before him had a right to the process he sought; he has decided that question. I have to inquire whether under any supposed cover of that process, the laws of the United States have been violated in the imprisonment of their officers, and this question I am going to decide.

And how do the learned counsel ask me to prepare for my decision? Because the judge of a state court, in a proceeding necessarily ex parte, may have been imposed on by misstatements or suppressions of fact, am I therefore constrained in another cause, under another law, within a different constitutional jurisdiction, to make my hearing ex parte also; to hearken only to him, who has abused, it is said, the process of the law by falsehood or fraud, and refuse my ear to him whom the law specially enjoins me to relieve, if he has been wronged?

What is to be the consequence? A man swears to an assault and battery; the entire truth told, he was arrested for robbing the mint or the mail. Another swears to a trespass in breaking his close and carrying away his goods; the goods were stolen, and have been recovered under a search warrant. Both affidavits are the truth unless that means the whole truth; they make out the prima facie case of the plaintiff. What then? Is the officer to go to prison in default of bail, and to stay there because the rogue swore to only half the story? Or would the argument change if the plaintiff should substitute another man's oath for his own, keeping himself aloof the while, not caring to proclaim his whereabouts?

But this is not to meet the question before me in all its breadth. He who has read the act of congress of March 2nd, 1833, or who remembers the times to meet which it was passed, knows perfectly well that it looked to the contingency of a collision between the general and the state authorities. There were statesmen then, who imagined it possible that a statute of the United States might be so obnoxious in a particular region, or to a particular state, as that the local functionaries would refuse to obey it, and would interfere with the officers who were charged to give it force, even by arresting and imprisoning them. In direct antecedence, therefore, to the section under consideration, they framed two other sections of the same statute, one authorizing the military forces of the United States to be employed in aid of the judicial power; the other authorizing a resort to especial jails for the safe-keeping of United States prisoners. It was necessary to go one step further. The military power might enforce the execution of the laws, when the marshal had failed and been made a prisoner himself for attempting to execute them; the prisons specially constituted might detain those whom the military had arrested; but the officer of the law, arrested in the discharge of his duty, imprisoned for the offense of attempting to discharge it, perhaps at the suit of the resisting state, more probably at the instance of some private grief, what was to become of him?

This seventh section meets the case, and gives the remedy. Is it credible that wise men, framing a statute for such an emergency, meant to deny to their judges to hear the wrong before they adjudicated the redress; or to draw upon the consciences of the men who had instigated the outrage on their officers, and to accept the recorded formalities by which the outrage had been consummated, as the only reliable and legal means of as-

certaining facts and legitimate deductions from them?

It is not to be questioned, that there have been men in some quarters of the country, whose efforts, if successful, would have made this section as applicable in spirit, as it is in terms, to cases under the fugitive slave law; and I do not see the circumstances which at the present moment should make its reasonable construction, and the proper mode of giving it effect, different.

The whole course of the argument goes to show that the section applies alike to all cases in which an officer is imprisoned because of acts done in pursuance of the United States laws. It is altogether a fortiori, that the relief must extend to cases of arrest under civil process. The suit of an individual has no claims to superior dignity or consideration over a prosecution instituted by the state; nor is it generally as well considered, or as rightful.

I pass over the argument, which supposes that I am about to try this cause between the parties, to the exclusion of a jury. It is simply founded in mistake. I can neither acquit nor convict. Nor can my action arrest the proceedings in the state court, nor have any effect on the trial there. The act of congress, which gives to revenue officers the right to bring themselves for trial into the circuit court, when their official conduct is in question, does not extend to the officers of the law.

If, therefore, there was such a case made out ex parte by Thomas, and such as, prima facie and on his affidavits, showed an abuse of authority by the officers, I should hear the evidence which they wished to offer to repel it. But it is not necessary for me to do this, for there is in truth nothing in them which sufficiently connects any of the United States officers with the acts of violence of which Thomas complains.

There is nothing in them to show by whom he was wounded, nor in what manner, nor under what provocation, nor with what attending circumstances, nor who pursued, or menaced, or cried 'Shoot him," or fired or presented pistols. The relators are in no wise connected with any of these incidents, except that two of them are doubtingly and imperfectly referred to as having witnessed the scene near the river bank, and a third as having, a little while after the affair was over, given his name to a gentleman who inquired for it. As to Keith, the fourth named defendant in the writ of capias, he is neither named, nor described, nor alluded to.

And beyond this, there is nothing before me. The plaintiff himself, who could have sworn clearly and affirmatively to all the merits of his case, had made no affidavit. He could have told us how it came to pass that he was wounded, and whether he was the aggrieved or the aggressor in the affray. If he was not in fact the fugitive named in the warrant, and resolutely perilled his own life by assailing the lives of those who were charged to apprehend him—or if they transcended their authority, and he was beaten without cause; his affidavit might have possessed us of it all, without a resort to inference or rumour. He too could have identified the parties that beat, or shot, or menaced him.

What others have sworn to, not only fails to implicate the relators in any act of violence whatever, but it leaves it absolutely to be guessed at, whether the plaintiff has been wronged at all. I cannot but wish that his personal affidavit had been found with the rest. He is absent; but he has constituted and instructed counsel, and I am justified in assuming that they have not failed to apprise him that his own statement, under oath, was the usual and might be, perhaps, the indispensable condition of success in his application to imprison the relators.

I have already had occasion to observe, that in a case arising under this statute, I cannot feel myself restricted by the practice that governs applications for bailable process. But I think it safe to avail myself of the light which that practice reflects. "No plaintiff," says Judge Sergeant, in the case of Nevins v. Merrie, 2 Whart. 500, "can be considered entitled to demand bail for a cause of action which he can neither positively swear to, nor allege sufficient facts and circumstances in the affidavit to satisfy the judge of its existence." Equally safe, it seems to me, would be the rule, that an officer of this court should not be detained in prison for an alleged abuse of his powers, without either a positive oath of merits from the plaintiff, or a sworn detail of circumstances to supply its place. Relators discharged.

### The Third Case.

The prisoners had not been discharged very long before they were arrested a third time, by the sheriff of Philadelphia county, under a bench warrant of outlawry from the quarter sessions of Luzerne county, based on an indictment found there by the grand jury, charging them with riot, assault and battery, and assault with attempt to kill; but not setting forth that the parties indicted were officers of the United States, nor that these alleged crimes had been committed while they were acting or professing to act in pursuance of a law of the United States, or under some order, process, or decree of some judge or court thereof. The prisoners had recently presented a petition for a habeas corpus, in which petition they averred, that all their action in the matter which forms the subject of indictment was lawful on their part, and in pursuance of a legal warrant directed to them by a duly constituted commissioner of the United States, and indorsed by one of the justices of the supreme court.

On the return of the writ, the petitioners

offering to prove these facts, it was objected, by Mr. D. P. Brown, that they were concluded by the warrant and indictment, and that this indictment not setting forth any case which could give this court jurisdiction to interfere under the act of congress of March 2, 1833, c. 57, § 7,[2] already stated, the court could not go behind it; and it was argued that if the federal courts could do what the petitioners asked, it could consider the case of every indictment found in any state, and, if they saw fit, discharge the party indicted; that this would lead inevitably to a conflict of state and federal jurisdiction, impossible to co-exist with union; and that, in this present case, conceding that the indictment was for an abuse of process, this court ought not to interfere and withdraw the accused from trial in the court where they were indicted, and which had first got jurisdiction of the case; because, if it did so, it would interfere with a settled rule of law, and there being no power under any act of congress to try and convict the parties now indicted for an abuse of process, they could not be indicted, tried nor convicted at all.

After argument on the other side, by Mr. J. W. Ashmead, U. S. Dist. Atty., the opinion of the court, Judge GRIER having been absent at Washington during the hearing, was delivered in substance as follows:

KANE, District Judge. This is one more branch of the controversies—I sincerely hope it may be the last—that have grown out of the attempted arrest of a fugitive slave in Luzerne county, some time since.

In deciding the case that was before me in February last between the same parties, I adverted to the spirit of the section of the act of congress of March 2, 1833, c. 57, under which I have awarded the writ of habeas corpus in this case, as this spirit is illustrated by the context, and by the time and circumstances of its enactment. On this point I have nothing to add. The phraseology of the statute is unequivocal in its import, and entirely consonant with its apparent object. It applies in broad and general terms to all officers of the United States, by whatever law or authority confined—with only this limitation, that the confinement must be for an act done or omitted in pursuance of a law of the United States, or in obedience to process of the federal courts.

This limitation presents the only question on which I have to pass. I am not called upon to inquire by what form of process the relators are held, by whom it was solicited or authorized, or issued or executed; but whether our officers are or are not imprisoned for acts done by them in pursuance of law or process. This is clearly in part a question of fact; and it seems to me that in determining it, I cannot be restricted to the evidence which may be found among the records of another court.

An illustration or two, not altogether without suggestive analogies in the history of our times, may make this plainer than a studied argument. If in a momentary fervour, a state should so far forget the constitution of the United States as to denounce every apprehension of a fugitive as a battery or a riot, and a court were to sentence the marshal's officers because they had obeyed the act of congress of 1850 [9 Stat. 462]; or, if the statute of a state had inhibited the collection of duties on imported goods, and the state court had imprisoned an officer of the customs for disregarding the enactment; or, if a state, in the transcendental spirit of reform, should forbid the infliction of capital punishment within its borders as a crime, and her courts were to convict our marshal of felony for executing our writ that commanded him to inflict it; can any one doubt, whether, under the words or according to the spirit of this section, it would be my duty to discharge him? A federal officer, undergoing imprisonment for an act definitely enjoined on him by the laws and process of the United States!

And yet, I can well imagine that the record in either of these cases would say nothing of the official character of the prisoner, or of his justification under the authority of the general government. If, then, the act of congress is to be made operative for the protection of the officer, he must be permitted to go behind or beyond the record, under which he is confined. And if he could claim to do this, even after conviction, how much more clearly before? If not concluded by the result of a trial, of which he had notice, and in which he perhaps took part, how much more clearly not by the preliminary action of a committing magistrate, or the ex parte finding of a grand jury!

The rule which has been referred to, as obtaining so generally in the cases of concurrent jurisdiction, that the court, which first asserts jurisdiction, shall retain it to the end, does not apply. That is a rule of comity, founded on the general convenience, seeking to avert a conflict of action between two sets of courts. It assumes that the jurisdictions are concurrent, and the controversies the same.

But in cases like that before me, either the subjects of controversy in the two courts are not the same, but the proceedings involve differing questions of law or fact; or invoke differing modes of relief or

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[2] That either of the justices of the supreme court, or a judge of the district court of the United States, in addition to the authority already conferred by law, shall have power to grant writs of habeas corpus in all cases of a prisoner or prisoners, in jail or confinement, where he or they shall be committed or confined, on or by any authority or law, for any act done, or omitted to be done, in pursuance of a law of the United States, or any order, process, or decree of any judge or court thereof.

censure; or else, all these being the same in the two courts, it was the object and purpose of the act of congress to make the jurisdiction of the federal court revisory, and its action controlling, for the very reason that otherwise, such a conflict might exist between the two. On the first of these suppositions, there has been no prior assertion of jurisdiction by the tribunal of the state; on the other, the relation of the federal to the state courts is adversary rather than concurrent. In a word, then, as I read the section, it is my duty to hear and determine, notwithstanding the proceedings that have been had before a state court, just so far as may bear upon the question of the relators' right to a discharge under the laws of the United States. But no further. I am not to decide the question of their guilt or innocence upon the charges preferred in this indictment. I have no authority to do this, either without or with a jury. My duties are performed when I have released the prisoner from unlawful imprisonment; for that imprisonment is unlawful, however formal it may be, that affects to punish for an act enjoined or justified by the supreme law of the land; or when I have remanded him to abide his sentence, or to take his trial.

It has been urged that my order, if it shall withdraw the relators from the prosecution pending against them, will in effect prevent their trial by jury at all, since there is no act of congress under which they can be indicted for an abuse of process. It will not be an anomaly, however, if the action of this court shall interfere with the trial of these prisoners by a jury. Our constitutions secure that mode of trial as a right to the accused; but they nowhere recognize it as a right of the government, either state or federal, still less of an individual prosecutor. The action of a jury is overruled constantly by the granting of new trials after conviction; it is arrested by the entering of nolle prosequis while the case is at the bar; it is made ineffectual at any time by the discharge on habeas corpus—it is in many cases controlled, or even negatived in advance, by the judge's certificate of probable cause. And there is no harm in this. No one imagines that because a man is accused, he must therefore of course be tried. Public prosecutions are not devised for the purpose of indemnifying the wrongs of individuals—still less of retaliating them. Their objects are general: they look to the public well being; and if this can be more readily or more certainly promoted by withholding the cause from trial than by pressing it on to a verdict, it is politic, and it is not unjust, so to withhold it.

Yet, though the marshal or his deputy cannot be tried by a jury, if he has acted in obedience to federal process, he may still be punished if he has abused it, and that by the court itself from which the process issued. The misbehaviour of any of our officers in their official transactions is a contempt, specially excepted from the operation of the act of 1831 [4 Stat. 488];[3] and being so excepted, it remains within our judicial cognizance. We may vindicate, therefore, the abuse of our process in the most summary manner, and with an emphasis of censure that can rarely be incommensurate with the offence.[4]

And on the other hand, there seems to be good reason why the court which issued the writ should itself judge of the fidelity with which it has been executed, and either punish or protect its ministerial officer. The process is not merely a warrant, but a mandate also, to be obeyed by the officer without regard to his judgment of its propriety, or his sympathies, or his fears. And the same local statute, the same sectional excitement, the same indignant feeling, whether enlightened and honest, or the reverse of both, which denounces the marshal for execution of a writ, should more properly condemn the judge for awarding it. It is right that the responsibility should attend upon the discretion. But all this is foreign to the question before me.

If the evidence shall present the case of an imperfect justification; if it shall show that these relators, or any of them, have transcended the rightful limits of their authority, and have wilfully or ignorantly violated the law, no considerations of policy or sympathy will press upon this court to rescue them from punishment, by withholding them from the tribunal which demands their presence. But, on the contrary, if it shall appear before me that they honestly and rightfully sought to execute their writ; that they employed force only because it was needed, and no more than was needed;—they must not be withdrawn from their daily recurring official duties, and sent away with the sanction of the court, under whose mandate they have acted, and by whom their action has been approved, to take their trial in a distant part of the country. I have unreserved confidence in the ability, integrity, and patriotism of the court from which this bench warrant has issued; but I may not

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[3] By which it is enacted, "that the power of the several courts of the United States to issue attachments and inflict summary punishments for contempt of court, shall not be construed to extend to any case, except the misbehaviour of any person or persons in the presence of the said courts, or so near thereto as to obstruct the administration of justice, the misbehaviour of any of the officers of the said courts in their official transactions," &c.

[4] It is possible, for the reason which is suggested by the argument in the text, that while the act of congress of 1883 provides for the transfer to the federal court by certiorari of proceedings instituted in the state courts against officers of the revenue, it makes no such provision for the case of officers of the law; the law of contempt being regarded as adequate to the punishment of abuses of legal process.

deny to these relators a discharge from what I deem unlawful imprisonment, however content I might be to submit my own liberty or honour to the guardianship of the learned justice who presides there.

I must therefore proceed to hear the case on its merits under the act of congress, and to that end must receive the evidence which is offered by the relators.

## Case No. 7,260.

JENKINS v. ARMOUR et al.

[6 Biss. 312;[1] 14 N. B. R. 276; 8 Chi. Leg. News, 267; 22 Int. Rev. Rec. 169.]

District Court, N. D. Illinois. Feb., 1875.

STOCK-NOTES IN INSOLVENT COMPANY—SET-OFF—TRUST FUND—INTEREST.

1. A stockholder in an insurance company rendered insolvent by a fire cannot escape his liability on a stock-note, by presenting a certificate of indebtedness on one of the adjusted policies and withdrawing his note.

2. Such a note constitutes a trust fund for the benefit of the creditors of the company, and the transaction is in effect a conversion of the company assets.

3. The stockholder must pay interest from the date of the withdrawal of his stock-note.

These were seven suits [by Robert E. Jenkins, assignee of the Commercial Insurance Company of Chicago] against as many different defendants [Joseph F. Armour and others], on stock-notes given to the company. At the time of subscribing for the stock each stockholder paid twenty per cent. in cash and gave his note to the company for the balance, without interest, payable upon demand when needed to pay losses. The dividends from time to time declared by the company had been applied upon these notes, until, at the time of the great Chicago fire of October 9, 1871, there was only thirty-five per cent. remaining unpaid on the notes. Soon after this fire, each of these defendants purchased policies from other persons, and procured their adjustment by the company, taking certificates of loss for the amount, which certificates they then surrendered to the treasurer at par in payment of their stock-notes.

Hutchinson & Luff, for assignee.
Upton, Boutell & Waterman, for Armour.

BLODGETT, District Judge. There can be no doubt that each of these defendants, at the time of the transactions alleged, knew of the insolvency of the company, and dealt with it upon that basis. The object of each of them was to obtain payment to themselves in full of their claims, notwithstanding the fact that such payment would be a withdrawal of the assets of the company from other policy-holders; for these notes against the several defendants were in effect cash, and the amount thereof should have been paid in cash into the treasury of the company for distribution among the creditors. The defendants were all responsible, and the contingency having arisen when the cash was needed upon these notes to pay losses, it became their duty to pay it into the company.

Following the law, then, as laid down in Hitchcock v. Rollo [Case No. 6,535] and Sawyer v. Hoag [Id. 12,400], decided by Judge Drummond in this court, and in the latter case as decided in the supreme court (17 Wall. [84 U. S.] 610), [and particularly the principles laid down by Judge Drummond in Scammon v. Kimball, Case No. 12,435],[2] there can be no doubt but that such surrenders and transfers were a fraud, and such a fraud as would be set aside by the court without special reference to the provisions of the bankrupt law [of 1867 (14 Stat. 517)]. The stock-notes were a part of the capital stock of the company, and as such were a trust fund for the creditors, and by collusion with the officers of the company, the defendants withdrew them from the treasury. The fact that some of the defendants were also officers of the company made no difference, and those who were only stockholders are equally liable.

An important question, and one not easy of solution, arises as to the time when interest should begin to run on these stock-notes, whether from the date of demand by the assignee, or of the exchange by the stockholders of these certificates for their notes. As against the company, if it had continued solvent, interest would only run from the time of a proper demand; but in these cases the liability of the defendants arises from their own acts under circumstances where they are properly chargeable as trustees. They, in fact, wrongfully converted to their own use the assets of the company at the time when they made these exchanges. They received payment of debts in full from the company when they knew it to be hopelessly insolvent, and withdrew from the treasury of the company their notes, which were valuable assets. The effect is the same as though they had taken and converted the amount in cash from the coffers of the company, and therefore they come within the rule that a trustee must pay interest from the date of conversion.

Judgment for plaintiff in each case, with interest at six per cent. from date of withdrawal of stock-note.

NOTE. A stockholder indebted to an insolvent corporation for unpaid shares, cannot set off against this trust fund for creditors, a debt due him by the corporation. The fund arising from such unpaid shares must be equally divided among all the creditors. Sawyer v. Hoag [17 Wall. (84 U. S.) 610]. A debt of one, insolvent, purchased by his debtor, immediately prior to the filing of a petition in bankruptcy, and purchased in order to set the same off against his indebted-

[1] [Reported by Josiah H. Bissell, Esq., and here reprinted by permission.]

[2] [From 14 N. B. R. 276.]

ness, is protected by the bankrupt act; it only forbids the set-off of claims purchased after the petition is filed. Hovey v. Home Ins. Co. [Case No. 6,743].

## Case No. 7,261.

JENKINS v. BOARD OF SUP'RS OF CULPEPER COUNTY.

[1 Hughes, 568.] [1]

Circuit Court, E. D. Virginia. April, 1876.

SPECIAL TAX—FAILURE TO LEVY—MANDAMUS.

Where the board of supervisors of a county charged by law with the duty of levying a special tax for the payment of the bonds and interest coupons issued for the erection of county buildings, had been negligent and inefficient in discharging their duty, a United States court will issue the writ of mandamus in favor of non-resident holders of overdue coupons, in favor of whom judgment had been recovered in the United States court, to compel the efficient performance of their duty.

Mr. John Howard moved the court for an absolute mandamus in the case of Thomas E. Jenkins, of Baltimore against the Board of Supervisors of the County of Culpeper. He read the petition of Mr. Jenkins filed on the 12th of October, 1875, setting forth that under an act of the general assembly of December, 1870, the county of Culpeper had issued bonds to the amount of fifteen thousand dollars, with interest coupons thereto attached, payable semi-annually, for the purpose of erecting a court-house and other public buildings in the county; that the bonds had been accordingly issued, and that several instalments of coupons, of which Mr. Jenkins was the holder, had fallen due and had been dishonored; that by the said act of assembly the board of supervisors were authorized to levy a special tax for the payment of the bonds and interest-coupons, and that the faith of the county was pledged to the payment thereof; that the board failed to perform their duty under the law; that Jenkins had accordingly brought suit in the United States circuit court upon the overdue coupons, and had obtained judgment thereon, upon which execution had been issued, and returned "No effects," and praying the court for a rule or mandamus nisi against the board of supervisors, requiring them to show cause why an absolute mandamus should not issue, commanding them to pay the judgment and execution immediately, or in default thereof to levy a special tax, under the direction and supervision of the court, for that purpose. And it was shown that the rule had been accordingly issued and had been duly served upon the board.

Mr. C. U. Williams appeared for the county of Culpeper, and filed the answer of the board of supervisors. The answer stated that the board had in December, 1874, passed an order levying a special tax for the purpose of paying the interest-coupons and of creating a sinking fund for the payment of the bonds themselves when they should become due; that the board had also passed orders directing the treasurer of the county to pay the coupons which had fallen due, and that no interest should be allowed on the coupons after their maturity. The board of supervisors thus claimed that they had done their whole duty in the matter, and their counsel contended that nothing further could be required of them.

Mr. Howard read the statutes, showing the jurisdiction of the board of supervisors under the law, and held that under all the circumstances of the case the board had been negligent of their duty, and had not properly exercised the powers with which they were clothed for a timely and effectual levy of taxes for the payment of the debt; that four semi-annual instalments of coupons had fallen due and not a dollar had been paid, and that it was the legal duty and business of the board of supervisors not merely to have levied a special tax, but to have levied it in time to meet the coupons, and to have seen that the special provision made for the payment of the coupons was fully carried out, and if necessary to levy other taxes for the purpose, and that it did not appear they had done so, and that upon the whole there had been a failure of duty on the part of the board and of the county, and that the court ought to issue an absolute mandamus commanding the board of supervisors to pay, or cause to be paid, the judgment and execution which had been recovered and issued against the county, principal, interest, and costs, and also the costs of the proceedings for mandamus.

THE COURT (BOND, Circuit Judge) entered an order awarding an imperative mandamus against the board of supervisors, commanding them, on or before the 1st day of February next, to pay, or cause to be paid, to Mr. Jenkins the amount of his judgment and execution, and costs, and the costs of the mandamus proceedings.

[1] [Reported by Hon. Robert W. Hughes, District Judge, and here reprinted by permission.]

## Case No. 7,262.

JENKINS v. BOYLE.

[2 Cranch, C. C. 120.] [1]

Circuit Court, District of Columbia. June Term, 1816.

STATUTE OF LIMITATIONS — TAKING CASE OUT OF.

The acknowledgment of the original cause of action, accompanied by a refusal to pay unless compelled by law, will not take the case out of the statute of limitations.

[Cited in Nicholls v. Warfield, Case No. 10,234.]

Assumpsit, upon a promise in writing to pay the debt of another if the latter did not pay in ninety days. The letter containing

[1] [Reported by Hon. William Cranch, Chief Judge.]

the promise was shown to the defendant, who admitted the letter to be his, but said the plaintiff ought to get the money from the third person, and that he would not pay unless compelled by law.

THE COURT (THRUSTON, Circuit Judge, absent) directed the jury that it was not a sufficient promise to take the case out of the statute of limitations, under the decision of the supreme court of the United States, in the case of Clementson v. Williams, 8 Cranch [12 U. S.] 72.

JENKINS (BROOKS v.). See Case No. 1,953.

## Case No. 7,263.

JENKINS v. CALVERT.

[3 Cranch, C. C. 216.] [1]

Circuit Court, District of Columbia. Dec. Term, 1827.

LANDLORD AND TENANT — FRAUDULENT REMOVAL OF GOODS — FOLLOWING BY LANDLORD — EVIDENCE OF FRAUD — RECEIPT FOR RENT OF PREVIOUS YEAR.

1. Goods fraudulently removed by the tenant, although not secretly or clandestinely, may be followed and distrained by the landlord.

2. The tenant's removal of his goods before the expiration of the term, without the knowledge of the landlord, and without paying the rent, is a fact from which the jury may infer that the removal was fraudulent as to the landlord.

3. A receipt for the last year's rent, is evidence that the rent for the preceding years has been paid.

Replevin. Mr. Key, for plaintiff [John Jenkins], prayed the court to instruct the jury, that if, &c. "the tenant removed the goods from the premises in the day-time, openly, and with the knowledge of the neighborhood, then the defendant [Edward H. Calvert] could not follow and distrain the goods, and the plaintiff is entitled to recover."

Which instruction THE COURT refused to give (MORSELL, Circuit Judge, dissenting).

Mr. Key then made the same prayer, with this addition, "unless the defendant shall prove to the satisfaction of the jury, that the removal was fraudulently intended to prevent the landlord from distraining. And the circumstance of the landlord's not being apprised of the day of such intended removal, is not a circumstance from which the jury may infer such fraud."

Which instruction THE COURT also refused to give (MORSELL, Circuit Judge, dissenting).

Mr. Key then prayed the court to instruct the jury, that if, &c. the rent of 1825 was paid, and a receipt therefor given by the landlord, they ought to presume that the rents of the preceding years were paid also, unless the defendant should show that they were not paid.

Which instruction THE COURT gave nem. con.

[1] [Reported by Hon. William Cranch, Chief Judge.]

JENKINS (COFFIN v.). See Case No. 2,948.

## Case No. 7,264.

JENKINS v. The CONGRESS.

[2 Betts, D. C. MS. 1.]

District Court, S. D. New York. Feb. 4, 1841.

LIEN FOR SUPPLIES—DEPARTURE OF VESSEL.

[Under Rev. St. N. Y. 18, pt. 3, tit. 3, a departure from the port where supplies have been furnished to a vessel, although with intent to return, destroys the lien given by the statute.]

[Cited in The Alida, Case No. 199.]

[This was a libel by William B. Jenkins against the steamboat Congress (Philip Bonestal, claimant) for supplies furnished in the home port.]

The libel seeks to charge the boat in rem for the amount of a bill of ship chandlery furnished her by the libellant in 1839, in the port of New York. The libellant resides in New York, and the materials were furnished the boat at this place, at the request of her then owner or master. The boat was then, and is still, owned in this state. The answer of the claimant alleges that the boat was employed during the year 1839 as a passenger boat, and for towing between the city of New York and Saugerties, in the county of Ulster, which place she left on the 24th of December, on her last trip, and returned to New York. The claimants purchased her on the 23d of March, 1840. Between the 20th and 24th of June, thereafter, she made two trips to Saugerties, carrying freight and passengers; on the 4th of July, she made a trip to Fort Hamilton, and on the 20th of August made two trips between New York and Hempstead, Long Island. The libel was filed.

Mr. Bowdoin, for libellant, contended that the libellant had a lien for these supplies, the boat being a domestic vessel, and that his remedy was not lost, because she had been to no other port than New York since they were supplied. Ports for navigation and trade are only such places as are appointed and authorized by the sovereign for such purpose, and, under our laws, by congress. He cited 2 Rev. St. p. 493, §§ 1, 2; Harg.'s Law Tracts, 46, 50, 53; 3 Durn. & E. [3 Term R.] 261; 1 Chit. Commer. Law, 726; Com. Dig. "Navigation," E; Mortimer, Com. Dict. "Port"; Jacob, Law Dict. "Port."

Mr. Shufeldt, for claimant, referred to state acts to show intent of legislature. 1 Rev. Laws (1813) 130, § 1; Act 40th Sess. (1817) c. 60; 2 Rev. St. 493; and also 17 Johns. 54; 1 Wend. 557; 5 Wend. 565; 20 Johns. 194; 3 Cow. 714.

BETTS, District Judge. Although the claims of material men are intrinsically of a maritime character, and as such fall within the cognizance of courts of admiralty, yet the general jurisdiction is so far modified in this respect in our courts, that it is not exercised over domestic vessels, in behalf of resident creditors, except in consonance with the local law. The General Smith, 4 Wheat. [17 U. S.] 438; Peyroux v. Howard, 7 Pet. [32 U. S.] 324; Phillips v. The Thomas Scattergood [Case No. 11,106]; Davis v. New Brig [Id. 3,643]. The rights of the parties are also measured in such cases by the law of the particular state in which the court sits. The Robert Fulton [Id. 11,890]. The provisions of the state law applicable to the subject are in the Revised Statutes (part 3, tit. 3). "Whenever a debt amounting to $50 or upwards, shall be contracted by the master, owner, agent or consignee of any ship or vessel, within the state, for such provisions or stores furnished within the state, as may be fit and proper for the use of such vessel at the time when the same were furnished, such debt shall be a lien upon such ship or vessel, her tackle, apparel and furniture; and shall be preferred to all other liens thereon, except mariner's wages." Section 1. There is no dispute but that the demand of the libellant falls within the provisions of this act. The controversy between the parties rests upon the question whether the privilege now exists, and can be enforced by this action. The second section of the same act provides that, "When the ship or vessel shall depart from the port at which she was when such debt was contracted, to some other port within this state, every such debt shall cease to be a lien, at the expiration of twelve days after the day of such departure, and in all cases such liens shall cease immediately after the vessel shall have left the state." The general bearing and intent of this limitation is sufficiently manifest. Whether the particular creditors enumerated in the statute are given this privilege because they enjoy the same under the civil law and law maritime,—as was manifestly the design of the first act in 1817 (1 Rev. Laws, 130, § 11),—or whether, because some of the credits at common law entitle the creditor to retain possession of the vessel until his debt is satisfied, the legislature meant to place the others in the same class, and extend the advantages and privileges of a bailment (locatio operis faciendi) for a short term of time beyond the continuance of the actual possession, the language of the statute is plain and significant to denote that the running out of the limitation is to be an absolute bar to the remedy in rem. And it is furthermore manifest that the departure of the vessel acts upon the right of the creditor as the surrender of possession does upon that of a bailee, without regard to the consideration of her return later or sooner to the place where the debt was contracted. The possession of a bailee, once waived or given up, cannot be reclaimed (Story, Bailm. 373), although the thing remain continually within his reach; and so this departure of the vessel, in the mode pointed out by the statute, severs the lien, and it can never afterwards be reclaimed. "It shall cease immediately (the act declares) after the vessel shall have left the state." And this necessarily presupposes her return within the state, where the law might otherwise affect her. As, in this last clause of the section, the legislature most clearly have reference to a temporary departure, and not a final one, the like language in the preceding number must be understood in the same sense. Twelve days after the day of the departure of a vessel from the port where the debt was contracted, to some other port within the state, as definitely and absolutely bars the lien against her as does her departure from the state. In so far, then, as the argument aims at an interpretation of the act which shall uphold the lien unless the vessel leaves the port without intent to return, it cannot be sustained.

## Case No. 7,265.

JENKINS v. EINSTEIN et al.

[3 Biss. 128.] [1]

Circuit Court, N. D. Illinois. July Term, 1871.

FRAUDULENT CONVEYANCE—INTENT OF BOTH PARTIES MUST APPEAR—INADEQUACY OF CONSIDERATION MUST BE GROSS — PURCHASE WITHOUT ABSTRACT OF TITLE—USURY — SALE TO ATTORNEY — WHEN VALID—DEPRECIATED NOTES — LOOSE CONVERSATIONS.

1. To set aside a conveyance as made to hinder and defraud creditors the intention of both parties must be shown.

2. Testimony of witnesses as to the value of property at an anterior date commented upon.

3. To set aside a conveyance for inadequacy of consideration, the consideration must be grossly inadequate, and such as to clearly indicate the existence of unfair dealing, fraud, imposition or oppression.

4. The fact that an attorney, who thinks that he knows the title, has confidence in the vendor, and purchases without an abstract or examination of title, is not a proof of fraud.

5. The fact that the negotiator of a loan, who personally guaranteed the paper, received a large compensation for so doing, does not vitiate a conveyance made to him in settlement of a part of the loan which he was afterwards compelled to take up.

6. It seems, than an assignee cannot set aside a transaction of the bankrupt on the ground of usury.

7. To set aside a conveyance made to his attorney by a party in embarrassed circumstances, it must be shown that he had been consulted in regard to the particular transaction, or that he was in a position to take an unfair advantage.

8. The fact that their relations were intimate and that the vendor expected to be able to repurchase on favorable terms, does not make the conveyance a simple security for indebtedness.

[1] [Reported by Josiah H. Bissell, Esq., and here reprinted by permission.]

9. The fact that a part of the consideration was the paper of the firm to which vendor belonged, which was then only worth a part of its face, does not, at common law, vitiate the transaction.

10. Loose conversations or statements should not be allowed to change the character of a conveyance, and subsequent parol promises by the vendee to give the vendor the advance in the property, and offers to convey to any one who would take it off his hands, are without consideration, and cannot be enforced either in law or equity.

In equity. This was a bill filed by Robert E. Jenkins, assignee of John K. Pollard, against Morris Einstein, Arthur D. Rich and Calvin P. Austin, to set aside a conveyance of certain real estate made by Pollard to Rich, and alleged to be with intent to hinder and delay his creditors.

During the year 1866, and for several years prior thereto, Pollard was engaged in business in Chicago as a member of the firm of Pollard, Doane & Co., a wholesale grocery house transacting a large business and in good credit, and also of the firm of R. M. Whipple & Co., real estate agents and general speculators. The defendant Rich, a lawyer of the same city, had frequently acted as attorney for Pollard and had had considerable financial transactions with him, and had, from time to time, advanced him sums of money. In June, 1865, the firm of R. M. Whipple & Co., then claiming to be entirely solvent, was pressed for money and applied to Rich for a loan of $20,000, and through his influence the loan was procured from third parties on the notes of R. M. Whipple & Co., who paid Rich for his commission in the negotiation the sum of $3,750, Rich personally guaranteeing $15,000 of the notes. This loan was procured at the express request of Pollard, who gave his personal promise to Rich to see it paid. Part of the notes were paid by the firm, but the balance Rich was compelled to take up, and in October, 1866, Rich still held $8,000 of the paper. At that time the affairs of R. M. Whipple & Co. had become badly embarrassed, and Pollard became alarmed in regard to its effect upon his grocery firm. At Pollard's request Rich then went with him to consult Whipple at Pithole, Pennsylvania, in regard to paying or securing this paper, and arranging for other liabilities of the firm then past due; but nothing was accomplished. On the 16th day of November, Pollard conveyed to Rich certain property on Fourth avenue, Chicago, for the expressed consideration of $25,000, made up as follows: Notes of R. M. Whipple & Co., held by Rich, $8,000; mortgage notes, guaranteed by Whipple, $3,000; checks of R. M. Whipple & Co. to J. K. Pollard, $9,000; and the balance, $5,000, in Rich's own note, due in one year, secured back on the property. At the same time he also conveyed to Rich certain property on the corner of Wabash avenue and Thirteenth street, for the expressed consideration of $15,000, as follows: $5,000 in cash, and his two notes for $5,000 each for the balance, due in twenty and thirty days, respectively, which notes were paid on maturity. On the 11th of March, 1868, Rich conveyed to Austin the Wabash avenue property for $26,000, cash. On the 15th of January, 1869, he conveyed the Fourth avenue property to Einstein for $26,500; $14,000 cash and $12,500 secured back by mortgage on the property, which mortgage Rich still owned at the time of the suit; and the bill charged the purchasers with notice of all of complainant's equities as set up in the bill.

Prior to the execution of the deeds by Pollard to Rich two judgments had been recovered against him in the superior court of Chicago, amounting to over $10,000, upon which executions were issued and levied, and the property sold at sheriff's sale. Rich knew nothing of these judgments until after the sheriff's sales, and soon after the time for redemption had expired, he bought them up for $13,000, taking a conveyance from the purchasers to himself. Rich, in his answer, denied all allegations in the bill charging him with fraud, and insisted that he was a bona fide purchaser for a valuable and adequate consideration. The facts further appear in the opinion.

George F. Harding and Milton T. Peters, for complainant.

The creditors, or the assignee, have the right to avoid a conveyance prior to their right or lien, by showing it usurious or fraudulent. Dix v. Van Wyck, 2 Hill, 522; Post v. Dart, 8 Paige, 642; Thompson v. Van Vechten, 27 N. Y. 568; Schroeppel v. Corning, 5 Denio, 236; Valentine v. Conner, 40 N. Y. 254. Conveyances made with intent to defraud or defeat creditors will be void, although there may be in the strictest sense a valuable consideration, nay an adequate consideration. 1 Story, Eq. Jur. § 369; Rogers v. Evans, 3 Ind. 576; Moyer v. McCullough, 1 Cart. [Ind.] 339. This is a secret reservation of the surplus of the value of the property, viz., of a benefit in the right of redemption upon a conveyance absolute in form. This is admitted to be fraud by all courts. McCulloch v. Hutchinson, 7 Watts, 434; Smith v. Lowell, 6 N. H. 67; Smith v. Smith, 11 N. H. 460; 1 Am. Lead. Cas. 71. An attorney cannot buy of or against his client. He has a duty to perform inconsistent with the character of purchaser on his own account. Van Epps v. Van Epps, 9 Paige, 237. He is a trustee. Howell v. Baker, 4 Johns. Ch. 118. The principle that a client is protected in his contracts with his attorney is deemed so important that the client is allowed to set aside a fraudulent assignment to his attorney; prevailing over general rule that one party to a fraud, standing on equal footing, cannot be relieved against the other. Ford v. Harrington, 16 N. Y. 285; 1 Story, Eq. Jur. 300-310; Thallhimer v. Brinckerhoff, 20 Johns. 396; Osborne v. Williams, 18

Ves. 379; Anon. 16 Abb. Pr. 423. Courts should set aside or disregard them. Presumption is that they are unfair. Story, Eq. Jur. 310–313; Jennings v. McConnel, 17 Ill. 148; Evans v. Ellis, 5 Denio, 644; Mason v. Ring, 3 Abb. Dec. 210; 11 Paige, 467; Case v. Carroll, 35 N. Y. 385; Hitchings v. Van Brunt, 38 N. Y. 335; Brock v. Barnes, 40 Barb. 521; Starr v. Vanderheyden, 9 Johns. 253; De Rose v. Fay, 3 Edw. Ch. 369; Howell v. Ransom, 11 Paige, 538; Jones v. Thomas, 2 Younge & C. Exch. 517; Wood v. Downes, 18 Ves. 120; Bellew v. Russel, 1 Ball & B. 96; Arden v. Patterson, 5 Johns. Ch. 44.

Rich & Thomas, for defendant Rich.

When the transaction between client and attorney is disconnected from that relation, they stand upon the rights and duties common to other persons. Story, Eq. Jur. §§ 310, 313, and notes, and cases cited; Montesquieu v. Sandys, 18 Ves. 313. To rescind a contract on the ground of inadequacy of consideration it must be shown to be grossly inadequate. Baldwin v. Dunton, 40 Ill. 195; Osgood v. Franklin, 2 Johns. Ch. 23. Parol evidence of any contemporaneous conversation, understanding or agreement of the parties, inadmissible to show that a deed absolute on its face, was only intended as a mortgage. Sutphen v. Cushman, 35 Ill. 190; McArtee v. Engart, 13 Ill. 242.

Rosenthal & Pence, for defendant Einstein.

BLODGETT, District Judge. The whole case centers around this transaction, the complainant alleging that it was fraudulent: 1st. Because it was made with intent to hinder, delay and defraud the creditors of Pollard. 2d. Because Pollard was imposed upon as to the amount of indebtedness held by Rich against him and against the firm of R. M. Whipple & Co. 3d. Because Rich occupied a confidential relation to Pollard as his attorney, and took advantage of that relation to impose upon him. 4th. That if the conveyances are valid for any purpose, they are in the nature of security for the actual indebtedness existing, and should only be held valid to that extent; that an account should be stated between Pollard and Rich, and redemption allowed upon payment of the amount found due, it being assumed that the evidence establishes the fact that there was an express contemporaneous agreement between them, that any advance in the value of the property should enure to the benefit of Mr. Pollard.

1. Were these deeds made with intent to hinder, delay or defraud the creditors of Mr. Pollard? This transaction was on the 16th day of November, 1866. As the law then stood, debtors in failing circumstances were allowed to prefer their creditors, and our courts sustained such preferences where there was no fraudulent act as between the parties, enabling the creditor preferred to absorb an undue share of the property. It will be seen from the evidence in the case, that there was some bona fide indebtedness which Pollard was both legally and morally bound to pay. The evidence of Rodney M. Whipple has been taken in this case with a view to reduce the aggregate amount of this indebtedness. This witness had been guilty of the grossest breach of trust towards Rich, in the abstraction of a part of his collateral securities for this indebtedness. He had, on one occasion, visited Rich, and assured him that a certain collateral note held by him, would be paid that day if presented, and that he would collect and return the money. Rich entrusted him with the note. He obtained the money and converted it to his own use, thereby rendering himself a proper subject for criminal prosecution. But on the faith of Pollard's pledge that no harm should ultimately result from this transaction, Rich did not prosecute.

Pollard's evidence is also taken, and he attempts to explain and show that by various transactions, from time to time, he had succeeded in reducing this indebtedness. But Rich held the notes referred to; he had Pollard's personal pledge that he would see them paid; he had made the transaction with Whipple & Co. on the strength of that pledge; and, taking the testimony of the defendants, in connection with the vouchers presented, it is much more satisfactory and conclusive, and, balancing all the testimony together, I have no doubt the weight and preponderance of proof is, and I am clearly of opinion that such an indebtedness existed, swelled by accrued interest, to nearly or quite the amount claimed by Rich.

It is strenuously urged that some portion of this indebtedness was made up of usurious interest and fictitious amounts which ought not to be allowed. I will not now discuss the question of usurious interest. This is not a bill to set aside the transaction for usury, and I doubt whether the creditors of Pollard could have relief on that ground.

Again: Even if this transaction was made by Mr. Pollard with fraudulent intent, his intentions alone will not control; we must ascertain the intention of both of the parties to the conveyance. The evidence is very conclusive that Mr. Pollard, up to this time, had maintained a high character for commercial integrity. But the affairs of R. M. Whipple & Co. had got into such condition that financial ruin was staring him in the face. He may have thought that if he turned this property over to Rich, and was subsequently able, by the improvement in the affairs of R. M. Whipple & Co., to pay the liabilities of that firm, Rich would be much more ready to give him back the property without profit, or at only fair rates

of interest on the money invested, than a stranger. It is a natural inference, from all the testimony developed in the case, showing the intimate and friendly relations which then existed between them, that under the circumstances Pollard would have preferred to deal with Rich, rather than a stranger.

The alleged inadequacy of price is another circumstance which is seized upon by the complainant in this case to establish the intent of fraud, and it becomes necessary that I should examine the testimony carefully to see whether the charge of inadequacy is made out. There is no doubt that where a debtor in failing circumstances, or actually insolvent, conveys his property to a creditor, even by a legal preference, for a grossly inadequate price, such conveyance is fraudulent as against other creditors. He has no right to cover up and conceal, or spirit away more property than is necessary to pay the creditor whom he legally prefers; the preference must be fair and just.

With reference to the value of the property, the evidence of several prominent real estate dealers has been taken in the case, and there is no very great discrepancy in their testimony as to the actual value of the Wabash avenue property, aside from the improvements. They rate the ground in November, 1866, from $200 to $300 per front foot. With my experience in regard to the discrepancy between witnesses in estimating the value of property at an anterior date, I am not surprised at these various estimates. The disparity is mainly in regard to the value of the improvements, some of the witnesses claiming that their value was merely what the house was worth to move off; that when the property reached a value of $250 per foot, a single wooden dwelling house upon it would not rent for enough to pay a fair profit on the investment, and that it was necessary to remove the old building and erect one of such character that the rental will return a fair profit on the investment. And this seems to be a business-like view to take of the subject. Of course there may have been a speculation in it; the property may have advanced from causes the parties had no right to anticipate. But when a man with money is asked to buy property in Chicago, and pay in cash, the question he would naturally ask himself is, whether he can obtain a fair income on the money he pays? It is very obvious from the testimony that the rental of this single house, standing on these lots, would not have afforded much income on the investment, at the price per front foot which the witnesses estimate it worth.

I therefore conclude that the evidence in regard to the value of the Wabash avenue property does not justify the court in assuming that it was worth, at that time, in cash, more than $15,000 to $18,000. The court must take notice of the fact that there is a wide difference between buying on small margins, expecting to realize out of the advance in price, and buying for cash. These speculative terms, known as "canal time," or one to five years, make widely different transactions from one where cash in hand is paid. In the latter case the purchase must be at such price as will sustain the investment. Nearly all of complainant's witnesses place the value of the house at about $10,000. It may have cost that; it was a well built house; was built by Mr. Pollard for his own home, and may have had that value to him in that place. But when the property is considered by the capitalist as an investment, it must be looked at from another stand-point. The defendant's witnesses, on the contrary, estimate the house at about what it would be worth to move off; from $1,500 to $5,000.

There is another consideration: The testimony of most of the witnesses was taken within the last year, nearly four years after the time of these transactions. It is conceded that there has been a very large advance in the price of property in the vicinity during that time. Now it is almost impossible for witnesses to recur to prices at that time, and state, with any approach to accuracy, its value at that remote period. Their present opinion will be influenced by the subsequent advance. The supreme court of this state, in the case of Baldwin v. Dunton, 40 Ill. 196, say: "It is not easy for the fairest and most unprejudiced mind, after a length of time, to recall with accuracy former values of property, and this is especially true where there has been a large appreciation in prices. Under such circumstances it is difficult to fix the true value of propery at an anterior date. * * To require a rescission the consideration must be grossly inadequate." This is the rule laid down by all the authorities in regard to the rescission of contracts for inadequacy of consideration. The consideration must be so inadequate as to strike the mind at first blush as far below the actual value of the property, and to cleary indicate the existence of some unfair dealing, some fraud, imposition, or oppression by the purchaser. McArtee v. Engart, 13 Ill. 242. The rule is well stated by Chancellor Kent, in Osgood v. Franklin, 2 Johns. Ch. 23. He says: "There is no case where mere inadequacy of price, independent of other circumstances, has been held sufficient to set aside a sale made between parties standing on equal ground, and dealing with each other without imposition or oppression; and the inequality amounting to fraud, must be so strong and manifest as to shock the conscience and confound the judgment of any man of common sense."

It is also urged as a badge of fraud in this case that Rich bought without an examina-

tion of title; without being furnished with an abstract; without any such precautions as purchasers usually require. But the answer to that is, that he had been the attorney of Pollard, and knew, or thought he knew, substantially the title, and was willing to take the property with Pollard's warranty deed, without a very careful examination. The result shows that he was a loser by the transaction, because it turned out that there were prior judgment liens upon the property, which Rich was subsequently compelled to pay, to the amount of over $13,000, in order to protect his title acquired by the deed.

2. Was Pollard imposed upon as to the extent of debts which Rich had against him? Pollard himself does not now attempt to swear that he was. But Whipple swears that a part was paid and the balance was usury. It will be borne in mind that Pollard agreed to give Rich $3,750 bonus for negotiating the loan in June, 1866, and that some of the notes given for this loan were reckoned in the indebtedness which was paid by Pollard at the time of the conveyances, and it is claimed that this bonus should be deducted. But Rich only acted as negotiator in obtaining the loan; both Whipple and Pollard knew that he did not pretend that he was loaning his own money. It is true he was receiving a considerable commission, but they had a right to estimate the value of his services; it is not for the court to say what was the value. The negotiation was for a large sum, and Rich guaranteed a large portion of the debt to the parties from whom the money was obtained, and subsequently had to pay it. I do not think it lies in the mouth of this complainant to question that transaction. It was a debt acknowledged by both Whipple and Pollard, and so far as this court is concerned, is to be held valid. I do not think the charge of imposition in regard to the extent of indebtedness is made out.

3. Did Rich occupy such confidential relations as prohibited his buying Pollard's real estate? The evidence shows that Mr. Rich had been the attorney of Pollard for many years. Pollard says that he had other attorneys, but the weight of evidence is that Rich had acted as his attorney more frequently than any other person. They had also been intimate friends. But there is no evidence that Pollard consulted Rich as his attorney, or that Rich was in any position to take advantage of him. He undoubtedly had the hold on Pollard which one friend has upon another when that other is in straightened circumstances. He would naturally prefer, if he could pay but one debt, to pay that of his friend. Pollard was fully aware of the value of the property, and in all respects capable of acting for himself. Indeed he seems to have been much more sanguine in regard to the future value of the property than Rich or other persons. Nor does there seem to have been any influence to control his own independent judgment in regard to it. There is no proor in the case that Rich was consulted as the attorney of Pollard in regard to the transaction, or that his advice as a lawyer either suggested or consummated the bargain. The rule laid down by Judge Story is, that when the transaction between client and attorney is totally disconnected with the relation, and concerns objects and things not embraced in or affected by, or dependent upon that relation, they stand upon the rights and duties common to all other persons and may deal with each other. 1 Story, Eq. Jur. § 313. In the case of Montesquieu v. Sandys, 18 Ves. 313, Lord Ch. Eldon says: "There is no authority establishing, nor was it ever laid down, that an attorney cannot purchase from his client what was not in any degree the object of his concern as attorney, the client making the proposal himself, proposing the price, no confidence asked or received in that article, and both ignorant of the value. Under such circumstances he is not the attorney in hac re, and therefore, not being under any duty as attorney to advise against the act, he may be the purchaser."

4. Were the conveyances made by way of security only, for actual indebtedness then existing? Pollard had pledged his honor that Rich should lose nothing by the loan to R. M. Whipple & Co.; he had no money with which to meet the obligation; he felt pressing upon him the duty and necessity of seeing that debt paid, and like an honest man he proposed to give what he had, which was the Fourth avenue property, Rich paying him the difference between its fair value and the amount of the indebtedness he then held. He had negotiated a sale of the Wabash avenue property to Pierce, but afterward learned that possibly Rich might be willing to buy it at the price for which he had proposed to sell, and at once replied that he "would prefer to sell to Rich; he is an honorable man, and is straight in every particular; he has no mean tricks about him." Now, there is no evidence whatever that the sale of this property to Pierce, then contemplated, was to be any other than a bona fide, absolute sale, and for the same price for which it was subsequently sold to Rich. My conclusion is that when Pollard found that Rich was disposed to buy, his mind at once jumped to the conclusion that he would prefer to sell to him, because, if successful in extricating himself from his embarrassments, he could more readily re-purchase from his friend than from a stranger. If sold to Pierce it was irrevocably gone, while if sold to Rich he had the anchor of friendship to his hopes that it might be subsequently returned to him on some fair terms; and he, therefore, without hesitation, dropped at once the negotiation with Pierce for the sake of selling to Rich.

It is urged very strenuously on the part of

the complainant that the paper of R. M. Whipple & Co., which was turned out in part payment for the property, was not then worth over ten cents on the dollar. It does not lie in the mouth of this complainant to make this averment. R. M. Whipple & Co. and Pollard, as a member of the firm, owed Rich, and as long as Pollard had money or means to pay, it did not lie in his mouth to say it was worth any less than its face. Preferences were then allowed and Rich had a right to secure such preference; and, therefore, the argument in regard to the then value of the paper has no weight on my mind.

All the testimony in regard to Pollard's transactions about this time shows this was the theory on which he proceeded; that he was paying Rich a personal obligation, and converting what remained of his property into means with which to pay those of his individual creditors to whom he felt under strong personal obligations. His relations with Rich were such, perhaps, as justified him in expecting the fairest treatment at his hands. But I see nothing in the testimony to show that Rich ever abused his professional or friendly relations with Pollard. I think the evidence shows rather that he made the purchase with reluctance and hesitation; that he would have preferred the money due him from Pollard and Whipple. In the case of Baldwin v. Dunton, before cited, the court says: "We are aware of no rule which prevents a friend, however intimate, from purchasing property of another; one friend or a relative has the unquestioned right to trade with another. And such considerations usually induce the giving a preference to a relative or a friend, rather than to a stranger, where a party is compelled to sell property at a bargain." In this case, undoubtedly, the property was sold at a bargain; undoubtedly Rich expected to make money out of it. But grant the full force of the rule insisted on by complainant, and even then was this transaction such that it shall only be treated as mortgage to Rich for the amount of his present claim against Pollard or against R. M. Whipple & Co.? In Sutphen v. Cushman, 35 Ill. 193, the supreme court of this state lay down the rule that parol evidence of what was said at the time the deed was made, and of any understanding or agreement of the parties independent of the deed, cannot be introduced to show that a conveyance, absolute on its face, was only intended as a mortgage. This rule shuts out from consideration all that Pollard, Waterman and Whipple testify to, in regard to any understanding or agreement of the parties, at the time the deed was made. The relations between the parties may be shown, and the facts and circumstances surrounding the transaction; but loose conversations and statements, which one or both of the parties may have indulged in as to what their intentions were, are not evidence to change the character of the document itself. If the relation of debtor and creditor existed at the time when the deed was executed, and continued thereafter; if the creditor retained the evidence of indebtedness and sought to enforce the original obligation of the debtor—that furnishes conclusive evidence of the character of the transaction as regarded by the parties themselves, and the courts, in such case, say that the deed, though absolute on its face, is to be considered a mortgage.

But in this case the evidence is very satisfactory that the paper forming part of the consideration of the Fourth avenue property, being notes and memorandum checks, as before stated, to the amount of $20,000, including accrued interest, were, upon the execution of the deed, put in an envelope and handed to Pollard; that after keeping them some time in his possession, he went into Rich's office and asked if he would keep them for him, stating that he did not want the boys at the store to know too much about his private business; that Rich refused to take them, and they were then handed over to Waterman, who laid them in the safe, where they remained with the seal unbroken until some months afterwards, when they were taken out by Pollard and have since been in his possession. There has been no claim of the continuance of the relation of debtor and creditor since that time; Rich has not sought to enforce the payment of these debts against Whipple or Pollard. He took immediate possession of the purchased property. The tenants in possession of the houses on Fourth avenue at once attorned to him and continued to pay rent to him until Einstein bought the property. Pollard, within a few days, took a lease of the Wabash avenue property, and though he has not paid much rent, it is very evident that is not because Rich did not demand it. When the taxes became due, even for the current year, the tax collector was sent to Rich, by Pollard, and he paid them, and has continued to pay all taxes and assessments on the premises from that time to the commencement of this suit.

There is a large amount of testimony in the case, consisting mainly of declarations made by Pollard, his statements of what he considered to be the transaction, and verbal promises made to him by Rich, such as that he would give him the advance or rise on the property. The objection to this testimony is simply that these were merely parol promises, which, if made at all, were without consideration and which cannot be enforced either in law or equity. The relation of debtor and creditor had ceased, as before stated, and there seems to be no reason for assuming that these declarations made by Rich, from time to time, during the ensuing year, were anything more than the good-natured promises of one friend to another, which he was under no legal obliga-

tion to carry out. The evidence is that Rich, within a year after this transaction, did offer repeatedly, to deed the property to any one whom Pollard would get to relieve him. My inference from all this is that he was then willing to part with the property for what it had cost him.

It is clear to my mind that it is not the duty of a court of equity to change the terms of an absolute deed, unless the testimony upon which you seek to do it is of so unquestioned a character as to satisfy the court that in doing so, it is not doing injustice rather than justice to the parties. Rich, for all that appears here, was acting with entire fairness. I can see nothing in the evidence which shows any disposition on his part to act unfairly, and nothing since the case commenced that shows any disposition to do more than to protect his rights against the imputations and charges brought against him.

The proof, then, in my estimation, falls far short of establishing either of the propositions on which the complainant claims to recover. I shall, therefore, be compelled to find the issues made in the case for the defendants, and dismiss the bill. This view of the case relieves me from the consideration of the relation which Einstein and Austin bear to the title. Bill dismissed.

That an assignee in bankruptcy cannot avoid a mortgage given by the bankrupt, on the ground of usury, see Bromley v. Smith [Case No. 1,922].

## Case No. 7,266.

JENKINS v. ELDREDGE et al.

[3 Story, 181.] [1]

Circuit Court, D. Massachusetts. May Term, 1844.

CONVEYANCE—PAROL TRUST—STATUTE OF FRAUDS—NOTICE—EVIDENCE IN EQUITY—SURPRISE—JOINT PURCHASE—FRAUD OF AGENT—INNOCENT PURCHASER—INTENTIONAL IGNORANCE.

1. The plaintiff (J.) purchased at auction from D. a certain lot of land, and on the failure of J. to comply with the terms of the sale, D. entered and took possession, but on application by J. was enjoined in equity from making a sale thereof. A new arrangement was then made, by which D. placed a warranty deed in the hands of P in escrow, agreeing that it should be surrendered to J. on a certain day, provided that by such day J. had complied with certain terms of payment, J. making a deposit of $1000 as forfeit money. J. then proceeded to build on the said land, but failing in his means, was unable to comply with his agreement. D. then threatened to sell the premises, and J. filed a second bill in equity to restrain the sale, and an injunction was granted, and an interlocutory decree was passed, that if J. should perform his agreement before a certain time, the injunction should stand continued, but otherwise should be dismissed. J. failed to perform his agreement, and the bill was accordingly dismissed. In the intermediate time, however, between the decree and the dismissal of the bill, J. having expended large sums on the building and exhausted his resources, applied to E. (the defendant) for his aid to raise money to complete the building and discharge the debts. And it was arranged between them, that an absolute conveyance of the premises should be made by D. to E. which was done, and on the same day J. executed a release of all interest to E. to complete the title, excluding in terms "all claims and demands made by, through, or on account of J., and also excepting any claim or demands arising out of any contract made by or with J.," and admitting that he (J.) had no legal or equitable right in the same. E. then assumed the ostensible ownership of the property, and J. was employed in superintending the erection of the building, and procured securities to assist in raising funds, and procured work to be done on his own account. E. afterwards sold the premises to K., one of the defendants. In this state of things, the present bill was brought by J. against E. and K. setting forth, that at the time of making the absolute conveyance to E., although no paper to such effect was executed, yet that it was understood between E. and J. that the premises were to be held by E. in trust for the benefit of J., and that the conveyance was made absolute solely for the purpose of freeing the premises from all claims by or through J., and that E. was only to receive a remuneration for any services which he might perform, and indemnification for his expenses, and then to reconvey the estate to J., and also that K. was not a bona fide purchaser for a valuable consideration, without notice. It was *held* that the circumstances showed no sufficient motive on the part of J. to induce him to make an absolute and unrestricted conveyance, but that they were perfectly consistent with the parol trust, as set up by the bill.

[Cited in Bentley v. Phelps, Case No. 1,332; Davis v. Tileston, 6 How. (47 U. S.) 120; Alexander v. Rodriguez, Case No. 172; Gaines v. Lizardi, Id. 5,174.]

[Cited in Hinckley v. Hinckley, 79 Me. 323, 9 Atl. 898.]

2. As the decree in the equity suit was not a dismissal upon the merits, it did not constitute an absolute bar to a future suit.

[Cited in Allen v. Blunt, Case No. 217.]

3. The release by J., although absolute in its terms, was indispensable to guard the property against J.'s creditors, so as to induce capitalists to advance funds, and therefore was not inconsistent with a parol trust, and the evidence was irreconcilable with any other supposition, than that E. was acting throughout as the agent of J.

4. If E., knowing that J. only intended that he should act as agent, did, nevertheless, intend to act for his own benefit solely, the concealment of such a design from J. was a fraud in equity.

[Cited in Squires' Appeal, 70 Pa. St. 267; McAnnulty v. McAnnulty, 120 Ill. 34, 11 N. E. 397.]

5. This was a case of parol trust resulting from agency, and resting upon honorary obligations, and as such a court of equity would enforce it.

[Cited in Tufts v. Tufts, Case No. 14,233.]

[Cited in Newton v. Taylor, 32 Ohio, 413; Newton v. Fay, 10 Allen, 510.]

6. It is not within the statute of frauds, because, 1st. It is a resulting trust as to the plaintiff, and a trust as to Eldredge merely for his liabilities, compensation, and expenditures. 2d. It is a case of agency. 3d. It is a case of constructive fraud. 4. It is a case of part-performance.

[Distinguished in Tobey v. Leonard, Case No. 14,067. Cited in Manning v. Hayden, Id. 9,043.]

[Cited in Rose v. Hayden, 35 Kan. 110, 10 Pac. 554; McGowan v. McGowan, 14 Gray, 121.]

[1] [Reported by William W. Story, Esq.]

7. The circumstances did not show that K. was a bonâ fide purchaser without notice, since even if he had no notice of the actual state of the title and the claim of the plaintiff, he had sufficient notice of the claim and controversy to be put upon inquiry, which was sufficient notice in equity.

[Cited in Perkins v. Currier, Case No. 10,985.]

8. Although the plaintiff may never have been able to comply with his agreement with the defendant, by discharging the incumbrances and remunerating the defendant, yet that furnishes no ground upon which a court of equity can say that the plaintiff's rights are extinguished, though it might furnish a ground to foreclose his rights and order a sale, on application by the defendant.

[Cited in McIntire v. Bowden, 61 Me. 158.]

9. In the courts of equity in this country, evidence as to confessions and statements by the defendant, not charged in the bill, are equally admissible in equity as at law,—with this qualification, that if one party keep back evidence, which the other might explain, and thereby take him by surprise, the court will allow the party to be affected by it to controvert it.

[Cited in Nesmith v. Calvert, Case No. 10,123; Bentley v. Phelps, Case No. 1,331; Conrad v. Griffey, 16 How. (57 U. S.) 47.]

[Cited in Campbell v. Dearborn, 109 Mass. 139.]

10. In cases of a joint purchase, where each purchaser is to have an interest in the purchase in proportion to his advances, parol evidence is admissible to establish the trust, as well as to rebut, control or vary it.

[Cited in Wyman v. Babcock, Case No. 18,113; Babcock v. Wyman, 19 How. (60 U. S.) 299.]

[Cited in Glass v. Hulbert, 102 Mass. 37.]

11. It is a fraud for an agent to avail himself of his confidential relation to drive a bargain, or to create an interest adverse to that of his principal in the transaction, and that fraud creates a trust, even when the agency must be proved only by parol.

[Cited in Boswell v. Cunningham, 32 Fla. 277, 13 South. 357; Fideler v. Norton (Dak.) 30 N. W. 132.]

12. The statute of frauds is never allowed as a protection to frauds, or as a means of seducing the unwary into false confidence to their injury.

[Cited in Cutler v. Babcock, 81 Wis. 206, 51 N. W. 420. Cited in brief in Vallette v. Tedens, 122 Ill. 609, 14 N. E. 53.]

13. The doctrine that the statute of frauds applies to cases of agreements in consideration of marriage, where reliance is placed solely on the honor, word or promise of the party, is restricted to cases of marriage, and does not apply to cases where there has been a part-performance on the other side.

[Cited in Green v. Green, 34 Kan. 744, 10 Pac. 159; Houghton v. Houghton, 14 Ind. 507.]

14. Quere. Whether the doctrine as to cases of marriage is well-founded.

15. Where the evidence showed that the defendant agreed to reduce the trust to writing, or to keep a private memorandum thereof, it was *held*, that this took it out of the statute, and showed, that it was not a mere subsequent promise, but a part of the original agreement.

[Cited in Slingerland v. Slingerland, 39 Minn. 201, 39 N. W. 148.]

16. The doctrine of Taylor v. Luther [Case No. 13,796] affirmed.

17. There is no substantial difference in respect to trusts between the statute of frauds of Massachusetts under the act of 1783, or the Revised Statutes of 1832, and the statute of 29 Car. II.

18. The present bill was brought during the pendency of a suit in the supreme court of the state against both the parties to the present bill, to enforce a claim in respect to these premises; and it was *held*, that as the parties, the objects, and the equities were different, and the relief prayed for proceeded upon different grounds and involved a different decree, that it constituted no bar to the present suit.

19. No purchaser is at liberty to remain intentionally ignorant of facts relating to his purchase within his reach, and then claim protection as an innocent purchaser.

Bill in equity. The bill was as follows: Joseph Jenkins, of New Haven, in the county of New Haven, and state of Connecticut, and a citizen of the state of Connecticut, builder, brings this bill against Charles H. Eldredge, David Kimball, Timothy Gilbert, John L. Munroe, James B. Lord, E. S. Goodnow, Henry Rice, all of Boston, in the county of Suffolk and commonwealth of Massachusetts, citizens of said commonwealth of Massachusetts, gentlemen, the Boston Museum and Gallery of Fine Arts, a corporation established by the law of said commonwealth of Massachusetts, and all the members of which are citizens of said commonwealth of Massachusetts, resident at said Boston.

And thereupon your orator complains and says, that sometime prior to the seventeenth day of April, A. D. 1839, it came to his knowledge, that a certain valuable tract of land was for sale in Boston aforesaid, and hereinafter described, belonging to Elizabeth Deblois; whereupon your orator, having had much experience as a builder, and in forming plans for the improvement of grounds in the said city, so as to render them productive of the highest rents and profits, and being well acquainted, in the course of his profession, with the state of public buildings in the city, and the general wants of the citizens in that respect, bestowed great pains, attention, skill and thought in considering how said property might be rendered most valuable to the purchaser, and to that end, with the like skill and pains, and after many weeks of deliberation, planned and contrived a large and costly building, suited to the wants of the city for a public museum, halls, and other apartments, with a basement consisting of shops and ware-rooms; and spent much time and pains in estimating the probable cost thereof, and providing lessees and occupants of the same; thus creating a scheme, and settling all the details of an enterprise in building, calculated to give to the proprietor a probable net gain of more than fifty thousand dollars; your orator intending to purchase said land for himself, and to erect such building, and to become the proprietor of said property. Pursuant to which design, your orator, on or about the seventeenth day of April, A. D. 1839, purchased of said Deblois said certain par-

cel of land situated in Boston; and on the seventh day of May, A. D. 1839, in pursuance and execution of a certain indenture of that date made by him and said Elizabeth touching the purchase of said land and the payment of the consideration therefor, he paid to her the sum of one thousand dollars, being a part of said consideration, and entered into an agreement to pay the residue thereof in the manner and at the times in said indenture specified. That, by virtue of the agreements in said indenture, he entered upon, and took possession of said parcel of land, and proceeded to excavate the same, and afterwards to the erection of a large and costly edifice, and expended in and about said excavation and erection the sum of fifteen thousand dollars of his own proper money, in addition to the sum of one thousand dollars, paid as aforesaid. And your orator further shows, that, after expending said sum of fifteen thousand dollars, the said edifice was not completed, but required still more and larger sums of money to be expended in and upon the same, and your orator had expended all the moneys under his control in and upon the same, and by means of its unfinished condition, was unable to borrow money on the security thereof, and so was unable to comply literally with the terms of said indenture, and, therefore, the said Elizabeth Deblois threatened to sell at auction the said parcel of land and the buildings thereon, which, by the terms of said indenture, were to become the property of said Elizabeth, on failure of your orator to comply with said terms, to the great loss and injury of your orator; and thereupon your orator filed his bill in the supreme judicial court of the commonwealth of Massachusetts, praying for an injunction upon said Elizabeth to restrain her from proceeding in said sale and for relief, and said injunction was granted, and said Elizabeth filed her answer to said bill, and afterwards it was decreed by said supreme judicial court, that if your orator should pay or tender to said Elizabeth on or before the twentieth day of July, A. D. 1840, the sum due under said indenture, and otherwise perform the same, the said injunction should be continued until the hearing, unless said Elizabeth should accept said sum, and all costs, and perform said contract on her part, in which case, the bill was to be dismissed, and if the complainant should omit to make such payment or tender, the said bill should be dismissed with costs. And your orator further shows, that by reason of the payment of said sum of one thousand dollars and of the moneys expended by him in excavating and building upon said land, he was, at the time of the recording of said decree, possessed of and entitled to a large and valuable interest in said land, and entitled to a conveyance thereof in fee simple from said Elizabeth, on his complying with the terms of said decree and of said indenture, and that his right to such conveyance was of great value, to wit, of twenty thousand dollars and upwards. And your orator further shows, that after the passing of said decree, he was greatly desirous to comply therewith, but being in embarrassed circumstances, and unable of his own means and resources to make the tender and payment decreed to be made to said Elizabeth as aforesaid, and to carry on said building to its completion, without other aid, he communicated his situation fully to said Eldredge, who was connected by marriage with your orator's family, and exhibited and explained to him at large the enterprise in which he was engaged, and the great gains which your orator would derive, if he could raise the means to complete the same, and requested the aid and assistance of said Eldredge to furnish your orator with the requisite moneys for that purpose. And after consultation together, said Eldredge consented to render to your orator the aid and assistance he desired. But as said Eldredge had not the capital for that purpose, and would need the legal title to said property, both to enable him to borrow money and to secure him for his liabilities as the indorser or surety of your orator, and for the compensation to be paid to him for all his trouble in the business, your orator formally, distinctly, and solemnly, agreed with said Eldredge that he, said Eldredge, should receive a conveyance of said land, with the buildings thereon, from said Elizabeth, and should raise money thereon by mortgage, in order to furnish your orator with the means to proceed in the erection and completion of said edifice, and on completion thereof should execute and deliver to your orator a deed of conveyance thereof, your orator agreeing to reimburse to said Eldredge, or save him, said Eldredge, his heirs, executors and administrators harmless, and indemnified from and against all payments, which he or they might be compelled to make, by reason of any such mortgage, and to pay to him or them a suitable compensation for his services in the premises, such indemnity, reimbursement and payment to be secured to said Eldredge by a lien upon said premises.

And the said Eldredge further agreed, that he would make a declaration in writing, specifying the terms, trusts and conditions on which the said property should be held by him, and place the same among his papers, to serve for the disclosure and manifestation of said trusts, terms, and conditions, in the event of his decease, or other like necessity; and in pursuance of said agreement with said Eldredge, your orator procured to be furnished to him by a personal friend and relation of your orator certain securities, upon and by means of which the said Eldredge borrowed the sum of about six thousand dollars, to be paid by him to said Elizabeth, in

part satisfaction of the consideration money of said purchase, pursuant to the decree aforesaid, and which sum the said Eldredge afterwards repaid, and relieved the securities aforesaid, and returned the same to James W. Jenkins Jr., the person who furnished him therewith, out of moneys received by him upon a mortgage or mortgages of said land; and your orator, by mutual agreement with said Eldredge and said Elizabeth, and for the sole purpose of making his title under her appear to be simple and unqualified, and not with any idea of parting with or surrendering his beneficial interests in said land or purchase, but the more effectually to secure them, permitted the time specified for fulfilment of said decree to pass by, without compliance with its terms, and said Elizabeth, at the special instance and request of your orator, executed and delivered to said Eldredge a deed of said land dated August the 24th, A. D. 1840, a copy whereof is herewith exhibited. And pursuant to the design above mentioned, to place in the said Eldredge such a title as would be above all suspicion by those who were to be applied to to loan money on the security of the said estate, and to enable the said Eldredge to borrow money thereon freely, and thus procure the means to complete the said building, your orator conveyed his interest in said land to said Eldredge, by his deed executed and delivered on the same day, and in which, pursuant to said agreement, he admitted, that he had forfeited all claim against said Elizabeth, a copy of which deed is herewith exhibited. That before the said conveyance was made by the said Elizabeth, Richards, Munn & Co. had a lien on the equitable estate of the plaintiff in the said building; and that the plaintiff and the said Eldredge agreed with the said Richards, Munn & Co. that the latter should release their lien, and that the plaintiff and the said Eldredge should assign to the said Richards, Munn & Co. a claim against the city of Boston, for taking a strip of the said land to widen Bromfield street, amounting to six hundred dollars, or thereabouts; and the plaintiff shows, that this agreement was made after the time for the performance by your orator of the terms of his bargain with the said Elizabeth, fixed and limited by the said decree, had expired, and when, as the said Eldredge now falsely pretends, all the equitable title of your orator, and, as a necessary consequence, all the equitable title of the said Richards, Munn & Co. claiming under your orator, had expired, and become null, and void, and of no effect. And your orator further shows, that, afterwards, the said Eldredge, at the request of the said Munn, made a deed of the said strip of land to the said city, and the said Munn received the consideration therefor, amounting to the said sum of six hundred dollars. And your orator further shows, that on the 10th September, 1839, he made a mortgage of his said equitable interest to the said Kimball, to secure the sum of one thousand dollars, and the said Eldredge, at the request of your orator, after the expiration of the time limited by the said decree, as aforesaid, for performance by your orator, gave the said Kimball a declaration in writing, to the effect, that he, the said Eldredge, would repay the said sum to the said Kimball, out of the proceeds or rents of the said estate, and your orator prays, that the declaration, so given, may be produced, and disclosed by the said Kimball, or the said Eldredge, and he charges these facts as evidence, that all your orator's equitable interest in the said premises did not expire and run out, as the said Eldredge now falsely pretends, before the said Eldredge agreed to take the said estate, and when your orator failed to perform the said decree.

And your orator further shows, that at the time when said arrangement was made with said Eldredge, your orator was indebted to sundry persons in divers sums of money for materials furnished in and about the construction of said building, which he was wholly unable to pay, except from out of said land and building, and that one purpose of making said arrangement was the procurement of means of ultimately paying said debts; and that the same was made by consent of said creditors, who made a request in writing to said Elizabeth, that she would make the said conveyance to the said Eldredge; and that the said Eldredge was a party to this arrangement, and well knew and agreed, that this was one of the purposes, for which he was to receive the conveyance. And your orator further alleges, that most of the debts so intended to be provided for, and which your orator would have provided for, if he had received the conveyance to him, which the said Eldredge was bound to make as aforesaid, and sufficient time was given for said purpose, remain unpaid, and are now due, and owing from your orator. And your orator further shows, that, by reason of the premises, at and before the time of his executing and delivering his deed to said Eldredge, he was possessed of and entitled to a large and valuable interest in said land, and that no consideration was paid to him by said Eldredge for the conveyance thereof, and that, by virtue of the premises, a trust was created, and resulted on the part of said Eldredge to hold said land for the use and benefit of your orator. And your orator further shows, that at or after the execution and delivery of the deeds aforesaid, the said Eldredge made a mortgage to said Elizabeth to secure the sum of about fifteen thousand dollars, being a part of the consideration of said purchase made by your orator from said Elizabeth, and borrowed of divers persons other large sums of money, amounting in all to the sum of twenty-five thousand dollars or thereabouts, and gave his promissory notes therefor, payment whereof was secur-

ed by mortgages on said land, a portion of which moneys so obtained, to wit, about the sum of six thousand dollars, being a part of the principal due as the price of said purchase, and the interest due on the whole price, was paid by said Eldredge as aforesaid on account thereof, and the residue or a portion thereof was given to your orator, to be expended in the completion of said building, and was faithfully so expended and appropriated; but whether the whole of the moneys, so procured by said Eldredge, on mortgages upon said land, were paid to your orator, or so expended, your orator does not know, and prays, that said Eldredge may discover, and set forth how the same have been expended and appropriated. And your orator further shows, that the whole, or nearly the whole, considerations for the conveyance made by said Elizabeth to said Eldredge as aforesaid, were the purchase of said land made by your orator, as aforesaid, and the agreement between said Elizabeth and your orator, connected therewith; said sum of six thousand dollars furnished by your orator to said Eldredge to be paid to said Elizabeth, as aforesaid; the erections and improvements theretofore made upon said land by your orator by his own proper labor and at his own proper expense and cost, whereby the value of said land was greatly enhanced; and the mortgage made by said Eldredge to said Elizabeth for the sum of about fifteen thousand dollars as aforesaid. And that no part, or a very small part of, the consideration for said conveyance from said Elizabeth to said Eldredge, was the personal liability or responsibility of said Eldredge for said sum of fifteen thousand dollars, or the note or notes accompanying said mortgage, said Eldredge being a man of very small or no property, and said Elizabeth placing little or no reliance for the payment of said sum upon the personal obligation of said Eldredge. And your orator further shows, that by reason of the premises, because and inasmuch as the consideration for said conveyance from said Deblois to said Eldredge was paid by your orator, and not by said Eldredge, a trust was created and resulted on the part of said Eldredge to hold said land for the use and benefit of your orator.

And your orator further shows, that said Eldredge claims, or has claimed, of your orator payment of the sum of about seven thousand one hundred and fifty-eight dollars, for his services or commissions in the premises, and for commissions and brokerage, which he alleges he has paid in raising the moneys aforesaid, and for interest on a small portion thereof, and for which sum he claims to have a lien upon said land and building. And your orator further shows, that after he had purchased of said Elizabeth the said parcel of land, and before the conveyance thereof to said Eldredge, as aforesaid, your orator had agreed with one Nathaniel Francis to purchase of him a small parcel of land adjoining the premises first above described, for the sum of two hundred dollars, and had proceeded to erect said building, in part thereon, and after the premises were conveyed to said Eldredge, said Francis refused to fulfil said agreement, and demanded the sum of one thousand dollars as the price of said small piece of land, and your orator refused to comply with said demand, and insisted upon the performance of said agreement, and your orator informed said Eldredge of said agreement, and required of him to demand and enforce performance of the same, and the said Eldredge, disregarding the requests and protestation of your orator in the premises, agreed to, and actually did, pay to said Francis the sum of one thousand dollars, as the price or the consideration of the conveyance by said Francis, out of the moneys procured by him on mortgage of said land and building, and received such conveyance from said Francis, and afterwards conveyed the premises purchased of said Francis, in mortgage for the purposes aforesaid.

And your orator further shows, that the said edifice is now completed and is of great value, to wit, the value of one hundred thousand dollars, and of much greater value than all the sums, for which the same is mortgaged, and that by virtue of the premises, your orator was entitled to a conveyance thereof from said Eldredge, with condition, that your orator should reimburse to said Eldredge, or save him and his representatives harmless and indemnified from payment of the several sums of money, for which the same had been mortgaged by him, and appropriated to the payment of the original consideration money of said conveyance from said Elizabeth, and in and about the erection and completion of said edifice. And your orator further shows, that since the said edifice was completed, divers halls and rooms therein have been leased by your orator to various persons, and indentures, or agreements of lease, as to other apartments, have been executed by other persons and the said Eldredge, he acting therein, as your orator contends, as the agent and trustee of your orator, and that divers large sums of money have been received by said Eldredge as and for rents reserved under such agreements and indentures, which said sums of money ought to have been applied to the payment of the moneys borrowed on mortgage of said lands, as aforesaid, or to the payment of the sums of money, due from your orator to him, as aforesaid.

And your orator further shows, that by reason of the premises a trust has been created, and has resulted for the benefit of your orator to have the said parcels of land conveyed to him, upon condition of indemnifying said Eldredge for any payment he might make of the several sums of money, for which the same have been mortgaged as aforesaid, and that your orator was entitled

to a reasonable notice of the times of payment of said several sums of money, and to an account from said Eldredge of the sums of money borrowed by him on mortgage of the premises, and expended in and about the purchase of said land and the erection of said edifice, and of the rents received by him, and to a reasonable time to obtain means to meet said payments, and that your orator is indebted to said Eldredge in the various sums of money advanced and loaned by him to your orator, and that the said Eldredge has a lien upon said lands to the amount of such sums of money, and also for the amount of a reasonable and liberal compensation to said Eldredge for his care, labor, and services, in the premises, for the benefit of your orator, and is a mortgagee in equity for those amounts, but has no further interest or estate in said property. And your orator further shows, that said Eldredge cannot, nor ought in equity to be permitted to, set up any claim or title to said land and building against your orator, contrary to the plain intent and agreement of the parties aforesaid to the transactions aforesaid, and your orator at all times relied with implicit confidence upon the supposed good conscience and desire to do equity of said Eldredge, who was confidentially employed by your orator as aforesaid for the interest and benefit of your orator, and also with the understanding that said Eldredge should be reasonably and liberally compensated for his services in the premises, but with no suspicion on the part of your orator, and no intimation on the part of said Eldredge, that said land and building would be applied and appropriated by the said Eldredge to his own proper use and benefit, to the prejudice and exclusion of your orator. And your orator further shows, that, during the whole period of the erection of said building, he had the entire personal charge and control of the work done thereupon, and expended his own time, skill and labor, and a large amount of his own money thereupon, and said Eldredge exercised no charge or control of said work, nor ever pretended that he had the right so to do; but it was mutually understood between your orator and said Eldredge, throughout the whole process of erecting and finishing said building, that your orator was erecting and finishing the same for his own exclusive benefit and not at all for the benefit of said Eldredge, except to enable him to raise money thereupon, perfect the security for money already raised, and indemnify and pay said Eldredge as aforesaid. And your orator well hoped, that after completing said building, and upon paying or securing to be paid to said Eldredge, all the moneys, by him advanced towards the completion of said building, and on indemnifying him against all his liabilities touching the same, and paying or securing to him a reasonable compensation for his care and trouble in the premises, he would have received from said Eldredge a clear title to said property, and have been suffered to enjoy the fruits of his own advances of money and materials, and of his own great labor, skill, and anxious care and attention in planning said enterprise and conducting the same to a successful conclusion. But your orator further avers, that he has now good reason to believe, and therefore he so distinctly charges the fact to be, that said Eldredge, upon your orator's first developing to him the great gains, which your orator would probably derive from said enterprise, and showing its practicability, conceived the design of defrauding your orator out of the same, and of abusing the confidence which might be reposed in said Eldredge; and to that end said Eldredge required, that the legal title to said premises should be conveyed to himself, without any declaration of trust in writing to be delivered to your orator, and induced your orator to confide all his rights in the premises in the manner aforesaid, to the honor and conscience of said Eldredge; the said Eldredge solemnly pledging his sacred honor to your orator, that he would faithfully execute the agreement aforesaid, and convey said premises to your orator, upon the terms and conditions hereinbefore set forth. But your orator charges, that at the time of making said agreement, said Eldredge did not intend to perform the same; but that he artfully and fraudulently induced your orator to enter into said agreement, and to execute the same, with intent the more certainly and successfully to defraud and deprive your orator of the fruits of his labor aforesaid, and to appropriate the same to himself; and to that end suffered your orator to go on with the erection of said building as before, under the belief that he was erecting it for himself alone. And your orator further avers, that on this ground also, a trust was created and resulted in equity, on the part of said Eldredge, to hold said premises for the use and benefit of your orator, and your orator has repeatedly requested said Eldredge to perform said trust, by executing and delivering to your orator a deed of the premises, in the manner and upon the terms aforesaid; or by making a written declaration of said trust; which the said Eldredge originally promised but subsequently refused to do.

And your orator further avers, that before he commenced the erection of said building, he explained the plan thereof to said Kimball, and entered into a written agreement with him, to the effect, among other things, that said Kimball should take a lease from your orator of the halls in said building, for the term of ten years, at the rent of five thousand dollars for a year, to the best of your orator's recollection; which agreement, as your orator avers, is in the hands of said Eldredge, and which he prays, that said Eldredge may be required to discover and produce. And that some dispute having arisen between your orator and said Kimball, in

regard to said agreement and lease, after the conveyance aforesaid to said Eldredge, the matter was referred to referees, mutually chosen by your orator and said Kimball, by an agreement, to which said Eldredge was only nominally a party, but your orator avers, that in all things relating to the matter herein articulated and set forth, and at the hearing before said referees, your orator attended and acted as the real party in interest, and as the true owner of said property, the said Eldredge being present and assenting thereto. And your orator further avers, that the said Kimball, pursuant to the original agreement aforesaid, and to the award of said referees, became, and now is in equity the tenant of said halls under your orator for a very large annual rent, namely, the sum of forty-six hundred and fifty dollars, or some other large sum, which rent ought to be paid to your orator.

And your orator further shows, that during the month of August, in the year 1841, and after the said building was completed, your orator, pursuant to his equitable title to the said property, called upon the said Eldredge for an account of all moneys raised, and furnished by him for completing the said building, and of his charges for his personal services in the premises, and thereupon the said Eldredge, not directly denying at that time your orator's right to such an account, prepared one and showed it to your orator, which your orator requires the said Eldredge to produce and discover, and he claimed to insert therein, among other charges, the unjust and excessive charge of five thousand dollars for his personal services, which he afterwards altered to thirty-five hundred dollars, and also the unjust and unfounded charge of thirty-six hundred and fifty-eight dollars, or thereabouts, for brokerage, and some small sum of interest, and pursuant to the fraudulent intent and design of the said Eldredge above mentioned, he absolutely refused to render any such or any account to your orator, or to suffer him to take into his own possession the paper, which he had prepared, containing the said account, but only suffered your orator to look at the same, and soon afterwards, he informed your orator, that if the whole claim was not paid on or before a certain day in September then next, he would, and, in pursuance of his fraudulent intentions aforesaid, he then did advertise the said premises for sale at public auction, without consulting your orator, and against his will. Whereupon your orator filed his bill in equity in the supreme judicial court of Massachusetts against said Eldredge, setting forth his own equitable interest in said premises, and praying relief, and thereupon obtained a writ of injunction against said Eldredge, restraining him from proceeding to make any sale of said premises till the further order of said court. After which proceeding on the part of your orator, a negotiation was commenced between him and said Eldredge, through the intervention of other persons, in which said Eldredge proposed to convey said premises to your orator, upon certain conditions, to be complied with on the part of your orator, including the payment of an unreasonably large sum of money, which said Eldredge insisted should be performed and paid within sixty days from the commencement of the negotiation. To this proposal your orator acceded, understanding, that the terms of the agreement were to be reduced to writing, and signed by the parties. But by reason of the delays and evasions of said Eldredge, it was not possible for your orator, by the aid of his counsel, to procure a written memorandum of said terms to be made until about one half of the said period allowed by said Eldredge for performance had expired; nor would said Eldredge sign said paper, although it was signed by your orator. By the terms of this agreement, your orator was bound to pay a large sum of money to said Eldredge, within the short period aforesaid, and on failure thereof, his said bill in equity was to be dismissed. And your orator avers, that said Eldredge did not offer by said agreement to render any account to your orator of his doings or expenditures in regard to said estate, nor of the rents and profits he had received from the same, nor were any means provided for the future settlement of such account; and that the sum demanded by said Eldredge as the condition of said conveyance, the amount of which your orator is not able to recollect, but prays that said Eldredge may be required to discover and set forth, was unreasonably and unjustly and extorsively demanded; but your orator, coerced by the necessities of his situation, and being advised by his counsel, that the dismissal of his said bill would not prejudice his right to file and maintain another, was induced to accept the terms so offered.

And your orator further verily believes, and so charges the fact to be, that said Kimball, during all the period aforesaid, well knew, or had good reason to believe, and did believe, that said Eldredge was merely a trustee of said property, for the ultimate benefit of your orator; that the legal and the equitable title of your orator were by him caused to be apparently vested in said Eldredge in pursuance of their aforesaid agreement, and for the purposes therein expressed; and that said Kimball, notwithstanding the apparent title of said Eldredge, always treated with your orator, during said period, as the real owner of said property. And your orator further believes, and so charges the fact to be, that said Kimball did conspire with said Eldredge to endeavor to prevent your orator from obtaining the money before mentioned, in order to comply with the said conditions demanded by said Eldredge, and to that end did in concert with said Eldredge, aid, and assist him in vilifying and disparaging

your orator, and his equitable title to said premises, and to impugn the justice of his claim to the same; and did request one of the persons, with whom your orator was negotiating for a loan of money for the purpose aforesaid, not to close any arrangement with your orator, but to make the same loan to him the said Kimball, taking the same estate as security for such loan. And your orator further avers, that by reason of the imputations thus thrown upon him and his equitable title to said property, and upon the general merits of his claim, and of the other hindrances and obstructions thrown in his way by said Eldredge and his confederate said Kimball, your orator was prevented from obtaining the money aforesaid, and from complying with the conditions imposed upon him, as aforesaid, by said Eldredge, and was accordingly obliged to submit to a dismissal of said bill.

And your orator further avers, that immediately upon the dismissal of said bill, said Eldredge advertised said estate and premises to be sold at auction, at a day so early, that your orator thought it would be impracticable for him to procure a suit in equity to be properly instituted, and to obtain a writ of injunction to prevent said sale; whereupon your orator, by advice of counsel, and in no wise intending to abandon his remedy in equity, as in and by this bill he now seeks the same, instituted a suit at common law against said Eldredge, and caused the said premises to be attached therein upon mesne process, in order as well to secure the payment of any sum of money, which might be due to your orator, in case it should be deemed, that his remedy lay at law only and not in equity, as to prevent him from selling the said premises, as he was about to do; and said intended sale was accordingly abandoned by said Eldredge.

But now so it is, may it please your honors, that the said Eldredge, in disregard and violation of the agreement, trust and duty aforesaid, and in pursuance of the fraudulent intentions aforesaid, refused to listen to the requests of your orator, or to deliver to him an account of the moneys received by him upon said land and building, and expended in and about the same or otherwise, and of his other claims in the premises, or to execute a deed thereof to your orator upon the condition aforesaid, or to perform the trusts aforesaid, and wholly refuses to recognise any right, title or interest in your orator in and to said land and building, and has pretended to sell and dispose of the same in manner hereinafter set forth, against the will and consent and express protestation of your orator, and without ever having made to him the conveyance aforesaid, or given him any just or reasonable notice or time or opportunity to procure the means of indemnifying said Eldredge for any payments made by him as aforesaid. All which actings, doings, pretences and refusals are contrary to equity and good conscience, and tend to the manifest wrong and injury of your orator in the premises. And your orator further shows, that said Eldredge, as absolute owner of said land and building, has already received and collected to a large amount the rents of the halls and apartments in the said building; that said rents should and ought to be applied for the benefit of your orator in paying the principal and interest of said mortgages or otherwise; that said Eldredge has not applied said rents to said purposes, or in any way, for the benefit of your orator, but has appropriated them, as your orator has reason to believe, and intends to appropriate such rents as may hereafter be received by him, to his own exclusive use and benefit; and that said Eldredge is not a man of property, but poor, and is an unsafe depositary of said rents as trustee of the same; said rents and profits, as your orator is informed and believes, amounting annually to the sum of about seven thousand dollars, including the rents due from said Kimball. And your orator shows, that, as he is informed and believes, said Eldredge has subsequently made a deed of conveyance of said premises to said Kimball, and has taken and now holds his promissory notes or other security, for all or a considerable part of the pretended purchase money for the same, and that said Kimball now pretends to be the sole owner of said estate, subject to certain mortgages thereon, as the bona fide purchaser thereof, for valuable consideration. But your orator has good reason to believe, and so charges the fact to be, that said conveyance was collusively and fraudulently made to said Kimball, with the design, between him and said Eldredge, to defraud your orator, and to displace any equitable claim or title which he might have to said estate, and to defeat or embarrass his remedy against the same; and upon the secret trust, understanding and confidence, that if your orator should establish such lien or claim, said Eldredge should deliver up said notes or securities to said Kimball, and should reinstate him in all respects relating to said premises, as he was before said conveyance; or upon some other secret understanding between them, which your orator prays they may severally be required to discover and declare. And your orator further is credibly informed and believes, that said Kimball is not a man of much property, but is an irresponsible person, and an unsafe depositary of the rents and profits accruing from said premises. And your orator further believes, and so charges the fact to be, that said Eldredge has confessed and admitted to some person or persons, to whom he has resorted for legal advice respecting the matters aforesaid, but to whom in particular your

orator is not so informed as to be able to set forth their names, but prays, that the said Eldredge may discover the same,—that he did in fact make the agreement first hereinbefore mentioned, with your orator; and that he has been advised by such person or persons not to commit any thing to writing, or to sign any writing touching the same, in order that said agreement may not be taken out of the statute of frauds. And your orator further charges, that before or at the time of said conveyance from said Eldredge to said Kimball, or before payment of the consideration thereof, if any consideration was paid, which your orator does not admit, said Kimball had full notice, knowledge and information of the actings and doings of said Eldredge, and of your orator in relation to said property, and of the right, title, interest or claim of your orator in or to said land or building, or great reason to suspect, and believe, that your orator had some right, title, interest or claim therein or thereto. All which actings, doings and pretences on the part of said Eldredge and said Kimball, are contrary to equity and good conscience, and tend to the manifest wrong and injury of your orator in the premises. And your orator further shows, that the mortgages made upon said property by said Eldredge were made to said Provident Institution for Savings, to said Elizabeth Deblois, to said William Hobbs, and to said Merchants' Bank, but the particulars of said mortgages and the sums respectively advanced thereon, your orator is unable fully to set forth, and prays for an account thereof, and that said Eldredge may produce the several mortgage notes or bonds and deeds; and your orator further shows, that all said mortgagees were cognizant of the title and interest of your orator in said land and building, and that the same was held by said Eldredge in trust for your orator, and made their several loans and advances with such knowledge.

The prayer of the bill is, that the said Eldredge and the said Kimball may be firmly enjoined from selling and conveying to any person, other than your orator, the said premises, and from making any alteration in said building, and from cancelling or impairing any lease of any part thereof, made by the agency of your orator, or in pursuance of any contract with him, and may also be firmly enjoined from receiving and collecting the rents now due, or hereafter to become due, from tenants of the several rooms and halls in said building, and that said Kimball, said Boston Museum and Gallery of Fine Arts, said Timothy Gilbert, said John L. Munroe, and James B. Lord, and said E. S. Goodnow and Henry Rice, the tenants as aforesaid, may be firmly enjoined from paying said rents to said Eldredge or to said Kimball, or to any other person, except a receiver to be appointed by this honorable court, and that this honorable court may appoint a receiver, with authority and instructions to take control of said property, to receive and collect said rents as the same shall become due, and apply the same in part to payment of the interest upon said mortgages, and hold the balance thereof subject to the order of this honorable court, and that said deed from said Eldredge to said Kimball may be declared void, and be delivered up to be cancelled, or the said Kimball be perpetually enjoined from claiming by or under the same, and that said Eldredge and Kimball may be compelled to execute the trusts aforesaid, and that your orator may have such other and further relief in the premises as his case may require and to your honors may seem meet.

The answer of Charles H. Eldredge was as follows:

The defendant, without controverting the facts of the bill, in respect to the purchase by the plaintiff from Elizabeth Deblois, and the subsequent agreement with her, and his taking possession, and his proceeding to excavate, and build, and his subsequent inability to proceed in building, and the entry of the said Elizabeth for non-fulfilment by the plaintiff of his agreement, and the injunction obtained by the plaintiff against the sale of the premises by the said Deblois; but insisting, that the plaintiff is bound to produce, and prove the same, before he shall be allowed to have any advantage thereof in this suit, proceeds as follows:

That, inasmuch as the said complainant had already, at the time of passing of the said decree, failed to comply with the terms of the said indenture, and forfeited all his right under the same, and could not therefore comply therewith,—this defendant denies, that by the payment of the said sum of one thousand dollars, and by the improvements and expenditures in said bill mentioned, made upon said lands, or by reason of any other matter or thing, the said complainant was, or would have been, possessed of a valuable or any other interest in said lands, or entitled to a conveyance thereof on fulfilling the terms of the said decree, in the said bill mentioned, as in the said bill of complaint is alleged. And this defendant further answering, says, that the said complainant did represent to this defendant, that he was in embarrassed circumstances, and unable, of his own means, to make the tender and payment to the said Elizabeth, according to the said decree, or to comply therewith, and to carry on the said building to its completion. But this defendant denies, that it was ever agreed between the said complainant and this defendant, that this defendant should receive from the said Deblois a conveyance of the said property, raise money thereon by mortgage, in order to furnish the said complainant with the means to proceed in the erection and com-

pletion of said building, or furnish the same to the said complainant to be expended in the completion of said building; and on completion thereof, convey the same to the said complainant, the said complainant agreeing to reimburse this defendant, or save him, his heirs, executors and administrators harmless, and indemnified from and against all payments, which he or they might be compelled to make by reason of any such mortgage, and to pay him or them a suitable compensation for his services, such indemnity, reimbursements and payments to be secured to this defendant by a lien upon said premises, or upon condition of the said complainant indemnifying the defendant from said mortgage, and paying him a suitable compensation for his services, or that he ever consented, or agreed, to render to the said complainant any such aid or assistance as in the said bill is alleged, or that any such like agreement was ever made between the said complainant and this defendant, as in the said bill of complaint is alleged, or that any agreement was ever made between the said complainant and this defendant, that this defendant should receive a conveyance of, or take or hold the said lands upon or under any trust or conditions, expressed or implied, for the use or benefit of the said complainant, or so that the said complainant could or might, upon any terms or conditions, or in any event, in law or equity, make any valid claim to any interest therein, or to any conveyance thereof from this defendant; and this defendant says, that the said complainant did disclose and explain to this defendant the details of his said enterprise, and his belief that great gain might be derived therefrom if it were carried into execution; and at various times, the exact dates whereof this defendant is unable to specify, did apply to this defendant, and make various propositions and requests to this defendant to take and hold said lands for said complainant, declaring his, said complainant's belief, that upon the payment of all the interest, costs and expenses of every kind, in addition to the price originally agreed upon, the said Deblois would consent to make a conveyance of the said land, although, by his failure to perform the terms of said agreement, his legal right and claim thereto had ceased, or words to that effect; but this defendant absolutely declined, and refused to take or hold the said lands under or subject to any condition or trust whatsoever, express or implied, in law or equity.

And this defendant says, that at the time of making the said propositions and requests by the said complainant, besides the utter nullity of his claims to, or title under his said agreement with said Elizabeth, by reason of his default as aforesaid, any and every interest in the land and building aforesaid, which the said complainant could claim pretend or allege had been already conveyed to, and was held by others either under the deeds of the complainant himself, or by liens or attachment, as this defendant was then informed and believed, and now verily believes, and was daily liable to other attachments or levies for debts of the complainant, so that even if this defendant had been willing to take and hold the said lands in trust for the said complainant, or to take a conveyance thereof, so as to leave the complainant any title or interest, legal or equitable therein, such title would have been probably a cause of embarrassment, and loss, and ruin to this defendant, and of no value to the said complainant, unless the actual state thereof had been fraudulently concealed from the creditors of the said complainant, who was notoriously insolvent, and whose pecuniary credit was entirely lost, and the attempt being obviously inadvisable and useless, and would have been probably ruinous to this defendant to complete the said building with the incumbrance of the complainant's debts charged thereon, and with the liability to the attachments, executions and claims of his creditors to be made thereon; that among these conveyances or liens were the following, that is to say, a mortgage of the complainant's whole interest in the premises to one David Kimball, dated Sept. 10, 1839, to secure the payment of one thousand dollars to said Kimball, being, as this defendant is informed and believes, the very same sum borrowed of said Kimball by the said complainant, in May, 1839, to enable the complainant therewith to pay the said sum of one thousand dollars before mentioned, paid by him to the said Deblois, and which sum, with interest, this defendant afterwards paid to said Kimball by deducting the same from the consideration, which the said Kimball agreed to give for the said land and buildings on his purchase thereof, a quitclaim deed, and conveyance by release of the whole premises made and executed, as this defendant is informed and believes, by the said complainant to one Seth Bliss, dated 20th July, 1840, which this defendant now believes to have been given to secure the payment of some large sum of money, due from said complainant to said Bliss, but which deed was in its form, and purported to be an absolute and unconditional conveyance of all the complainant's interest in the said premises, which deed still remains in full force as this defendant is informed and believes, under which the said Bliss now claims, that whatever was or may be the complainant's interest in the said premises, was thereby conveyed to him the said Bliss, and is his property, at least, to the extent of the moneys due from the said complainant to him the said Bliss, to enforce which claim the said Bliss has brought his bill of complaint before the justices of the supreme judicial court of the state of Massachusetts, before whom the same is

now pending against this defendant, and this defendant has been informed and believes, that there were other liens and attachments for various debts of said complainant upon the premises, which would have attached to any interest if he had any interest in the same premises. And this defendant says, that under these circumstances, however requested, and however disposed to benefit the complainant, he could not, when applied to, prudently or safely, or with any prospect of benefit to the complainant, or without probable ruin to this defendant, and therefore would not, and as the complainant well knows, did not take the said premises under or subject to any legal or equitable trust whatsoever. And this defendant denies, that any agreement or understanding whatsoever, except the express agreement and understanding between the said complainant and this defendant, that this defendant should take a title to said property, free from all right or claim on the part of the said complainant, express or implied, in law or equity, (as in the complainant's seventh interrogatory is inquired for,) ever existed, or was made between the said complainant and this defendant, other than the expressions of the motives and designs of this defendant, depending wholly on his own free will and discretion, and pleasure, for the execution thereof, as therewith expressly declared and fully understood, as hereinafter fully and particularly declared and set forth, and every allegation of any other, or different agreement, or understanding, express or implied, in the said complainant's said bill contained, this defendant denies.

And this defendant says, that although there was no such agreement, as by said complainant alleged, and although he, this defendant, always refused to take, or hold, any conveyance or title, excepting an absolute and unconditional estate in the premises free from any trust whatsoever; nevertheless, he freely admits, that one of his motives in purchasing the said estate, from the said Deblois, and taking the conveyance thereof from her, herein stated, was, besides the hope of profit and benefit to himself, a desire also to benefit the complainant's family, and with them, the complainant himself, and that this defendant then believed, that if the said building should be completed, in the manner projected, it might yield some pecuniary profit, and that it was his design, and intention, if, in the end, the same should be found to exceed in value the amount of all his payments, expenses and liabilities therefor, and such reasonable profit to himself, as he should in his own discretion think right, and also the amount of certain debts then, and before, and now due, to this defendant, from the said complainant, and also from a member of his family, then to give to the said complainant, or to his family, an opportunity to purchase the same for the amount of all his, this defendant's, payments, expenses, and liabilities therefor, and other claims aforesaid. And this defendant freely also admits, that he did, after the expiration of the time fixed by said decree, and not before, state his motive and design aforesaid in conversation with the said complainant, both before, and after his, this defendant's, receiving the conveyance from the said Elizabeth herein stated, but this defendant expressly declares, that while thus having and expressing such motive and design, it was therewith also distinctly declared by this defendant to the complainant, and by the said complainant at all times well known and understood, that no agreement whatever in any way binding upon this defendant, either at law or in equity, existed or was made or should be made, or was intended to be made by this defendant, or between him and the said complainant; nor was this defendant to be in any way, or by any means, a trustee for the complainant in respect of the premises, but that, on the contrary, the said land and estate was, and was to be, the property of this defendant, absolutely, and unconditionally, with the right of disposal thereof, and of the proceeds thereof, at his own discretion and freewill and pleasure, in such way as he should think fit; all which this defendant says was often and expressly declared to the said complainant, and as often and expressly admitted and assented to by said complainant, and that said declarations and admissions were so full, clear, and explicit, that no possibility of mistake or misapprehension, could or in fact did exist, or remain on the part of the said complainant.

And this defendant says, that he purchased of the said Deblois, for the sum of twenty-one thousand and eight dollars and thirty-six cents, the said parcel of land, and paid her therefor five thousand eight hundred and eighty-one dollars and thirty-six cents, in cash, of his own proper money, and gave her his own promissory note, and a mortgage of the premises for the remainder of the purchase money, that is to say, fifteen thousand one hundred and twenty-seven dollars, and received from the said Deblois her deed thereof, duly executed to this defendant, dated 24th August, 1840, by which deed of the said Deblois, by her made and executed to this defendant, she conveyed the said premises to this defendant, to have and to hold to him, his heirs and assigns, to his and their use and behoof forever, with covenant of warranty in the common form, excepting only, that to the covenant against all incumbrances there are added these words, "excepting from this covenant any incumbrances made or suffered by Joseph Jenkins upon the described premises," and to the warranty against the claims and demands of all persons these words, "excepting any claim or demand arising out of any contract made by or with said Jenkins," as by the said origi-

nal deed in the possession of this defendant, and ready to be exhibited, will at large appear, and to which, for greater certainty, this defendant begs leave to refer, a true copy whereof is herewith filed. And afterwards, on the same sheet of paper with the said deed of the said Elizabeth, the said complainant made and executed to this defendant his own deed of release and quitclaim to this defendant of all the premises, also dated the same twenty-fourth day of August, but delivered to this defendant and recorded with the deed of the said Deblois on the said twenty-fifth day of August, which this defendant is ready to produce, and to which he begs leave, for greater certainty, to refer; a true copy whereof is herewith filed; which deed purported expressly and unconditionally to release and convey unto this defendant all the complainant's right, title and interest whatsoever in the premises, to have and to hold the same to this defendant, his heirs and assigns forever, free and discharged of and from all claims and demands by, through or under said complainant, and by which said deed this complainant did admit, that he had not complied with the conditions contained in a contract for a conveyance of the lands described in the said deed from said Deblois, and that the said complainant had no legal or equitable right in or upon the same. And this defendant says, that the only consideration paid for the conveyance of the said Deblois aforesaid was the money, note and mortgage aforesaid, given to the said Deblois, under which said deed of said Deblois, so as aforesaid accompanied with the release of the said complainant, this defendant entered, and since has held the same premises as his absolute estate in fee simple to himself, his heirs and assigns, to his and their sole use and behoof, until the conveyance thereof by this defendant to David Kimball herein mentioned.

And this defendant further answering says, that he never did agree with the said complainant, that he, this defendant, would make any written declaration or memorandum of any trust or condition, as in the said bill of complaint set forth, or any other declaration, or memorandum, of any trust, or condition, or agreement, whatsoever, touching the premises. And this defendant says, that it was always before, and at the time of, and since the receiving of the said conveyances from the said Deblois by this defendant, expressly declared to the said complainant, and assented to by the said complainant, that nothing whatsoever should be written even upon the subject of this defendant's intentions and designs aforesaid, and that the reason thereof was also repeatedly stated to the said complainant, that is to say, that this defendant might not, by any such statement, incur any risk of affecting his own absolute title to the said estate and property, even by such a statement of his intentions, which might be misconstrued, inasmuch as he intended to retain the absolute title and disposal thereof, and to insure to himself the power and discretion of doing therewith as he might think right and best, or words to that effect, it being well understood and agreed between the said complainant and this defendant at all times, that nothing was to be done or agreed, whereby any express, implied or resulting trust in law or equity should or could be created or arise for the benefit of the said complainant, and this defendant denies the making of any expressions to any person whatsoever of any intention or purpose to make any writing whatsoever upon the subject, excepting only, that at some time after the receiving the conveyance from the said Deblois herein mentioned, and when and after the whole title and estate in the said lands was absolutely and unconditionally in the said defendant, Joseph Jenkins, Junior, a son of the said complainant, once said to this defendant, that he ought to make some writing, declaring his intentions in regard to said estate, as he might die before the matter was ended, and in that case his heirs could not know and carry out his intentions, or something to that effect, to which this defendant answered, that he should not do so, and added that it had been expressly declared by him to the said complainant from the beginning, and fully understood, that there was to be no writing whatever, and for the express reason, that this defendant would have his title absolute and unincumbered with any trust or condition whatsoever in law or equity; to which the said son of the said complainant replied, that his request was not, that any paper should be delivered to any one, but simply that this defendant would place such a writing among his own private papers, that in case of his death, his heirs might be able to do with the estate, what he, at his own free will and pleasure, would do, if living, for the benefit of the said complainant and his family, or something to that effect; to which this defendant, the same then seeming to him expedient, replied, that he would make some deed of trust to be placed among his papers to provide for such contingency. And this defendant says, that he intended at that time, and believes he was from the conversation that was had clearly understood to intend, by the expression deed of trust, only a paper writing expressive of his designs and intentions, as herein set forth, and no other or different writing. But after said conversation, this defendant, reconsidering the whole matter, thought it inexpedient to make any writing whatsoever, and did not make any such writing, having from the beginning declared his intention to do nothing, which could even by bare possibility be construed as admitting or creating any title to, or interest in, or claim in any way to or upon the said lands and building in the complainant. And this defendant says, that the aforesaid conversation, the purport and meaning whereof,

as nearly as this defendant can now recollect, as set forth, was a mere informal and accidental conversation with a third person, and not in the presence or hearing of the said complainant, and that the declaration by this defendant of his purpose to make such a writing was a mere gratuitous expression of his then present disposition, which he had a clear right to reconsider, and fulfil, or modify, and wholly abandon, at his own discretion, the circumstances and situation of the property, and of the said complainant obviously requiring, and justifying special caution, as to every such matter on the part of this defendant.

And this defendant says, that the complainant never furnished or procured to be furnished to this defendant the sum of six thousand dollars, or any other sum to be paid to the said Deblois towards the consideration money of any purchase, or so far as this defendant knows or believes, procured to be furnished and securities upon or by means whereof this defendant borrowed or obtained the sum of six thousand dollars or any other sum to be paid to the said Deblois in part satisfaction of any consideration money, of any purchase, as is alleged in the complainant's said bill, but this defendant says, that James W. Jenkins, Junior, in said bill mentioned, did deliver to this defendant upon his, this defendant's own responsibility, certain promissory notes and bills of exchange, to the amount in the whole of about six thousand dollars, as near as this defendant can recollect, to the end, that this defendant by pledging the same, might, if he should think fit, raise money to pay the consideration money, which this defendant might give to the said Deblois for his proposed purchase of said land, and this defendant says, that he never made use of or pledged the said promissory notes and bills of exchange, or raised any money by means thereof, to pay the said consideration money, or any part thereof, but that he returned the same to the said James W. Jenkins, Jr., and denies that he used such securities and afterwards returned and repaid the same by or out of moneys raised by mortgage or otherwise as is alleged in said bill of complaint.

And this defendant further answering, says, that he did agree to take a deed from said Elizabeth of said property, in order to give him an unqualified title under her, but not to save any rights of the said complainant, nor for the purposes in the said bill alleged. And this defendant further answering, says, that the time mentioned in the said decree for the compliance therewith by the complainant was not allowed to expire, without any compliance with its terms, for the purpose mentioned in the said bill, or for any purpose by agreement between the complainant and this defendant, or between the complainant, said Deblois and this defendant; but this defendant says, that the said time had expired before this defendant made any agreement to take a deed from the said Elizabeth of the said property, and this defendant was informed and believes, that the only reason why the said time was allowed to expire was, that the said complainant, by reason of his pecuniary embarrassments, was unable to comply with the terms thereof. And this defendant further answering, says, that the said Elizabeth did convey the said property to this defendant, as herein mentioned, but not in pursuance of, or according to any such agreement or purpose, as in said bill is mentioned. And this defendant further answering, says, that the said complainant did acknowledge, that he had forfeited all claim against said Deblois, and consent, that this defendant should take the said deed and conveyance from the said Elizabeth, and did make his release and quitclaim to this defendant, as herein mentioned, in order, that this defendant thereby might have, as the said deeds purported, an unqualified and absolute title to the said land and building, to have and to hold the same to him, his heirs and assigns, to his and their use and behoof, and not under or in pursuance of any such agreement, or for or with any such design or purpose of saving or securing any right or interest, legal or equitable, of said complainant as in the said bill of complaint is alleged, but on the contrary, for the very purpose of surrendering all the complainant's claims in or to the premises, and preventing any legal or equitable right, title or interest, express or implied, from arising, existing or resulting, or being insisted upon by or for, or on behalf of the said complainant, in or to or out of the premises in any event whatsoever; as it was clearly, explicitly, and fully understood and agreed to by said complainant, at the time of the making of the said deeds, that the title to said estate in this defendant was to be clear, full, perfect, and absolute.

And this defendant, further answering, says, that he believes, that at the time of the conveyance to this defendant made by the said Deblois, and at the time of the making of the deed of said complainant to this defendant, the said complainant was indebted to divers other persons besides Richards, Munn & Co., and said Kimball herein mentioned, for materials furnished in and upon the said building, and money borrowed, but which he could not pay from the said lands or building, inasmuch as he had, before that time, ceased to have any interest, either at law, or in equity, in or to the same, and which he as this defendant believes was unable by any other means under his control to pay. And this defendant further answering, denies, that the payment of such debts, or the procurement of means therefor, was the declared, or as far as this defendant knows and believes, the real object or purpose, or one of the objects or purposes of the said conveyances, or either of them, or of any ar-

rangement in relation thereto with this defendant, as alleged in the complainant's said bill of complaint, except so far as the same might have depended on or have been entertained, by reason of the expressions of the motives and designs of this defendant, depending wholly on his own will, discretion, and pleasure for the execution thereof, therewith explicitly declared and fully understood, as herein fully and particularly stated and set forth. And this defendant further answering says, that he does not know, but has been informed and believes, that several of the creditors of said complainant, some of whom had furnished such materials, and some of whom had loaned the said complainant money, did request in writing the said Elizabeth to convey to the said defendant the said lands, or express their assent, that such conveyance should be made, but what was the particular tenor of said requests or assents, this defendant has not been informed, and cannot set forth as to his belief. And this defendant says, that the fact of his taking the estate and property aforesaid, as herein stated, absolutely and unconditionally, without any title or interest in the said complainant, excepting such benefit as this defendant might, of his own will and pleasure, allow him, was in no respect a secret arrangement, but, as this defendant believes, was commonly known, and also to the creditors of the said complainant, and that the same was in fact, approved by creditors, as affording the only hope of any benefit from the premises, depending wholly upon the free will and pleasure of this defendant, as herein particularly set forth. And this defendant, further answering, denies, that such request or assent was given or made, pursuant to any arrangement to pay the debts of said complainant from said land and building, or that any such debts were intended to be provided for as in said bill is alleged, or that he, this defendant, was a party to any such arrangement, or that he had any notice of any such purpose, or agreed to receive, or hold, or that he was to receive a conveyance for any such purpose, as is in said bill alleged, or that this defendant was or is bound to make any conveyance to said complainant as in said bill is alleged.

And this defendant further answering, denies, that at the time when the said complainant made the acknowledgment and release under seal to this defendant herein mentioned, the said complainant had any valuable or other interest whatever in the premises. But this defendant at the time was advised to take such acknowledgment and release, in order to remove all grounds for any pretence of claim of the complainant thereafter to any interest in the premises. And this defendant further answering, says, that no pecuniary consideration was paid, or agreed to be paid, by this defendant for the said release, but that, as far as he knows and believes, the inducement and consideration of the said complainant for making said release and acknowledgment was the hope and expectation, that this defendant might derive such advantage from the premises as to be willing to give the complainant some benefit therefrom, at his discretion, as herein mentioned. And this defendant denies, that the said complainant had any valuable interest, or other legal or equitable interest in the said premises, to convey to this defendant; and denies, that any trust was created or resulted on the part of this defendant, for the benefit of this complainant. And this defendant further answering, says, that upon the making of the conveyance of the said Deblois to him herein mentioned, he made and executed a mortgage to the said Deblois of the premises for fifteen thousand one hundred and twenty-seven dollars, as aforesaid, and other mortgages thereafter, to a large amount, at different times; and that there is now due upon the mortgages, made by this defendant upon the premises, forty thousand one hundred and twenty-seven dollars, and interest, and mortgages to the amount of fifteen thousand dollars, heretofore made, have been paid by this defendant. And this defendant further answering, says, that the greater part of the moneys raised upon mortgages, excepting the moneys paid to said Deblois, was delivered to said complainant to pay sundry persons for material and work upon said building, done and furnished after the conveyance to this defendant; but this defendant does not admit, that the said moneys have been faithfully applied by said complainant; and the amount so applied, is peculiarly within the knowledge of said complainant, and if it be material in this case, this defendant insists, that the said complainant ought to be required to make proof thereof; and with the greater part of the residue of said moneys this defendant paid some of the moneys due on mortgages on said building, and for debts contracted in the completion of said building; but this defendant insists and submits, that these are matters which concern his own affairs merely, and that he is not bound to set them forth. And this defendant further answering, says, that the only consideration, agreed by this defendant to be paid to the said Deblois, for the conveyance from the said Deblois to the said defendant, was twenty-one thousand and eight dollars and thirty-six cents, fifty-eight hundred and eighty-one dollars and thirty-six cents thereof in cash, and the residue to be secured by a mortgage on the premises, as aforesaid. And this defendant says, as before, that the complainant did not furnish the sum of six thousand dollars, or any other sum, as a part of that consideration, and that the erections and improvements mentioned in said bill of complaint were no part thereof, unless by enhancing the value of the premises, and thus serving as an inducement to said De-

blois to take said mortgage, they might have been or may be so considered, but that the said complainant had paid the said Deblois, as this defendant has been informed and believes, the sum of one thousand dollars, as set forth in the said indenture, which, as this defendant is informed and believes, he borrowed of David Kimball herein mentioned, and which said sum of one thousand dollars and interest, being eleven hundred and seventy-five dollars, this defendant, at the time of the said purchase, assumed upon certain conditions, as hereinafter mentioned, to pay, and afterwards paid to the said Kimball, by deducting that amount from the consideration which he, said Kimball, agreed to give for the said premises on his purchase thereof, and who pretended to have a claim upon the premises, by virtue of a mortgage, therefor made by said complainant, as aforesaid, to secure the same, of all his pretended interest in the premises. And this defendant denies, that any part of the consideration of his purchase aforesaid was paid by said complainant, or that any trust resulted from any such payment.

And this defendant further answering, says, that he does not claim, nor ever has claimed from the said complainant payment of the sum, or about the sum, of seven thousand one hundred and fifty-eight dollars, or any other sum, for this defendant's services, commissions and brokerage, paid in raising any moneys, or for interest on any moneys, or any other account, as agent of the complainant, as the defendant has never acted as the agent of the said complainant in the purchasing the said lands or completing the said building, but has done the same entirely on his own account, and the complainant has, for this defendant, superintended the completion of the said work. But this defendant says, that after the completion of the said building, being willing to benefit the said complainant, and in accordance with his intentions, depending upon his own free will and pleasure, before expressed, this defendant did offer to sell or convey the said lands and building to said complainant at a certain sum, which would give to this defendant a profit of thirty-five hundred dollars only, after payment of the debt of said complainant and the debt of a member of his family, and which profit of thirty-five hundred dollars was a small and an inadequate profit for the great care, risk, perplexity and trouble, caused and created to this defendant by the purchase and completion of said building, and in making the estimate of the cost of said building, commissions, brokerage and interest, which this defendant had paid, were taken into the account of the cost of the building, as properly constituting a part thereof. And this defendant further answering, says, that being at that time the absolute owner of the said lands and building subject to mortgages which he had made thereof, he did not, nor does claim to have any such lien thereon as in the said bill of complaint is alleged. And this defendant further answering, saith, that the said building is now completed, as far as it is, at present, intended to complete the same, but is not of the value of one hundred thousand dollars, as this defendant believes, but, as this defendant believes, of the value of sixty-two thousand dollars; this defendant having sold the same for a consideration, which, as agreed upon, was nominally sixty-two thousand five hundred dollars; but a part of said consideration being paid in specific articles, the whole of the consideration paid and secured was not of greater value than sixty-two thousand dollars, which he believes to be the real value of said land and building, but the consideration expressed in the deed was fifty-five thousand dollars. And this defendant further answering, denies, that the said complainant is entitled to any conveyance thereof upon the conditions mentioned in said bill, or upon any conditions whatever; or to any account of the value thereof, or of the doings or transactions of this defendant in relation thereto. And this defendant says, that the said complainant has never tendered to this defendant, nor has been able, as this defendant claims, to tender to this defendant, any indemnity for a reimbursement of the moneys, which this defendant has paid for, and raised and expended upon the said lands, and building, and interest thereon, or a reasonable sum for the labor, care and responsibility of this defendant in the purchase and completion of the premises.

And this defendant, further answering, says, that he has refused, and does refuse to convey the said lands and building to the said complainant on the conditions in the said bill of complaint set forth, or to make any declaration of any such trust as is therein set forth; inasmuch as this defendant, until the sale by this defendant aforesaid, was the absolute proprietor thereof, subject to the mortgages aforesaid, and claims, and was entitled to hold the same, and has, since the purchase thereof, claimed to hold the same in fee simple, subject to the said mortgages, and not charged with any other condition or trust whatsoever. And this defendant says, that he never intended or designed to make any such conveyance or declaration of trust as in the said bill is mentioned, or other than is herein mentioned in that behalf. And this defendant further answering says, that after the completion of the said building, as aforesaid, two rooms in the said building were leased by the said complainant wrongfully, without the knowledge or consent of this defendant, to certain persons. And the said complainant wrongfully received of such persons part of the rent therefor in advance. And when these facts came to the knowledge

of this defendant, he notified the said persons, to whom such leases had been made, that he was owner of the said building, and that they must remain there as tenants of this defendant, or quit the premises; whereupon they agreed to hold as tenants of this defendant. And this defendant denies, that the said complainant has made any other leases of any part of the premises, with or to the knowledge or assent of this defendant, excepting certain leases at will for this defendant, which he has confirmed. And this defendant says, that he has never been the agent or trustee of the complainant in any thing touching the purchase or completion of the said lands and buildings, or the leasing thereof, but has leased the same in his own behalf, and for his own account, and has expended the rents, as far as they have been received, in and about said building, and submits, that he is not bound to render any account thereof to the said complainant. And this defendant denies, that any trust has been created, or resulted for the benefit of the complainant, to have the said parcels of land, or either of them, conveyed to him upon the condition of indemnifying the said defendant for any payment of the several sums of money, for which the same have been mortgaged; or that the complainant was entitled to a reasonable or any notice of the times of payment of the said several sums of money, or to an account of the sums of money borrowed by this defendant on mortgage of the premises, and expended in and about the purchase of the said lands, or the erection of the said edifice, or of the rents received by him; or that the said complainant is indebted to this defendant for any of those sums; or that any of those sums were advanced or loaned to said complainant; or that the defendant rendered, or that the complainant is indebted to this defendant for any services in the premises for the benefit of the complainant; or that this defendant is or ever was a mortgagee in equity of the premises; but that, until the sale thereof to said Kimball, he, after his purchases of said Deblois and said Francis, ever was the sole and absolute proprietor thereof, subject to the mortgages made by him, and to no other condition or trust whatsoever, and may well in equity, as well as at law, set up a good claim and title to said land and building against the said complainant, and that, in so doing, he does not act contrary to, or in breach of any interest or agreement of the parties to the transactions relative thereto; and this claim of this defendant so to hold the premises, is entirely consistent with good conscience and a desire to do equity on the part of this defendant.

And this defendant further answering, denies, that he was confidentially or otherwise employed by the said complainant, as in his said bill alleged, for the interest and benefit of said complainant in relation to the said lands and property, or with any understanding that this defendant for any services to be rendered for said complainant, as in the said bill of complaint is alleged, and denies it to be true, that he ever held forth to the complainant, or that there was any reason, or that he gave the complainant any reason to trust or believe, that he was so acting, or considered himself so employed, or that there was no reason for suspicion on the part of the said complainant, or no intimation by this defendant, that this defendant would appropriate said land and property to his own use and benefit, to the exclusion of the said complainant, and says, on the contrary, that this defendant expressly declared to the said complainant, and gave him fully to understand that he, this defendant, would not take a conveyance of the said land and property to any use and trust for the said complainant, and that he should take the conveyance thereof from the said Deblois, and from said Francis, to his, this defendant's, own use, and that of his heirs and assigns, absolutely and subject to no other use and trust whatsoever, express or implied, and that the said complainant well knew, before and at the time of the conveyance aforesaid, from the said Deblois and from said Francis to this defendant, the intention and purpose of this defendant in that regard, and assented thereto, relying on the good will and pleasure of this defendant to benefit the complainant's family, and the complainant himself, knowing and at all times fully understanding, that the defendant should have and did have a perfect and absolute title to said estate, and that the complainant's sole and only reliance was upon the good will and disposition of the defendant as aforesaid, which good will this defendant has ever evinced to said complainant by offering at sundry times, when proprietor of said estate, to sell to said complainant at a reasonable profit, as is herein set forth. And this defendant further answering saith, that he denies, that the said complainant had any cause or reason to, or did believe or trust, that this defendant would use his utmost or any endeavors in relation to said property, or the raising money thereupon for the completion of the said edifice, with any view to the benefit and advantage of said complainant, as the ultimate proprietor thereof, as in the said bill is alleged, or otherwise than is herein set forth. And this defendant further answering, denies, that he ever held forth to the said complainant, or gave him to understand that this defendant was using his utmost, or any endeavors for the benefit of the said complainant, as the ultimate proprietor of the said land and building, as in the said bill of complaint is alleged, or otherwise than is herein stated, and says that this defendant has not, or ever had, or made any claim upon said complainant for services of said complainant, nor has the said complainant tendered or offered to pay to this defendant any thing as or for any services of

this defendant; but since the completion of the said building, this defendant has offered to sell and convey the said lands and building to the said complainant for a sum, which, after all that this defendant has paid for and expended upon the premises, and the debt of the said complainant, and of a member of his family to this defendant, would give to this defendant the inadequate profit of thirty-five hundred dollars for all his labor, responsibility, risk and trouble in the premises, but the said complainant, as this defendant believes, then was, and at all times since has been, and now is, wholly unable to raise and pay that amount therefor. And this defendant says, that from the pecuniary embarrassments of the said complainant ever since this defendant purchased said property, he believes that he has not been ready or able to compensate and reward this defendant largely and liberally for any such services, if this defendant had had or made any such claim for services aforesaid as in the said bill is alleged, and whether the said complainant was willing so to compensate or reward this defendant, this defendant does not know and has not been informed, except by the allegations of the said complainant.

And this defendant says, that in all things relative to the purchase of the said lands and buildings, and the completion of the said buildings, and the disposal of the premises, he has acted with good faith and fidelity, without violating any agreement he ever made with the said complainant, or failing to discharge any duty, which this defendant ever owed to said complainant, as will appear by his acts set forth in this his answer. And this defendant further answering, says, that during the erection of said building, after this defendant purchased the same, the said complainant superintended the same, and had the principal charge of the work done thereon, and expended time, skill and labor thereon for this defendant, and not as having any interest, legal or equitable, therein, but only in the hope and expectation, that this defendant might derive such advantage therefrom as to be willing to give such chance of pre-emption to the complainant on such terms, that the complainant or his family might be benefited greatly by the purchase thereof, or that this defendant might otherwise dispose thereof, so that this defendant might, after reserving a reasonable profit to himself at his own discretion, pay the remainder to the complainant or his family (which chance of pre-emption this defendant has always offered to said complainant, as aforesaid, until the conveyance to said Kimball, and has twice advertised the said estate for sale at auction, with the purpose of paying over such remainder if there should be any, so far as he was not enjoined therefrom on the bill of Seth Bliss aforesaid, but which sales have been prevented by the complainant.) But this defendant denies, as far as this defendant knows, has been informed, and believes, that the said complainant expended any of his own proper moneys in completing the said building after this defendant purchased the same; and when the building was nearly completed, the said complainant made and presented his bill for his services therein, from Aug. 25, 1840, to January 8, 1841, wherein he charged this defendant 1150 dollars for services in the erection of the building for this defendant, and offered to assign his claim aforesaid, as superintendent, to a creditor of the said complainant, for security for the moneys due or owing to said creditor. But this defendant denies, that it is true, as in said bill of complaint is alleged, that this defendant did have or exercise no control over said work, and never pretended that he had a right so to do; but this defendant says, that on the contrary, at all times when it was necessary so to do, he insisted upon his right to control the said work, as the sole proprietor of the said building, and this defendant says, that on one occasion, in consequence of the misconduct of said complainant in misapplying moneys, which this defendant delivered to him, to be paid to the workmen upon and persons furnishing materials for said building, he, this defendant, threatened to dismiss the said complainant from his employment, as superintendent of the said building, and gave him notice to that effect, and thereupon the said complainant expressly acknowledged this defendant to be the sole owner of the said lands and building, and to have the sole right to control the work thereon, and promised this defendant, that he would honestly apply such moneys in future in payment of the labor and materials for the said building, and account with this defendant for all his doings therein, and upon this condition, this defendant consented to withdraw his notice aforesaid, and to retain the said complainant as the superintendent of the said work.

And this defendant, denies, that it was mutually understood between the said complainant and this defendant through the whole or any part of the process of erecting and finishing the said building, after this defendant had taken a conveyance thereof, that said complainant was erecting and finishing the same for his exclusive benefit, or not at all for the benefit of this defendant, except to enable him to raise moneys thereupon, perfect the security for money already raised, and indemnify and pay the said defendant, as in his said bill is alleged, or that the complainant was or was induced by this defendant to believe, or did believe, that the complainant was acting for his own benefit alone, and erecting a fortune for himself and his family, and not for the benefit of this defendant or any other person: unless from any reliance of the complainant on the good will and pleasure of this defend-

ant to benefit him and his family, it might be so considered by the said complainant. And this defendant denies, that upon any development by the said complainant of any gains which might be derived from the enterprise in the said bill mentioned, or upon showing its practicability, or at any other time or occasion this defendant conceived any design of defrauding this said complainant out of any gain or profit to be derived therefrom, or of abusing any confidence, which the said complainant might repose in this defendant, or that for any such end or purpose, this defendant required or proposed, that the legal title to said premises should be conveyed to himself without any declaration of trust in writing, to be delivered to the said complainant, or induced the said complainant to confide any rights in the premises to the honor and conscience of this defendant in the manner or for the purpose mentioned in said bill, or that he artfully or fraudulently induced the complainant to enter into or execute any agreement, or attempted to defraud and deprive the said complainant of the fruits of his labor, or to appropriate the same to himself, or to that end suffered the said complainant to go on with the erection of the said building under the belief, that he was erecting it for himself alone, or under any misapprehension in relation thereto, or meditated or practised any fraud whatever upon said complainant. But on the contrary thereof, at the time of the purchase and conveyance to this defendant of the said premises, the said complainant had no legal or equitable right or interest in the premises, as he well understood and admitted, and it was equally well understood and agreed by him with this defendant, that he should not have or claim at any time any legal or equitable interest whatever in the premises, and that the said defendant should hold and dispose of the premises at his own free will and pleasure, without any legal or equitable obligation to account therefor to said complainant. And this defendant denies, that he ever made, or promised, or pledged his honor to execute any agreement with or to the said complainant, to convey the premises to the said complainant upon the terms and conditions in the said bill set forth. And this defendant says as before, that he could not have taken a conveyance of the premises, under the then existing circumstances, upon any such trust as is alleged in the said bill, without subjecting himself to great danger of embarrassment and ruin. And this defendant denies, that any trust was created or resulted in equity on the part of this defendant, to hold said premises for the use and benefit of the said complainant, by reason of any thing done or agreed by or on the part of this defendant and the said complainant, or between this defendant and the said complainant.

And this defendant says, that he never promised the said complainant to make any written declaration of any trust, as in the said bill is alleged, but on the contrary says, that it was expressly agreed between this defendant and said complainant, that there should be no trust created touching the premises, but that this defendant should have a clear, perfect and absolute title in fee simple to said estate, unincumbered by any title, claim or interest of the complainant whatsoever. And this defendant further answering says, that he has exhibited to the said complainant a memorandum of the moneys expended by this defendant in relation to said building, but this defendant has refused, and does insist, that he is not bound to render any account to the said complainant, of the moneys received and expended as aforesaid. And this defendant says, that he has refused to convey the property to the complainant, except as herein set forth, and to recognize any trust for or title in said complainant, as none did ever exist since the conveyance of the said estate to this defendant, and this defendant insists, that he is not bound to set forth to what specific purposes he has applied the sums of money by him raised, by mortgage upon said property, as the same concerns himself and his affairs only, and not the said complainant. And this defendant further answering says, that he has advertised the said estate for sale, and has since sold the same, after having offered it, as aforesaid, to the said complainant, and allowed him the space of about four months, a time named by said complainant as a reasonable and sufficient time, to purchase the same on the terms aforesaid, with the full knowledge and assent on the part of the said complainant, that if he did not, in that time, purchase the same on the said terms, this defendant should and would sell the same at auction or to some other person, as this defendant had a right to do; and the said defendant says, that the said complainant was not then, nor has, at any time since, been able or ready to purchase the same on the terms aforesaid, and this defendant says, that he does not recollect or believe, that the said complainant protested against the sale of the premises in any other way than by filing his bill for an injunction to restrain the same. And this defendant further answering says, that while he was owner of the said estate and until he sold the same, he did claim to receive and did receive the rents thereof, so far as they have been paid, excepting so far as they were wrongfully received by the said complainant as aforesaid, as this defendant had a right to do. And this defendant further answering says, that he insists, that he is not bound to render any account of the said rents to the said complainant, or to disclose to him what he has done with the same, or the intentions of this defendant in respect to the disposal thereof, and denies, that the said rents

should or ought to be applied to the benefit of the said complainant. And this defendant insists, that he is not bound to set forth the amount or nature of his property, but deems himself sufficiently responsible to meet and comply with all the engagements, which he has made. And this defendant says, that he has no precise knowledge of the amount of the property of said Kimball, but believes him to be a man of considerable property and able to meet his engagements.

And this defendant further answering says, that he did, on the first day of March, in the year of our Lord one thousand eight hundred and forty-two, convey by deed of warranty, with release of dower of the wife of this defendant, the said land and buildings to said David Kimball, bona fide for a valuable and adequate consideration, which this defendant insists that he is not bound to set forth, it being a matter, in which the said complainant is no wise legally or equitably concerned, and this defendant nevertheless says, that the consideration, which was agreed upon, was nominally sixty-two thousand five hundred dollars, but a part thereof being in specific articles, the whole of the consideration paid and secured was not of greater value than sixty-two thousand dollars. And this defendant, further answering, denies, that the said Kimball took the said conveyance under any express or tacit agreement or understanding with this defendant to aid and assist him in perfecting a title to the premises, or disposing of them for this defendant's profit or advantage, or in order to preclude said complainant from asserting and establishing any pretended equitable interest in or title to the said land or building, or under any other agreement express or implied, than such as is contained in the said deed to the said Kimball, and says, that he has before stated the whole and true amount of the consideration as nearly as he can estimate the same, and says, that part of the consideration was paid in specific articles delivered to this defendant and part by cancelling the obligation of this defendant to said Kimball to pay the sum of one thousand dollars and interest as aforesaid, and the remainder over and above the mortgages, which mortgages said Kimball was to pay, and the amount of which is included in the consideration, was in negotiable promissory notes made by said Kimball payable to his own order and endorsed by him and delivered to this defendant, some of which have been negotiated payable at different times, some of which were secured by mortgage of the premises, and some by mortgage of other property, some of which notes have been paid, and all of which have been paid that have become due, and respecting all which notes there was no understanding or agreement between the said Kimball and this defendant other than appears on the face thereof, excepting an agreement to indemnify the said Kimball against the attachments made of the premises, as aforesaid, as the property of this defendant by the said complainant, by allowing a deduction from two of the said notes to the amount, if any, for which any execution, which might issue in the said suit, might be levied upon the premises in due form of law, which said agreement was in concise terms, as this defendant believes, entered on the back of the said two notes, but since the termination of said suit, other notes of like tenor have been given in substitution of these notes without such endorsement. And this defendant insists, that he is not bound to give a more particular or any statement of the manner in which the said consideration has been paid or secured to be paid, or who has held the said promissory notes since they were given. And this defendant denies, that the said conveyance to said Kimball was collusively or fraudulently made, or was made with any design between him and the said defendant to defraud the said complainant, or to displace any equitable claim or title, which the said complainant might have to said estate, or to defeat or embarrass any remedy he might have against the same, or upon any secret trust, understanding or confidence, that if the complainant should establish any lien or claim thereon said defendant should deliver up said notes or securities to said Kimball, or reinstate him in all or any respect as he was before the said conveyance, or upon any other secret trust or confidence between them.

And this defendant further answering says, that he is informed and believes, that before or at the time of the said conveyance to said Kimball, and before the payment and negotiation of said notes, as aforesaid, the said Kimball had notice of the dealings of said complainant and this defendant relative to said property, but had no notice of any right, title or interest at law or in equity, of said complainant, in or to the said land and building, existing at that time. And this defendant says, that he believes the said Kimball had, at that time, no notice or reason to believe, that the said complainant claimed to have any interest in the premises, although he had probably notice, that said complainant had previously made some claim in respect thereof by his filing the bill in equity herein mentioned against this defendant, which had then been dismissed. And the said Kimball, as this defendant believes, not only from this circumstance, but because the said complainant had afterwards brought his action at law, and attached the said premises as the property of this defendant, which action was then pending, had good reason to believe, that the said complainant had abandoned all claim and pretence of claim to any title or interest, legal or equitable, in the premises, other than such as might have been re-

quired by the said attachment which was provided for as aforesaid. And this defendant, further answering, denies, that as far as he knows, or has been informed or believes, the said Kimball did, during all or any part of the period in the said bill in that behalf mentioned, know or have any reason to believe, that this defendant was merely a trustee of said property for the ultimate benefit of said complainant, or that the legal or equitable title of the said complainant was caused to be apparently vested in this defendant, in pursuance of any such agreement, or for any such purpose as in the said bill is alleged, or that the said Kimball, during the said period in the said bill mentioned, treated with the said complainant as the real owner of the said property. And this defendant, further answering, saith, that, he is informed and believes, that the said complainant did make an agreement with the said Kimball for the rent of the halls of the said building, before the same had been erected, and before this defendant received from the said Deblois a conveyance thereof, and this defendant says, that he believes the same to be in the hands of the said Kimball, but this defendant is advised and believes, that the said agreement became null and of no effect whatever, by reason of the inability and failure of the said complainant to erect the said building or comply with the terms of his agreement with said Deblois so as to obtain any title to the premises.

And this defendant further answering, says that he did attempt to sell the said estate at auction, as he had a right to do, but not in pursuance of any fraudulent intent or purpose, when a temporary injunction from proceeding therein upon the prayer of the said complainant in his bill in equity filed in the supreme judicial court of Massachusetts, was granted without any notice or hearing of this defendant. And this defendant further answering, says, that after he had put in his answer to the said bill, which he then and still believes to be a complete defence thereto, and a notice of an intended motion to dissolve the injunction had been given to said complainant, and the counsel of this defendant was about to move the same before the said court, a negotiation was proposed by or on the part of said complainant, and was commenced between the said complainant and this defendant, through the intervention of other persons, which resulted in a stipulation, filed in the said cause, that unless the complainant should, within sixty days from the twenty-second day of November then last, fulfil all the conditions therein mentioned, the complainant's said bill should be dismissed with costs for this defendant, one of which conditions was, that the said complainant should pay to this defendant a certain sum of money, which this defendant denies to be unreasonable, or unjustly or extorsively demanded, and perform certain other things within sixty days from the twenty-second day of November, 1841, the time when these terms were and this defendant believes agreed upon, and this defendant says, that a portion of the sixty days expired, but how much this defendant does not recollect, before the said stipulation was signed by the said complainant and filed in the said cause, but this defendant denies, that the said complainant was hindered therein by reason of any delay or evasion of this defendant. And this defendant knows of no time spent in any endeavors of said complainant to have the same reduced to writing;—and that the terms of said stipulation were settled in the said twenty-second day of November, and fully understood by the complainant and his counsel, and the delay in reducing the same to a technical form was, in no respect, from any doubt as to the substantial part thereof, nor was the complainant any way hindered from performing said terms by such delay, and this defendant says, that it was never agreed, that this defendant should subscribe the same, but on the contrary thereof, that it was fully understood by the said complainant, that this defendant should not be required, and he never was required to subscribe the same. And this defendant further answering denies, that there ever was any conspiracy between him and said Kimball to prevent the said complainant from obtaining the said money in order to comply with the conditions of said stipulation; or that the said Kimball did act in concert with this defendant or assist him in vilifying or disparaging the said complainant, or any pretended equitable title of the said complainant in the premises, or to impugn any just claim of the said complainant thereto, with any such intent or purpose as in the said bill is alleged. But this defendant has, at all times, denied, and still denies, and insists, that the said complainant, after the purchase thereof by this defendant, had any equitable title or just claim in or to the premises. And this defendant further answering, denies, that he did, or the said Kimball, with the knowledge or assent of this defendant, or in pursuance of any concert with this defendant, did request any person, with whom the said complainant was negotiating for a loan, not to close any arrangement with the complainant aforesaid, but to make the same loan to said Kimball, and take the same estate as security for such loan. And this defendant further answering, denies, that by reason of any imputations thrown upon the said complainant, or his pretended equitable title to the said property, or the general merits of his pretended claim, or by any other hindrances or obstructions thrown by this defendant, or said Kimball, acting in concert or confederacy with this defendant, in the way of the said complainant, he was prevented from obtaining the said money and complying

with the conditions of said stipulations, and thus obliged to submit to a dismissal of his said bill, as in the complainant's present bill is alleged.

And this defendant further answering, says, that after the dismissal of the said bill of complaint filed in the said supreme judicial court, he did advertise the premises for sale at auction in about twelve days, which, this defendant submits, would have given the complainant sufficient time to prepare and file a bill in equity, if he had then thought he had an equitable interest in the premises. And he says, that this attempt to sell was at that time abandoned, in consequence of the attachment of the premises as the property of this defendant upon a writ in a certain suit at law, brought by said complainant against this defendant, wherein the said complainant declared against this defendant upon certain pretended promises therein alleged to have been broken, and among other things a certain alleged promise to pay for work and labor alleged to have been done by the said complainant for this defendant to the alleged damage of the complainant of fifty thousand dollars, in which suit such proceedings were had that some time afterwards the said complainant became nonsuit. And this defendant says the said complainant had no claim against this defendant, except a pretended claim in respect to said property and the erection of said buildings, and the moneys, work, labor and materials sued for in said writ, this defendant believes and therefore avers were moneys, work, labor and materials, pretended by said complainant to have been furnished by him in the erection of said building, and thus by said claims and the attachment of said premises as the property of this defendant, this defendant submits, that the said complainant did abandon any and all pretended claim and remedy in equity, which he now sets up and seeks in this his present bill. And this defendant says that the reason he abandoned the attempt to sell the said estate at auction was, that a cloud was, as he thought, cast upon the title by the attachment aforesaid, whereby the chance of an advantageous sale at auction was diminished.

And this defendant further answering, denies, that he has ever confessed or admitted to any legal or other adviser or person whatever, that he made any such agreement with said complainant, as in the said present bill of complaint is set forth relating to said land, nor has been advised by any one not to commit such agreement to writing, or sign any writing touching the same, as no such agreement was ever made, nor any agreement, which, if reduced to writing, would entitle the complainant to any interest in the premises. But this defendant says, that he, never intending to take or hold the said lands under or subject to any condition or trust whatsoever, and at the same time having the motive and design herein mentioned, if he should think fit and not otherwise, to benefit the family of the said complainant, the complainant himself did, before agreeing to make the purchase aforesaid, advise with a certain person learned in the law, whether it would under the circumstances be safe for this defendant to make such purchase, and take such absolute title with a full understanding, that it was to be subject to no trust, express or implied, while this defendant had and expressed verbally such motive and design to benefit the family of the said complainant and the said complainant himself, if under the circumstances as they might turn out this defendant should think fit. And at the same time this defendant was advised, that he would be safe in so doing, he was advised also, that it would be better to commit nothing to writing touching the same. And this defendant further answering says, that in the month of June, and not August, 1841, according to his best recollection, the said complainant did, as this defendant believes, ask this defendant to exhibit to him some statement of the cost of the said building, to this defendant, with reference to the arrangement and proposed purchase of April or May hereinafter stated. The particulars of which request this defendant, for want of recollection, cannot more particularly set forth, except that it was not pursuant to any equitable title then claimed to said property in said complainant or with any intent or purpose then expressed of calling on this defendant to account to him said complainant, as trustee or agent, but to enable him, said complainant, to determine what the price, for which this defendant had proposed to sell to said complainant, would amount to, adding 3500 dollars profit to this defendant to the cost and the debt due from said complainant and from a member of his family to this defendant. And this defendant did, in consequence thereof, and to show the said complainant, that the price, at which he proposed to convey the premises to said complainant was reasonable, but not admitting, and with no belief, that this defendant was bound to render an account to said complainant of his doings in the premises, made some memoranda on a sheet of paper, which are still in his possession, of the moneys expended, and the cost and expenses of the said building incurred by this defendant, and did exhibit the same to the said complainant, but not by way of rendering or intending to render to said complainant an account as trustee or agent or otherwise, nor was he as such required to render any account, which paper writing was headed "memoranda of cost of building on Tremont street." And this defendant says, that the sum of three thousand five hundred dollars was not, nor was any other sum put down therein as a charge for his this defendant's personal services, as agent, or trustee, or otherwise,

nor was there any charge for personal services or commissions of this defendant as agent, or trustee, or otherwise, put down in said memoranda, but this defendant, after consulting with his friends, did think that he ought, for his care, labor, trouble and responsibility, to have, as profit, the sum of five thousand dollars, and so verbally stated to said complainant, but at his request reduced the sum to three thousand five hundred dollars. And this defendant says there were items of brokerage and interest and commissions in said memoranda, but none but such as had been bona fide paid by this defendant in raising moneys, and for moneys raised to enable him to complete the said building, and this defendant insists, that he is not bound to set the same forth, or to furnish any copy thereof, and denies, that he has ever exhibited any such account to the said complainant touching the premises as in said bill is alleged.

And this defendant says, that Richards, Munn and Co. did claim to have a lien upon the premises, by reason of a contract for materials furnished by them to said complainant before this defendant's purchase of the premises, to be used in the said building, which contract was, as this defendant believes, recorded, according to the law respecting such liens; and the same was released and discharged under an agreement, that this defendant should give the said Richards, Munn and Co. or to the said Munn this defendant's note of hand for four hundred and fifty dollars, and that an assignment of a claim for damages, for the taking of a certain strip or parcel of land, taken by the city of Boston to widen Bromfield street, should be made to Richards, Munn and Co. or to said Munn. And this defendant believes, that some release or other act was done by the said complainant, but what precisely this defendant does not know, and cannot set forth. And this defendant says, that afterwards he paid the said note and gave a deed of the said land to the said city of Boston, and Richards, Munn and Co. or said Munn received the money paid by the city therefor. And this defendant says, that the said Kimball did claim a lien upon the said premises by mortgage for one thousand dollars as herein before set forth, and the claim aforesaid was released at the time of the purchase of the said estate by this defendant, in consideration of an agreement of this defendant before the purchase, in case he should purchase, to pay said Kimball the said sum of one thousand dollars and interest, from the first moneys, that might accrue from the rents of said estate after paying the expense and interest that might accrue in procuring the necessary advance of money for erecting the said building upon said estate, and in case of a sale thereof before rents had accrued as before stated to pay that amount from the proceeds of sale, should there be a sufficient surplus after paying the money advanced and all expenses; but this defendant was not to be considered in any way liable to pay, except he was enabled to do so from the sources above mentioned, which sum of one thousand dollars and interest this defendant did pay as herein before stated—which said agreement this defendant produces and files in this cause for the usual purposes. And this defendant says, that the arrangement and agreement aforesaid, in regard to the pretended claim and lien of Richards, Munn & Co. and said Kimball, was made by this defendant, not as the agent, or trustee, for the said complainant, or as acknowledging that he had any interest therein, as the said complainant then well knew, nor because this defendant believed, that the said Richards, Munn & Company or the said Kimball had any real or legal lien on the premises. But this defendant says, as they had a colorable or pretended claim or lien, which might be a cloud upon this defendant's title and embarrass him in raising money upon said estate to complete said building, these arrangements to extinguish and remove the same seemed expedient and advisable to this defendant, for his own interest, and the said complainant aided this defendant herein, not as having any legal or equitable interest in the premises, but in the hope and expectation, that this defendant might see fit, of his own free will and pleasure, to benefit the said complainant, as herein before stated. And this defendant says, that these matters are no evidence that the said complainant's equitable interest in the said premises had not expired and run out, when this defendant agreed to take said estate and after the said complainant failed to perform the said decree, as in said bill alleged.

And now, inasmuch as various charges of fraud, conspiracy, extortion, breach of trust and the like, are in the complainant's bill, most falsely and slanderously made against this defendant, apparently with the sole intent of injuring his good name, this defendant, in justification of himself and of his acts, would summarily repeat and solemnly declare; that, as before stated, when he purchased said estate, it was his intent, if the same should be found of greater value than the amount of his expenditures, claims and reasonable profit, as aforesaid, to offer, at such time and terms as he might deem best, to the complainant or his family, an opportunity to purchase the same for the amount aforesaid; that the possession of an absolute and indefeasible title, free from any and every trust in law or equity, was the only condition, on which he would purchase said estate, and that, under the advice of his counsel, he took the conveyances thereof to perfect in himself such a title; that every title or color of title, or claim in law or equity, on the part of the complainant, was expressly disavowed and guarded against, and with special care, as the existence of

any interest in the complainant would, on account of his notorious insolvency, have put at ruinous hazard the whole investment of this defendant; that after said purchase, in times of peculiar difficulty, and under great embarrassments in the procuring of the necessary funds, he caused the building to be erected as aforesaid; that after its completion, as the complainant professed to believe that it was of immense value, far exceeding any estimate thereof made by this defendant, this defendant repeatedly offered to the complainant himself the privilege of purchasing the same for the amount of the actual expenditures, claims, interest, and a reasonable profit as aforesaid; which amount the complainant assented to, and was fixed as the price, after some discussions as to the sum added as profit; that the only reason known to this defendant, why the complainant did not purchase said estate for such price, was his utter want of means and credit, and the refusal of others, to whom he applied to make advances to him, on his security or the security of the estate if purchased by him; that, to make the purchase more easy to the complainant, this defendant offered to extend the time of payment of parts of the purchase money, and also to allow his own name to remain on parts of the outstanding liabilities; that after giving to the complainant such opportunities, and after having waited the whole time asked for by the complainant himself, and after having notified him long previously of his intent so to do, unless the purchase was made by him, he at length, in September last, advertised the same for sale at auction, which sale the complainant prevented by the injunction obtained as aforesaid; that although, as he was advised by his counsel, the injunction would at the hearing be at once dissolved, he afterward, in November, gave to the complainant another opportunity for sixty days to purchase the estate on terms as liberal, and assented to by the complainant himself, having added thereto only the actual further expenditures and costs; that after the dismissal of the complainant's bill under the stipulation aforesaid, this defendant again, in February last, advertised the estate for sale at auction; which sale the complainant again prevented by attachment on a writ; that, when so advertising said estate for sale at the times aforesaid, it was the intent of this defendant by such sale to ascertain and obtain the full value of the estate; that it was his purpose, notwithstanding all the vexatious proceedings of the complainant, if the same should sell for a sum exceeding the amount of his expenditures and claims as aforesaid and a fair profit, to give to the complainant or his family the whole net surplus of the proceeds, unless restrained by the proceedings under the bill of the said Bliss pending as aforesaid; that by these various proceedings and stratagems of the complainant, done in gross violation of good faith and of his own positive agreements, a public sale was rendered impossible; that the object of the complainant, as this defendant believes, was thereby to compel this defendant to continue to hold said estate till the complainant could, by some change of times or some lucky accident, procure the purchase money, hoping, that this defendant would, however reviled or injured by him, renew the offer to himself or his family; that this defendant was absolutely unable to continue to hold said estate, for the whole cost of which (excepting a very small sum furnished from his own means) he was indebted to others, the payment of a large portion of which debt was due and urgently demanded and extension of time refused; that in this state of things, with these large debts, the times hard beyond example, the estate of very uncertain value and liable to depreciation, the title injured by the pretensions of the complainant and incumbered by his malicious attachment, he had but one way to relieve himself from the risk of utter bankruptcy and ruin, to wit, by selling the estate at private sale to one, who from his situation, as lessee, could be induced to give its full value; that he therefore sold it, while under such attachment, to David Kimball as aforesaid, for the highest price which he could obtain for the same, a price which he believed and still believes to have been its full value; that afterwards, when the attachment was dissolved by the dismissal of the suit at law, the proceedings now pending were openly threatened by the complainant; that therefore, while the complainant assumes such a position and urges such claims, this defendant, as to all the proceeds of such sale received or to be received, and the disposition, which he may make thereof, holds himself accountable only to his own sense of right, claiming a full and absolute discretion therein, intending in this, as in all his conduct, to deal honorably towards the complainant as towards others, but denying his right to compel an account thereof in any court whatsoever.

And this defendant sets forth,—in answer to the several averments of contracts, agreements, promises and trusts concerning the premises with, to or for the benefit of said complainant, in the said bill contained, and to so much of the said bill, as sets forth any pretended contract, agreement, trust or confidence between the said complainant and the defendant, or as seeks any relief or discovery of this defendant of or concerning any pretended contract, agreement, trust or confidence between this defendant and the complainant touching the said lands mentioned in said bill or any part thereof—the statute of frauds, as enacted in the laws of the commonwealth of Massachusetts, by the first section of the seventy-fourth chapter, and the third section of the fifty-ninth chapter, of the Revised Statutes. And this de-

fendant says, that neither he, nor any person by him lawfully authorized thereto, did ever make or sign any note or memorandum in writing, or any writing whatsoever, of or containing any such contract, promise, or agreement, or grant or declaration, or any contract, promise or agreement, or grant or declaration whatsoever, with, to or for the benefit of the said complainant, touching the said lands, or creating any estate or interest therein, or creating or declaring any trust respecting the same, in or for the benefit of the said complainant, and this defendant insists upon the said statutes and claims the same benefit therefrom, as if he had pleaded the same. And this defendant says, that the said complainant, after the completion of the said building, so far as it has been, or is intended at present to be completed, did file his bill in equity in the supreme judicial court of the commonwealth of Massachusetts against this defendant, one Elizabeth Deblois, William Hobbs, the Provident Institution for Savings in Boston, and the president, directors and company of the Merchants' Bank, as the said complainant in his said bill of complaint has alleged, wherein the said complainant stated himself to have the same pretended equitable interest in the premises he now claims, and insisted upon similar pretended trusts for his benefit, and made the same claims against the defendant which he now makes, and complained of the same pretended wrong and injury whereof he now complains, and prayed, that they might full, true and perfect answers make to the premises in said former bill alleged, and that the said Eldredge might be enjoined from selling and conveying to any other person than the said complainant the said premises, and might be compelled to execute the trusts in said former bill set forth, and that the said complainant might have such other and further relief in the premises therein alleged, as his case might require and to the said court might seem meet; that this defendant appeared to the said suit and put in his answer to the said bill of complaint, stating among other things in effect, as he now does, that this defendant took an absolute estate in the premises from said Deblois and subject to no trust for the complainant, and denying, that said complainant had any interest whatever in the premises, and thereupon, with the aid and advice of his counsel, the said complainant did agree and stipulate, and file his said stipulation and agreement in the said cause under his hand, that unless he should within sixty days fulfil all the said conditions therein mentioned, the said bill should be dismissed with costs for the defendant. And afterwards, it appearing to the court, that the terms of the said stipulation had not been performed by the said complainant, on motion of the counsel for the defendant, it was ordered and decreed, that the said former bill be dismissed with costs for the defendant as by the said former bill, answer, stipulation and decree on the files of the said court remaining, to which this defendant for greater certainty craves leave to refer.

And this defendant denies, that the terms of the said stipulation were first proposed by this defendant, and says, that they were voluntarily proposed by the said complainant as herein before stated, and denies, that it was agreed between this defendant and said complainant, that this defendant should prepare or sign the same, or that there was any delay or evasion on the part of this defendant in regard to the reducing the same to writing, or any other delay or hindrance than such as he believes to have been unnecessarily caused or created by said complainant, or that the amount required to be paid by the terms of the said stipulation was unreasonably, unjustly or extorsively demanded by this defendant, as in the said bill is alleged, or that this defendant, or any one, with the knowledge or assent of, or in pursuance of any concert or conspiracy with this defendant, ever said or insinuated, or did any thing, with any intent or purpose of in any way obstructing, or hindering, or preventing, the said complainant from complying with the terms of the said stipulation, or that he was so hindered, obstructed, or prevented by any thing said, or insinuated, or done by this defendant, or that the said stipulation was procured to be made or enticed into on the part of the said complainant, or that the said complainant was delayed, hindered, obstructed or prevented in or from complying with the terms thereof by this defendant or any one acting for or in concert with him, or by any unfair or undue means used, as far as this defendant knows, is informed, and believes, by any person whatsoever, and this defendant avers, that the said bill, now exhibited against this defendant, is for the same matter as the said bill before exhibited, and this defendant insists upon the same proceedings and decree in said former suit as a complete bar to the present suit of the said complainant, and prays that he may have the same benefit therefrom as if he had formally pleaded the same.

And this defendant says, that Seth Bliss herein before mentioned, to whom the said complainant by his deed bearing date the twentieth day of July, A. D. 1840, conveyed all his pretended right, title and interest and estate in the said lands and buildings as herein before mentioned, on or about the sixth day of September, in the year of our Lord 1841, exhibited his bill in equity before the justices of the supreme judicial court of the state of Massachusetts against this defendant, and the said complainant insisting upon the said conveyance, and stating, as is therein stated, and praying, that this defendant might be decreed to render a full and true account of the amount paid and advanced by him for the purchase of the said estate, and for the erection and

completion of the edifice, and of the liabilities he had come under, and which were outstanding on account thereof, and to convey said estate to the said Bliss, on payment being made to him, this defendant, of the amount of moneys, which he had so paid and advanced, and for his services, care and responsibility in the management of the same, and being indemnified against his said outstanding liabilities, or to sell and dispose of said estate, under the direction of the said supreme judicial court, and after reimbursing himself the amount of all moneys so paid and advanced and for his services, care and responsibility aforesaid, and indemnifying himself against his said liabilities, then outstanding, from the proceeds of such sale, to pay from the surplus of such proceeds a certain amount of moneys claimed by the said Bliss in his said bill to be payable to himself therefrom as in said bill particularly set forth; and further praying, that he the said Bliss might have such further and other relief in the premises as the nature of his case might require and as might be agreeable to equity; and further specially praying, that the said justices of the said supreme judicial court would grant unto the said Bliss their writ of injunction restraining this defendant from selling or conveying the estate to any person other than the said Bliss, unless by a sale thereof he should realize such sum as should be sufficient to repay him, this defendant, the amount of all his advances and liabilities as aforesaid, and for his care, services and responsibility, and also a surplus sufficient to pay to the said Bliss the whole amount of moneys so as aforesaid claimed by him in his said bill, and enjoining this defendant, in case of such sale, that he should retain from such surplus the amount of said moneys so claimed by said Bliss, and not to pay over the same to any person other than the said Bliss, until the further order of the said court in the premises; and further praying, that a writ of subpoena should issue to this defendant, and the complainant, requiring them to appear in said court and answer and abide the order and decree thereof in the premises; all as in said bill more particularly set forth. Whereupon, to wit, on the same sixth day of September last, such writ of subpoena, as prayed for by the said Bliss, was issued from said court unto this defendant, and the complainant, and on the same day duly served on this defendant, and as this defendant is informed and believes, at the same time, or soon after, and long before the filing of the present bill, on the complainant, who then was (if he is not now) a citizen and resident within this state—and on the same sixth day of September, a writ of injunction was granted by said court as prayed for by the said Bliss in the said bill against the defendant and the complainant, enjoining in manner and form as prayed for; which injunction was afterwards, to wit, on the seventh day of the same September, so far modified by order of said court, as to allow this defendant to sell said estate at public auction, on complying with certain conditions; the said injunction in all other respects to stand confirmed until the further order of the court; which injunction remains still in full force, and has never been dissolved; unto which bill of the said Bliss so filed as aforesaid, this defendant appeared in said court, long before the filing of the present bill of the complainant; and the complainant either hath appeared, or was held to appear by the said subpoena long before the filing of his present bill of complaint; whether he hath, in fact, appeared, this defendant knoweth not. Which bill of the said Bliss against this defendant and the complainant is still pending in the said supreme judicial court of the commonwealth of Massachusetts for the county of Suffolk, unto which this defendant and the complainant are and were, before and at the time of the filing of the present bill, and ever since, held to answer, and are and were before, and at the time of the filing of the present bill, and ever since, enjoined by the said writ of injunction, as therein set forth. And this defendant avers, that the said bill of the said Bliss, so pending, as aforesaid, in the said court against this defendant and the complainant, is for and concerning the same premises as the present bill of complaint, that the said court have full jurisdiction in equity over all the said parties and premises, and that this defendant and complainant are thereby absolutely withdrawn and restrained by law, and under heavy penalties, from submitting themselves to or acting under the decrees of any other court, made in compliance with the prayer of the complainant's present bill of complaint. And this defendant sets forth, and insists upon these matters also as a complete bar to the complainant's present bill of complaint, and he prays, that he may have the same benefit thereof, under the rule of this court, as if he had formally pleaded the same in bar to the said bill. And as to all the matters in the said bill of complaint, which this defendant has omitted or declined to answer, or has only partially answered, and which by the rules of this court in chancery, he is not bound to answer, this defendant, insisting upon and claiming the benefit of said rules, and in no wise waiving his rights by any partial answer, prays, that he may have the same advantage of the said rules, as if he had pleaded or demurred to the matters aforesaid.

The answer of David Kimball was as follows:

David Kimball, one of the defendants, also put in an answer, denying the rights of the said complainant, and stating, that, after refusing to take a lease of the premises from the complainant, he hired the same of El-

dredge, not as agent, or trustee for the complainant, but as owner thereof. That he does not know, or believe, that the said Eldredge was confidentially employed by the said defendant in relation to the said property, but that the said complainant did absolutely release all his rights to the said property to the said Eldredge, and that he cannot now set up any right against the said defendant as a bona fide purchaser, without notice. That this defendant had not, nor has any reason to believe, that the said complainant had, or has, any legal or equitable interest in the premises, after the purchase of the said Eldredge from the said Deblois, but at the same time, this defendant has been informed and believes, that in the purchase and erection of the said building, the said Eldredge did expect, that the complainant would be benefited thereby, and that it was the expectation of said Eldredge, that said complainant would ultimately be the owner of the said lands and buildings, provided he, the said complainant, could repay to said Eldredge what moneys he had expended in completing the same, and relieve him from all the liabilities he had incurred, and a further sum for profit or compensation for labor, care, trouble and responsibility in the premises, or on some such terms, he, the said complainant, relying wholly on the honor of the said Eldredge, and the good feelings he might have towards the complainant in this regard, and as both parties well understood, as this defendant believes, having no legal or equitable interest in or claim to the premises whatsoever. And this defendant, further answering, says, that the said Eldredge, on the first day of March, 1842, did convey to this defendant bonâ fide, by deed of warranty, with release of dower of the wife of said Eldredge, the said land and building, the consideration for which conveyance, as agreed upon, was nominally sixty-two thousand five hundred dollars, consisting in part of specific articles, at an estimated value; the whole of the consideration paid and secured might not be of greater value than, but was, at least, of, the value of sixty-two thousand dollars, which was a full and adequate price for the same, and which was bonâ fide paid and secured, as hereinafter mentioned; but the consideration alleged in the deed was fifty-five thousand dollars.

And this defendant further answering, denies, that he took the said conveyance under any express, or tacit agreement, or understanding with said Eldredge to aid and assist him in perfecting a title to or disposing of the said premises for his said Eldredge's profit or advantage, or in order to preclude the complainant from asserting or establishing any pretended equitable interest in or title to the said land and buildings, or under any other express or tacit agreement or understanding, than is expressed in the said deed, by which said Eldredge conveyed the premises to this defendant; and this defendant says, that he has before stated the whole and true amount of the consideration, as nearly as he can estimate the same, and says that part of the consideration was paid in specific articles delivered to said Eldredge, a part by cancelling said Eldredge's obligation to pay the sum of one thousand dollars and interest borrowed of this defendant by said complainant, and originally secured by mortgage of said complainant of the premises, and the remainder over and above the then existing mortgage, which mortgage the defendant assumed to pay, was secured to be paid by negotiable promissory notes made by this defendant, payable to his own order, and endorsed and delivered to said Eldredge, payable at different times,—some of which were secured by mortgage of the premises, and some by mortgage of other property of this defendant, some of which notes have been paid as they became due,—and all have been paid, which have become due, from the proper moneys of this defendant,—and this defendant has been informed, and believes, part of those, which are still outstanding, have been, and as far as he knows, or has been informed, they all may have been negotiated bonâ fide, and this defendant does not know, nor has been informed, and cannot set forth, who has held, or does hold the same or any of them, and this defendant says, that no agreement or understanding was ever had, or made between the said Eldredge and this defendant, relative to the said notes or any of them, except what appears upon the face of the said notes, and an agreement endorsed upon two of the said notes, to the effect, that so much if any thing should be deducted from the amount of these two notes as might be necessary to indemnify this defendant for the amount, if any thing, for which any execution, which might issue in said complainant's said suit at common law, might be duly levied on the premises; since the termination of that suit, other notes of like tenor have been given in substitution for these, without said endorsement. And this defendant insists and submits, that he is not bound to give a more particular or any statement of the manner, in which said consideration has been paid or secured to be paid, or who have held or now hold the said promissory notes; and this defendant denies, that the said conveyance was collusively or fraudulently made, or was made with any design between him and said Eldredge to defraud the said complainant, or to displace any equitable claim or title, which the said complainant might have to said estate, or to defeat or embarrass any remedy he might have against the same, or upon any secret trust, understanding or confidence, that if the complainant should establish his lien or claim thereon, said Eldredge should deliver up said notes or securities to this defendant, or reinstate

him in all or any respect as he was before the said conveyance, or upon any other secret trust or confidence between the said Eldredge and this defendant whatsoever.

And this defendant further answering says, that before the conveyance aforesaid from the said Eldredge to this defendant, he had notice of the dealings of the said complainant and of said Eldredge in relation to said property, but this defendant denies, that he had at the time of receiving the said conveyance and paying, so far as it was paid at that time, and securing to be paid, the consideration therefor, in the manner before stated, any notice of any right, title, interest or claim of the said complainant in or to the premises, or any reason to suspect or believe, or did believe, that the said complainant had or claimed to have any right, title or interest in law, or equity, in or to the said property, as in the said bill is alleged; but this defendant had notice, that the said complainant had previously made some claim in respect to the premises, by filing his bill in equity against the Eldredge in the supreme judicial court of Massachusetts, which bill had then been dismissed, and the said complainant had brought his action at law, and attached the said premises as the property of the said Eldredge, which action was then pending; and this defendant had good reason to believe, and did believe, that said complainant had abandoned all claim to any title or interest, legal or equitable, in the premises, other than such as might have been acquired by the said attachment, which was provided for as aforesaid; and this defendant denies, that he did, during all or any part of the period in the said bill, in that behalf mentioned, know, or have any reason to believe, or did believe, that the said Eldredge was merely a trustee of the said property for the ultimate benefit of the said complainant, or that the legal or equitable title of the said complainant were caused to be apparently vested in the said Eldredge, in pursuance of any such purpose, as in the said bill is alleged, and denies that this defendant, during the said period, in the said bill mentioned, or any part thereof, treated with the said complainant as the real owner of the said property. And this defendant, further answering, says, that the said complainant did make the agreement with this defendant for the rent of the halls to be made in said building, before the erection thereof, as in said bill is alleged, which said agreement is in the possession of this defendant, and which he produces, and to which for greater certainty he refers, and a copy of which he herewith files, and which agreement this defendant believes, and so told said complainant, became null and void, and of no effect whatsoever, and has always been so treated by this defendant, by reason of the inability and failure of the said defendant to erect the said building, or comply with the terms of his agreement with the said Deblois in said bill mentioned, so as to obtain any title to the premises.

And this defendant further answering, says, that there was no dispute between the complainant and this defendant, which was referred to referees, touching said agreement or lease; but there was a difference between said Eldredge and the corporation before mentioned, of which the defendant was the treasurer, and a member of a committee, to hire the premises of said Eldredge for the corporation, respecting the amount, which the said corporation, under the circumstances, ought to pay to said Eldredge for rent of the premises, and said Eldredge and said corporation, by this defendant and one Alfred A. Wellington, a committee for that purpose, agreed to submit the same to the arbitration of certain referees, who, by an agreement between said Eldredge and said corporation, were to take said former agreement with said complainant, as the basis, upon which to decide the rent to be paid by said corporation, and to take into consideration any deviations there might have been made from the said contract, with all other matters and things, that might appertain thereto, and were to decide what, under all the circumstances, should be an equitable, just and proper rent for the said corporation to pay to the said Eldredge, and this defendant says, that this matter was conducted by said Eldredge on his part before the referees, and by this defendant on the part of the said corporation, as the parties solely interested, and the defendant denies, that the said complainant was a party to the said agreement, or with this defendant chose said referees, or that there was a word passed between said complainant and this defendant relative to the selection of the said referees, and this defendant further denies, that the whole matter was conducted by the complainant as the real party, or that he was the real party, or acted as such at the hearing, or that said Eldredge's name was only formally used in said agreement, or that the said complainant appeared before the said referees in any other character than as a witness, or to explain the plans of said building and state, or testify respecting the same, and this defendant denies, that he, this defendant, pursuant to such original agreement in said bill mentioned in that behalf, and the award of said referees, or pursuant to either of them, became, or was or is at law or in equity the tenant of the Halls in said bill mentioned, or either of them, under the said complainant for any rent whatever. And this defendant further answering, says, that he has been informed and believes, that the said Eldredge did advertise the premises for sale at auction, and so far attempt to sell the same as this defendant believed, and still believes he had a right to do, and as this defendant believes, not in pursuance of any fraudulent intent or purpose, as in said bill is alleged, but was tem-

porarily enjoined from selling the same as in the said bill is mentioned. And this defendant further answering, says, that he has been informed and believes, that after the said injunction was granted, but whether before or after it was removed or not this defendant does not know, some negotiation was opened between the said Eldredge and said complainant, touching or relating to the said lands and buildings, but what was the nature of the said negotiation, or what was agreed upon or whether any thing was agreed upon, this defendant does not know, has not been informed, and cannot set forth as to his belief.

And this defendant says, that the said Eldredge on the first day of March, A. D. 1842, did convey to this defendant, by his deed of warranty of that date, with a release of dower of the wife of said Eldredge, the said land and buildings, the consideration expressed therein being fifty-five thousand dollars, but the true and real consideration being as herein before stated, which was actually and bonâ fide paid and secured to be paid as herein before stated, and which was a full and adequate consideration for the purchase of the said land and buildings, which said deed duly executed by the said Eldredge and by his wife this defendant produces and refers to for greater certainty. And this defendant says, that at the time of receiving the said deed and conveyance from the said Eldredge, and at the time of paying and securing to be paid the said consideration therefor as aforesaid, he had no notice nor intimation nor reason to suspect or believe, nor did suspect or believe, that the said complainant had or pretended to have any right, title or interest or claim in or to the said premises saving such as he might have acquired by the said attachment; and this defendant insists that he is a bonâ fide purchaser for a valuable consideration, without notice, and is entitled to protection as such purchaser, and that the said complainant, under the circumstances, ought not to be allowed as against this defendant to set up any claim to any right, title or interest in the said premises; and this defendant not waiving this ground of defence, but insisting thereon, prays that he may have the same benefit therefrom as if he had pleaded the same. And this defendant says, as to the several averments of contracts, agreements, promises and trusts concerning the premises, with, to or for the benefit of said complainant in the said bill contained, and as to so much of the said bill as sets forth any pretended contract, agreement, trust or confidence between the said complainant and the said Eldredge, or as seeks any relief or discovery of this defendant of or concerning any pretended contract, agreement, trust or confidence between said Eldredge and the complainant, touching the said lands mentioned in said bill or any part thereof, says that neither the said Eldredge nor any person by him lawfully authorized thereto, ever made or signed any note or memorandum in writing, or any writing whatsoever of or containing any such contract, promise or agreement, grant or declaration, or any contract, promise or agreement, grant or declaration whatsoever with, to or for the benefit of the said complainant touching the said lands, or creating any estate or interest therein, or creating or declaring any trust respecting the same in or for the benefit of the said complainant as required by the statute of frauds of the commonwealth of Massachusetts. And this defendant insists upon the said statute, and claims the same benefit therefrom as if he had pleaded the same.

B. R. Curtis and S. Greenleaf, for plaintiff.
William H. Gardiner, for defendants.

STORY, Circuit Justice. This cause is one of extraordinary complexity, and no small difficulty, as well in the principles of law involved in it, as in the conflicting and varied details of the evidence. It has been most fully and elaborately argued at the bar; and to discuss it, at large, upon all the topics, embraced in the argument, would require from the court a length and volume of opinion and reasoning, totally inconsistent with its duties to other suitors. What, therefore, I shall endeavor to do, is to bring into view those principles of law, which must form the foundation of the ultimate decree of the court, with such allusions only to the evidence, as may serve to show, what are the conclusions of fact, to which I have arrived, as, on the whole, the best supported, without any effort to reconcile discrepancies, or to explain or dissipate the obscurities, which surround many parts of it. And, after all, I am persuaded, that so far as my own judgment is concerned, it is to the survey of the cause in masses, and not in minute details, that I may hope to expound the grounds of my own opinion, and to enable the parties to take the opinion of the supreme court, upon an appeal in the premises. The bill of the plaintiff and the answer of Eldredge present, in truth, the entire outline of the case, as each party desires to have it to be understood, and supersedes the necessity of any other detailed statement.

The great points in the cause, to which all others are subordinate, and on which all others depend, are, (1) whether Eldredge originally took the property in controversy upon trust for the ultimate benefit of Jenkins, substantially as stated in the bill; and if so, (2) whether that trust is one, which, in point of law, it is competent for this court to direct to be carried into execution.

That there was a trust of some sort between the parties seems to me clear from the whole evidence in the case, including the answer of Eldredge. The latter insists, indeed, that it was a mere honorary understanding, or arrangement, dependent, for its execution,

solely upon his own free will, discretion, and pleasure, and by no means constituting, or intended to constitute, any trust binding in law or in equity, and that Jenkins always so understood it, and agreed to it. At the same time, Eldredge admits, that his motive in engaging in the speculation or enterprise was, mainly, with a view to the benefit of Jenkins's family, with some of whom he was nearly connected, after receiving a full remuneration for his own services and advances, if the speculation should turn out to be successful. In furtherance of this view, he states in his answer, "And this defendant denies, that any agreement or understanding whatsoever, except the express agreement and understanding between the said complainant and this defendant, that this defendant should take a title to said property, free from all right or claim on the part of the said complainant, express or implied, in law or equity, (as in the complainant's seventh interrogatory is inquired for,) ever existed, or was made between the said complainant and this defendant, other than the expressions of the motives and designs of this defendant, depending wholly on his own free will, and discretion, and pleasure, for the execution thereof, as therewith expressly declared and fully understood, as hereinafter fully and particularly declared and set forth, and every allegation of any other or different agreement, or understanding, express or implied, in the said complainant's said bill contained, this defendant denies. And this defendant says, that although there was no such agreement, as by said complainant alleged, and although he, this defendant, always refused to take, or hold, any conveyance or title, excepting an absolute and unconditional estate in the premises free from any trust whatsoever; nevertheless, he freely admits, that one of his motives in purchasing the said estate, from the said Deblois, and taking the conveyance thereof from her, herein stated, was, besides the hope of profit and benefit to himself, a desire also to benefit the complainant's family, and with them, the complainant himself, and that this defendant then believed, that if the said building should be completed, in the manner projected, it might yield some pecuniary profit, and that it was his design, and intention, if, in the end, the same should be found to exceed in value the amount of all his payments, expenses and liabilities therefor, and such reasonable profit to himself, as he should in his own discretion think right, and also the amount of certain debts then, and before, and now due, to this defendant, from the said complainant, and also from a member of his family, then to give to the said complainant, or to his family, an opportunity to purchase the same for the amount of all his, this defendant's payments, expenses and liabilities therefor, and other claims aforesaid. And this defendant freely also admits, that he did, after the expiration of the time fixed by said decree, and not before, state his motive and design aforesaid in conversation with the said complainant, both before, and after his, this defendant's, receiving the conveyance from the said Elizabeth herein stated, but this defendant expressly declares, that while thus having and expressing such motive and design, it was therewith also distinctly declared by this defendant to the complainant, and by the said complainant at all times well known and understood, that no agreement whatever in any way binding upon this defendant, either at law or in equity, existed or was made or should be made, or was intended to be made by this defendant, or between him and the said complainant; nor was this defendant to be in any way, or by any means, a trustee for the complainant in respect of the premises, but that, on the contrary, the said land and estate was, and was to be, the property of this defendant, absolutely, and unconditionally, with the right of disposal thereof, and of the proceeds thereof, at his own discretion and free will and pleasure, in such way as he should think fit; all which this defendant says was often and expressly declared to the said complainant, and as often and expressly admitted and assented to by said complainant, and that said declarations and admissions, were so full, clear, and explicit, that no possibility of mistake or misapprehension, could or in fact did exist, or remain on the part of the said complainant."

On the other hand, Jenkins insists, that, although it was agreed between himself and Eldredge, that there should be no written agreement given or held by Jenkins, which should evidence the nature of the trust between him and Eldredge, yet that it was positively agreed, that Eldredge should hold the property in trust for him, subject to the agreement between them, the due execution of which required, that Eldredge, in order to raise money to complete the erections on the land, should possess a clear title, which he should be able to convey to the purchaser free from all incumbrances and equities. And that it was a contemporaneous arrangement, that Eldredge should make and keep among his own papers a written declaration of the trust to evidence the same in the event of his decease, or other like necessity. The bill charges, "That as said Eldredge had not the capital for that purpose, and would need the legal title to said property, both to enable him to borrow money to secure him for his liabilities as the indorser or surety of your orator and for the compensation to be paid to him for all his trouble in the business, your orator formally, distinctly, and solemnly, agreed with said Eldredge that he, said Eldredge, should receive a conveyance of said land, with the buildings thereon, from said Elizabeth, and should raise money thereon by mortgage, in order to furnish your orator with the means

to proceed in the erection and completion of said edifice, and on completion thereof should execute and deliver to your orator a deed of conveyance thereof, your orator agreeing to reimburse to said Eldredge, or save him, said Eldredge, his heirs, executors and administrators harmless, and indemnified from and against all payments, which he or they might be compelled to make, by reason of any such mortgage, and to pay to him or them a suitable compensation for his services in the premises. such indemnity, reimbursement and payment to be secured to said Eldredge by a lien upon said premises. And the said Eldredge further agreed, that he would make a declaration in writing, specifying the terms, trusts and conditions on which the said property should be held by him, and place the same among his papers, to serve for the disclosure and manifestation of said trusts, terms, and conditions, in the event of his decease, or other like necessity; and in pursuance of said agreement with said Eldredge, your orator procured to be furnished to him by a personal friend and relation of your orator certain securities, upon and by means of which the said Eldredge borrowed the sum of about six thousand dollars, to be paid by him to said Elizabeth, in part satisfaction of the consideration money of said purchase, pursuant to the decree aforesaid, and which sum the said Eldredge afterwards repaid, and relieved the securities aforesaid, and returned the same to James W. Jenkins Jr., the person who furnished him therewith, out of moneys received by him upon a mortgage or mortgages of said land; and your orator, by mutual agreement with said Eldredge and said Elizabeth, and for the sole purpose of making his title under her appear to be simple and unqualified, and not with any idea of parting with or surrendering his beneficial interests in said land or purchase, but the more effectually to secure them, permitted the time specified for fulfilment of said decree to pass by, without compliance with its terms, and said Elizabeth, at the special instance and request of your orator, executed and delivered to said Eldredge a deed of said land dated August the 24th, A. D. 1840, a copy whereof is herewith exhibited."

The first inquiry, therefore, is whether, taking all the circumstances together, the trust was a mere honorary trust, such as has been stated, possessing no legal or equitable obligation, and resting purely in the good will of Eldredge, to be fulfilled or not by him, according to his mere pleasure, or it was, in fact, a trust to be operative and binding between the parties, and creating, as between them, whatever might be its operation as to third persons, a clear equitable right to have the property transferred from Eldredge to Jenkins, after discharging all the incumbrances and charges, properly attached thereto. This is a question of no inconsiderable difficulty upon the actual posture of the evidence. In order to a just solution of it, it is necessary to look carefully to the situation of the parties, when the negotiation with Eldredge took place, to the objects manifestly in view, to the surrounding circumstances, and to the subsequent transactions of both parties.

What then was the state of things before and subsequent to this period? Jenkins was an experienced builder, perhaps somewhat too much inclined to become a speculating projector. In April, 1839, he purchased at public auction a certain parcel of land at the corner of Tremont and Bromfield streets, in Boston, for $20,169.50, then owned by Miss Deblois, and constituting the premises in controversy. Being unable to comply with the conditions of sale, a new arrangement was made in May following between Jenkins and Miss Deblois, that her warranty deed, conveying the premises to Jenkins, should, upon the execution of that agreement and the payment of $1000 by Jenkins to her, be deposited in the hands of Thomas W. Phillips, Esq. in escrow, and retained by Phillips until the 24th of July following; and if Jenkins, on or before that time, should pay to Deblois the sum of $5042.50, with interest, &c., and should execute a note to Deblois, for $15,127, payable in five years, with interest, &c., and also execute a mortgage of the premises to Deblois, as security for the payment of the note, and also of the taxes assessed on the premises, Phillips was to deliver the deed to Jenkins; otherwise, the contract for the sale of the land was to be terminated and annulled, without prejudice to Deblois's right to claim damages for the non-performance of the contract; and the $1000 was to be forfeited to Deblois. Jenkins paid the $1000, pursuant to the agreement. Jenkins immediately afterwards went into possession of the land, and proceeded to excavate the same, and to begin the erection of a building thereon, and expended a large sum of money thereon, which, in his bill, he alleges to have been about $15,000. His resources being then exhausted, he was unable to comply with his agreement by paying the $5042.50 in July, 1839, as stipulated; and Deblois, pressing payment, threatened to sell the premises at auction. In order to prevent this, Jenkins filed a bill in equity in the supreme court of the state of Massachusetts in May, 1840, to restrain the sale, and for relief, and an injunction was accordingly granted. The answer of Deblois having been put in, it was then agreed by the parties, and accordingly an interlocutory decree was passed on the 22d of June, 1840, that if Jenkins should, on or before the 20th of July, 1840, pay or tender to Deblois the amount due her under the contract of May, 1839, and perform all the other parts of the contract, then the injunction should stand continued to the hearing of the cause, unless Deblois should ac-

cept the same with costs, and perform the said contract on her part; in which event, the bill was to be dismissed; and also to be dismissed, if Jenkins failed to tender and perform, as aforesaid. Jenkins did fail to perform his part of the agreement, and thereupon the bill was dismissed accordingly, on or about the 20th of July, 1840. In the intermediate time between the passing of the decree and the failure to perform it, Jenkins made an application to Eldredge for his aid and assistance to raise money, and otherwise to complete his enterprise. It was thereupon arranged between Jenkins and Eldredge, that the premises should be conveyed by Deblois to Eldredge; and accordingly the same were conveyed to him by her deed dated 24th of August 1840; and Jenkins afterwards, on the same day, in order to make the second title complete in Eldredge, and freeing "it from the exception contained in Deblois's deed, excepting any clause or demand, made by, through, or on account of Joseph Jenkins, and also excepting any claim or demand arising out of any contract, made by, or with said Jenkins," executed a release to Eldredge, by which he admitted in terms, that he had "no legal or equitable right in or to the same." From that time forward, Eldredge continued to be ostensibly, and so far as the second title was concerned, the sole and exclusive owner of the legal and equitable estate in the premises. Jenkins was subsequently employed superintending the erection of the building. The necessary moneys were advanced or provided by Eldredge, generally upon his own credit, but sometimes, as it should seem, through the aid of the credit of some of Jenkins's relatives. And according to the testimony of Jenkins, Jr. his father not only superintended the building after Eldredge had the title, but actually, when Eldredge ceased to advance funds, provided work and materials for the same, on his own account, to the amount of $3244.16.

Now, pausing at the time when Eldredge agreed to enter into the arrangement with Jenkins, which was in successful progress, if not absolutely and definitively completed before the expiration of the time assigned by the decree for the payment of the money, or the dismissal of the bill, what possible motive could there be for Jenkins to enter into it, unless he was to receive ultimately some fixed and certain benefit from it? He had already embarked a considerable sum of money in the enterprise; he had bestowed his skill, time, and labor upon it; he had not only paid money, but he had entered into collateral contracts respecting it, which were obligatory upon him. If then he was about to part, as between himself and Eldredge (for the question might be very different in respect to the rights of third persons), with all his interest in the premises, how should it happen, that not the slightest remuneration or indemnity was provided for him in the negotiation with Eldredge? Was he to sink all that he had expended of time and money, for the benefit of Eldredge, with nothing left but a barren spes recuperandi, resting upon the mere pleasure, and good will, and generosity of Eldredge? Such a supposition, with reference to an embarrassed man, is somewhat startling, especially when we look at the magnitude of the interest at stake. If there had been any pretence, that Eldredge entered into an agreement only to remunerate Jenkins out of any surplus, in the event of a successful termination of the enterprise, after all other incumbrances and charges were paid for, there might be some ground to say, that Jenkins, from his sanguine temperament, was content to rely solely on that, as a sort of tabula in naufragio. But Eldredge flatly denies any such agreement, and treats the transaction as a surrender of the whole premises to himself, unclogged with the slightest charge for the benefit of Jenkins. And then again, how did it happen that Jenkins was not only to superintend, but that he did actually superintend the erection of the building after the conveyance to Eldredge, without any agreement or understanding (for none is pretended) for any remuneration or compensation for his future labor and services? It is true that the plaintiff did afterwards make a charge for his services, after disputes had arisen between him and Eldredge; but that claim was never allowed. The manuscript account since produced by order of the court contains no allowance of any such compensation. It is impossible not to feel, that there is, under such circumstances, an intrinsic improbability, which casts a shadow over this part of the case. But, then, it is said, that in reality, at the time of the negotiation with Eldredge, the case, as to Jenkins, was hopeless, and that being without credit, he had, and could have, no reasonable ground to believe, that he could find any means of relief beneficial to himself; and that at the time when the deed was with his consent given by Deblois to Eldredge, the decree in the equity suit had become absolute, and all rights of every nature of Jenkins in the premises had become extinguished.

In the first place, it is by no means clear, that, at the time of giving the deed, the rights of Jenkins were extinguished, as the argument supposes. The decree in the equity suit was a mere dismissal of the suit, by the agreement of the parties, and not a decree of dismissal after a hearing upon the merits. A decree is a good bar to a future suit only when the dismissal is upon the merits. It may, under other circumstances, and especially under circumstances like those of the case before the court, constitute a material ground, why the court may not, in its discretion, at the hearing, grant any relief upon a second bill; but it is not pleadable as a flat bar to such a second bill.

Besides; why might not a court of equity, upon such second bill, have directed a sale of the estate, allowing Deblois to become a bidder, and, if the estate should sell for more than the purchase money, to decree the surplus to Jenkins?—Certainly there is no insuperable barrier in the doctrines and practice of a court of equity to prevent such a decree. But assuming it were otherwise, still it would by no means follow, that because Jenkins had no legal or equitable right to the premises, Deblois would have conveyed the premises to Eldredge, except at the solicitation of Jenkins, and with a view to benefit the latter; and even this, if in the nature of a good will, was a surrender on the part of Jenkins, of claims valuable to him, although resting in the mere discretion of Deblois.

In the next place, it is manifest that Jenkins was lulled into security by the negotiation with Eldredge, and was thereby induced to make no other efforts to obtain relief, before the time prescribed by the decree had expired, and that he placed implicit reliance, and unlimited confidence, not only in the ability of Eldredge to relieve him, but also in his strong friendship and earnest desire to aid him, and this may well account for the fact, that he suffered the decretal time to expire, without seeking assistance elsewhere, in the firm persuasion, that Deblois would interpose no objection, if he was successful in obtaining aid from any quarter. In this respect, it is plain, that he was not misled, and Deblois waived her strict rights in favor of Eldredge, at the solicitation of Jenkins. It is equally clear, from all the evidence, and from Eldredge's own acknowledgment in his letter of the 5th of August, 1840, that Eldredge was fully persuaded, that the speculation would be a safe and profitable one; and that he should receive an ample remuneration from it for his advances and services, or, to use his own expressive language to Mr. Phillips, that he should "take a good shave out of it." Then, again, it is said, that the deed of release of Jenkins to Eldredge, of the 24th of August, 1840, already alluded to, demonstrates that Jenkins then claimed no legal or equitable title in the premises, and professed to surrender all claim thereto, so that, from the moment of the execution of that instrument, if not before, Eldredge ceased to be a trustee of Jenkins for any purpose whatsoever. But it appears to me, that the conclusion drawn from this transaction does not reach to the extent suggested. It proves no more than what was the original and admitted intent of the parties, to put into Eldredge's hands the whole legal and equitable title to the premises, so far as respected third persons, so that he might be able to raise money thereon to complete the building, and discharge the incumbrances. It was not only not inconsistent, but in entire harmony, with the case set up by the bill. The legal and equitable title was to be in Eldredge, not only for the purposes above stated, but also to guard the property against any attachments and levies by the creditors of Jenkins. Nay, we find some of the creditors soliciting the conveyance to be made to Eldredge by Deblois, for the very reason that they considered it to be for their interest. The ultimate trust in the premises, therefore, (if any was intended), was designedly to be a trust resting mainly in personal confidence, and dependent upon the good faith of Eldredge, and not to be evidenced by any written acknowledgment, which was accessible to Jenkins. Whether, under such circumstances, it is a trust available in equity, is another question, which will hereafter be considered.

There is one other circumstance, upon which some stress has been laid, which may be noticed in this connexion, to which I confess that, under all the circumstances, I attach very little weight. It is the conversation testified to by Moses Kimball, as having taken place between Jenkins and Eldredge on the 6th of January, 1841.—Kimball's memorandum is in these words: "This day, between 11 and 12 o'clock, a. m., I was present at a conversation between Mr. Eldredge and Colonel Jenkins. Mr. Eldredge requested me to pay attention to what he said. He said, that in a letter received from Col. Jenkins that morning, he, Jenkins, stated that he, Eldredge, stood, in his relation to the estate, in the light of mortgagee, and that he then asked of him (the colonel) whether he retracted what he had said in the letter—after some hesitation, the colonel referred to the letter as stating the matter explicitly, but on being crowded by Mr. E. for a definite answer, he declined to answer either way. Mr. E. then said, that he must cease to be the superintendent of the building. Some other conversation having ensued, Mr. E. asked Jenkins if he wished to deny that the estate belonged to him. Col. J. said no. I consider that your title to it is as good as to the hat on your head. After some further conversation, Mr. Eldredge asked if he was to understand him, Jenkins, to say that he, E., stood in relation to the estate as a mortgagee—Jenkins said no, it would be foolish for me to say so.—Mr. E. then said, that he revoked what he said about superintendency." What is this but the reluctant confession of Jenkins, forced by a stern necessity against his own sense of the truth and justice of the case, as stated in his letter of the same morning, and, as far as the evidence goes, in conformity to what he constantly, if not invariably, maintained as the substance of his arrangement with Eldredge? As a confession, it is worth nothing; as a waiver of rights, previously existing, it is equally insignificant.

Without dwelling further upon these general considerations, I must say, that, upon the fullest survey of the general evidence in its details, as well as in its general struc-

ture, it does appear to me, that it is utterly irreconcilable with any other supposition than the existence of the confidential relation of principal and agent between Jenkins and Eldredge throughout this whole transaction, from its inception to its close. I do not say, that all the statements and circumstances are perfectly reconcilable with each other. There are conflicting and contradictory statements, and opposing testimony. Still it does appear to me, that, taking the mass of the oral evidence, supported as it is to a considerable extent by written evidence, the court can safely arrive at no other conclusion than that, which I have indicated. I am fully aware of the strong denials contained in Eldredge's answer, and of the just weight, which is to be allowed to such an answer. Still it must be weighed against other opposing evidence and circumstances; and I may add, that much which is contained in this answer, inevitably leads to the conclusion, that Eldredge had always present in his mind, that he was not acting alone for his own exclusive interest, but that the interest of Jenkins was also to be consulted and sustained, and was involved in his acts. On the other hand, it is beyond doubt, that Jenkins always considered, that his interest was mainly to be consulted and sustained throughout, and, after all other charges were paid, that the residue of the proceeds of the speculation was to be his. Eldredge could not but know this; and if he concealed from Jenkins, that he had no such intention, but meant to act solely and exclusively for his own interest, such a concealment would, in the contemplation of a court of equity, constitute a meditated fraud upon Jenkins. The letter alluded to in this conversation, although in Eldredge's possession, has not been produced by him. It might throw great light upon the subject.

I will now proceed to suggest some of the reasons, which lead me to maintain, that there was an intentional secret parol trust, behind and beyond, but in concordance with the written documents conveying the title, upon which Jenkins and Eldredge originally acted as the basis of their arrangements, and which was never waived or extinguished.

In the first place, let us see how Eldredge states the matter in another part of his answer, not heretofore referred to. He says, "That he never did agree with the said complainant, that he, this defendant, would make any written declaration or memorandum of any trust or condition, as in the said bill of complaint set forth, or any other declaration, or memorandum, of any trust, or condition, or agreement, whatsoever, touching the premises. And this defendant says, that it was always before, and at the time of, and since the receiving of the said conveyances from the said Deblois by this defendant, expressly declared to the said complainant, and assented to by the said complainant, that nothing whatsoever should be written, even upon the subject of this defendant's intentions and designs aforesaid, and that the reason thereof was also repeatedly stated to the said complainant, that is to say, that this defendant might not, by any such statement, incur any risk of affecting his own absolute title to the said estate and property, even by such a statement of his intentions, which might be misconstrued, inasmuch as he intended to retain the absolute title and disposal thereof, and to insure to himself the power and discretion of doing therewith as he might think right and best, or words to that effect, it being well understood and agreed between the said complainant and this defendant at all times, that nothing was to be done, or agreed, whereby any express, implied or resulting trust in law or equity should or could be created or arise for the benefit of the said complainant, and this defendant denies the making of any expressions to any person whatsoever of any intention or purpose to make any writing whatsoever upon the subject, excepting only, that at some time after the receiving the conveyance from the said Deblois herein mentioned, and when and after the whole title and estate in the said lands were absolutely and unconditionally in the said defendant Joseph Jenkins, Junior, a son of the said complainant, once said to this defendant, that he ought to make some writing, declaring his intentions in regard to said estate, as he might die before the matter was ended, and in that case, his heirs could not know and carry out his intentions, or something to that effect, to which this defendant answered, that he should not do so, and added that it had been expressly declared by him to the said complainant from the beginning, and fully understood, that there was to be no writing whatever, and for the express reason, that this defendant would have his title absolute and unincumbered with any trust or condition whatsoever in law or equity; to which the said son of the said complainant replied, that his request was not, that any paper should be delivered to any one, but simply that this defendant would place such a writing among his own private papers, that in case of his death, his heirs might be able to do with the estate, what he, at his own free will and pleasure, would do, if living, for the benefit of the said complainant and his family, or something to that effect; to which this defendant, the same then seeming to him expedient, replied, that he would make some deed of trust to be placed among his papers to provide for such contingency. And this defendant says, that he intended at that time, and believes he was, from the conversation that was had, clearly understood to intend, by the expression deed of trust, only a paper in writing expressive of his designs and intentions as herein set forth and no other or different

writing. But after said conversation, this defendant, reconsidering the whole matter, thought it inexpedient to make any writing whatsoever, and did not make any such writing, having from the beginning declared his intention to do nothing, which could even by bare possibility be construed as admitting or creating any title to, or interest in, or claim in any way to or upon the said lands and building in the complainant."

Now I would remark, that this statement is in its character somewhat extraordinary. It denies, indeed, that he, Eldredge, ever intended, by any written memorandum, to fetter his complete legal and equitable title in the premises, with any trust; and yet it does admit, that he did tell Jenkins, Jr., that he would make a deed of trust, and place it among his own papers, to provide for the contingency of his death. Why should he do this, if he was not conscious, that, in fact, all the parties in interest understood, that such a trust was intended to be operative; but at the same time it was to be such as would not interfere with the unconditional power to dispose of the premises to third persons? Eldredge admits, that he never did execute any such deed; but he does not pretend, that he ever communicated this change of intention either to the father or the son. Why this concealment? But this statement is directly contradicted, in its most important features, by Jenkins, Jr., in his testimony. Speaking of the negotiation between Jenkins (the father), and Eldredge, he says: "There were a number of interviews at my office for this purpose, and finally my father, in presence of J. W. Jenkins, Junior, and myself, proposed to Eldredge that he should take the title of the estate and mortgage it for the necessary amount, and upon the completion of the building convey it to my father. Eldredge had often said that he could raise the money if he could have the title in his own hands. Eldredge accepted the proposal and agreed to raise the funds necessary to the completion of the building and the payment of Miss Deblois on short time, if not otherwise obtained—then obtain a permanent loan covering all the liabilities of the estate, and deed the estate to my father subject to the incumbrances. My father agreed for this service to secure a handsome compensation to Eldredge by a subsequent mortgage of the estate, and to include in that compensation a mortgage which Eldredge had for about $2000 on a farm in Barre. This Eldredge agreed to distinctly." Again he says: "It was agreed that Eldredge should have as perfect a paper-title as could be made, so that he could raise money on the estate expeditiously, and also that he might not be subjected to any trustee process." And again: "It was agreed that no bond should be given by Eldredge, but that he should make a memorandum or declaration of trust, which he was to keep among his own papers. This agreement was made before Eldredge took the title." But, what bears more precisely on the point under consideration, again he says: "After the deed had been made to Eldredge, I was told by some of my friends that Eldredge talked to them in a manner different from his manner of talking to me with regard to this matter, and they thought my father should be put on his guard. In consequence of these remarks I asked Eldredge the next time that he came into my office if he had written the declaration of trust which had been agreed upon, and which was to be kept by him among his own papers. He replied, that he had not, and that my father had required no bond from him, but had trusted entirely to his life and his honor, and that he would carry out the agreement at all hazards. I said, that it was perfectly apparent, that my father had trusted to his honor, but that it was understood and agreed at the time of the negotiation, that a declaration of trust was to be made, which he might keep among his own papers, so that in the event of his death the very object of the whole negotiation might not be frustrated; he then said he had no objection to making such a declaration, and would do so immediately." Now, the importance of this testimony cannot be overlooked. But it is said, that it is not credible testimony, and various and minute objections, assailing its credibility, have been relied on at the argument. Certainly, standing alone, however credible, it would not be sufficient to impeach or outweigh the answer.

But it does not stand alone. It is confirmed in its leading points, the existence of the trust, by the testimony of Mr. Hilliard, who was the counsel of Jenkins. He says: "I have knowledge of such an agreement; my knowledge was obtained from declarations of Eldredge, and conversations, which I have had with him, and conversations, which I have heard between him, and Jenkins; at the time when this agreement was entered into, Eldredge was in my office every day, and this subject was frequently and freely discussed, and talked over between us; the agreement, as I understand it, was this, that Eldredge should take a conveyance of the estate from Miss Deblois, and that, by a mortgage of the property, together with his own personal security, he should raise a sufficient sum of money to complete the building, and that, after the completion of the building, he should convey the estate to Jenkins, subject to such mortgages as he might have put upon it for the purpose of raising the money, and that he should receive a mortgage subsequent to those last mentioned to secure his own compensation for his services; and that a mortgage of a certain farm in Barre, belonging to Col. Jenkins, which he held at that time for prior indebtedness, should be given up, and that

amount should be secured in addition to this compensation for services by this subsequent mortgage. I hired an office in Brazer's building about the middle of May, 1840, and I was sick and confined to my house about a fortnight after that, so that I was not at my office until about the first of June, and it was soon after that period that these plans were first disclosed to me by Eldredge and Jenkins. I can say confidently, that it was certainly within a month after, that I knew of the arrangement between Eldredge and Jenkins. Eldredge once inquired of me what in my opinion would be the effect of allowing a certain decree of the supreme court in relation to this property to expire; whether in that event, if he should afterwards take a deed from Miss Deblois, it would give him such an absolute, indefeasible title that he would be subjected to no trouble and embarrassment from the creditors of Col. Jenkins; whether I expressed any opinion on that subject or not, I don't remember. I have had many conversations with Mr. Eldredge during that period; he has often stated to me that he held the estate in trust for the benefit of Colonel Jenkins; he has often spoken of it in terms as Col. Jenkins's property; he stated to me that he was acting merely as an agent, and that he meant to be well paid for his services. I recollect his asking me at one time how much I thought he ought to receive for his services; he said he thought the estate would be a fortune to Col. Jenkins; he never said any thing to the effect that he was under no obligations to convey the estate to Col. Jenkins, or that it was all to depend on his free will and pleasure, and nothing to that import." James W. Jenkins, also, who stood in a peculiarly confidential relation to the parties, is equally explicit. He says in his testimony: "During these interviews with Eldredge, he said, that he could get a deed of the estate, if I would furnish him with the means. At one time it was proposed and agreed to, that I should furnish Eldredge with negotiable paper, upon which he might raise $5000, or enough to pay the instalment to Miss Deblois. It was also agreed, that Mr. Eldredge should take a deed of the estate from Miss Deblois, and hold it for the purpose of raising more money to enable Colonel Jenkins to complete the buildings. The paper, which I furnished, was returned to me, as not being known in this market. Mr. Eldredge, at the time that this paper was returned, stated to me, that if I could furnish the colonel with other paper, not too long, and good, that it could be done, no doubt, and advised me to do so, and assured me, that I should be perfectly safe in so doing. Accordingly, the next time, that I came to the city, I met Mr. Eldredge and Colonel Jenkins, and finally before I left I gave Mr. Eldredge other paper, for the purpose of saving the estate to Colonel Jenkins. It was agreed, that this paper should be used as collateral security, for Eldredge to raise the money upon. It was sent back in a few weeks to me. After all other plans for raising the money had fallen through, Mr. Eldredge said, that if the title was in him, he could raise the money to complete the work, but he said all along, that he had no means, in himself, of raising the money in order to get the title. During these negotiations there were frequent meetings between Eldredge, Jenkins and myself, at the office of Hilliard and Jenkins in State street, to talk over the general objects of this business. The agreement there made was, that Mr. Eldredge should take the deed from Deblois, and raise the money to complete the building. Joseph Jenkins, Jr. was generally present at these meetings, and Hilliard sometimes." Again he says: "There was an unqualified bargain for Mr. Eldredge to take the estate without paying any consideration whatever, except for the land, and for the purpose of its being completed for the benefit of Col. Jenkins—of the details by which that agreement was arrived at, I cannot state, as I was not present at all the interviews. I never was present at any interview, when it was arranged, if it ever was arranged, in what manner the estate should be reconveyed to Col. Jenkins." And again: "In the early part of this matter, Mr. Eldredge said, that he would take this property into his hands as desired, and enable the colonel to complete the building, but that he would not be legally bound in the matter, and that they must trust to his life and honor. I never heard any thing said between the parties in the early part of this transaction about the property being sold." There is much more in the testimony of the same witness to the same effect, and it is corroborated in its main bearing by the letter of Eldredge, addressed to him under the date of August 5, 1840, explained by the accompanying circumstances stated in his testimony. Mr. Phillips's testimony, as far as it goes, supports the same conclusion, and shows his understanding, that in taking the deed from Deblois, he was acting as Jenkins's friend, and with a view to benefit his family and creditors, and that the most he expected from his agency was "to take a good shave out of it," (the estate). Mr. Bliss also states: "I have had several conversations, at different times, with Mr. Eldredge, since the conveyance of the estate to him, in which he always refused to give me any legal security on the estate, and also refused to accept Col. Jenkins's order for the amount which he owed me. I always understood from him that he held the estate in trust, not legally, but honorably. I don't know that he used the word 'trust,' but he always gave me to understand, that all he expected was, that he should be paid for his expenditures upon the estate, and also to receive compensation for his services. At first he told me, that he should charge

$5000 for his services, and that afterwards in a proposed settlement with Col. Jenkins, he had agreed to take 3500 dollars. He once offered to convey the estate to me, if I would pay his claim, and get the consent of Col. Jenkins. These conversations took place, I think, on the first half of the year 1841. My impression is very strong, that the offer to convey to me, subject to Jenkins's consent, was made soon after the building was occupied. I cannot undertake to be very confident about the time, but I am very positive as to the fact." The letter of Eldredge to J. W. Jenkins, of May 1, 1841, I cannot but view as showing, that Eldredge, upon the proposal of a reference between himself and the plaintiff of this property, did not treat it as his own sole concern; but that he held it, in fact, upon some honorary understanding, that he was to receive a large compensation for his agency therein. He there says: "The fact is, my friend, that I am resolved to play this game out frankly, fairly and honestly, yielding no right and doing no wrong, and am prepared to make a proper and formal reference when the terms and men are agreed upon, but I shall not swerve an inch from the position that I have taken, viz. that I shall be paid $5000 beside all expenses, or if they do not like that, I will refer the whole matter, and in case I do refer it, shall expect you to appear before the referees as a witness. There is one thing certain, that if that property should ever become fairly mine, the family will be better off than they would be were it in the colonel's hands."

There is, too, a letter, written by the plaintiff to Eldredge, under date of December 16, 1840, which is important, at least to show what was the plaintiff's understanding of his rights in the property, and, if what Jenkins, Jr. states of the occasion of writing it be true, it furnishes very cogent, if not irresistible evidence, that the whole transaction was a mere agency of Eldredge for plaintiff. He says (and it is in answer to a cross interrogatory of Eldredge): "Sometime in May or June, 1839, my father agreed to purchase of Mr. Francis a gore of land at the easterly end of the Deblois land between Bromfield street and Montgomery Place, the consideration for which was to be $200. Shortly after, Mr. Francis called at my office, and told me, that the deed was ready. I knew nothing of the situation of the matter, till after my father had discontinued the work on the building, and had erected on this gore of land the easterly wall to the height of about thirty feet. I understood, when Eldredge took the deed, that this consideration money had not been paid to Mr. Francis, and that he declined giving the deed upon the terms agreed upon, but required that he should have $250, and that the chimneys of his dwelling-house should be carried up to the height of the walls to be erected by my father. I understood also, afterwards, that Francis had raised his demand to $1000. Eldredge then came to me and told me these facts, and that he wished to secure the deed of that gore of land, and that he intended to pay this $1000, but that he wished my father would write him a letter protesting strongly against such a bargain, in order, that the whole responsibility should be thrown upon Eldredge, so that when the estate should be conveyed to my father, he might recover from Francis the difference between $1000 and the original consideration. My father wrote such a letter, a copy of which I annex to this deposition (letter marked A). The letter was delivered by me to Eldredge in person." What says the letter? "Now, sir, you are aware that the ultimate interest in this matter and in the building, which I am erecting on the Deblois estate, is mine. The property is mine virtually, subject only to the payment of such amount as you shall have paid and incurred on that account when you shall convey the property to me: Therefore I do hereby protest against your compliance with the last proposition of said Francis, viz., to pay him $1000—or indeed any sum above the $250—which you originally stipulated to pay him. I shall hold Mr. Francis to the bargain which he made with me last year, notwithstanding any transactions you may have with him—unless perhaps I might submit to the proposition to which you assented and upon which we have acted in the erection of said building. You will understand that whatever you pay the said Francis for said gore of land above the $250, which you have agreed to pay, you must do at your own risk and not with any right to charge the same to me in the adjustment of the affairs of said building." No written reply ever appears to have been made to this letter; and Eldredge in his answer dryly admits, that the protest was made, but that he told the plaintiff, that it was a matter, which concerned himself only, and that he should pay Francis the $1000.

Another not unimportant circumstance, which, I agree, might, standing alone, admit of being deemed a mere offer to reconvey, as owner, independent of any agency, requires to be noticed, because it stands well with the supposition of an agency, although not decisive of it. It is the negotiation and rendering of an account of expenditures on the building by Eldredge to the plaintiff, of which J. W. Jenkins gives the following account. "I was present at an interview between Colonel Jenkins and Eldredge at the Merchants' Bank, sometime in the summer of 1841, which was the interview, which was brought about by me. Mr. Eldredge exhibited in figures and memorandums the amount of the expenditures on the building, and the colonel's indebtment to him. Colonel Jenkins objected to the amount, as Mr. Eldredge had included in it a charge of $5000 for his services, which was not stated as

commissions, and had also included in it a further charge of some 3500 or 3600 dollars, for brokerage. They talked a long time about these charges, Colonel Jenkins offering one thousand dollars, and Eldredge claiming five thousand dollars; and finally it was agreed, that Mr. Eldredge should be paid 3500 dollars. This was the time before spoken of, when it was agreed, that a mortgage on the premises should be given for this charge and other indebtedness of Jenkins to Eldredge. The charge of brokerage was assented to by Mr. Jenkins, if Mr. Eldredge said that he had paid it. After the interview spoken of in the last answer, and after Colonel Jenkins had obtained an injunction against Mr. Eldredge to prevent him from selling the estate, I had an interview with Mr. Eldredge and Joseph Jenkins, Jr. at the Museum Building, at which Mr. Eldredge agreed, that he would do all he could to aid the colonel in getting money to redeem the estate out of his hands, by representing it to capitalists as good security. Mr. Eldredge has, since that interview, told me, that he never believed, that Colonel Jenkins would be able to raise the money. Eldredge, afterwards, I think, got the injunction taken off, and afterwards advertised the estate, as I believe, and told me at that time, that if Colonel Jenkins made another attempt to stop the sale, he would put the deed in his pocket and keep it there, and also, that if he had been allowed to sell it, he should have made over the surplus proceeds for the benefit of Colonel Jenkins's family, and that it would have been better for them to have had it sold."

There is yet another circumstance, that demonstrates, that the plaintiff still retained an interest in the premises, notwithstanding the conveyance to Eldredge; and that is, his procuring securities from J. W. Jenkins, his relative, to aid in the operations of Eldredge. This is not denied; and yet it seems to me wholly irreconcilable with the notion, that, immediately upon that conveyance, the plaintiff was cut adrift from all interest and connexion with the property. These securities were ultimately returned; but what use was made of them in the intermediate time is not satisfactorily explained, nor perhaps is it very material; for it is manifest, that they were received by Eldredge to aid his operations, and were procured by the solicitations of the plaintiff.

These are some of the main circumstances relied on in the evidence to establish the case made by the bill, and denied by the answer of Eldredge. The question is, whether they do not overcome the denials of the answer? The evidence has been assailed with great ability, and sifted with minute and scrupulous diligence, to shake its credibility, and to impugn the conclusions to be drawn from it. There is very little direct evidence in support of the answer, as indeed, from the nature of the case, little could be expected. The release of the plaintiff, I have already adverted to. It is not only not inconsistent with the trusts set up by the bill, but it was manifestly indispensable to be made, in order to induce capitalists to advance the funds necessary to complete the building. The conversation stated by Moses Kimball, has been also adverted to; and it is, as I have already suggested, a confession coming from the plaintiff by an inexorable necessity. The bill in equity, filed by the plaintiff against Eldredge in the state court, in September, 1841, and the answer thereto, and the stipulations agreed between the parties upon that occasion, do not seem to me, so far as the present question is concerned, to affect the posture of the case. They do not materially shift the ground of the present bill. Nor do the circumstances of the reference between Eldredge and David Kimball, or the statements of Mr. Fiske, throw any new and important lights on the matter.

I do not go over the particulars, in respect to the credibility of the testimony, which has been so powerfully pressed, and the improbabilities of the asserted trust, so ingeniously insisted on. I can only say, that, after weighing the whole matter, my judgment is, that the trust, such as it is, is sufficiently established by the evidence to overcome the denials of the answer. But here we are met by an objection—that much of the evidence stands upon confessions and statements, made by Eldredge, and testified to by the witnesses, which are not charged in the bill, so as to let them in as proper evidence. And in support of this objection, among other cases, Hughes v. Garner, 2 Younge & C. Exch. 328; Graham v. Oliver, 3 Beav. 124; Earle v. Pickin, 1 Russ. & M. 547; and especially Attwood v. Small, 6 Clarke & F. 360,—are cited. I had occasion in the case of Smith v. Burnham [Case No. 13,018] fully to consider this whole matter; and I remain of the opinion then expressed, that there is no difference, and ought to be no difference, in cases of this sort, between the rules of a court of law, and those of a court of equity, as to the admission of such evidence. Its admissibility may, however, be properly subject, under particular circumstances, to this qualification, (which Lord Cottenham is said to have supported), that if one party should keep back evidence, which the other might explain, and thereby take him by surprise, the court will give no effect to such evidence, without first giving the party, to be affected by it, an opportunity of controverting it. This course may be a fit one in cases, where, otherwise, gross injustice may be done. But I consider it as a matter resting in the sound discretion of the court, and not strictly a rule of evidence. But whatever may be the rule of evidence in England on this point, it is not so in America; and our practice in equity causes, where the evidence is generally open to both parties, rarely can justify, if, indeed, it ever

should require, the introduction of such a rule. Mr. Vice Chancellor Wigram, in Malcolm v. Scott, 3 Hare, 39, 63, seems to me to have viewed the rule very much under the same aspect as I do. See, also, Story, Eq. Pl. (3d Ed., 1844) § 265a, and note. But, at all events, the practice is entirely settled in this court, and I, for one, feel not the slightest inclination to depart from it, be the rule in England as it may be.

The result, therefore, at which my mind has arrived, is this: Before the time had expired under the agreement with Deblois, the plaintiff entered into an agreement with Eldredge, which was so far completed and fixed, as that each party acted upon it as if definitively settled, that he should become and act as the agent of the plaintiff in the premises; that Deblois should convey the legal title to Eldredge, and that in his favor Jenkins should surrender his equitable title to the same against Deblois, and should consent to her conveyance to Eldredge. That at this time it was known to all the parties, that the plaintiff had expended a large sum upon the premises, amounting to about $15,000. That the object of the arrangement with Eldredge was to clothe him with the whole legal and equitable title in the premises, in order to enable him to raise funds to complete the building, to discharge the debts due to the creditors thereon, and to secure to himself an ample compensation, as agent, for his services and risks in the undertaking. That after he was remunerated for these expenses and charges, Eldredge was to reconvey the premises to the plaintiff, and that, as between them, the same were to be deemed held upon a parol trust, obligatory and conclusive between the parties. That, upon the faith of this arrangement, the conveyance was made by Deblois to Eldredge, and the release or order by the plaintiff, to Eldredge. That the whole of the subsequent acts of the plaintiff in superintending the building, and in attending to the concerns thereof, were done by him, as the ultimate beneficial owner thereof, and that Eldredge was but a compensated agent, and not the true owner. That the subsequent disputes and controversies between the plaintiff and Eldredge have not changed or extinguished the original state of things under this arrangement. That, whatever anomalies appear in the acts and observations of the parties, at different times, were the result of this ambiguous character of the arrangement, looking one way, so far as documents spoke, and designed by the parties to have, as between themselves, a very different operation; and that the subsequent struggles were just such as might be presumed to arise from the diminished confidence and credit which each of the parties placed in the integrity and good faith of the other.

Such, it appears to me, is the true character of the present case, as it may be gathered from the whole evidence in the case. It is, under this aspect, a case of trust, resulting from agency, resting in parol, and intended between the parties to depend upon honorary obligations; but still to be strictly fulfilled. In this view of the case, is it a trust, which a court of equity will enforce, or is it one, which merely rests in the good will and pleasure of Eldredge to perform or not, and is, otherwise, incapable of being executed? It strikes me, that it is a trust of a somewhat novel and extraordinary character, and not exactly arranging itself under any description of trusts, which are usually discussed in the elementary works, or judicial authorities. It possesses mixed ingredients, and has peculiarities, which never before have fallen under my observation. The main ground of objection against it is, that it falls within the category of the statute of frauds. It is essentially a trust, by a parol agreement, respecting an interest in lands.

It is contended on the part of the plaintiff that the case is taken out of the statute, (1) because it is a case of a resulting trust; (2) because it is a case of agency, and fully established; (3) because Eldredge has been guilty of fraud in his conduct and operations; (4) because it is a case for specific performance, the plaintiff having partly performed his part of the agreement, and not being now in a condition to be reinstated in all his former rights. Of course, all these grounds are contested on the other side. My own opinion is, that the case is not to be considered as one standing purely or singly upon either of these grounds, but as embracing ingredients of all of them. Let us look at the case under these several aspects.

In the first place, as to the resulting trust. I agree to the argument, that a resulting trust can only properly arise, by the consent of the parties. But the question here is, whether the circumstances do not demonstrate such a case of consent. The main objection relied on against it seems to be, that the agreement was to vest the whole legal and equitable title in Eldredge. Certainly it was so; but that was not the whole agreement. The agreement was, that it should vest in Eldredge sub modo, so that he might execute all the objects, and raise funds to complete the building. To do this, and to enable him to give a perfect title to capitalists for their advances, he was to have the whole legal and equitable title in himself; and as against such persons making advances, it is clear, that the plaintiff had no rights whatsoever. But as between himself and Eldredge, the conveyance was a mere security for the advances and expenditures of Eldredge, and a compensation for his services; and then the residue, after the discharge of these claims, was for the plaintiff. At the time, when the agreement with Eldredge was made, the plaintiff had a clear equity in the premises

against Deblois. He suffered it to expire under the decree, relying upon the agreement of Eldredge, and the willingness of Deblois,—considering the advances he had made, and services he had performed on the estate,—not to take any advantage of it; a confidence which was, in respect to Deblois, well founded and established in the event. All the parties treated it, at that time, as a case, where the plaintiff was the real beneficiary, and entitled, if not to an equitable title, strictly so called, yet as entitled to a sort of prescriptive right. Now I am not called upon to say, that at the time when Deblois, in consequence of the arrangements with Eldredge, conveyed the premises to him, the plaintiff had entirely lost his equity in the premises, as against Deblois. I entertain great doubts, whether, looking to all the circumstances, it was so. But what I do say is, that, at that very time, the plaintiff had expended a large sum of money on the premises; that Deblois never could have conveyed the same to Eldredge, without the plaintiff's express solicitation and consent; and that Eldredge was in no just sense a purchaser for his own sole account, giving a full value for the premises, but bought with a full knowledge of the enhanced value by the expenditures of the plaintiff, and for the purpose of giving the benefit of such expenditures as a resulting trust between the plaintiff and himself in the premises. In this respect, it approaches very nearly to the case of a joint purchase, where each purchaser is to have an interest in the purchase, in proportion to his advances. Now in such cases, parol evidence is clearly admissible to establish the trust, as well as to rebut, control, or vary it. It appears to me, that it may well be treated as a mixed case; quoad the plaintiff, as a resulting trust pro tanto,—and quoad Eldredge, as a trust pro tanto for his liabilities, expenditures, and compensation. In the view which I take of the matter, it was a resulting trust ab initio, in the intention of both parties, from the moment of the agreement and conveyance, and not a subsequent understanding. But here we are met with the objection, that no parol trust can be set up in opposition to the written documents; and that the conveyance of Deblois and the release of the plaintiff are inconsistent with any such trust. The answer has been already, in fact, given to this objection, by showing, that the trust is not inconsistent with the documents, or purposes for which they were given; but is in harmony with the res gestae. But the court is pressed with authorities on this point, which certainly are of a cogent nature. One of them is Bartlett v. Pickersgill, 1 Eden, 515, 1 Cox, 15, 4 East, 577, note. But that is distinguishable as to the present point, although bearing on the point of agency, for all the consideration did not move from Eldredge for this purchase, in my view of the evidence, as it did in that case from the agent. The case of Leman v. Whitley, 4 Russ. 423, is far more difficult to answer. There the parol evidence to raise a trust was rejected, that evidence being offered to show, that a son conveyed to his father nominally as a purchaser for £400, but really as a trustee, in order that the father, who was in better credit than the son, might raise money upon it by way of mortgage for the benefit of the son; and the master of the rolls (Sir John Leach) held, that the case was within the statute of frauds, and that it must upon the documents be treated as a purchase. That case is not quatuor pedibus with the present. But still it has a very strong, not to say stern bearing on it. I confess, that I have never felt satisfied with that decision, and should have great difficulty in following it, even if there were no authorities, which seemed fairly to present grounds for doubt. See 2 Story, Eq. Jur. § 1199, note. Lees v. Nuttall, 1 Russ. & M. 53, which will presently be cited for another purpose, looks the other way. Carter v. Palmer, 11 Bligh, N. R. 397, 418, 419, in the house of lords, although distinguishable in its circumstances, does certainly establish a principle, letting in parol evidence to establish a trust in a case of agency. But a very strong case is Morris v. Nixon, 1 How. [42 U. S.] 118, where a trust was actually enforced upon parol evidence by the supreme court of the United States, in contradiction to the answer of the defendant, and to the conveyance and documents passed between the parties; and in many particulars, it approaches very near to the present, for it grew out of an agency as to the premises. Cripps v. Jee, 4 Brown, Ch. 472, is equally strong to the same purpose. There was, indeed, slight written evidence leading to the conclusion, that there was a trust in that case, contrary to the written evidence (as there is in the present case); but the main evidence to show, that the conveyance, although absolute in form, was, in fact, a conveyance in trust to discharge incumbrances, with a resulting trust of the surplus for the grantor, was parol evidence; and upon the parol evidence the court established the trust. Indeed, the transaction in that case is in many respects the counterpart of the present.

In the next place, as to the agency. It appears to me, that here a confidential relation of principal and agent did exist; and that being once shown, it disables the party from insisting upon the objection, that the trust is void, as being by parol. The very confidential relation of principal and agent has been treated, as for this purpose, a case sui generis. It is deemed a fraud for an agent to avail himself of his confidential relation to drive a bargain, or create an interest adverse to that of his principal in the transaction; and that fraud creates a trust, even where the agency itself may be, nay,

must be proved only by parol. Bartlett v. Pickersgill, 1 Eden, 515, 1 Cox, 15, 4 East, 577, note, and Leman v. Whitley, 4 Russ. 423, are, I admit, against this doctrine,—not wholly, but to a limited extent; for the latter case excludes a case of fraud. But then Lees v. Nuttall, 1 Russ. & M. 53, expressly decides, that if an agent employed to purchase an estate, purchase for himself and on his own account, he becomes a trustee for the principal. In that case the whole agency and trust was made out by parol, and the purchase was from a third person. Carter v. Palmer, 11 Bligh, N. R. 397, 418, 419, goes the full length of the same proposition.

In the next place, as to the asserted fraud. If, as the argument of the plaintiff supposes, Eldredge originally engaged in the undertaking with a meditated design to mislead the confidence of the plaintiff, and, by practising upon his credulity, and want of caution, to get the title to the property into his own hands, and then to convert it into the means of oppressively using it for his own advantage and interest, I should have no doubt, that the case would be out of the reach of the statute of frauds; for the rule in equity always has been, that the statute is not to be allowed as a protection of fraud, or as the means of seducing the unwary into false confidence, whereby their intentions are thwarted, or their interests are betrayed. There are many authorities in the books turning directly upon this point. See cases cited in 1 Story, Eq. Jur. §§ 252, 256, 768, 1265. In Montacute v. Maxwell 1 P. Wms. 618, 620, which was a bill for the execution of a parol agreement for a settlement upon the wife, of her property for her separate use, the statute of frauds being set up by a plea, that it was an agreement in consideration of marriage, which the statute expressly required to be in writing, and signed by the party, the lord chancellor (Parker) said: "In cases of fraud, equity would relieve even against the words of the statute; but where there is no fraud, only relying upon the honor, word, or promise of the defendant, the statute making those promises void, equity will not interfere." The case is reported in several other books. Finch, Prec. 526; 1 Eq. Cas. Abr. 19, pl. 4; 1 Strange, 236. By the report in 1 Strange, 236, it appears, that although the plea was, at first, allowed, yet upon the plaintiff's amending her bill, alleging some other circumstances resting mainly in parol, the plea was ordered to stand for an answer. The case itself seems originally to have stood upon a peculiar ground, that marriage is not a part performance to take the case out of the statute; contrary to the common rule in other cases within the statute; and has been so understood by subsequent judges. See Dundas v. Dutens, 1 Ves. Jr. 196, 199, 2 Cox, 235; Redding v. Wilkes, 3 Brown, Ch. 400, 401; Taylor v. Beech. 1 Ves. Sr. 297, 298. In its general language, the case affirms the doctrine, that fraud takes the case out of the statute, even in cases of agreements in consideration of marriage. The other language, that it is otherwise where there is no fraud, but reliance is solely placed upon the honor, word, or promise of the party, must be limited to cases of marriage; and certainly is inapplicable to cases, where there has been a part performance or execution of the agreement on the other side. Indeed, the whole doctrine, even in relation to agreements on marriage, does not stand upon any clear and satisfactory ground; for if a man promises, upon his marriage, to make a settlement upon his intended wife, and she is, by a fatal confidence in his good faith and integrity, induced to celebrate the marriage before the settlement is executed, and he designedly misleads her, not intending at the time to perform his agreement—it seems to me as arrant a fraud as could be perpetrated upon an innocent and unsuspecting woman. I doubt the whole foundation of the doctrine, as not distinguishable from other cases, which courts of equity are accustomed to extract from the grasp of the statute of frauds. It is not, however, necessary to consider, what should be the true rule in such a case; the present is not one of that nature; but stands upon very different grounds. I think, moreover, that there is one ingredient in the present case, which gives it a marked character, which is often relied on in cases of agreements on marriage, that Eldredge did agree to reduce the trust to writing, and to keep a private memorandum thereof in his own possession, as evidence, in case of his death or other accident. I do not accede to the statement, that this was a mere subsequent promise, long after the execution of the conveyances, as his answer imports; but it was a part of his original agreement, and upon the faith of which the arrangement was completed. He never did comply with that part of the agreement. He admits, that he never made any such memorandum. If he had made one, it might have swept away the whole of his present defence. I should not incline, however, to impute to Eldredge any such original premeditated intention of fraud as the argument of the plaintiff supposes, unless driven to it by the most cogent circumstances of necessity. And it does not seem to me necessary, in this case, to go to such a length. In my judgment, the result is the same, although the original design of Eldredge was perfectly fair, and honorable, if he has since deviated from his duty, and attempted to absolve himself from the obligations of the trust, such as he knew the plaintiff believed it to be, and constantly acted upon; because, in point of law, it would be a breach of trust, involving a constructive fraud, such as a court of equity ought to relieve. Mr. Chancellor Kent, in his excellent Commentaries (volume 4, 5th Ed., p. 143), has

laid down a doctrine broad enough to cover the present case. He says: "A deed absolute upon the face of it, and though registered as a deed, will be valid and effectual as a mortgage as between the parties, if it was intended by them to be merely a security for a debt. And this would be the case, though the defeasance was by an agreement resting in parol; for parol evidence is admissible to show, that an absolute deed was intended as a mortgage, and that the defeasance had been omitted or destroyed by fraud or mistake." In the case of Taylor v. Luther [Case No. 13,796], I had occasion to carry the doctrine one step farther, and to say, that "it is the same, if it be omitted by design, upon mutual confidence between the parties; for the violation of such an agreement would be a fraud of the most flagrant kind, originating in an open breach of trust, against conscience, and justice." And this is fully supported by the case of Morris v. Nixon, 1 How. [42 U. S.] 118.

In the next place, as to the ground of a part performance on the part of the plaintiff. From what has been already suggested, there seems to me strong ground to support this suggestion. The plaintiff did, at the time of the conveyance to Eldredge, surrender up his present rights, or just expectations, under the contract with Deblois; he suffered his equity to expire, and he agreed to give up to Eldredge all claims, which he might have to the premises; and consented to a direct conveyance thereof to Eldredge. He did more; he surrendered up all remuneration for his past advances and services; and also all remuneration for his future services, except so far, as ultimately, after satisfying all other claims, there might remain a surplus of value of the property to indemnify him. It has been suggested, that he had, at the time, no claim upon Deblois for those advances, or services, or improvement of the property. I doubt, if, in equity, that doctrine is maintainable, if the value in the hands of Deblois had been greatly enhanced thereby. But upon this, to which allusion has been before made, I do not dwell. But I do put it, that none of these acts would have been done; and, above all, the release to Eldredge by the plaintiff would never have been executed, but upon the faith, that the trust was to exist for the plaintiff's benefit, and the release was a part execution of the agreement between him and Eldredge. And here I cannot but remark, that the very exception in the deed of Deblois to Eldredge, (a most fit and proper exception, under the circumstances, and upon which the release was designed to operate) "excepting any claim or demand made by, through, or on account of Joseph Jenkins, and also excepting any claim or demand, arising out of any contract made by or with said Jenkins,"—shows clearly, that all the parties understood, that Jenkins then had or claimed some right or title in the premises, and that the extinguishment of it was essential to the security of purchasers. So that, upon the ground of part performance, there is much in the case to take the case out of the reach of the statute. In concluding my remarks on this head, I wish to add, that my opinion has proceeded upon the ground, that there is no substantial difference between the statute of frauds of Massachusetts, either under the act of 1783, c. 37, § 3, or the Revised Statutes of 1835, c. 59, § 30, and the statute of 29 Car. II. c. 3, on the subject of trusts; and such is the conclusion, to which I have arrived, upon the examination of these statutes.

It remains for me to notice several other objections, which have been pressed upon the attention of the court. In the first place, the lapse of time, and the omission of Jenkins to institute the present suit at an earlier period. Taking all the circumstances of the case, there does not appear to me to be any ground whatsoever for this objection. The whole controversy has been continually kept alive by a constant course of adverse operations or claims. Then, again, it is said, that the plaintiff has never, up to the time of the commencement of the present suit, been able to comply with the terms of the agreement, as he states it, from his total want of means and credit, to discharge the charges and incumbrances thereon. This is probably true. But still it furnishes no ground, upon which a court of equity can say, that his rights are extinguished, although it might furnish a ground, why a court of equity, upon the application of Eldredge, might be called upon to interfere to foreclose his rights, or to order a sale of the property, to discharge the charges and incumbrances thereon; if not done within a reasonable time.

In the next place, the proceedings in the bill in equity of Jenkins v. Eldredge [unreported], filed in the supreme court of the state in September, 1841, is relied on as a bar to the present suit. There was a stipulation in that case, that unless the plaintiff should, within sixty days from the 22nd of November, 1841, fulfil all the conditions stated therein, his bill should be dismissed with costs for the defendant (Eldredge.) The conditions were not complied with, and accordingly, on the 24th of January, 1842, the bill was dismissed. Now it is difficult to perceive how the dismissal of that suit, under all the circumstances, can be held as a strict technical bar to the present. It was not a dismissal after any hearing upon the merits; the stipulation was signed by Jenkins alone, and was not mutual in its operation. It contains no agreement, that the dismissal shall be final, as upon the merits of the matters contained in the bill. There is, also, much reason to suppose from the decision in the case Gould v. Gould, 5 Metc. (Mass.) 274, that the supreme court of the state would, upon a hearing, have held the

case not to be within its jurisdiction, as embracing matters of constructive trust and fraud. But upon this, it is not necessary to express any definitive opinion, since the decree does not purport to be a decree upon the merits; and unless it were so, or the parties expressly agreed to give it that effect, it would not be a bar. The only possible manner, in which it can be permitted to bear upon the present case, would be as a reason addressed to the discretion of the court, why, after such shifting and protracted litigation, it should not interfere, and prolong the controversy. But there are circumstances in the case, which would prevent the court, as a court of equity, from pressing severely upon the plaintiff. He was a broken down man,—broken in credit, and driven, if one may so say, to desperate expedients, to seize upon any plank in the shipwreck of his hopes. Eldredge, too, it seems, had promised to aid him in his endeavors to perform the stipulation; but so far from keeping his promises on this head, if the evidence is believed, he seriously obstructed him in his efforts to obtain pecuniary aid.

In the next place, as to the pendency of the bill in equity, of Bliss v. Jenkins [unreported], in the state court, before and at the time when the present suit was brought; it appears to me in nowise to amount to a bar, in any just sense. The parties are not the same; the bills have different objects; different equities are involved in them; and the relief prayed for proceeds upon different grounds, and must, or may, involve different decrees. Moor v. Welsh Copper Co., 1 Eq. Cas. Abr. 39. The only case apparently bearing on the point is entirely distinguishable in its character; for the plaintiff in the first suit, after the suit was brought for certain stock, and while it was pending, had sold a part of the shares of the stock in controversy to the plaintiff in the second suit, who brought the latter suit against the same defendant, to enforce his claim to the same shares; and it was to this latter suit that the plea was put in. The plea was held bad, because not well pleaded in its structure, though the court thought it might, if well pleaded, have been sustained as a bar to the second suit. Story, Eq. Pl. §§ 737, 738. I see no reason to be dissatisfied with this decision. It proceeded upon the plain ground, that a plaintiff should not, any more than a defendant, be allowed pendente lite to create a new interest in the suit, which should displace the rights of the defendant. It does not appear that Jenkins has ever appeared to answer in the suit of Bliss, and, indeed, Eldredge, in his answer, says, that he knoweth not, that he has appeared. The injunction granted in that suit, is against Eldredge only; and for aught that appears, Jenkins is not at all bound by that suit; and the mere fact, that Bliss has brought a suit against him, claiming an adverse interest, does not compel Jenkins to abandon a suit brought to enforce his own rights against Eldredge. What may hereafter be fit and proper to be done touching the suit of Bliss, in order to protect his interest, and to save Eldredge from a double responsibility, is a matter which may, in a further stage of the present suit, require the consideration of the court. At present, I do not intermeddle with the inquiry.

There are many other circumstances in the case, upon which the parties have relied, and which might furnish matter for comment, if this opinion had not been protracted to an unusual length. It cannot, however, be necessary to dwell on them; for they do not materially change the complexion of those considerations, which have been already suggested.

In respect to the case of the defendant, Kimball, the whole merits turn upon this, whether he is a bonâ fide purchaser for a valuable consideration, without notice. I am clearly of opinion that he is not such a purchaser, and, therefore, he must share the fate of Eldredge in respect to the bill. If he had not full notice of the actual state of the title, and the claim of the plaintiff to the premises, at the time of his purchase,—which I very much incline to think he had,—he had sufficient notice of the claim and controversy, to be put upon inquiry; and, in a court of equity, no purchaser is at liberty to shut his eyes, and to remain voluntarily in ignorance of facts within his reach, and then claim protection as an innocent purchaser. Even his own answer leaves him with strong presumption, that he was content to purchase with all the infirmities which might attach to the title, and to take his chance of success in common with Eldredge.

These are all the remarks which I deem necessary to make in the case. I have deliberated upon it with much solicitude and care; and the parties have now the result of my best judgment. That judgment, however, is not, I have the consolation to know, final; and the supreme court, upon an appeal, can correct any errors into which I may have fallen. This is the last case which, if I could have had my choice, I should ever have desired to have entertained in this court. It is, at every turn, surrounded with difficulties and obscurities, from which I would have gladly sought deliverance. But courts of justice must act upon cases, as the parties choose to present them, and their duty is not to shrink from uninviting labors, but to survey, and, if practicable, to master the intricacies. "Hic labor extremus, longarum haec meta viarum." I shall, therefore, declare, that the plaintiff is entitled to relief, according to his bill, upon the ground of the defendant, Eldredge, being an agent and trustee of the plaintiff in the premises; and I shall refer it to a master, to ascertain and report to the court, what is due to Eldredge for his advances, disbursements, expenditures, and compensation in the premises. The mas-

ter is to be at liberty to examine both parties upon oath, as to any matters within the scope of the inquiries before him, and to require the production of all vouchers and documents in the possession of either of them, to aid him in the proper inquiries. I shall reserve all other orders in the premises until the coming in of the master's report.

[See Cases Nos. 7,267–7,269.]

## Case No. 7,267.

JENKINS v. ELDREDGE et al.

[3 Story, 299.] [1]

Circuit Court, D. Massachusetts. May Term, 1845.

BILL OF REVIEW — WHEN REHEARINGS ALLOWED —EVIDENCE ON REHEARING—NEW TESTIMONY— SUPPLEMENTAL BILL TO ADMIT NEW EVIDENCE —WHEN GRANTED.

1. A bill in the nature of a bill of review lies only after a final decree, and not upon an interlocutory decree.

[Cited in American Diamond Rock Boring Co. v. Sheldon, 1 Fed. 870.]

2. Rehearings in equity are only allowed in this court where some plain omission or mistake has been made, or where something material to the decree is brought to the notice of the court which had been before overlooked.

[Cited in Emerson v. Davies, Case No. 4,437; Tufts v. Tufts, Id. 14,232; Steines v. Franklin Co., 14 Wall. (81 U. S.) 22.]

[Cited in First Nat. Bank v. Ashmead (Fla.) 2 South. 666; Ex parte Hayès (Ala.) 9 South. 157; Warner v. Warner, 31 N. J. Eq. 552; Canerdy v. Baker, 55 Vt. 580.]

3. Where the petition prayed for leave to file a supplemental bill to bring forward new evidence, and for a rehearing in the cause when such supplemental bill should be ready, it was *held*, that the new evidence could not be brought forward by a mere order on the petition, but could only be admitted in a supplemental bill, where testimony could be taken on both sides.

[Cited in Reeves v. Keystone Bridge Co., Case No. 11,661; Giant Powder Co. v. California Vigorit Powder Co., 5 Fed. 203; Gillette v. Bate Refrigerating Co., 12 Fed. 110.]

4. On a rehearing, no evidence is admissible but that which was used in the case at the original hearing, or was taken, and might then have been used. But where there is a document, which, by mistake, has either not been proved, or not been properly proved, leave will be granted under special circumstances to exhibit an interrogatory for that purpose.

5. The same doctrine also applies to cases where there is a petition for leave to file a supplemental bill to bring forward new evidence.

6. The doctrine of Baker v. Whiting [Case No. 786] affirmed.

7. Witnesses, who have been already examined in a cause, cannot be again examined by a master without a special order of the court, and then only in respect to facts not before testified to by them, and not then in issue.

8. New oral testimony, tending merely to corroborate evidence on the one side or to contradict evidence on the other, on the points in issue, is not a sufficient foundation for a supplemental bill.

[Cited in Blandy v. Griffith, Case No. 1,530.]

[Cited in Ketchum v. Breed, 66 Wis. 98, 26 N. W. 277.]

9. No new evidence is a sufficient foundation for a supplemental bill, unless it be of such a nature, that it would, if unanswered, require a reversal of the decree.

[Cited in Irwin v. Meyrose, 7 Fed. 536.]

[Cited in Crews v. Richards, 13 Pac. 69.]

10. After an interlocutory decree, a supplemental bill to admit new evidence is never granted, where the party might, by due diligence, have introduced such evidence originally in the cause, or where he had full means of knowledge within his reach.

[Cited in Blandy v. Griffith, Case No. 1,530; Colgate v. Western Union Tel. Co., 19 Fed. 829.]

[Cited in Ketchum v. Breed, 66 Wis. 98, 26 N. W. 277.]

11. Where the new evidence offered to support a supplemental bill was, 1st, to establish that the date of the agreement between the plaintiff and the defendant was after the time fixed in the interlocutory decree in the suit between the plaintiff and Deblois; 2nd, To impeach some of the plaintiff's witnesses; 3rd, to establish that the decree was not by consent, but in adversum; 4th, that the value of the original property was far below what it was estimated; it was *held*, that as all of these points were in issue in the original cause, and were elaborately argued, and as the evidence was then within the reach of the defendant, and might, by ordinary diligence, have been produced, and also as they would not materially influence the opinion of the court if they were established, that they were not a sufficient foundation for a supplemental bill.

[Cited in Pinch v. Anthony, 92 Mass. 474.]

12. Under the circumstances of the case, the dismissal of the bill in equity by the plaintiff against Deblois was not on the merits, and could only have been justified by the consent of the parties—and was therefore no bar to the present suit; but, had it been without consent, nevertheless, as it was not on the merits, it was no bar.

[Cited in Edgar v. Buck, 65 Mich. 358, 32 N. W. 645.]

13. Where an attempt was made to overturn the testimony of one of the plaintiff's witnesses by showing, that his testimony before the master contradicted the statements in his original examination, it was *held*, that, as his examination before the master as to matters previously testified to by him, without a special order from the court, was improper, it could not be admitted.

14. The defendant should pay all ordinary costs.

The master having made his report in this case, in pursuance of the former interlocutory decree of the court, upon the matters referred to him [Case No. 7,266], certain exceptions were taken to the report. But before the hearing of the case upon the exceptions, the defendant, Eldredge, filed a petition to the court of great length, and extending over about 150 pages. The prayer of the petition was as follows: "Wherefore the said Eldredge, feeling himself greatly aggrieved by the said interlocutory decree of this honorable court; and perceiving, that a final decree in pursuance thereof, and of the master's report in said cause, will not only deprive the said Eldredge of all profit and compensation upon this said undertaking, but even expose him to a ruinous loss, both of property and reputation, and believing, that the said interlocutory decree was found-

[1] [Reported by William W. Story, Esq.]

ed in an entire misapprehension of the real facts of the case, caused by obscurity and imperfections in the evidence, without fault on his part, and especially by the demonstrable errors and falsehoods of the said testimony of the principal witnesses of the complainant, in respect of the time when, and the terms upon which, any agreement whatsoever was first made between him and the complainant, relative to his becoming the purchaser of the said estate, and otherwise as herein above set forth, prays this honorable court for a rehearing of the said cause; and also, that he may have leave to file a bill, in the nature of a bill of review, for the purpose of bringing before the court, in due form, the newly discovered evidence aforesaid, and evidence of the facts above stated, to which no testimony was taken at the former hearings, tending to elucidate the truth of the case, and such other new matter, above set forth, as may since have arisen, of like tendency, and for the further purpose of impeaching the said decree, as fraudulently obtained by the complainant, upon testimony, which he well knew to be false, and that the cause may be reheard, with the additional evidence so taken; or also, that the court, in such manner and form as may be most consistent with the rules and practice of this honorable court, would be pleased, before entering a final decree in the cause, to direct, that proof shall be taken, and brought before the court, of the same matters pertinent to the issue of the cause, as were proved before the master, under the said interlocutory decree, and of the other matter herein above stated, and shown to be material, and that the cause may thereupon, with such additional evidence, be reheard and adjudged, as equity and good conscience may require."

The plaintiff, having interposed an objection to the petition and the prayer thereof, as inadmissible, and contrary to the principles and practice of equity, upon the ground, that, in this stage of the cause, the defendant, Eldredge, was not entitled to offer evidence to establish the supposed facts stated in his petition, or to ask any such relief by a rehearing or otherwise, as he proposed by his petition, the court, before hearing any proof of the supposed facts, directed the counsel for Eldredge to confine the argument to the preliminary question; whether the application was maintainable upon its professed grounds, stated in the petition, reserving the consideration of the proof for future examination and discussion.

B. R. Curtis, for plaintiff.

W. H. Gardiner, for defendant Eldredge.

STORY, Circuit Justice. The application in the present case is of an unusual nature; at least, in the form, in which it is presented by the prayer of the petition. The petition asks for a rehearing of the cause, and also for leave to file a bill in the nature of a bill of review, for the purpose of bringing new evidence before the court. It is very clear, that a bill, in the nature of a bill of review, is not the appropriate remedy for such a purpose, in the present stage of this cause; for such a bill lies only after a final decree, and not upon an interlocutory decree, like the present, where the subject is still before the court in fieri, upon the master's report, in pursuance of the interlocutory decree.

In respect to a rehearing, if it were to be upon the original evidence in the case, and that only, after all that I have heard from the counsel upon the present occasion, it does not appear to me, that any thing has been offered, which, in my judgment, shakes the propriety of the original decree. I remain firmly convinced, that it is entirely correct in its main deductions, as to law and fact; and, if it be founded in error, that error must be corrected by the appellate tribunal; and if the decree should, upon an appeal, be reversed, it would be binding upon the conscience of this court, whether I should approve of it or not. Very strong and marked disapprobation of the decree has been expressed by the learned counsel for the petitioner, in language of considerable warmth, and certainly somewhat unusual at the bar of this court. I do not doubt, that the counsel is perfectly sincere in that disapprobation; and it seems not to have occurred to him, that the learned counsel on the other side may have, from the beginning, been as deeply, and thoroughly, and sincerely convinced of the merits of the case on the part of the plaintiff, although it has been expressed in a more subdued tone, not the less impressive, because it was more measured. During a pretty long period of judicial life, it has been my misfortune on many occasions to have differed widely from counsel on one side or the other, in important causes, as to the merits thereof. But this, although a matter of regret, could not, as it ought not, in any, the slightest degree, to influence the duties or judgment of the court. The asseverations of counsel, however solemn, have nothing to do with the facts or merits of causes before the court; and if any judge could be so unstable in his views, or so feeble in his judgment, as to yield to them, he would not only surrender his independence, but betray his duty. However humble may be his own talents, he is compelled to treat every opinion of counsel, however exalted, which is not founded in the law, and the facts of the case, to be voiceless and valueless. He is compelled to say, in the language of other days; "Sin altior istis, sub precibus venia ulla latet, spes pascis inanes." For myself, I can only repeat, that I have given my best judgment to the consideration of this case, so far as the original evidence goes,

and I adhere to the opinion, already expressed, with an unfaltering confidence.

But I desire to say a few words on this occasion, as to rehearings of equity causes, in this court, upon the original evidence. They have been exceedingly rare in this court, I admit, as, in my judgment, they ought to be, unless some plain, and obvious, and palpable error, or omission, or mistake, in something material to the decree, is brought to the notice of the court, which had before escaped its attention. But if a rehearing were to be granted upon the mere certificate of counsel, who had argued the cause, that, in their judgment, the decree was erroneous, (a certificate, which, with great sincerity and readiness, would almost always be given by the counsel), it is obvious, that in the great mass of equity causes of a difficult and important nature, in this court, depending upon conflicting views of law, and also upon conflicting, and often, irreconcilable evidence, a rehearing would be almost a matter of course; and considering the vast time occupied in hearing such causes, there would be little time left for the court to devote itself to any other business, and the other suitors in the court would suffer the most oppressive delays, and often, the most irremediable injustice. Besides; it is no small recommendation of our practice, that it thereby requires, in the first instance, on the part of counsel, a thorough examination and preparation for the hearing; and on the part of the court, a most solicitous, and exact study of the whole cause, before the judgment is pronounced. The other course would encourage inattention or indifference, and induce the counsel, as well as the parties, to speculate upon contingencies, and to argue the cause at large, only, when the court had delivered the result of its opinion. On all these accounts, it has been the constant habit of the supreme court of the United States, to refuse rehearings of any cause, after it has once pronounced its own judgment, whatever might be the conflicts in the evidence, or the differences among the judges themselves, as to the merits of the controversy.

I am aware of the English practice on this subject. It has guards, which do not, and cannot exist here, where the counsel and the client are brought into immediate and constant contact with each other. But such as is the practice in England, it is a source of almost infinite delays and inconveniences; and under a chancellor, like Lord Eldon, whose mental constitution led him to cherish interminable doubts, and to court rehearings, it must be a source of irreparable mischiefs, and sometimes of unmitigated ruin. I have no desire to introduce such a practice into this court. When a cause has been once fully argued in this court, and an appeal lies from its decree, there is, ordinarily, no reason for a rehearing here upon the original evidence; and if such a practice is to be introduced, it must be by the will and judgment of some one, who shall succeed me. If rehearings are to be had, until the counsel on both sides are entirely satisfied, I fear, that suits would become immortal, and the decision be postponed indefinitely.

The present application, if maintainable at all, should properly, in its prayer, be for leave to file a supplemental bill, to bring forward the new evidence, and for a rehearing of the cause at the time when the supplemental bill should also be ready for a hearing. See Baker v. Whiting [Case No. 786]. In my judgment, it would be against the settled principles and practice of courts of equity, to allow the new evidence to be brought forward by a mere order upon the petition; and, indeed, in this stage of the cause, wholly irregular to admit it, except upon a supplemental bill, where testimony could be taken on both sides, to meet the new exigencies of the case. The general rule is, that, upon a rehearing, no evidence can be gone into, which was in the case at the original hearing, and capable of being then produced. But where evidence in the case was omitted to be read at the original hearing, such, for example, as a document, or where the proof of an exhibit in the original cause was omitted, the court will make an order, allowing them to be read, or proved, saving just exceptions. See 3 Daniell, Ch. Prac. pp. 125, 126, c. 28, § 2; Walker v. Symonds, cited 1 Mer. 38, note; Gilb. Forum Rom. 183; Wood v. Mann [Case No. 17,953]. If there are any decisions, carrying the practice beyond this line, I am not prepared to admit their correctness or authority. The cases of Wright v. Pilling, Finch, Prec. 494, and Hedges v. Cardonnel, 2 Atk. 408, are very loosely reported and distinguishable; and it may well be doubted, if the new evidence, there spoken of, was any thing more than what was not, in fact, read or used at the former hearing, but was actually in the case. See 3 Daniell, Ch. Prac. 124. Dashwood v. Bulkeley, 10 Ves. 230, 238, and White v. Fussell, 1 Ves. & B. 151, decide nothing on the point. Wood v. Griffith, 1 Mer. 35, is the other way. In Williams v. Goodchild, 2 Russ. 91, Lord Eldon said, that the difference between a rehearing and an appeal was this, that, upon a rehearing, you might read evidence, which had been collected before the hearing, though it was not read at the original hearing; but that, upon an appeal, you could only read that evidence which you had read below. Higgins v. Mills, 5 Russ. 287, was merely an allowance of liberty to prove viva voce an exhibit, upon an appeal from the rolls, which is but a rehearing, before the lord chancellor.

In some cases, too, where by a mistake or slip of the solicitor or counsel, a document has not been proved at all, or not

proved by competent evidence, leave has, under very special circumstances, been granted, to exhibit an interrogatory for that purpose. To this effect is Cox v. Allingham, Jac. 337, where the master of the rolls (Sir Thomas Plumer) "stated his strong impression of the dangers, which would arise, if, in every instance, a party, whose case broke down at the hearing, were to be at liberty to go into further evidence. To encourage it would be to subvert the whole practice of the court." Other cases will be found in Seton, Decrees, 363, note, and in 2 Daniell, Ch. Prac. 416, 417. Lord Cottenham, in Marten v. Whichelo, Craig & P. 257, alluded to those cases, and said, that it was utterly impossible to reconcile the cases, or to extract any principle, upon which any fixed rule can be founded; and in the case before him, (and it is a very strong illustration of the general doctrine), he utterly refused leave to supply the defect of the evidence, at the hearing of the debt of the creditor, (it was a creditor's bill), against the devisees of the estate, the debt having been, as to the executor, taken pro confesso, and would not allow the defendant to go into new evidence against the devisees, but dismissed the bill.

The present application steers wide of all the cases, where leave has been given to supply defects of evidence at the original hearing, upon a rehearing, by new interrogatories, upon mere petition. As has been already remarked, it can be done only by leave to file a supplementary bill, and then must proceed in the usual manner.

The real question, therefore, for the consideration of the court, is, whether leave should be granted to file a supplemental bill to bring forward the new evidence. In substance, there is no difference between this case and the case of leave to file a bill of review, or a bill in the nature of a bill of review, except, that the latter is solely applicable to cases where there has been a final decree; whereas applications, like the present, may be before or after an interlocutory decree. But the doctrine of the court, as to the nature of the evidence, which will justify and support the application, is, in each case, substantially governed by the same considerations, and limited by the same rules. I had occasion to consider this subject with a good deal of attention in the case of Baker v. Whiting [Case No. 786], and with the opinion then expressed, I am entirely satisfied.

Much of the evidence, which is now offered in support of the petition, has been extracted from the testimony of the witnesses, given before the master, who were examined in the original cause; and to the same points which were then in issue, and constituted the basis of the interlocutory decree. To the admission of all this evidence, an objection, preliminary in its own nature, has been addressed to the court; and that is, that it was totally improper and irregular, to examine any witness, who has been once already examined in the cause, before the hearing, without a special order of the court; and such an order, when obtained, is limited to such facts as were not testified to by the witnesses, and not then in issue. The general rule certainly is, that witnesses already examined in the cause, cannot be again examined before the master, without leave of the court for this purpose. This rule was laid down by Lord Bathurst in Browning v. Barton, 2 Dickens, 508, and was fully recognized by Lord Thurlow, in Sawyer v. Bowyer, 1 Brown, Ch. 388, 2 Dickens, 639, and in Vaughan v. Lloyd, 1 Cox, 312, 313, who, on this last occasion, gave the reasons for it. He there said, "the question is, whether the court has not taken the precaution of making it necessary for the party, in that case, to apply for leave of the court; which leave the court will certainly grant, wherever the substantial justice of the case requires it; but will put the party under the terms of having the interrogatories approved and settled by the master, who, in so doing, will take care, that the same witness is not a second time examined to the same facts, not only to prevent the parties from being loaded with unnecessary expense, and the cause with useless depositions; but, what is still a greater object, to avoid the danger of perjury, which would be incurred by a witness deposing a second time to the same fact, after having seen where the cause pinched, and how his testimony bore upon it;" and he accordingly suppressed the depositions taken before the master. See, to the same point, Smith v. Graham, 2 Swanst. 264; Rowley v. Adams, 1 Mylne & K. 543; Birch v. Walker, 2 Schoales & L. 518; Willan v. Willan, 19 Ves. 590, 592. To the observations made by his lordship, it might be added, that the practice would go to the utter subversion of the rule, which prohibits new evidence and new testimony, of the old witnesses, after publication of the testimony. See Willan v. Willan, 19 Ves. 590, 592; Wood v. Mann [Case No. 17,953]; Whitelocke v. Baker, 13 Ves. 512.

It has been suggested at the bar, that the rule has been broken in upon, upon several occasions, and several cases have been cited in support of the suggestion. But, upon examination, they will all be found to turn upon special circumstances. None of them show, that the witnesses can be again examined to the same matters contained in their former depositions, but only to collateral and independent matters. Courtenay v. Hoskins, 2 Russ. 253, was a case where a witness, examined at the hearing to prove exhibits, was admitted to prove other exhibits before the master, without an order. Metford v. Peters, 8 Sim. 630, was to the same effect. So is Birch v. Walker, 2 Schoales & L. 518. In Whitaker v. Wright, 2 Hare, 310, 321, the question arose upon

an application for an order to re-examine the witness upon a point not previously in issue in the cause. It was the case of a creditor's bill, where the practice of the court allowed the parties to make a new and distinct case before the master. In Rowley v. Adams, 1 Mylne & K. 543, the circumstances were so special, that no conclusion can properly be drawn from that case to govern others. In that case, however, the master of the rolls (Sir John Leach) fully recognized the general rule.

But, passing from this point, not, in my judgment, unimportant for the deliberate consideration of the court, let us look to the general nature and objects of the new evidence now offered. In the first place, it goes solely and exclusively to matters already in controversy, and in issue in the cause, upon which evidence was taken on both sides. That evidence was fully sifted, and discussed at great length, and in the most minute details, at the original hearing. The evidence was conflicting, and, in some cases, irreconcilable, and the court arrived at its own judgment upon a survey of all the circumstances, and balancing the weight of the testimony at every step. What the defendant, in effect, now proposes, is to open the whole case anew; to adduce new evidence to the main points in controversy; to supply the defects and omissions in his former evidence; and to shake, and, as he hopes, to overturn, the testimony on behalf of the plaintiff. It is, in fact, therefore, an effort to open the whole matter anew, upon all the main facts and circumstances of the case, and to reargue, and to rejudge the whole case, upon new evidence, partly argumentative, and partly presumptive,—partly oral, and partly documentary; but, whether of the one character or the other, it establishes no new fact, of itself decisive of the merits of the cause, and necessarily changing the original decree; but it is merely corroborative or auxiliary to what is now in the cause. Such an application is certainly novel in a court of equity, and if maintainable in the present case, it goes to the full extent of changing the whole course of practice in courts of equity, and of subverting all the old rules and qualifications, as to the admissibility of new evidence. Irregular and unsatisfactory as some of the authorities are upon this subject, none of them affect to entertain or support so broad a doctrine.

And this leads me to remark, in the next place, that the new evidence, upon which a supplemental bill should be allowed to be filed, should not be of a mere cumulative or corroborative nature; for if it were admissible, then, it would be open to the other side to impeach or control it, by other cumulative or corroborative evidence on that side; and thus, all the mischiefs would be introduced, against which the general rule prohibiting the examination of new witnesses, after publication of the testimony, was intended to guard. The doctrine has been fully recognized, as to new evidence upon bills of review, and the same reasons must apply to supplemental bills. Blake v. Foster, 2 Ball & B. 457; Young v. Keighly, 16 Ves. 348; Baker v. Whiting [Case No. 786]; Norris v. Le Neve, 3 Atk. 26, 36, 37; Hind. Prac. 59. Gilbert, in his Forum Romanum (page 186, c. 10) manifestly supports this view of the matter. Mr. Chancellor Kent, in Livingston v. Hubbs, 3 Johns. Ch. 124, seems to have acted upon, and enforced the same doctrine. In Dexter v. Arnold [Case No. 3,856], and Baker v. Whiting [supra], and Wood v. Mann [Case No. 17,953], this court had occasion to examine and review the decisions, and arrived at the same conclusion. Indeed, there is no reason to suppose that new oral testimony, going merely to corroborate evidence on one side, or to contradict evidence on the other, on the points in issue, has ever been deemed sufficient, of itself, to justify any departure from the general rule. For the most part, although perhaps not exclusively, the new evidence has been in writing, either documentary, or written statement, bearing directly on the very merits of the case, and affecting the very foundation of the original decree. Such were the cases of Earl of Portsmouth v. Lord Effingham, 1 Ves. Sr. 430; Attorney General v. Turner, Amb. 587, and Partridge v. Usborne, 5 Russ. 195; Barrington v. O'Brien, 2 Ball & B. 140; Blake v. Foster, Id. 457; and Ord v. Noel, 6 Madd. 127, 130. See, also, Taylor v. Sharp, 3 P. Wms. 371. Upon this subject, the language of the court of appeals, of Kentucky, in the case of Respass v. McClanahan, Hardin, 350, composed, as the court then was, of very able judges, is important to be carefully weighed. On that occasion, the chief justice, in delivering the opinion of the court, said: "This court, after the most careful search cannot find one case reported, in which a bill of review has been allowed, on the discovery of new witnesses, to prove a fact, which had before been in issue,—although there are many, where bills of review have been sustained on the discovery of records, and other writings relating to the title, which was generally put in issue. The distinction is very material—written evidence cannot be easily corrupted; and if it had been discovered upon the former hearing, the presumption is strong, that it would have been produced to prevent further litigation and expense. New witnesses, it is granted, may, also, really be discovered, without subornation. But they may be as easily procured by it, and the danger of admitting them makes it highly impolitic." Even for the purpose of discrediting a witness in the cause, the admission of new evidence has been limited to an inquiry into his general credit, or limited to the testimony of witnesses, who contradict his statements,—not to matters in issue, but solely to matters not

in issue in the cause, and immaterial to the merits. This was clearly laid down by Lord Eldon in Purcell v. M'Namara, 8 Ves. 324, and again recognized by him in Carlos v. Brooke, 10 Ves. 49. In the latter case, he summed up the doctrine in the following expressive language: "I think, my opinion in Purcell v. M'Namara was right. My opinion was this; that the court, attending with great caution to an application to permit any witness to be examined after publication, has held, where the proposition was to examine a witness to credit, that the examination is either to be confined to a general credit; that is, by producing witnesses to swear, that person is not to be believed upon his oath; or, if you find him swearing to a matter, not in issue in the cause, and therefore not thought material to the merits, in that case, as the witness is not produced to vary the case in evidence by testimony, that relates to matters in issue, but is to speak only to the truth or want of veracity, with which a witness had spoken to a fact, not in issue, there is no danger in permitting him to state, that such fact, not put in issue, is false; and, for the purpose of discrediting a witness, the court has not considered itself at liberty to sanction such a proceeding as an examination to destroy the credit of another witness, who had deposed only to points put in issue. In Purcell v. M'Namara it was agreed, that after publication it was competent to examine any witness to the point, whether he would believe that man upon his oath. It is not competent even at law to ask the ground of that opinion; but the general question only is permitted. In Purcell v. M'Namara the witness went into the history of his whole life; and as to his solvency, &c. It was not at all put in issue, whether he had been insolvent, or had compounded with his creditors: but, having sworn the contrary, they proved by witnesses, that he, who had sworn to a matter not in issue, had sworn falsely in that fact; and that he had been insolvent and had compounded with his creditors; and it would be lamentable, if the court could not find means of getting at it; for he could not be indicted for perjury, though swearing falsely: the fact not being material. The rule is, that in general cases the cause is heard upon evidence given before publication; but that you may examine after publication, provided you examine to credit only; and do not go to matters in issue in the cause, or in the contradiction of them, under pretence of examining to credit only." See, also, S. P., White v. Fussell, 1 Ves. & B. 151, 153. The same doctrine was held by Mr. Chancellor Kent in Troup v. Sherwood, 3 Johns. Ch. 558; and by this court in Wood v. Mann [supra].

So that, I think, it may be taken as the first result of all the authorities, or, at least, of those, which ought, upon such a subject, to have a controlling influence, that new oral evidence, merely corroborative or cumulative, is not a sufficient foundation for a supplemental bill, nor within any of the exceptions allowed to the general rule.

To what has been already suggested, it may be added, that the evidence, entitling the party to ask leave of the court, to file a supplemental bill, should not only be true, but should be material, in an emphatic sense; that is, it should be such new matter, as must, if unanswered, in point of fact, either clearly entitle the party to a reversal of the decree, or raise a case of so much nicety and difficulty, as to be a fit subject of judgment in the cause. In other words, it should furnish a just and solid foundation, upon which the court may properly repose its judgment. It is not sufficient, that it is such, as might be argued, with more or less effect, by way of a presumption against, or in favor of former testimony. But it should go further, and demonstrate, that, consistently with it, the decree ought not to stand. So Sir John Levet seems to have understood the rule in Ord v. Noel, 6 Madd. 127, 131, and so he interpreted the decision in Norris v. Le Neve, 3 Atk. 26.

In the next place, leave is never given to file a supplemental bill, in order to admit new evidence, after an interlocutory decree, where the party might, by due diligence, have introduced it originally into the cause, or had full and ample means of knowledge of it, within his reach. It matters not, that he, or his solicitor or counsel, did not understand the true value or importance of it, if they knew the facts, or had ample means of knowledge, and a fortiori, if, by the very nature and character of the matters put in issue, they were bound to search, and to make full and perfect inquiries. The authorities are very numerous and pointed to this effect. But it will be sufficient, upon such a subject, to refer to a few leading authorities. In Young v. Keighly, 16 Ves. 348, 353, Lord Eldon said, that in cases of this sort, the question always is, not what the plaintiff knew, but what, using reasonable diligence, he might have known. Norris v. Le Neve, 3 Atk. 26; Whitelocke v. Baker, 13 Ves. 511; Bingham v. Dawson, Jac. 243; Barrington v. O'Brien, 2 Ball & B. 440; and Blake v. Foster, Id. 457, 461,—are to the same effect. Mr. Chancellor Kent fully recognized the same doctrine in Wiser v. Blachly, 2 Johns. Ch. 488, and Hamersley v. Lambert, Id. 432, 436; and in Livingston v. Hubbs, 3 Johns. Ch. 124, 125, the same learned judge said, (which is very pointed to the present case): "The defendant was charged in the bill, with gross misrepresentations on that point, and the charge was denied on the answer, and put at issue. The defendant's attention was called to the very fact, and he was bound to use reasonable diligence in bringing forward his proof on that point." In Dexter v. Arnold [Case No. 3,856] the authorities were much considered, and the like conclusion was adopted—and it was followed out in the analogous case of taking new evi-

dence after publication of the testimony, in Wood v. Mann [supra]. There is, also, in the case of Respass v. McClanahan, Hardin, 352, 354, which has been already referred to, another highly important remark, illustrative of the doctrine just stated. The court there said: "We will add, that there is an important difference between the discovery of a matter or fact itself, which, though it existed at the former hearing, was not then known to the party to exist, or which was not alleged, or put in issue by either party, and the discovery of new witnesses or proof of a matter or fact, which was then known, or in issue. In the former case, the party, not knowing the fact, and it not being particularly in issue, there was nothing to put him in the reach, either of the fact or the evidence of the fact; and, therefore, the presumption is in his favor, that as the matter made for him, his failure to show the matter was not owing to his negligence or fault. But where the matter was known, or put in issue, the party is put upon the investigation, and the presumption is strong, that, by using due diligence, he might have shown the truth of the matter, on the former hearing."

These are some of the principles, which I have thought it right to bring under review, upon the present occasion, with reference to the point, now under consideration, as to the general nature and object of the new evidence.

The new evidence naturally divides itself into two heads: (1) Oral; and (2) documentary. In one part, it is addressed to the establishment of a fact, (a date), supposed to be material in the cause, and the groundwork of the interlocutory decree. In another part, it is addressed to the credit, or rather the discredit, of certain of the plaintiff's witnesses. Two other points are avowed to be in the view of the counsel for the defendant; the first to establish, that the decree in the case of Jenkins v. Deblois [unreported], mentioned in the pleadings and evidence, was not a decree by consent; the second, to establish, that the value of the property, at the time, was far below what it was supposed to be at the original hearing. Now, I repeat it, there is not a single one of all these four points, which was not on issue in the original cause, and to which evidence was not taken, and upon which most elaborate and protracted arguments were not had at the bar, at the original hearing. It has been suggested, that the counsel of the defendant did not, at the hearing, attach so much importance to these matters, as they now do, and did not then so fully comprehend their weight with the court. What possible influence such a suggestion should have upon the mind of the court may be answered by the cases of Norris v. Le Neve, 3 Atk. 26, 35, 36, and Young v. Keighly, 16 Ves. 348, and Blake v. Foster, 2 Ball & B. 457. However correct they may be, in the particular case, the court could not yield to them, without a departure from what the settled practice of the court requires.

Connected with this, I may allude to a matter, brought forward by the supplemental petition of the defendant. It suggests, that the ill-health of counsel did not, in effect, enable him to have the full benefit of their assistance and learning, as he could have desired, or they, under other circumstances, could have given in the cause. But although the ill health of the counsel was known and regretted by the court, yet the cause was not called on for argument, until full time for preparation, and after the counsel, who argued the cause, was enabled to perform the entire duty without objection. If he had requested further time, upon the ground of want of preparation, under the circumstances, the court would certainly have acceded to the request. And I may now add, that upon the state of the record, as it was then presented, and no intimation was then given of any desire to file a supplemental bill, the argument was as copious, and able, and thorough, both as to the facts and the law, as it seemed to the court, as it probably could be. Nor have I, at the present argument, heard any suggestion founded upon that record, which was not largely discussed and fully considered at that hearing. If the court were then wrong, after such an argument, so powerfully urged, it seems to me, that the appropriate redress belongs to the highest appellate court, and can hardly be found on any re-argument here.

But to return to the more direct questions before the court. Some considerable portion of the evidence, now sought to be introduced, respects the supposed date of the agreement between Jenkins and Eldredge, and that it was not before, but after the expiration of the time fixed on the decree in the case of Jenkins v. Deblois; and great stress is laid upon this fact, as having a most material bearing in the case. The very point was directly put in issue by the pleadings, and it was fully argued at the original hearing, upon the record; and certainly, so far as the fact could be material, it was within the reach of the defendant, Eldredge, (for all the means of ascertaining were completely open to him), before the hearing as afterwards,—I do not say, by the exercise of great diligence, but by the exercise of any diligence. As the record stood, it appeared to me, that the negotiations were begun, before the time expired, even if the agreement was not then completed. But whether the agreement was then completed or not, was not, in my judgment, material; and I should have come to the same result (and so the opinion intimates, as far as it goes), whether the fact were the one way or the other. For whether Jenkins had, at the time of his agreement with Eldredge, any legal or equitable title in the property against Deblois, or not, he might well believe, that he had an honorary confidence, that Deblois would grant indulgence to him, if he could in any manner satisfy her claim, in the nature of a good will; and there

is not a tittle of proof in the case, that Deblois would have arranged any bargain with Eldredge, if not done with the co-operation, and at the solicitation of Jenkins. In my judgment, therefore, the posture of the case, as between Jenkins and Eldredge, is not, and would not be, in the slightest degree, varied by the fact, whether the agreement between them was consummated before or after the expiration of the time. In each case, their agreement, whenever made, must receive the same interpretation, taken in connexion with the other circumstances of the case.

Then, again, it is argued, that the new evidence will show, that the decree in the case of Jenkins v. Deblois, was not a decree by consent, but in adversum. Now this point, also, was fully argued at the original hearing; and, so far as it could be material, it was fully within the power of Eldredge to have made the fact certain, before the publication of the testimony. Certainly, at the original hearing, I was satisfied, that the fact must have been, that the decree was by consent. The very terms of it seem to me necessarily to so import; nor am I able to conceive, that any court of equity, at that stage of the cause, could make such a decree, unless by consent. What was the stage of the cause? It was not a case set down for a final hearing upon the merits, after issue, and all the evidence had been taken in the cause. It seems to have been an application to dissolve the injunction, which had been already granted, and which certainly the court could continue or not, and upon what terms it might choose, until the final hearing —and the decree then purporting to be interlocutory, continues the injunction to the hearing, if the stipulated conditions are complied with; if they are not, then the bill is to be dismissed. Now, unless by consent, the court could not, according to any rules or doctrines known to equity proceedings, dismiss the bill before the hearing, although it might dissolve the injunction before the hearing. To dissolve the injunction is one thing,—to dismiss the bill, before the hearing, on the merits, is quite a different thing. In short, under such circumstances, Jenkins had a right to a hearing on the merits, after issue and evidence taken, unless he consented to waive his right. I go farther, and add, that, under the circumstances of the case, without such consent, the dismissal of the bill would not be a bar to a subsequent bill in equity, for the same matter; for a decree, to be a bar, must be upon the merits, after the hearing thereof.

Thus much I have thought it right to say upon this point. But, in truth, my judgment never rested upon it, except so far as the argument insisted, that it was a complete bar to all legal and equitable claims, on the part of Jenkins, against Deblois, a conclusion which I was not at all disposed to concur in, or adopt.

Then, as to the point of the value, or supposed value of the property, at the time of the agreement or the decree, that matter was also argued at the hearing, and constituted a signal part of the defence. Upon this subject, every fact was open to complete proof, before the publication of the evidence; it was put in issue by the parties, and it cannot be, that Eldredge is here to be at liberty to offer new proof of facts, which were then completely before his eyes, and of general notoriety.

What then is the new documentary proof proposed to be offered, in support of the petition? As I gather from the petition, and the statements on both sides, it consists of two letters, written by Mr. C. G. Loring, which have always been in Eldredge's possession,—(and which are now offered to refresh his memory as to a date) of the book, or memorandum, of accounts, and business, kept by Joseph Jenkins, Jr., which was referred to by him in his deposition, and the production of which was not (as far as appears upon the record,) asked for by Eldredge, either at, or before the original hearing, nor by any motion made to the court therefor, at any time until the hearing before the master; of the memorandum of an account of Eldredge, in his own possession, and produced at the hearing, under a suggestion of the court, at the motion of Jenkins; and of a paper, or written promise, given by Jenkins to Eldredge, and well known to the latter, and of which the production by Jenkins might have been compelled by a cross bill, or by an order to produce it at the original hearing.

Now, in respect to all this documentary evidence, it is perfectly clear, that any portion of it was within the power of Eldredge to produce, or to have had produced, before publication, or, at all events, before the cause was set down for a hearing. It was matter put directly in issue by the pleadings. No application was ever made by him to enlarge the time for publication of the testimony; no special order was asked of the court, to require the production of the book of accounts, and business, of Joseph Jenkins, Jr., or of the written statement, in the possession of the plaintiff Jenkins. No cross bill was ever filed. The publication of the testimony took place in May, 1843. Joseph Jenkins, Jr., died in the autumn of the same year. The cause was afterwards set down for a hearing; but was not argued until the latter part of April, 1844, and the argument then occupied the court (as nearly as I can recollect,) about seven or eight days. So that, I think, it is impossible not to say, that Eldredge was entirely content to leave his case, up to the very time of the argument, without the slightest effort to add any of this documentary proof to that already in the cause. He asks the court, at this late period, to reopen the whole cause, that he may supply any and all defects in the evidence, which he now, after the fullest

discussion, supposes may be material to his case. I think, that it may be said, without hesitation, that such an application, so broad and so unqualified, has never before been presented to any court of equity, and it would amount to a subversion of its whole established rules of practice.

In respect to the letters of Mr. Loring, as to the matter of date, they are not, in my judgment, material; and if they were, what ground is there to say, that Eldredge should now be permitted to bring new documents before the court, which were always in his custody? It is no answer to say, that he did not then deem them material. It was his own choice, or his own wishes, not to produce them, or use them, when, by law, their use might have been required and allowed. In respect to the book of accounts and business, of Joseph Jenkins, Jr., let it be remembered, that if its production had been positively required, (and an order from the court might have required it,) it would have been open to the witness to have produced the book, and explained what he meant, and to have corrected the error, if any, or to have shown, that the imputations upon his veracity were unfounded. But he is dead; and the court is now called upon to rake open the ashes of the dead, and, when the voice of the departed is hushed, to interrogate, to his dishonor, if not to his infamy, the naked pages of the book, unexplained and unaided by collateral circumstances. I do not say, that a court of equity is positively precluded from such a course, under all and any circumstances. But I should be loth to break in upon the settled practice of the court, designed to guard the living, and, a fortiori, to protect the dead from attacks, which it may no longer be in their power to repel. The testimony of Joseph Jenkins, Jr., was most powerfully assailed at the argument; but it seemed to me, that, as to the leading facts, upon which my judgment proceeded, it was entirely supported by other independent facts and circumstances.

In respect to the oral evidence, so far as it has not been already commented on in the preceding remarks, it goes entirely to discredit the testimony of the witnesses, on the part of the plaintiff, on their original examination; and especially to the testimony of Mr. Hilliard, and James W. Jenkins, not by showing, that they are persons of notoriously bad character, and not to be believed on their oaths; but by means of new evidence to the very facts, to which they were originally examined, that they have been guilty of gross misstatements, if not of deliberate falsity. The facts are to be made out in respect to Mr. Hilliard, by proving the time when he hired his office, etc., through testimony, which was just as much within the reach of Eldredge, at the time of his examination, as it now is. And it may be added, that Mr. Hilliard's testimony on this very subject, was at first as rigorously assailed at the original hearing, as it is now sought to be. In respect to the testimony of James W. Jenkins, that is now sought to be overturned by showing, that, in his testimony before the master, he contradicted a statement he had made in his original examination. I have already had occasion to say, that nothing could have been more irregular, and incorrect, than to have examined this witness at all, before the master, without an express order of the court, which would, of course, have been limited to matters, to which he had not before testified. To give effect to such an irregular and incorrect examination before the master, would be to give to the party the benefit of violating the rules of the court. I do not stop to inquire, whether the supposed contradiction is material or not. It is sufficient to say, that it is against the rules of the court, to allow it to be deemed to be at all in the case. It ought to be suppressed.

It may be proper to add in this connexion, that, according to our practice, all the interrogatories, and cross interrogatories, designed to be put to any particular witness, are seen, and perfectly well known to both parties, long before the examination takes place before the commissioner, and not unfrequently, by a sort of mutual indulgence at the bar, the counsel of both parties are present at the examinations,—whether it was so in the present case, I do not inquire, because my judgment does not proceed upon it. But I may say, that it is rare, that any substantial defects in the material testimony are or can be found, unless there has been a want of diligence in the party, in not putting his counsel in full possession of all the merits of his cause, upon the state of the pleadings.

Without going farther into a consideration of the particulars, stated at such voluminous length in this petition, and which I pass over in silence, because, in my judgment, they are sufficiently answered in the preceding remarks, or admit of similar answers, I am compelled to come to the conclusion, that it would be an utter violation of the rules of the courts of equity to allow the present petition to prevail. There is no new evidence now offered, which, in truth, if of any value, ought not to have been originally produced in the cause; and there is none, which, with ordinary diligence, might not in due season have been produced. What Lord Eldon said in the case of Whitelocke v. Baker, 13 Ves. 511, 514, under circumstances calling for far more indulgence than the present case, admonishes me of the duty, which is imposed upon this court. His lordship, on that occasion, said: "The next ground for this motion is the materiality of the farther evidence, which it is supposed can be given. If that could be represented as most material, I dare not trust myself with laying down a precedent, that would authorize attempts to bring for-

ward an application in every case, where, even after a cause had been struck out (that cause had been struck out) the party might see, that it would not be convenient to hear the cause upon the evidence, on which he originally intended to hear it. The danger from that would be enormous." The case of Young v. Keighly, 18 Ves. 348, 351, before the same learned judge, inculcates a still more impressive lesson, for the court, in that case, rejected the new evidence, although it seemed to be the opinion of the judge, that, if admitted, it might most materially bear upon the merits of the case.

I think it my duty to dismiss the petition, and to deny the party the right to file a supplemental bill, and to have the rehearing and relief, which that petition seeks. It has been suggested, that the petition ought, if dismissed, to be without prejudice; but I think no such qualification of its effect ought to be introduced. The merits of the application, in point of law, have been as fully brought before the court, in the present case, as they could have been after a final decree, upon an application for a bill of review. If the defendant, Eldredge, has any merits, on which to found his petition in point of law, they have been as fully brought before the court, and at the proper time, as they could properly be upon a petition for a bill of review. The same questions, in the same form, necessarily arise in both cases. The defendant, Eldredge, has elected to take the course of filing his petition, and being heard, as by the course of proceedings in equity he is entitled to be heard, upon the admissibility of the new evidence, before the final decree; and, in my judgment, he is not entitled to re-argue the same questions, after the final decree, upon a petition for a bill in the nature of a bill of review. He has made his choice, and conformably to what was suggested at the hearing, he must now abide by the choice, which he has made. I feel myself bound not to open this litigation anew by any such reservation as that the dismissal shall be without prejudice.

[For subsequent proceedings, see Cases Nos. 7,268 and 7,269.]

## Case No. 7,268.

JENKINS v. ELDREDGE et al.

[3 Story, 325.] [1]

Circuit Court, D. Massachusetts. May Term, 1845.

COMMISSIONS TO TRUSTEES—AGREEMENT OF LEASE—CONSTRUCTION.

1. An agreement for a lease of certain premises was made by the plaintiff to the defendant K., on the 1st January, 1839, and subsequently, E., on the 18th of January, 1841, in pursuance thereof, agreed to lease the same to the said K. and to W. for 10 years from the 1st of June, 1841, the annual rent being fixed by the award of referees made in virtue of the said last agreement, at $4,650. K. then took possession, and occupied the premises upon these terms until December 14th, 1842. E. then, claiming to be owner, conveyed the premises to K. on March 1st, 1842. On March 7th, the plaintiff filed with K. a notice of his claim thereto; and subsequently K., as owner, agreed with himself and W., as proprietors of the Boston Museum, to reduce the rent to $3,000 and taxes. The present bill in equity having been filed by the plaintiff against K., the matter was referred to a master, who reported, 1st. That the agreement by E. was a present demise. 2d. That K. was liable for the full rent of $4,650. 3d. That the evidence did not justify a reduction of the rent by K. 4th. That the interest was properly charged upon the rent. 5th. That K. was not entitled to commissions as trustee for the plaintiff. The court approved the 1st ruling, on the ground, that as no further act of demise was contemplated, and K. having taken possession under the agreement, it was a present demise for ten years. The court approved the 2d ruling, on the ground, that any reduction by K. of the rent originally fixed by referees after notice of the plaintiff's claim, and without his consent, was an act which, not being for the plaintiff's benefit, would, in the event of the establishment of his claim, be unauthorized. The 3d and 4th rulings were assumed as necessary consequences of the second. The 5th ruling was over-ruled, on the ground, that, as K. held the premises as trustee of the plaintiff, and had not been guilty of gross misconduct, he was entitled to his commissions, although he was not an open and express trustee.

[Cited in Jewett v. Cunard, Case No. 7,310.]

2. The general practice in America, and especially in Massachusetts, is to allow commissions to trustees in cases of open and admitted express trusts, unless the trustee have forfeited them by gross misconduct in the administration of the trust.

3. An agreement for a lease will be construed to be a present demise, if no future formal lease be contemplated, and especially if possession be taken under it.

4. *Held*, that the defendant should pay all ordinary costs of the suit.

[This suit was originally before this court in Case No. 7,266. There was a decree for plaintiff, Joseph Jenkins, and the cause was referred to a master to take an account. A petition for a rehearing filed by Charles H. Eldredge, one of the defendants, was denied in Case No. 7,267.]

The cause was afterwards argued upon the exceptions to the master's report filed by the defendant Kimball. As to the claim of Kimball, upon which the exceptions arose, the report of the master was as follows:

"The following state of facts was laid before me by the complainant's counsel, and duly proved: 1st. That certain rooms in the said building have been, since the first day of June, A. D. 1841, hitherto, occupied by a corporation, styled 'The New England Museum and Gallery of Fine Arts.' That, in May, 1839, the complainant and the said defendant, Kimball, entered into the contract, found on page 206 of the printed record of this cause (see page 514, post); and afterwards, the said Eldredge, and the said corporation, entered into the contract, found on pages 206, 207 (see page 515, post), of the said printed record; and an award upon the rent, to be paid, was made thereupon,

[1] [Reported by William W. Story, Esq.]

as is found also on the said 207th page, of the said record. That the said Kimball was proprietor of 275 shares of the capital stock of the said corporation, the par value of which was $100 per share, and one Alfred A. Wellington was proprietor of the remaining 25 shares thereof, the said Wellington being the president, and the said defendant, Kimball, being treasurer of the said corporation. That the said corporation continued to pay the rent of $4,650, fixed by the said award, from the first day of June, 1841, to the fourteenth day of Dec., 1842; during which time the stockholders and officers of the said corporation remained as above stated, except, that twenty shares of the said capital stock were sold, in Nov., 1842, to Mr. David S. Greenough, but the same were not transferred to him until the 27th day of Dec., 1842. That, on the first day of March, 1842, the said defendant, Eldredge, conveyed the whole estate, in fee, to the said Kimball, and on the 7th day of the same month, the said complainant served a written notice upon the said defendant, Kimball, giving him, the said Kimball, notice of his, the said complainant's title, and prohibiting him from doing any thing affecting the said property in any way. That on the 14th day of Dec., 1842, the said Kimball, by agreement with the said corporation, reduced the rent to the sum of three thousand dollars per annum, and taxes. And thereupon I have ruled, and do report, that the said Kimball is chargeable, in his said account, with the rent of the said rooms, specified in the instruments mentioned, at the rate of $4,650.00 per annum; because, first the instruments contained on pages 206, 207 (see page 515, post), of the said printed record, constitute together a demise of the said rooms, to the said corporation, at an annual rent of $4,650, payable quarterly; and because, secondly, the said Kimball, in the transaction aforesaid, whereby he reduced the rent, is to be treated as a trustee, dealing with himself.

"In justification of the aforesaid reduction of rents, the learned counsel for the said defendant, Kimball, offered the evidence of one Moses Kimball, the agent of the said Boston Museum, tending to show, that, in December, 1842, when the said rent was reduced, it seemed probable, that the said corporation would not continue to be able to pay the rent of $4,650 per annum, and to go on with its business, for several months previous, and also, from the fact, that its property was under mortgage, to nearly its whole value; and hence it was contended, that there existed no means of enforcing the payment of the existing rent. The testimony of the said witness was also offered, to show, that the building was constructed, and adapted to the purposes of a museum, and that no other tenant could probably have been found in Boston, who would hire it for such a purpose. Upon this evidence, I ruled: First. That the said Kimball having, as a trustee, dealt with himself in a matter, affecting the income of the trust property, cannot be permitted to show, that, at the time he so dealt, there was more or less risk of the failure of the existing tenant to pay the stipulated rent; because a court of equity does not go into matters of probability, in order to ascertain, whether a trustee, who has dealt with himself, would or could not have made a better contract; secondly, that, if the justification of a controling necessity is ever admissible in such cases, the evidence in the present case, did not show a full justification.

"I, therefore, report, that the account of the said Kimball is surcharged in the following items; to wit; that each of all the items of rent, in which the said Kimball debits himself, as received "of museum," on and after March 14th, 1843, ought to be debited, respectively, in the sum of $1,162.50, instead of $750.00; and that, from the sum total of the account, thus surcharged, should be deducted the sum of $305.00, being the amount of the taxes, paid by the said corporation to the said Kimball, upon the said rooms, and debited by said Kimball to himself in his said account; and that the interest account should be adjusted accordingly. Second. The account, brought in as aforesaid, by the said Kimball, contains an item, credited to himself, on the fifth page, being the sum of $791.00, for commissions on the amount of rent, collected by him, which I report as disallowed, and that the same ought to be deducted from the sum total of the credit side of the said account. And thereupon I find, and report, that there is due, on the day of the date of this report, from the said Kimball to the said complainant, as the true final balance of the said Kimball's account, the sum of twelve thousand seven hundred and eighty-one dollars and seventy-three cents, as stated in the schedule hereto annexed."

The contracts referred to in the foregoing report, were as follows:

"Memorandum of agreement made this first day of May, in the year of our Lord eighteen hundred and thirty-nine by and between Joseph Jenkins of Boston of the one part and David Kimball of said Boston of the other part, witnesseth—That, whereas the said Jenkins is about to erect a spacious and elegant edifice, occupying the entire front and length of the lot of land on Tremont street, recently purchased by him of Miss E. Deblois, which edifice is identified and described in the drawings and specifications exhibited and to be embraced in the lease hereafter mentioned—the building to be completed on or before the first day of January next;—Now it is hereby agreed mutually by the parties that all of the said edifice above the basement is to be leased to said Kimball by said Jenkins for the term of ten years from the time when said building is to be completed,

for the purpose of a museum and other kindred objects, the said Kimball yielding and paying for the same to said Jenkins the sum of five thousand dollars for each and every year in quarter yearly payments, without taxes. It is however understood that, whereas the said Kimball is immediately to repair to Philadelphia for the purpose of purchasing the 'American Museum,' if he, the said Kimball, shall be unable to purchase the same, then this agreement is to be void, otherwise to remain in full force. In witness whereof the said parties binding themselves, their heirs, executors and administrators each to the other in the penal sum of ten thousand dollars for the faithful fulfilment of this agreement, have hereunto set their hands and seals, the day and year first above written. David Kimball. Joseph Jenkins. Signed, sealed and delivered in presence of, (nine words being first interlined,) J. Jenkins, Jr. Moses Kimball."

"Whereas on the first day of April, A. D. 1839, Joseph Jenkins and David Kimball, both of Boston in the county of Suffolk and state of Massachusetts, did covenant and agree to and with each other, that the said Jenkins should lease and the said Kimball hire certain rooms in a building on Tremont street, and whereas the said rooms were not completed at the time recited, yet nevertheless as C. H. Eldredge of said Boston did afterwards become the owner of said building, and did complete the said rooms, and the said Kimball having become a member of a corporation entitled the New England Museum and Gallery of Fine Arts, and the said corporation being desirous of occupying the said rooms, but have not or yet been able to agree with the said Eldredge upon a sum that shall be paid therefor as rent, now therefore, the said corporation and the said Eldredge do hereby covenant and agree to and with each other that the said Eldredge shall lease to the said corporation the said museum rooms in said building for a term of ten years, and the said corporation shall receive the said rooms for the said time, and pay therefor a rent to be decided as follows, viz. First, the matter shall be referred to Sam. Hubbard and E. Hasket Derby, and in case of disagreement between the referees they shall choose a third, and the decision of two shall be binding upon the parties to this covenant. Second. The said corporation shall appear before the said referees with the same rights, privileges and immunities, and none other than the said Kimball would have were he a party to this covenant. Third. The said referees shall take the said contract between the said Jenkins and the said Kimball as the basis upon which to decide the rent to be paid by the said corporation, and shall take into consideration any deviation that may have been made from the said contract with all other matters and things that may appertain thereto, and shall decide what under all the circumstances shall be an equitable, just and proper rent for the said corporation to pay to the said Eldredge. Fourth. The referees shall decide when the said rent shall commence, giving the said corporation a reasonable time to fit up the said rooms. In witness whereof we have hereunto set our hands and seal this eighteenth day of January in the year of our Lord one thousand eight hundred and forty-one. David Kimball, A. A. Wellington, Committee of the New England Museum and Gallery of Fine Arts. C. H. Eldredge. Witness, Jesse Gould."

"The aforenamed referees having repeatedly met and heard the parties to this agreement, and having given the subjects submitted to them, with the circumstances attending the same, full consideration, do decide and determine the yearly rent to be paid by the said corporation called 'the New England Museum and Gallery of Fine Arts,' to the said Charles H. Eldredge, shall be the sum of four thousand six hundred and fifty dollars, as an equitable, just and proper rent —and that the same shall commence on the first day of June, A. D. 1841—to be paid quarter yearly. The charges of this reference taxed at one hundred dollars, to be paid equally by the parties. Samuel Hubbard, Elias Hasket Derby.

"Boston, March 1, 1842.—Whereas I have this day sold to David Kimball the estate to which this obligation has reference, I hereby assign the same to said Kimball. C. H. Eldredge. Witness, Samuel Sweetser."

The exceptions filed by Kimball were as follows: First. "For that the said master hath reported and ruled, that said Kimball is chargeable with the sum of forty-six hundred and fifty dollars per annum, instead of the sum of three thousand dollars and taxes, the amount credited by said defendant in his account, rendered said master, for the rent of certain rooms mentioned in said report, on the ground, that the instruments, contained on pages 206, 207, of the printed record of this cause, constitute together a demise of said rooms, for a term of ten years, at an annual rent of forty-six hundred and fifty dollars, payable quarterly. Whereas the said master ought not to have ruled, that said defendant was chargeable with any other and farther sum, than the sum so credited by defendant in his said account, or that said instruments do constitute together, as against this defendant, a demise of said rooms for a term of ten years, as aforesaid. Second. For that the said master hath reported and ruled, that the said Kimball is chargeable with the sum of forty-six hundred and fifty dollars per annum, instead of the sum of three thousand dollars and taxes, the amount credited by him, in his account rendered said master, for the rent of certain rooms mentioned in said report, on the ground, that the said Kimball, in the agreement between him and said corporation, whereby said rent was reduced, was a trustee dealing with himself, and as such not permitted to show, that said agree-

ment by which said rent was reduced, was justifiable as being made in good faith, in the exercise of a prudent and sound judgment. Whereas said master ought not to have ruled, that said defendant was chargeable with said further sum, or that in said agreement said Kimball was a trustee dealing with himself, or that, as such trustee, he was not permitted to offer evidence to justify said agreement as aforesaid. Third. For that the said master hath in and by his said report ruled, that the evidence of Moses Kimball, offered by this defendant, tending to show, that the reduction of the rent of said rooms, made by this defendant by agreement with said corporation, was proper, requisite, and justifiable, did not show a full justification. Fourth. For that the said master hath ruled and charged this defendant with interest upon the additional sums by him decreed to be payable for rent of said room by this defendant, beyond the amount credited in the account so filed by this defendant. Fifth. For that the said master had disallowed a credit, taken by said Kimball in the account by him rendered and filed with said master, of the sum of seven hundred and ninety-one dollars for commissions on rents, and sums of money collected by him, said Kimball, as shown by said account, which sums said master ought to have allowed as a credit to this defendant."

B. R. Curtis, for plaintiff.
Mr. Bartlett, for Kimball.
Mr. Gardiner, for Eldredge.

STORY, Circuit Justice. In respect to the first exception of Kimball, it does not strike me, that it is of any importance in the case, whether the paper referred to is to be deemed a present demise, or a contract for a demise. In either case, as to the rent to be paid during the occupation of the premises, by the museum corporation, the asserted lessees, it is to be governed by precisely the same considerations. The original agreement in this case, between Jenkins and Kimball, on the first day of May, 1839, is certainly a mere contract for a lease at a future day, viz. when the building shall be finished. The subsequent agreement between Eldredge, and Kimball, and Wellington, on the 18th day of January, 1841, consummated as it was by the award of the referees, made under, and in virtue of that agreement, became a present demise or lease, in my judgment, for ten years, to commence on the first day of June, 1841, at the annual rent of $4,650. No farther act or demise was contemplated by the parties, and Kimball went into possession, under the agreement and award accordingly. One test, whether it is a present demise or not, is founded upon this consideration, whether a future formal lease is contemplated by the parties. If not, then the agreement will, if there be apt words, be construed as a present demise. If such a future formal lease is contemplated, it is not, of itself, decisive, that the instrument or agreement is not a present lease. I do not pretend to go over the authorities upon the subject; perhaps they cannot be all reconciled. Some of the most pointed cases, are Doe v. Ries, 8 Bing. 178; Piners v. Judson, 6 Bing. 206; Staniforth v. Fox, 7 Bing. 590; Hancock v. Caffyn, 8 Bing. 358; Alderman v. Neate, 4 Mees. & W. 709; Doe v. Benjamin, 9 Adol. & E. 644; and Jones v. Reynolds, 1 Adol. & E. (N. S.) 506.

But as has been already suggested, it is not material in the present case, whether the agreement be construed as a mere executory contract, or as a present demise, since in either case Kimball has occupied under it.

The second exception is of a very different character. The question here is, whether, under the circumstances stated in the master's report, Kimball ought to be held responsible for the original rent, agreed to be paid, or only for the reduced rent, which he agreed to take from the lessees at a subsequent period. The master held him bound to pay the original rent; the exception is founded upon the suggestion, that he ought to be liable only for the reduced rent. Now it is material to state, that, at the time when the lease was made to the museum corporation, Kimball was the proprietor of two hundred and seventy-five shares of that corporation, and Wellington was the proprietor of the remaining twenty-five shares. Wellington was president, and Kimball was treasurer, of the corporation. And this continued to be the state of things up to the 14th of December, 1842. Eldredge conveyed the whole estate to Kimball on the 1st of March, 1842, and on the 7th of the same month, Jenkins served a written notice on Kimball of his title; the present bill was brought at the May term, 1842; and the agreement for the reduction of the rent, was made on the 14th of December, 1842. So that, in fact, at the time of the reduction, Kimball and Wellington were the sole proprietors of the museum; Kimball claimed to be the sole owner of the building; and Jenkins was then asserting his title to the property, as equitable owner in the present suit. Stripped, therefore, of its artificial garb, the agreement was, in fact, an agreement by Kimball, as owner of the property, with himself, as proprietor of eleven-twelfths of the museum, and Wellington, as proprietor of the remaining one-twelfth, for a reduction of the rent, with full notice of the suit, and of the asserted trust, and without any consultation with, or assent thereto by Jenkins. Of course, Kimball had no right to make any such reduction of the rent, so as to bind Jenkins, and what he did, was at his own peril, and obviously, if the trust was established, it was a reduction for his benefit exclusively, and injurious to the cestui que trust. It was a reduction too, in the face of

the award, by which, very competent referees had fixed the rent at $4,650 per annum, for the ten years. In my judgment, there is no pretence of any necessity, as has been suggested at the argument, to reduce the rent. Admitting a depression to have existed at that time, non constat, that there might not be, and indeed there seems, subsequently, to have been a correspondent revival of the value afterwards. And certainly, in a case where the party, if a trustee, had so deep an interest in a low rent, he ought not to be permitted to make a bargain substantially to promote that interest, at the expense of the plaintiff. At all events, he had no right to change the existing state of things, at the time when the present suit was brought, to the prejudice of the plaintiff, without his consent, or approval. At the argument, it at first occurred to me, that there might be a good ground to make some distinction in his favor. But upon examining the facts, I am perfectly satisfied, that the master was right in his conclusion, and that Kimball is rightfully chargeable with the whole rent of $4,650, originally reserved during the period stated in the report.

The third and fourth exception depend upon the second, and are governed by it. No necessity is shown by the evidence for the reduction of the rent, of such a nature as can possibly apply to the present case. It was the case of a mere calculation of chances. The charge of interest follows properly from the liability to pay the full rent.

The fifth and last exception is one, upon which I have felt the most difficulty. According to the course of the authorities in England, no allowance of a claim of this sort, for commissions, would be sanctioned by a court of equity, even in cases of an open, and admitted express trust. Here, the trust was denied by Kimball, as well as by Eldredge, and it has been forced upon both in invitum by the judgment of the court. In America, and especially in Massachusetts, it has been the general practice to allow commissions to trustees, in cases of open and admitted express trusts, where the trustee has not forfeited them by gross misconduct. The present case is confessedly new, and does not fall within the predicament of an express trust, nor within that of gross misconduct, in the administration of such a trust. I confess, that I do not feel sure, that the party is, under all the circumstances, entitled to the allowance of commissions; but I, nevertheless, should not feel quite satisfied with refusing the allowance. It seems to me, on the whole, equitable to allow it. If the cause shall, upon other grounds, go to the supreme court for revision, the plaintiff can, by a cross appeal, bring this matter in review before that court.

I, therefore, do order and direct, that the report of the master be confirmed as to all matters, except the disallowance of the sum of $791, claimed as commissions, which sum I direct to be deducted from the balance found due by him of $12,462.41. So that the balance, with which the said Kimball do stand charged at the date of the report, be the sum of $11,671.41, instead of the said sum of $12,462.41. I do not consider, under the circumstances, that any interest can, or ought to be allowed on the commissions; nor any deduction from the other interest be properly made on account thereof. Having disposed of the exceptions, it remains only to say, that I am satisfied with the report in all other respects, and do order the same to stand confirmed accordingly.

In respect to the final decree, upon reflecting upon the subject, it appears to me to be the positive duty of this court, (subject, of course, to the appellate jurisdiction of the supreme court), to put an end to this most protracted litigation, for the very reason so pointedly suggested by Voet, that suits may not be immortal, while men are mortal.

Upon the question of costs, there does not seem to me to be any ground to suggest, that either of the defendants is entitled to costs, or that the plaintiff ought to be denied the ordinary costs of the suit. The defendants have resisted the rights of the plaintiff, now established by the court, at every step of the controversy; and having so done, they, and not the plaintiff, ought to bear the burthen or expenses of the litigation. Of course, I do not speak of the extraordinary expenses, but only of the ordinary costs.

In respect to the suit brought by Bliss against the defendant, Eldredge, now pending in the state court, it seems but reasonable, that, as far as this court can operate upon the matter, it ought not to subject Eldredge to double vexation. Bliss has voluntarily appeared and assented, as I understood him, to any decree of this court in the premises.

[See Case No. 7,269.]

## Case No. 7,269.

JENKINS v. ELDREDGE et al.

[1 Woodb. & M. 61.] [1]

Circuit Court, D. Massachusetts. Oct. Term, 1845.

FINAL JUDGMENT—HOW ALTERED—EXTENSION OF TIME FOR PAYMENT OF MORTGAGE.

1. The terms of a final judgment cannot be altered by the court in any material part, except on a review, or appeal, or writ of error, or rehearing allowed for sufficient cause.

[Cited in Bank of U. S. v. Moss, 6 How. (47 U. S.) 39.]

[Cited in Bath's Petition, 22 N. H. 580; Cook v. Wood, 24 Ill. 297.]

2. Decrees are final, after the end of the term at which they are rendered, unless specially entered otherwise, and they are final after entered up as final on some day before the end of the

[1] [Reported by Charles L. Woodbury, Esq., and George Minot, Esq.]

term, with a view to other proceedings upon them as final decrees. Especially are they not to be altered when so entered by agreement of the parties.

[Cited in The Illinois, Case No. 7,003.]

3. Extending time for payment of a mortgage when foreclosed, is granted afterwards as an exception in equity, but extending the time to redeem in an application to redeem, on which a final decree has once been rendered, will not be so granted.

[Cited in Tufts v. Tufts, Case No. 14,233.]

4. Proceedings, such as the paying money on an execution, the opening of biddings at sales, and reports of masters, are not exceptions, but relate to new matters, after the decree, when they do not precede a final decree.

5. Without special statutes, accident in not appearing, or otherwise, happening before final decree, cannot be relieved against after final decree, unless by bill in equity, or unless fraud was mingled with it, or irregularity in the proceedings.

[Cited in Bank of U. S. v. Moss, 6 How. (47 U. S.) 39.]

The point under consideration in this case arises upon a petition, filed in it by [Joseph] Jenkins, March 29th, 1846, at the adjourned term, praying that the time for the payment of certain money by him, which had been ordered in a decree in the cause, might be extended thirty days. The original proceeding was a bill in chancery by Jenkins against the defendants [Charles H. Eldredge and others], which had been argued and decided in his favor at the May term, 1845. [See Cases Nos. 7,266–7,268.] But no final decree having been entered up, and an appeal being contemplated by the respondents, they mutually agreed, about the first of January, 1846, to certain alterations in the minutes for the decree, which had been prepared by the judge who delivered the opinion, and filed a written stipulation for judgment to be rendered in conformity to the new terms agreed upon, without appeal. It was accordingly so entered January 1st, 1846. Among the terms was the payment by Jenkins, by the 1st of April, 1846, of a certain sum of money, amounting to near $40,000, which, by this petition, he asks leave to have thirty days more for collecting and paying over. The reasons assigned for asking a longer time, were, the length of an arbitration, which had been necessary to settle a part of the amount, and the generally disturbed, uncertain and straitened condition of the money market. No evidence was offered by the plaintiff, but, on the part of the respondents, Mr. Thayer was examined, and he testified, that such an amount of money could readily have been borrowed on good mortgages, at six per cent., at any time since January 1st, 1846, in Boston; and some loans of large sums had been made at five and a half and five per cent., during that period, subject to be recalled on notice of four and six months.

Charles P. Curtis, for petitioner.

William H. Gardner, for respondents.

WOODBURY, Circuit Justice. The general rule on this subject is believed to be much the same in courts of equity as in those of law; and it is, that, after final judgment, the terms of it cannot be altered, in any essential particulars, except on a review, or writ of error, or appeal; or, at least, on a rehearing, allowed after showing sufficient cause. Albers v. Whitney [Case No. 137]; Doggett v. Emerson, Id. 3,961]. When a judgment is to be considered as final, is a different question; but it is usually regarded as final, after the end of the term at which it is rendered, when there is no special minute to the contrary. 1 Story, Eq. Pl. § 403. See 61st rule of this court. All judgments are, in such case, generally drawn up as if completed then, and that must be considered the registry or enrollment of them, where there is no entry or agreement to the contrary. See 62d rule. But when, as in this case, a judgment or decree is settled by agreement of the parties, and is entered as completed on some particular day; or when one is so entered, by direction of the court, without any such agreement, it must, by analogy, be considered as final from that day, and execution will issue accordingly, when asked for, or any other proceedings be had appropriate on a final judgment. After that day it ceases to exist in loose minutes, or on the waste docket, or in any way unadjusted; and these are the ordinary tests of its being finished or final. 2 Madd. Ch. Prac. 373; 7 Brown, Parl. Cas. 204; 1 Ves. Jr. 251; 7 Ves. 293. Perhaps after that, a mere clerical mistake in the figures, or in a formal part of the judgment or decree, may be corrected, either on motion or petition, but nothing done which goes to its merits and to the principles or orders themselves, that have been made by the court. 7 Ves. 293; 12 Ves. 456, 458; 1 Hoff. Ch. Prac. 559; 2 Smith, Ch. Prac. 14; 2 Johns. Ch. 205; 4 Johns. Ch. 545; Albers v. Whitney [supra]; [Sibbald v. U. S.] 12 Pet. [37 U. S.] 492; [Cameron v. M'Roberts] 3 Wheat. [16 U. S.] 591; [Bank of Kentucky v. Wister] 3 Pet. [28 U. S.] 431; [The Palmyra] 12 Wheat. [25 U. S.] 10; [Poole v. Nixon] 9 Pet. [34 U. S.] 771.

Are there any exceptions to these general principles, in cases where time is given in the judgments to make payments or sales, or where a master is to make examinations and reports? None have been cited at the bar, and none are within my own recollection, except in cases of bills to foreclose a mortgage. There, in the decree to make payment within a given time, the period has been extended, on the payment of interest and cost. 3 P. Wms. 343; 1 Brown, Ch. 183. But this departure from the original judgment has been regretted, and it has been refused in the case of bills brought to redeem mortgages, which was the case with one part of the present proceeding. 17 Ves. 382; 2 Madd. Ch. Prac. 377; Brinckerhoff v. Lansing, 4 Johns. Ch. 65, 76. Because, as the court say, in this last case, the plaintiff, who asks the favor, comes into court voluntarily, and should be always ready, or able to be ready, to redeem,

before suing. While in the first case the defendant, who asks more indulgence, does not come into court voluntarily, nor profess any readiness to pay, and hence, under certain circumstances, longer time has been granted to him. 2 Madd. Ch. Prac. 377.

There is another class of cases, where in the proceedings themselves, after the final judgment, the court will interfere, such as opening the biddings in a proper case, on depositing the money received. 2 Madd. Ch. Prac. 385. So at law, directing payments of the money into court by the sheriff, or to one of the parties in claims by two, under the execution. These, however, it will be seen, relate to the proceedings after the final judgment, and not to any change in the terms of the judgment itself. A judgment is final, notwithstanding certain consequential proceedings are to be had by a master, &c. Quackenbush v. Leonard, 10 Paige, 131; Girod v. Michoud, 4 How. [45 U. S.] 503.

There is still another class of cases, where courts have interfered after final judgment, to act on the judgment itself, sometimes as at common law, sometimes under special statutes, and sometimes under new and distinct process, such as audita querela. But in this instance, there is no special statute, nor any process of audita querela; and the only question remaining is, whether there is any thing which, on motion or petition as at common law, can justify an interference with the judgment itself, and a change in the time agreed on and directed for the payment of the money. If there had been fraud shown in the agreement, or a clear mistake, so as to justify in equity annulling it, the judgment founded on it would not stand very strong in foro conscientiae. And if it could be vacated, it would be, on facts very different from those which are presented here, and on a separate bill in equity usually. So, if a judg ment had been rendered without any agreement, and without appearance, in consequence of no actual service or notice to the defendant, or of some accident, or with an appearance, but from an act of God, or some other inevitable cause, or from some wrong of the other party, a good defence existing had not been interposed; in such cases there would be equitable ground for relief, much stronger than any averred in this case. In states, however, where no statutes exist expressly remedying such cases, it is very questionable whether any power exists at common law to reopen, or change, in a material part, any final judgment. Delancey v. Brownell, 4 Johns. 136; Popina v. M'Allister [Case No. 11,277]; Cameron v. M'Roberts, 3 Wheat. [16 U. S.] 591; 8 Dowl. 664. See contra, 6 Wend. 562; 2 Greenl. 109. And though in Cameron's Case some years had elapsed, the principle is the same, whether it be days or years, if the judgment has gone from the waste-book and minutes, and been entered up as perfected. The supreme court were much divided on this point in a case at the last session, where the accident was very clear and the equity strong. It was a prayer for a mandamus to the judges of the circuit court of the District of Columbia, to issue an execution, which they had suspended against a debtor, where he had been defaulted and judgment perfected against him; but by mistake as to the term of the court, he did not appear and plead as intended a discharge in bankruptcy, which he had previously received. A majority of the supreme court thought the execution could not properly be suspended, unless the judgment on the default was irregular and incomplete under the laws of the District, as was contended. The application for a mandamus failed from an equal division of opinion on that point chiefly. Dixon v. Miller, not reported.

No reasons exist here at all equal in strength to any of those in favor of an interference; and hence its propriety becomes more questionable than in any of those, though in them it has been refused. But beside these objections, this judgment is, in terms, the result of a deliberate written agreement, signed and filed by the parties in the cause; and, to change such a judgment, after entered up, without a new agreement by the parties, or other reasons than have been assigned here, could not be vindicated, it is believed, by any sound principle whatever, or any precedent. This conclusion is the less objectionable, on account of its operation here, than it might be in some cases, as the terms of the judgment or final decree in this case are such, that before a sale of the property on the failure of the plaintiff to make payment by the first of April, the master must give from forty to sixty days' notice; the shortest time reaching beyond the indulgence now asked. And if the plaintiff, on the day of sale, has the amount required ready, he can buy in the estate at any price he chooses, as the surplus, over that amount, is to go entirely to himself. Petition refused.

## Case No. 7,270.

JENKINS v. GREENWALD.

[2 Fish. Pat. Cas. 37; 1 Bond, 126.] [1]

Circuit Court, S. D. Ohio. April Term, 1857.

PATENTS — INFRINGEMENT — INJUNCTION — ADEQUATE REMEDY AT LAW — PROMISE TO REFRAIN FROM INFRINGEMENT — PROFITS — HOW ASCERTAINED—EQUITY RULES—THREE RIGHTS OF PATENTEE UNDER HIS PATENT.

1. Although inventors only are named in section 17 of the act of 1836 [5 Stat. 124], no doubt can be entertained that it extends to and includes the assignees of such inventors.

2. If there is no sufficient ground for the allowance of an injunction, and the case is to be viewed as a mere proceeding to recover compensation for an infringement of the exclusive right of the complainant, there would seem to be

[1] [Reported by Samuel S. Fisher, Esq.; reprinted in 1 Bond, 126, and here republished by permission.]

an adequate remedy at law, which would render the interposition of a court of equity improper.

[Cited in Ross v. City of Ft. Wayne, 58 Fed. 408.]

3. If the party sued as an infringer admits the infringement, but asserts that, after notice or service of the injunction, he had refrained from the use of the thing patented, and that he will not again infringe, it is no reason why the injunction should not issue or be made perpetual. The complainant, in such a case, is not obliged to rest his interests on the mere asseveration of the party that he will not repeat the act of infringement. Having once been a wrong-doer, the law supposes the possibility of his being so again, and will impose the proper restraint to prevent the repetition of the wrongful act.

[Cited in Perry v. Corning, Case No. 11,003; White v. Heath, 10 Fed. 294.]

[Cited in Judge v. Kribs, 71 Iowa, 186, 32 N. W. 325.]

4. The equity rules adopted by the supreme court, under the authority of an act of congress, are, of course, obligatory on the circuit courts. The latter have not the authority to rescind a rule adopted by the supreme court for the government of their practice in chancery.

5. The profits recoverable in an action for a violation of an exclusive right, under a patent, are not regarded as unliquidated damages.

6. The right to recover rests upon the principle that the party complained of has unlawfully appropriated to himself the benefits of an improvement or discovery which belong exclusively to another; and that so far as he has made profit by such appropriation, he is liable to the party injured. This profit is ascertainable by evidence; and does not, like the claim for damages in an action for a tort, rest in the mere discretion of a court or jury.

7. The patentee has, under his patent, three distinct rights which he may dispose of separately to different individuals. These are: the right to make the machine, the right to use it, and the right to vend it.

8. A grant to A. of the exclusive right to make, vend, and use a certain machine within the county of Hamilton, Ohio, conveys the right to make and vend such machines within said county for licensees who intend to use the same without said county; and the manufacture by others of machines within said county, for use without, is an infringement of the rights conveyed to A.

9. The damages for such infringement are the profits of the manufacture.

This was a bill in equity, filed to restrain the defendant [Isaac Greenwald] from infringing the letters patent granted to William Woodworth, and more particularly referred to in the report of the case of Foss v. Herbert [Case No. 4,957]. A limited injunction against the defendants had been granted by Mr. Justice McLean, which the complainant [Ebenezer Jenkins] now moved to perpetuate. The facts upon which the motion was based sufficiently appear in the opinion of the court.

Coffin & Mitchell, for complainant.

R. D. & J. H. Handy, for defendant.

LEAVITT, District Judge. This case is before the court on a motion by the complainant for a decree to perpetuate the injunction heretofore allowed by Judge McLean, and for the profits arising from an alleged infringement, by the defendant, of the complainant's exclusive right to construct Woodworth's patented planing machine within certain territorial limits, which will be hereafter noticed. This motion is resisted on several grounds, which will be adverted to.

Before proceeding to the consideration of the points arising in the case, it will be proper to state the material facts involved. This I shall do without presenting even an analysis of the allegations of the parties, as set forth in their pleadings. On April 21, 1846, James G. Wilson, in whom was vested, by assignment, the title to the Woodworth patent, entered into a contract with the complainant and one Benjamin Bicknell, by which, on the conditions specified, Wilson sold and granted them "the exclusive right to make, use, and vend to others to construct and use, during the full term of said letters patent, from this day until December 27, 1856, machines for planing, tonguing, and grooving, upon the principle, plan, and description of the said renewed patent, and amended specifications, within the territory of Hamilton county, in the state of Ohio, and so much of the adjacent territory in the state of Kentucky as lies along and adjoining said Hamilton county, and within five miles of the Ohio river." After reserving the right of Hudson and Hughes to the use of one machine in the city of Cincinnati, previously granted by Wilson, the contract recites that several other licenses had been granted within Hamilton county on certain conditions stated. Wilson also reserves the right to license the use of other machines within the territory designated in the contract, upon the condition "that the aggregate machines allowed by sale or license, executed by him, or his former assignees, Brooks and Morris, licensed to be used in that territory, do not exceed thirteen," etc. It is then provided that "Bicknell and Jenkins shall not erect for use, or directly or indirectly authorize to be used, within the said territory, any machines, until the number is, or shall be, reduced to eight, and when any right of any person to use any of the said thirteen machines shall cease, Bicknell and Jenkins shall not put in operation a machine or machines in lieu thereof, until the whole number of machines in said territory shall be reduced below eight, and when so reduced, the number of machines shall be kept at eight." It is also agreed that, in the licenses to be granted, it shall be stipulated that the licensees shall not work lumber, by said machines, at a less rate than seven dollars per 1,000 feet of board measure, and that they shall render full accounts of their earnings, etc. Bicknell and Jenkins agree to pay for the rights granted at the rate of $2,500 a year, with the condition, that if their receipts from licenses do not amount in any year to that sum, they are to pay or account to Wilson at the rate of $1.25 per thousand, etc. Wilson binds him-

self, "on due notice to institute and prosecute all actions necessary to secure the monopoly granted by said patent, within said territory, at his own expense, and expressly reserves to himself all damages which may accrue therein, and the exclusive right to prosecute for piracies." Bicknell and Jenkins reserve the right, on giving three months' notice of their intention, to surrender the agreement, at the end of any year. Wilson, after the assignment to Jenkins and Bicknell above mentioned, assigned whatever remaining interest he had in said letters patent within said territory to Elisha Bloomer. On August 25, 1847, Bicknell assigned to Elisha Bloomer an undivided half of his right to build machines under said contract; and on September 1, 1849, Bloomer assigned his interest to Bicknell. On December 2, 1853, Bicknell assigned all his right to build and sell machines, all claims for damages for infringements, and for profits of making the machine, to the complainant.

It is among the averments of the bill, that the defendant had made a number of machines, at Cincinnati, upon the plan of the Woodworth patent, without license therefor from Wilson, in violation of the complainant's exclusive right; and that then, on August 29, 1854, he was engaged in making one at his shop in Cincinnati. The bill prays for an injunction restraining the defendant from the further construction of the machines, and for an account of the profits, and for general relief. The defendant, in his answer, admits, in substance, that he had constructed several planing machines on the Woodworth plan, at Cincinnati, without a license from Wilson, and that at the time of the filing of the bill, he had one in his shop. He denies that he has infringed any right of the complainant, and avers that the complainant has no exclusive right to build the machines for use or sale, outside of the limits of the territory designated in the contract with Wilson.

This case has been referred to a master, to take testimony as to the number of machines constructed by the defendant, and the profit derived therefrom. The report of the master shows the number of machines made by the defendant; and that either at the time the notice of the application for the injunction was served, or at the time of filing the bill, there was one in his shop. But it appears from the evidence, that all the machines made by the defendant were sold, to be used at places not within the limits of the territory described in the contract referred to.

The first objection to the decree asked for by the complainant is, that this court has not jurisdiction. By section 17 of the patent act of 1836 [5 Stat. 124], jurisdiction is given to the circuit courts of the United States, in all cases arising under any law of the United States, granting or confirming to inventors the exclusive right to their inventions or discoveries; and they are authorized, "upon a bill in equity filed by any party aggrieved in any such case, to grant injunctions, according to the course and principle of courts of equity, to prevent the violation of the rights of any inventor as secured to him, by any law of the United States, on such terms and conditions as said courts may deem reasonable." Although inventors only are named as entitled to the benefits of this statute, no doubt can be entertained that it extends to and includes the assignees of such inventors. Ogle v. Ege [Case No. 10,462]; [Woodworth v. Wilson] 4 How. [45 U. S.] 712. Such was clearly the view of Judge McLean in granting the injunction in this case. The statute limits the discretion of the court to the granting of injunctions, "according to the course and principle of courts of equity," etc. And it is insisted by counsel, that, as the case before the court shows that, at the time the writ of injunction issued, the defendant was not in the act of infringing the complainant's exclusive right, and has denied any intention of doing so in future, there is nothing on which the injunction can operate, and that, therefore, it should be dissolved, and the bill dismissed. It is true, if there was sufficient ground for the allowance of the injunction, and the case is to be viewed as a mere proceeding to recover compensation for an infringement of the complainant's exclusive right, there would be great force in the objection now urged to the jurisdiction of this court. In the case supposed, there would seem to be an adequate remedy at law, which would render the interposition of a court of equity improper.

The allegations of the bill, and the admissions of the defendant, in his answer, as to the fact of infringement, have been before noticed. Upon the point now under consideration, the only inquiry is, whether it is necessary to justify an order for an injunction, or for its continuance when allowed, that the defendant should have been in the act of infringing the complainant's exclusive rights at the time of its allowance. The argument of the counsel for the defendant is based on the supposition that this is necessary. But, it seems clear, the position of counsel is not sustained, either by reason or authority. In his treatise on Patents (section 335) Mr. Curtis says: "If the plaintiff shows the necessary possession, and an infringement has actually been committed by the defendant, the injunction will be granted, notwithstanding the defendant admits the infringement, and promises not to repeat it." The writer refers to the case of Losh v. Hague, Webst. Pat. Cas. 200, as sustaining his position. In that case, the vice-chancellor is reported as saying: "Now, it seems to me that there can be no question but that the wheels complained of as having been made by the defendant, do

answer the description of the plaintiff's wheels, and I do not think it enough, on a question of injunction, for the defendant to say that he has done the thing complained of, but will not do it again." And further, "But if once the thing complained of has been done, I apprehend this court interferes, notwithstanding any promise the defendant may make not to do the same thing again."

I think the supreme court of the United States, in the case of Woodworth v. Wilson, 4 How. [45 U. S.] 712, decided the point under consideration, though not expressly referred to, in the opinion given. That was a proceeding in chancery for an infringement of the Woodworth patent. An injunction had been granted to restrain the defendant from the use of the machine; and in the progress of the case, a rule for the attachment against him, for violating the injunction, had been issued. In the statement in the proceedings in the court below, it appears that the defendant showed cause against the rule, by an affidavit in which he stated that immediately on the service of the injunction he ceased to use the machine. The report further states that the case was heard on the merits and upon the rule granted; and the court dissolved the injunction, dismissed the bill, and discharged the rule. The case was appealed to the supreme court of the United States, where the decree of the circuit court was reversed. Although not specially noticed by the judge in delivering the opinion of the court, it is obvious the point under consideration was decided. For, if the fact stated in the defendant's affidavit, that he had ceased to use the machine upon the service of the injunction, had been viewed by the supreme court as a sufficient ground for the decree in the court below, dissolving the injunction and dismissing the bill, it is clear there would have been no sufficient ground for reversing that decree. In the opinion of the court, it is remarked that "some other objections were taken to the maintenance of the suit on the argument, which it is not material to notice particularly. They have all been considered; and, in the judgment of the court, afford no sufficient ground for the dismissal of the bill, and the dissolving the injunction." These authorities seem decisive on the point referred to. They establish the position, that if the party proceeded against as an infringer of the exclusive right of the person having the title to the patent, admits the infringement, but asserts that after notice or service of the injunction, he had refrained from the use of the thing patented, and asserts that he will not afterward infringe, it is no reason why an injunction should not issue, and be made perpetual. The complainant in such a case is not obliged to rest his interests on the mere asseveration of the party, that he will not repeat the act of infringement. Having once been a wrong-doer, the law supposes the possibility of his being so again, and will impose the proper restraint to prevent the repetition of the wrongful act. This view sufficiently explains the reason why the court has declined to make an order for a further reference of this case to the master, and for leave to amend the answer, in accordance with the motion of counsel, filed since the argument on the hearing. The principal ground of the motion was, that there was an error committed by the master in taking the testimony in relation to the day on which the last machine made by the defendant was taken from his shop, and a similar error by the defendant in his answer on the same point. It is obvious, that if the conclusion of the court, as indicated, is correct, there could be no necessity for the reference moved for, as the legal aspect of the question would not be affected by the admission that the facts were as claimed by the defendant.

It is further insisted in argument, by the counsel for the defendant, that the complainant has precluded himself from taking a decree, in his favor, by allowing the defendant to be examined as a witness before the master, on the reference to him, and numerous authorities are cited, to the effect that if a complainant in chancery examines a defendant as a witness, it is a waiver of his right to a decree against him. Such, under ordinary circumstances, is, without doubt, the rule in chancery. But it is not applicable to the present case. In the first place, there is no evidence before the court that the defendant was examined as a witness before the master, at the suggestion or request, or with the knowledge of the complainant. There is, however, anotner answer to this objection. By the seventy-seventh rule of the rules adopted by the supreme court of the United States, regulating the chancery practice of the circuit courts, it is provided, that "the master shall regulate all the proceedings in every hearing before him, upon every such reference; and he shall have full authority to examine the parties in the cause, upon oath, touching all matters contained in the reference," etc. These rules were adopted by the supreme court, under the authority of an act of congress, and are, of course, obligatory on the circuit courts. And the eighth rule of this court, declaring that "interest in the event of a suit shall not render a witness incompetent, unless he be a party to the suit," neither conflicts with, nor abrogates, the seventy-seventh rule of the chancery practice. The circuit court has not the authority to rescind a rule adopted by the supreme court for the government of its practice in chancery. And the eighth rule, above quoted, excluding, by implication, a party from being a witness, was obviously intended to apply to cases at law.

It is also contended in argument, that the

complainant is not entitled to a decree for profits in this suit, if an infringement is proved, for the reason that the right to sue for and recover damages for piracies has not vested in him, by the assignments of Wilson to Bloomer, and of Bloomer to Bicknell. It is claimed by counsel that the latter assignment is only of the right of Bloomer to "build machines in Hamilton county, and can not be held to imply a right in the assignee to sue for damages accruing from infringements." These assignments have been before noticed. Wilson's assignment to Bloomer was, "of all his remaining interest in the patent" within the territory designated, and Bloomer assigned his right to build the machines, without any reservation of a right to any damages that may have accrued from infringements, or of a right to sue for them. It was, without doubt, competent for him to have reserved this right; but not having done so, and now asserting no claim, there is no reason, perceptible to the court, why the complainant, as the assignee of Bicknell, being vested with the entire interest in the patent, should not protect his rights by suit in his own name. Bloomer certainly has no interest in the patent, nor could he be compelled to join in any proceeding, having for its object the establishment of the rights of the complainant under the patent. Besides, there is no allegation or proof to the effect that any of the infringements complained of, in this suit, transpired during the period that Bloomer held his interest in the patent.

It is further insisted by counsel, that if there has been an assignment, which transfers to the complainant the right to sue for infringements of the patent, it is void, for the reason that, in its legal effect, it is an assignment of a right to unliquidated damages. This view is clearly not sustainable. The profits recoverable in an action for a violation of an exclusive right, under a patent, are not regarded in the light of unliquidated damages. The right to recover rests upon the principle that the party complained of has unlawfully appropriated to himself the benefits of an improvement or discovery which belongs exclusively to another; and that, so far as he has made profit by such appropriation, he is liable to the party injured. This profit is ascertainable by evidence; and does not, like the claim for damages in an action for a tort, rest in the mere discretion of a court or jury.

The remaining inquiry relates to the construction of the contract between Wilson and Bicknell and Jenkins. The counsel for the complainant insists that the clause granting the exclusive right "to make, use, and vend to others to construct and use" the Woodworth planing machine within the territorial limits designated, imports a right in the grantee to construct for sale or use elsewhere, and wherever a market can be found; and that consequently the construction of the machine, within those limits, by the defendant, though sold for use outside such limits, is an infringement of the exclusive right of the complainant, and that he is entitled to a decree for the profits derived from such infringement, as proved by the testimony in the case. On the other hand, it is contended that the limitation as to territory applies alike to the right of making, and to the right of vending and using; and that the complainant can not claim, under the contract, any exclusive right to make the machines for sale or use, except within the territory described. And it is argued that, as a necessary result, if machines are made by one having no license or authority, within those limits, for sale or use elsewhere, it is merely a technical infringement of the complainant's right, and does not afford a basis for a decree for an account of profits on the sales of the machines so made and sold.

As before noticed, the proof is clear that the defendant has made no machines which have been sold or used within the territory mentioned in the contract. He asserts in his answer a right to sell them elsewhere, without the license or consent of the complainant, and without being answerable for the profits. If this construction of the contract is sustained, it is clear the complainant is entitled only to nominal damages for the infringement. In that case he would have no right to invoke the aid of a court of chancery, as the law would afford a plain and adequate remedy. It is obvious, therefore, that the construction of the contract referred to, presents a material question for the decision of the court. In the case of Bicknell v. Todd [Case No. 1,389], which was an application to Judge McLean for an injunction, the learned judge, after giving a synopsis of the contract, says: "Under this contract, Bicknell and Jenkins have a right to make for use, within the district specified, the planing machines, under the restrictions named; and they have also a right to all the receipts under the thirteen licenses granted, they paying to Wilson the sum stipulated." The question arising in this case, whether Bicknell and Jenkins, under the contract, had the exclusive right, within the territory defined, to make machines for sale and use outside of it, did not arise in the case referred to, and was not decided by Judge McLean. It is, therefore, an open question in this court, and, perhaps, not wholly free from difficulty. I will state briefly the conclusions to which I have been brought on the point stated; and, in doing so, may properly express my regrets that I can not have the aid of my brother judge in its consideration and decision. This contract, in its terms, grants to Bicknell and Jenkins "the exclusive right to make, use, and vend to others to construct and use"

the Woodworth planing machine, for the full term of the patent, within the limits specified. It does not, in express words, extend the grant to the right of constructing machines, within those limits, for sale or use elsewhere. It is equally clear there is nothing in the contract which expressly negatives such a right. The intention of the parties must, therefore, be sought for; and if that can be ascertained by reference to the entire instrument, it will furnish a guide in giving it a construction, in reference to the point under consideration. And here it is material to notice, that the person having the title to a patent for a new or improved mechanical structure, has three distinct rights, which he may dispose of separately to different individuals. These are: the right to make the machine, the right to use, and the right to vend. In the case of Bicknell v. Todd, before referred to, Judge McLean distinctly recognizes this doctrine, as applicable to the contract now in question. He remarks, that "these rights have been treated as distinct by the parties to this contract;" and adds: "This is clear from the words of the contract, and especially from that part of it which reserves the right of Hudson and Hughes to make a machine, which had been granted to them by Wilson." At the date of this contract, Wilson held the entire interest in the Woodworth patent, including the territory named, except so far as he had previously granted certain rights within it. By his contract with Bicknell and Jenkins, he transferred his interest to them, subject to the restrictions and limitations specified. In this transfer, it seems clear he intended to distinguish between the right to make the machine generally, and the right to make for use, within the limits designated. While there is no limitation as to the former, the latter right is cautiously guarded and restricted. Wilson, prior to the date of the contract, had granted several licenses to use the machine in Hamilton county, and, in his contract with Bicknell and Jenkins, reserved the right of licensing other machines in the district mentioned, upon the condition that the number should not exceed thirteen. Bicknell and Jenkins bound themselves not to "erect for use, use, or directly or indirectly authorize to be used, within said territory, any machines, until the number is or shall be reduced to eight." Under this restriction, it is obvious they could expect but little profit from the right granted them within the district described, except what they might realize from the receipts to which they were entitled, from the machines licensed by Wilson. They could build and use no new machine within the district till the number licensed was reduced from thirteen to eight. And as to making machines, their right was only that of replacing such of the number licensed as might become unfit for use. This would seem to be an inadequate consideration for the $2,500 which they were to pay, yearly, for the rights granted to them; and would justify the conclusion that the right to make the machines was intended to have a wider meaning.

In the argument of the counsel for the complainant, it is contended that the right to make and the right to use the machine, in the contract under consideration, are distinct and independent, and that the parties intended to separate them. It is insisted, therefore, that while Bicknell and Jenkins are restricted in their right to make, for use, within the territory named, there is no limitation to their right to make, for sale, without that territory. This is probably the true construction of the contract. But then the inquiry arises, does the grant of the naked right to construct, import a right to Bicknell and Jenkins to sell for use, outside of the territory named? The right to make carries with it the right to sell; but does it necessarily imply the right to use the machine when made and sold? According to the argument of the complainant's counsel, the mere right to make, with the right to sell, may be vested in one person, while the right to grant a license for the use of the machine may be in another. Has Wilson, in his contract, parted with the right to authorize the use of the machines, to be made by Bicknell and Jenkins, for sale outside of Hamilton county, and the adjacent territory, in Kentucky? Upon the supposition that he had granted the right, Bicknell and Jenkins were authorized to make and license for use anywhere within the United States. I can not perceive anything in the terms of this contract justifying the conclusion that a right so immensely valuable was transferred by Wilson. The consideration named in the contract would certainly be no equivalent for such a right. But, on the supposition that Wilson transferred, without limitation as to any territory outside of that named in the contract, the mere right to construct the machines for sale, reserving the right to license such machines for use, the contract becomes intelligible, and the intention of the parties obvious. In this view, it excites no surprise that Wilson should have granted, without restriction or limitation, the right to manufacture the machines for sale anywhere, beyond the limits of the district specified. His policy was to encourage the making of the machines, since his profits from licenses would be increased in proportion to the number made and sold. The city of Cincinnati, being one of the principal centers of business in the West, and of easy access from various points, would be a desirable place for the manufacture of the machines. From thence, they would readily find their way into the smaller towns and villages.

If this view of the contract is correct, it follows that the defendant has infringed the complainant's exclusive right to make the

machine, by constructing machines within the district defined, and selling them elsewhere, and must account for the profits accruing to him from such violation of the right of the complainant. And the question is presented, upon what principle shall these profits be estimated? Counsel assume that the complainant occupies the position, and is entitled to all the rights of an assignee of the entire interest in the Woodworth patent, and as such is entitled to an account for all profits, including the price charged as the profit of the assignee, on the sale of his rights under the patent. But I am unable to perceive the justice of a decree in this case on that basis. If the right granted to Bicknell and Jenkins, as to all territory outside of that described in the contract, was the naked right to construct the machine, with a right to sell, but not to license for use, the rule of damages must be their actual profit from the manufacture of the machine, excluding any profit as a patentee.

I am aware that, in his treatise on Patents, Mr. Curtis asserts a principle that may seem to be in conflict with that on which it is proposed to place the decree in this case. He says: "When a patentee sells to another a patented machine made by himself, or permits such person to make the machine, the party thus authorized becomes a licensee, with the right of selling the machine, which carries with it the right of using it." Section 195. Without controverting this doctrine, I doubt its applicability to the case before the court. This case must be disposed of with reference to the contract between the parties. As before stated, this contract was made and so regarded by the parties, with reference to the rights of the patentee, or his assignee, of making, of vending, and of using a patented machine, as distinct and separable, and as capable of being vested in different persons; as before noticed, this principle was expressly sanctioned by Judge McLean, in the case referred to, and he held that the parties to this contract seemed so to have understood it. The doctrine laid down by the writer just mentioned, does not therefore apply to this contract. If the right of Bicknell and Jenkins was a mere right to construct the machine within certain limits, implying a right to sell outside of such limits, but without any right to use, or authorize others to use, the machine, the injury sustained by the complainant, as the result of the defendant's infringement of his exclusive right, is to be measured by the profit, which, as a manufacturer and not as a patentee, he realized from making it.

The report of the master shows that the defendant, on his own account and in connection with his partner, Bonsall, constructed and sold nine machines; and that the amount usually paid to the patentee, for the right to make machines, is $225 each. It does not appear, from the report, whether this is inclusive or exclusive of the profit made by the manufacturer. This profit, as it seems to the court, furnishes the rule for fixing the amount of the decree. For the purpose of ascertaining this, there must be a further reference to the master, unless the parties can agree on the amount. Case referred back to the master for the purpose of stating an account, in accordance with the principles stated.

[For other cases involving this patent, see note to Bicknell v. Todd, Case No. 1,389.]

## Case No. 7,271.

JENKINS v. JOHNSON et al.

[9 Blatchf. 516; 5 Fish. Pat. Cas. 433.] [1]

Circuit Court, S. D. New York. April 10, 1872.

PATENTS—IMPROVEMENT IN THE MANUFACTURE OF ELASTIC PACKING.

1. The reissued letters patent granted to Nathaniel Jenkins, August 3d, 1869, for an "improvement in the manufacture of elastic packing," the original patent having been granted to him, as inventor, May 8th, 1866, are valid.

2. The first claim of that patent, namely, "An elastic packing composed of at least four-tenths of finely pulverized, refractory earthy or stony material, intimately mingled with, and held together by, rubber prepared for vulcanizing, and then vulcanized, as and for the purpose described," claims a packing, into the composition of which there enters at least four-tenths of refractory, earthy, stony or mineral matter, which must go in in a pulverized state in order to be intimately incorporated with the India-rubber, which serves as a vehicle to hold the powder, the compound being then vulcanized, by subjecting it to heat, in the presence of sulphur, and the result being a packing which is elastic, while it is indestructible by heat.

[Cited in Clarke v. Johnson, Case No. 2,855; Id., 4 Fed. 440.]

3. The letters patent granted to Nathaniel Jenkins, October 6th, 1868, for an "improvement in steam globe-valves," are valid.

4. The claim of that patent, namely, "The arrangement of the bearing surface, '1,' of the valve-head, and the elastic packing held in an annular recess in the valve-head, as described, with the valve-seat, f', and the raised seat, f, in the manner as shown and specified," claims the arrangement of an annular chamber or cup, containing an elastic packing, with a raised seat, in connection with the two bearing surfaces, outside of the cup and the raised seat, the whole operating in the manner described.

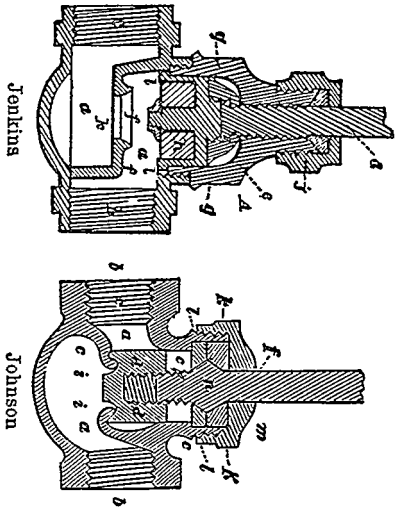
5. Such invention is not anticipated by a valve consisting of a raised seat, and a metallic receptacle fitting over it; nor by a valve with a raised seat, and a cup, and a packing of lead or tin fused into the cup.

[Final hearing on pleadings and proofs.

[Suit brought upon two letters patent—one [No. 54,554] for an "improvement in the manufacture of elastic packing," granted to complainant [Nathaniel Jenkins] May 8, 1866, and reissued August 3, 1869 [No. 3,579]; and the other for an "improvement in steam

[1] [Reported by Hon. Samuel Blatchford, District Judge, and by Samuel S. Fisher, Esq., and here compiled and reprinted by permission. The syllabus and opinion are from 9 Blatchf. 516, and the statement is from 5 Fish. Pat. Cas. 433.]

globe-valves," granted to complainant October 6, 1868. The nature of both inventions is set forth in the opinion.




[The foregoing engravings illustrate the globe-valve of the complainant, and that covered by a prior patent granted to the defendants [John Johnson and others.]

[In Jenkins' valve the elastic packing, h, is placed in an annular ring, l, which formed the valve or stopper. When the valve descends, the packing presses on the raised seat, f, or if the packing is worn or distended, it presses upon the body of the seat below the raised portion. The Johnson valve contained a raised seat and an annular valve or stopper, d, but no elastic packing.] [2]

[Patent No. 49,414 was granted to John Johnson, August 15, 1865.]

Thomas W. Clarke and William D. Booth, for complainant.

Anthony R. Dyett, for defendants.

BLATCHFORD, District Judge. This suit is founded on two letters patent granted to the plaintiff. One of them is a reissued patent granted August 3, 1869, for an "improvement in the manufacture of elastic packing," the original patent having been granted to the plaintiff, as inventor, May 8, 1866. The other is a patent granted to the plaintiff, as inventor, October 6, 1868, for an "improvement in steam globe-valves."

The specification of the packing patent describes the invention as one of an "elastic packing for joints and valves exposed to destructive fluids." It says: "The nature of the invention consists, first, in constructing the packing of refractory earths, or earthy and stony matters, mingled with rubber and such other materials as are necessary to vulcanize the rubber, in such quantity that the earthy or stony matter shall be more than four-tenths of the entire compound, and then vulcanized in molds to the desired shape of the packing; and, second, in the selection of such earthy or stony materials, and proportioning them in the compound. All elastic packing, of indestructible properties, to a valve, joint, or aperture through which a destructive fluid is to pass, such as steam of any kind, hot water, kerosene, or other coal oil, hot or cold, has been unattainable till recently; but, after experiments of more than one year, I claim to have discovered a tight, indestructible, elastic packing, for these purposes. It will be seen, from the following formulas, that a leading feature of the composition is, that it contains large quantities of earthy materials, such as French chalk, or talcose matter, a very refractory material; Paris white, a substance which is decomposed only at a very high temperature, and in presence of air or gases of combustion, or of strong acids, with steam, and is not easily fused; and litharge, which assists in vulcanizing, and does not tend to decompose the other ingredients, at the temperatures to which the composition is exposed. In the selection of the earthy or stony matter, the choice would be governed by facility of pulverization, and insusceptibility to heating influence. Soapstone is indicated as an ingredient by the use of French chalk. Paris white indicates the use of other earthy carbonates. The substance of the invention is the employment, for a packing, of an earthy powder of refractory quality, intimately mingled with vulcanized rubber, and constituting forty per cent. of the compound. With the following ingredients, the proportions would be within the following limits: pure rubber, from 20 to 25 per cent.; pure gum shellac, from 10 to 20 per cent.; pure Paris white, from 20 to 30 per cent.; pure French chalk, from 15 to 25 per cent.; pure litharge, from 11 to 18 per cent.; pure lamp-black, from 2 to 3 per cent.; pure sulphur, from 1 to 3 per cent. Increase the quantity of rubber when the fluid to be resisted is less penetrating; and increase the quantity of Paris white, French chalk, litharge, and shellac, when it is more penetrating. One hundred parts of the above substances, mingled within the percentages given, will be comparatively indestructible, in the presence of coal-oil, steam, or hot water, and will preserve their elasticity and texture for a long time." A table is then given, of proportions in use, with coal-oil, steam, and hot water, respectively, of the various ingredients above mentioned, which, it is stated, have given favorable results, and which the patentee states he is inclined to consider the best attainable for their respective purposes. They range, except as to lamp-black, which goes up to 3¼ per cent., within the limits before stated. The specification continues: "I do not, however, confine myself to these exact proportions, but consider the composition most accurately stated by the limitations given before. The ingredients, other

[2] [From 5 Fish. Pat. Cas. 433.]

than the rubber, are to be finely powdered and intimately mixed together. They are then to be spread on the surface of the rubber, and rolled with it, between cold rollers, until they are thoroughly incorporated with the substance of the rubber. The mass is then to be molded in iron molds, of proper shape, and subject to a high vulcanizing heat—say that due to a steam pressure of sixty to seventy-five pounds, or, if desired to be very hard, even more—for from twenty to forty-five minutes." The claims are as follows: "1. An elastic packing, composed of at least four tenths of finely pulverized refractory, earthy, or stony material, intimately mingled with and held together by rubber prepared for vulcanizing, and then vulcanized, as and for the purpose described. 2. The composition of the ingredients, and within the proportions above set forth, substantially as and for the purpose described. 3. The employment of French chalk, or equivalent talcose mineral, substantially in the manner and for the purpose described."

"Refractory" is thus defined: "Noting earths or metals that are infusible, or require an extraordinary degree of heat to fuse them." "Earth," in chemistry, is "a metallic oxide, inodorous, dry, uninflammable, and infusible;" and, among the chemical earths, are silica and magnesia. A metallic oxide is composed of oxygen and a metal, as a base. A "stone" is "earthy or mineral matter condensed into a hard state." A "mineral" is defined as "a natural body, destitute of organization or life—a substance found in or on the earth, which is neither animal nor vegetable." "French chalk" is "steatite or soapstone—a soft magnesian mineral." Soapstone is composed chiefly of silica and magnesia. "Steatite" is defined as "a variety of talc—soapstone." "Talc" is defined as "a mineral," and is composed chiefly of silica, magnesia, and water. Litharge is an oxide of lead.

The answers set up want of novelty and want of patentability and non-infringement, as a defense to the packing patent; but there is no specification of any prior invention. There can be no doubt, on the proofs, that a packing compounded and prepared like the plaintiff's packing, and possessing its characteristics, did not exist before his invention. It is highly useful, supplied a great need, and has displaced previous packing, where resistance to destructive fluids is required.

The proper construction of the first claim of the patent is, that it claims a packing, into the composition of which there enters at least four-tenths of refractory, earthy, stony, or mineral matter, which must go in in a pulverized state, in order to be intimately incorporated with the caoutchouc or India-rubber, which serves as a vehicle to hold the powder, the compound being then vulcanized by subjecting it to heat in the presence of sulphur, and the result being a packing which is elastic while it is indestructible by heat. In the product, the India-rubber and the sulphur are chemically combined, forming vulcanized India-rubber; but the substances which, in the completed product, give to it its refractory character, are not chemically combined with the vulcanized India-rubber, but act mechanically. The refractoriness of the product is due to the non-elastic refractory substances in it, while its elasticity is due to the non-refractory vulcanized India-rubber. It was necessary that the packing, to serve all the ends of a packing, should be both refractory and elastic. It might thoroughly resist heat; yet, if it were not elastic, so as, by its resilience, under pressure, to tightly close all orifices which ought to be closed, it would not fulfill the purposes of a packing; and it might act for a short time as a practical elastic packing, and yet soon be destroyed by heat, if not so refractory as to resist the effects of heat for a long time. But the patentee discovered that a compound fulfilling the conditions of that claimed in his first claim would be comparatively indestructible in the presence of coal-oil, steam, and hot water, and would preserve its elasticity and texture for a long time.

The packing of the defendants is an elastic packing, constructed of refractory earths, mingled with India-rubber and sulphur, and then vulcanized. It has the indestructible properties of the plaintiff's packing. It contains large quantities of soapstone. Its earthy refractory matter constitutes forty per cent., at least, of the compound. The soapstone is in the proportion of from fifteen to twenty-five per cent. The ingredients found in the defendants' packing, by analysis, are India-rubber, sulphur, the oxides of lead and iron, and soapstone. The proportion of India-rubber and the proportion of sulphur to the whole mass exceed, each of them, the highest percentage given in the specification for those articles respectively. But it is shown that the excess of sulphur beyond the amount taken up by the India-rubber for vulcanization unites with the iron and lead and forms refractory mineral matter, and that such refractory mineral matter and the soapstone together are, at least, forty per cent. of the whole compound. This refractory forty per cent. acts mechanically, to resist heat, after the sulphur has united with the iron and lead, and is cemented together by the vulcanized India-rubber, which gives to the whole mass the necessary elasticity. The packing is substantially the same as the plaintiff's packing, as regards its mechanical application and operation in use, and its adaptation to the end desired. It results, therefore, that the defendants have infringed the first claim of the patent.

Regarding the third claim as a claim to the employment of French chalk or equivalent talcose material, in the range of proportions named in the specification, in the compound covered by the first claim, the defendants have infringed the third claim also. This

construction of the third claim is the one contended for by the defendants. Whether the third claim is susceptible of a broader construction, it is not necessary to decide in this case.

The specification of the valve patent says: "The invention is of that class of globe-valves in which an elastic or semi-elastic packing is employed for sealing the joint of the valve, the object of this invention being to provide more perfect security, or additional means of security, against clandestine escape of the steam or water about the joint of the valve, when closed, the same construction which accomplishes this also producing a durable or lasting valve. The invention consists in a peculiar construction or arrangement of parts, and the combination therewith of an elastic or semi-elastic annulus or packing, the arrangement of parts being such that, in the event of the destruction or weakening of the elastic packing, the metallic portions of the joint shall come in contact and operate to effect a tight union of the same." The structure is then described. It is a globe-valve, having a chamber, an inlet, an outlet, a stem, a stopper or valve, on the bottom of the stem, and a raised seat or annular ledge, f, raised some distance above the surrounding metal, f'. The stopper or valve is composed of a metallic head, pivoted to the lower end of the stem, in any suitable manner, such head being formed, upon its under side, with an annular chamber, for the reception of an annulus or packing of elastic or semi-elastic India-rubber, or other suitable material or compound, such packing being retained in place, in its chamber, by a nut screwed upon the shank of the head, and partially overlapping it, the packing extending a short distance below or beyond the annular lid, or circumscribing circumference, or bearing surface, l, of the head. The stem runs through a stuffing-box. On lowering the stopper or valve, in the act of closing the valve-opening or passage below, the packing is pressed tightly on the annular raised seat, f, which, by such pressure, is forced somewhat into the packing, and a tight joint between the valve and the seat is secured. From long usage, or from being subjected to the action of great heat, the packing may become enlarged or distended. Should this take place, it will, upon the descent of the valve, become inclosed between the annular end or face, l, of the valve-head, and the surface, f', immediately surrounding the valve-seat, f, and, by this means, form a secondary or additional means of closing the valve-opening against the passage of steam or water. Should the packing, in extreme cases, become wholly or partially destroyed, and unfit to perform its functions, the two metallic surfaces, l and f', will be brought tightly in contact, and, in themselves, form a close joint, thus creating an additional and third means or resource for effecting the desired object. The claim is this: "The arrangement of the bearing surface, l, of the valve-head, and the elastic packing held in an annular recess in the valve-head, as described, with the valve-seat, f', and the raised seat, f, in the manner as shown and specified."

The defense in regard to this patent is non-infringement, and that the defendant, Johnson, was the prior inventor of the improvement, covered by the patent, and that the valves made and sold by the defendants are such as are described in letters patent granted to the defendant, Johnson, August 15, 1865, for an improvement in steam-valves.

The proper construction of the claim of the patent, in view of the state of the art at the time of the plaintiff's invention, is, that it claims the arrangement of an annular chamber or cup, containing an elastic packing, with a raised seat, in connection with the two bearing surfaces outside of the cup and the raised seat, the whole operating in the manner described. The valve patented to Johnson in August, 1865, consisting of a raised seat and a metallic receptacle fitting over it, does not anticipate the invention. Nor does a valve with a raised seat, and a cup, and a packing of lead or tin fused into the cup. The elastic packing is an essential element in the arrangement. The full utility of the raised seat and the cup, and of the two bearing parts outside of them, is not developed until an elastic packing is used. The use of the elastic packing is not the mere substitution, in respect of the arrangement covered by the claim, of one packing for another equivalent packing. The use of an elastic packing is necessary to fully utilize the form of valve, and the form of valve is necessary to develop all the merits of such elastic packing as the specification of the plaintiff's patent speaks of—packing which becomes enlarged or distended by pressure or heat, and which, by the use of the plaintiff's arrangement, will, when it escapes outside of the cup and the raised seat, be pressed between the outside bearing surfaces, to still secure a tight joint. Lead or tin packing, fused into a cup, is not an elastic packing, in the sense of the plaintiff's specification, nor is it the equivalent of such elastic packing.

The earliest date of the application of the plaintiff's arrangement by Johnson, in making valves, was October, 1867. The plaintiff applied it a year earlier. Nothing that is adduced by the defendants affects the novelty of the plaintiff's invention in the valve patent; and the valves made and sold by the defendants are like the plaintiff's valve, in construction and arrangement.

There must be a decree for the plaintiff, for a perpetual injunction and an account of profits, in respect of the first and third claims of the packing patent, and of the claim of the valve patent, with costs.

[For other cases involving patent No. 54,554, see Clarke v. Johnson, Case No. 2,855; Id., 4 Fed. 437; Jenkins v. Walker, Case No. 7,275; Nelson v. McMann, Id. 10,109.]

## Case No. 7,272.

JENKINS v. MAYER.

[2 Biss. 303;[1] 3 N. B. R. 776 (Quarto, 189).]

District Court, N. D. Illinois. May Term, 1870.

BANKRUPTCY—PLEDGE BEFORE KNOWLEDGE OF INSOLVENCY—PREFERENCE—FAILURE OF AGENT TO MEET OBLIGATION OF PRINCIPAL — WHETHER ACT OF BANKRUPTCY.

1. A man not knowing himself to be insolvent may pledge his property to another whose money he has unlawfully used, and such a transaction is not a preference void under the bankrupt act [of 1867 (14 Stat. 517)].

2. Such a pledge is equally valid if made by an agent, and his authority need not be in writing.

3. Money paid to redeem property thus pledged cannot be recovered by the assignee.

4. Clerks and agents are not supposed to have such entire control over the resources of their principal as to make their failure to meet an obligation of their principal an act of bankruptcy against him.

This was a petition by Robert E. Jenkins, as assignee in bankruptcy of D. S. Heffron, to set aside a certain transaction between the bankrupt and Constant Mayer, the respondent, and to compel the restoration to the assignee of certain payments received in pursuance of the transaction thus attacked.

Rich & Noble, for assignee.

Hoyne, Horton & Hoyne, for defendant.

BLODGETT, District Judge. The facts elicited in the evidence are substantially these: Up to some time in August, 1869, the bankrupt Heffron and one A. H. Hovey were in partnership as seedsmen and florists, and also as dealers in statuary, pictures and works of art. For the better transaction of the latter branch of their business, they had a "fine art gallery," where articles in that line were exhibited and remained for sale on commission. In the course of this business Constant Mayer, one of the respondents, had forwarded to them a valuable picture, entitled "Good Words," to be sold on commission.

In August the co-partnership was dissolved, and the business of the firm continued by Heffron. In September or October this picture was sold for $3,000, to be paid for about the 1st of November. Some time in September Heffron left Chicago for the East, and entrusted the general management of his business to his former partner, Mr. A. H. Hovey, who had power to sign checks and notes. In the latter part of October a note of Heffron's came due at one of the banks in this city, and Hovey, having no other available resources, collected the amount due on the picture sold for Mayer, and used the proceeds for the payment of the note. Heffron, who was at the time at Utica, N. Y., on business, on being advised of this act on the part of his agent, wrote to Mayer, apologizing for the use of his money, and enclosing his draft at thirty days for the amount. On the receipt of this letter, Mayer at once wrote to Messrs. Hoyne, Horton & Hoyne, his attorneys here, directing them to proceed to collect the money at once by attachment, and denouncing Heffron for this unauthorized use of his money. When this letter came to the hands of Mayer's attorneys here, Heffron was still absent, and Hovey in the general charge of his business. The attorneys called upon Hovey for a settlement of their client's demand, and informed him of their instructions in the premises. Hovey assured the attorneys that Heffron was abundantly solvent and able to pay his debts, but that he was unavoidably detained at the East by the illness of his wife, and that when he returned, which they expected would be in a few days, the money would certainly be paid, and proffered them security if they would not commence suit. The result of the interview was that Hovey, as attorney and agent for Heffron, made and executed a bill of sale under seal, absolute on its face, to Mayer for a lot of pictures, works of art, and other property, the value of which was about $5,400, as stated in the schedule thereof, but the real purpose of which was to make Mayer secure for the amount of his funds thus appropriated to Heffron's use by Hovey. At the same time this bill of sale was executed by Hovey the property described therein was nominally turned over to J. Albert Hovey, a young man who seems to have been partially employed about the premises, to hold for Mayer; but the goods were not removed from the store, nor their visible possession and ownership changed. It is conceded that A. H. Hovey had no authority under seal to execute the bill of sale, his sole authority in writing resting on a letter from Heffron, authorizing him to sign checks and notes, and attend to his, Heffron's, business. About the 1st of December Heffron returned, and resumed the control of his affairs. He was informed of this transaction between Hovey, as his agent, and Hoyne, Horton & Hoyne, as attorneys for Mayer, and replied, "he should not have done so, if here; yet, as it was done, the arrangement had better be carried out;" or words to that effect. Soon after his return a proposition was made by some customer to change a picture he had for one of those conveyed by the bill of sale, and pay the sum of $600 difference; and, after consultation with Hoyne, Horton & Hoyne, this exchange was effected, and the $600 was paid directly over to Messrs. Hoyne, Horton & Hoyne by the purchaser, and by them credited to Heffron on the amount due Mayer. Subsequently Heffron placed a large portion of his works of art in the hands of an auctioneer for sale at auction, among which were a part of the goods included in the bill

[1] [Reported by Josiah H. Bissell, Esq., and here reprinted by permission.]

of sale, and a portion, about $600 or $800 worth of the goods mentioned in the bill of sale were sold. And on or about the 20th of December last, Heffron paid to said attorneys, for Mayer, $1,000 more. Since the commencement of the proceeding in bankruptcy against Heffron, another picture included in the bill of sale has been sold for $150, and the proceeds of which are in the hands of E. I. Tinkham, provisional assignee, subject to the decision of the questions involved in this cause. It is also agreed that a lot of potatoes included in the bill of sale have been sold for $240, and the proceeds are held subject to this decision. It is objected that this transaction is fraudulent as against the assignee of Heffron, because: First. It gave Mayer, a creditor, an undue preference over the other creditors of Heffron. Second. Hovey, the agent of Heffron, who executed the bill of sale, had no sufficient authority for his acts in that regard. Third. Said goods were suffered to remain in the control of the bankrupt without visible change, of control, or possession.

In support of the first point numerous decisions by my predecessor and other district courts have been cited, all tending to establish the conceded point that any act intended to give a preference is void under the bankrupt act. The reason and authority of these decisions is not denied, but the question is, was this a case where a preference, such as is prohibited by the act, was intended. Heffron, by his agent, had unlawfully used the funds of Mayer coming into his hands, and had offered his draft, due in thirty days, for the money thus appropriated. Mayer refuses to accept the draft, but directs his attorneys to commence suit by attachment at once; and Hovey, who had acted for Heffron in the use of the funds, and who was still acting for him, proposed to turn over the goods in question to secure the payment of the money, saying he had no doubt it would be adjusted immediately on Heffron's return, which was daily expected. And the attorneys of Mayer took the responsibility of accepting the security, instead of commencing suit as their client had directed. These facts seem to me clearly to take the case out of the class of cases cited. There is no pretense that Mayer or his attorneys had any actual knowledge of Heffron's insolvency at the time this transaction took place, although there is evidence going to show that he was, in fact, insolvent at the time, but was not himself aware of the fact, nor was Hovey, his general agent, so aware. But it is claimed that the cases cited show that "insolvency consists in present inability to pay debts," and that Mayer, through his attorneys, knew that he could not pay this debt, and was therefore insolvent. This rule might apply if Heffron had been present and the negotiations had been with him. But he was absent, and that absence was alleged as the sole reason for nonpayment, and the reasons given for such absence were not such as would excite any suspicion of insolvency or present inability to pay. Clerks and agents are not supposed to have entire control of the resources of their principal to such an extent as to make their failure to meet an obligation of their principal an act of bankruptcy against him.

And, in this case the proof is ample that no suspicion of insolvency had entered the mind of Heffron or his agent, Hovey. The bill of sale was executed as a temporary expedient to indemnify the attorneys for the responsibility they took in disregarding the instructions of their client, by withholding the suit he had instructed them to commence. I do not think, therefore, that the evidence shows this to be a case of fraudulent preference of a creditor within the bankrupt act, and the cases cited which have arisen under it.

In regard to the second point, that Hovey had no authority to execute the bill of sale, I deem it sufficient to say that it did not require a written authority, and that Mr. Heffron, before the proceedings in bankruptcy, and immediately on his return, ratified the act of Hovey and acquiesced in the same. It is objected that the bill of sale being under seal, the ratification must be by as solemn an instrument; but this, I apprehend, only applies when it is necessary that the original should have been under seal. As to the other objection, that the goods should have been separated, the evidence shows they were placed in charge of J. Albert Hovey, and that Mr. Heffron acquiesced in his assumed custody; and as there is no evidence that any creditor or purchaser was deceived or misled, I shall deem it good between the parties, and only concede to the assignee the assertion of such rights in regard to the property as Heffron might have asserted at the time proceedings in bankruptcy were commenced.

As to that part of the petition which claims a refunding to the assignee of the money received from Heffron since the bill of sale was executed, this depends upon the question whether the transaction between Heffron, through Hovey, his agent, and Mayer, through his attorney, was valid, and whether that, although an absolute sale on its face, was, in fact, only a pledge. Having come to the conclusion that this was a valid pledge of the goods, it seems to me that money paid to redeem the goods from that pledge cannot be recovered back. It seems clearly for the interest of the estate that the goods thus pledged, being of much greater value than the debt, should be redeemed, in order that the creditors may have the benefit of the excess in value over the debt secured by them.

NOTE. A mortgage of personal property may be valid against the assignee in bankruptcy of the mortgagor, even though it be not recorded, nor possession of the property delivered

to the mortgagee. In re Dalby [Case No. 3,540]. Also an unrecorded deed of real estate. In re Wynne [Id. 18,117]. The assignee in bankruptcy, except in cases of fraud, stands in no better situation than the bankrupts themselves. Winsor v. McLellan [Id. 17,887]. When a sale by the bankrupt before bankruptcy is void as to creditors under a state law, the assignee may recover the property. Allen v. Massey [Id. 231]. For a full discussion of the rights of creditors and the validity of liens consult In re Wynne [supra], opinion by Chief Justice Chase, where it is held that the assignee takes the property of the bankrupt "in the same plight in which it was held by the bankrupt when his petition was filed."

JENKINS (MUIR v.). See Case No. 9,903.

## Case No. 7,273.

JENKINS v. NICOLSON PAVEMENT CO.

[1 Abb. (U. S.) 567; 4 Fish. Pat. Cas. 201; 3 Am. Law T. Rep. U. S. Cts. 177; 2 Chi. Leg. News, 405; 13 Int. Rev. Rec. 13; 2 Leg. Gaz. 413.] [1]

Circuit Court, D. California. June, 1870.[2]

PATENTS—CONSTRUCTION OF ASSIGNMENT—SUBSEQUENT REISSUE—EXTENDED TERM.

1. An assignment of an interest in an invention and of letters patent therefor, made during the original term, carries no interest in a subsequently extended term, unless it contains a provision to that effect.

[Cited in Gear v. Grosvenor, Case No. 5,291.]

[See note at end of case.]

2. An assignment which grants "all the right, title and interest which I (the assignor) have in said invention and letters patent" * * * "to be held and enjoyed by" (naming the assignee &c.) "to the full end of the term for which the said letters patent are or may be granted," does not operate to pass a subsequent extension. The words "for which said letters may be granted," may pass a subsequent reissue of the letters for the residue of the original term, but cannot be construed as including an extended term.

[See note at end of case.]

[This was an action on the case, tried by submission, before Judge SAWYER, to recover damages for the infringement of letters patent [No. 11,491], for "improvement in wooden pavements," granted to Samuel Nicolson, August 8, 1854, reissued December 1, 1863 [No. 1,583], again reissued August 20, 1867 [No. 2,748], and extended to George P. Bigelow, administrator of said Nicolson, for seven years from August 8, 1868. The plaintiff claimed title by virtue of an assignment from the administrator, made subsequent to the extension of the patent. The defendant also claimed title by virtue of an assignment from Nicolson, executed during the original term, and which is set forth in full in the opinion.] [3]

J. R. Sharpstein and H. M. Hastings, for plaintiff.

S. M. Wilson and A. P. Crittenden, for defendant.

SAWYER, Circuit Judge. This is an action to recover the royalty established by the patentee for license to lay down the pavement known as the Nicolson pavement. In 1854, Samuel Nicolson obtained letters patent for an improvement in wooden pavements. In December, 1863, he obtained a reissue of the letters patent. In December, 1864, said Samuel Nicolson executed the following assignment of an interest in said invention and letters patent to Jonathan Taylor, viz:

"Whereas, I, Samuel Nicolson, of Boston, in the state of Massachusetts, invented a certain new and useful improvement in wooden pavements, for which letters patent of the United States of America (numbered 1,584 of re-issued patents, and bearing date the first day of December, in the year 1863), have been granted to me, giving to me and my legal representatives the exclusive right of making, using and vending the said invention throughout the said United States, the original patent being dated August 8, 1853, and given for the term of fourteen years,—

"And whereas, Jonathan Taylor, of Milwaukee, in the state of Wisconsin, has agreed to purchase from me all the right, title, and interest which I have in and to the said invention, for and in the city of San Francisco, in the state of California, as secured by the said letters patent, and has paid to me the sum of $1, the receipt whereof is hereby acknowledged: Now, therefore, this indenture witnesseth, that for and in consideration of the said sum to me paid, I have assigned, sold and set over, and do hereby assign, sell, and set over unto the said Jonathan Taylor, all the right, title and interest which I have in said invention and letters patent, for and in the said city of San Francisco, but in no other place. The same to be held and enjoyed by the said Taylor, for the use and behoof of him and his legal representatives, to the full end of the term for which the said letters patent are or may be granted, as fully and effectively as the same would have been held and enjoyed by me had this assignment never been made.

"In witness whereof, I have hereunto set my signature and affixed my seal, this 1st day of December, A. D. 1864.

"Samuel Nicolson."

The patent referred to in said assignment is the same patent issued to Nicolson in 1854, erroneously referred to as issued in 1853, and reissued in 1863. Taylor, prior to August, 1868, assigned to the Nicolson Pavement Company, defendants in this suit, all his interest in said patent, acquired under said as-

[1] [Reported by Benjamin Vaughan Abbott, Esq., and by Samuel S. Fisher, Esq., and here compiled and reprinted by permission. The syllabus and opinion are from 1 Abb. (U. S.) 567, and the statement is from 4 Fish. Pat. Cas. 201.]

[2] [Reversed in 14 Wall. (81 U. S.) 452.]

[3] [From 4 Fish. Pat. Cas. 201.]

signment, and the said interest was held by said defendants at the time of the commencement of this suit.

In August, 1867, said Nicolson obtained another re-issue of the said letters patent on an amended specification. Nicolson having subsequently died in January, 1868, and George T. Bigelow having been appointed his administrator, said Bigelow, in his character of administrator, in July, 1868, procured from the commissioner of patents a renewal or extension of said letters patent for seven years from August 8, 1868, in pursuance of section 18 of the act of congress of July 4, 1836 [5 Stat. 124], and the act of May 27, 1848 [9 Stat. 231]. Afterwards the plaintiff acquired, through assignment from said Bigelow as administrator, made on August 14, 1868, all his right, title, and interest in said invention and patent for the state of California. Since said August 14, 1868, the defendants, without leave or license of plaintiff, have constructed and laid down in the city of San Francisco a large amount of pavement, employing in its construction the invention for which said letters patent were issued.

The question in this case is, whether the assignment from Nicolson to Jonathan Taylor of December 1, 1864, set out in the statement of facts, vested any estate, right, title, or interest in the assignee, in or to the extended or renewed term, which was acquired by Bigelow as administrator under the act of congress, subsequent to the date of said assignment. It is quite clear that an assignment of an interest in an invention, and letters patent therefor, before the expiration of the original term, carries with it no interest in a subsequently extended term, unless it contains a specific provision to that effect. Wilson v. Rosseau, 4 How. [45 U. S.] 646; Bloomer v. McQueen, 14 How. [55 U. S.] 549; Brooks v. Bicknell [Case No. 1,945]; Phelps v. Comstock [Id. 11,075]; Clum v. Brewer [Id. 2,909]; Curt. Pat. §§ 203, 208, 209; Gibson v. Cook [Case No. 5,393]; Woodworth v. Sherman [Id. 18,019]; Hodge v. Hudson River R. Co. [Cases Nos. 6,559, 6,560].

Does the assignment in question contain any stipulation for an interest in any extended term that might be acquired by the patentee under the acts of congress? To my mind it plainly does not. The assignment recites the reissuing of a patent for an improvement in wooden pavements, in 1863; that the original patent was issued in 1853, and was "given for a term of fourteen years;" that said Jonathan Taylor had agreed to purchase all his right, title, and interest "in and to the said invention" for the city of San Francisco, in the state of California, "as secured by said letters patent," the payment of the consideration, &c., and that in consideration, &c., "I have assigned, sold and set over * * * all the right, title and interest which I have in the said invention and letters patent for and in the said city of San Francisco, but in no other place, the same to be held and enjoyed by the said Taylor * * * to the full end of the term for which the said letters patent are or may be granted," &c. That is to say, the recitals show that the original patent had been issued for the term of fourteen years, and that before the expiration of the term there had been a reissue of the patent; that Taylor had agreed to purchase a certain interest in said invention, "as secured by said letters patent" (the letters patent recited, and not some others that might afterwards be issued for another term, no allusion being made to any future renewal); that in consideration of the premises he has assigned, sold, and set over to the said Taylor his interest "in the said invention and letters patent,"—the letters patent thereinbefore mentioned. Thus far there is not a word that can be tortured into an allusion to any term or letters patent other than the original term of fourteen years, and the letters patent originally issued, and the reissued letters recited.

These form the entire subject matter of the contract. There can be no doubt as to the intention of the parties, unless certain words in the habendum clause, contrary to the ordinary rules of construction, can be construed as extending the contract to a subject matter not before embraced or referred to in the recitals or granting portions of the deed. As we have seen, the habendum clause is, "the same to be held and enjoyed * * * to the full end of the term for which the said letters patent are or may be granted." The words "may be granted" are the only ones in the whole instrument that can possibly be thought to point to an extension that might subsequently be acquired. But they must be read in connection with, and subordination to, the rest of the instrument; and this very clause refers to "the term for which the said letters patent," &c.; a single term is referred to, and the said letters patent. The reference is in terms to the term and the letters patent already mentioned. The phrase, "may be granted," seems to be an expression loosely used, and without any definite meaning in the connection in which it is found, unless it refers to other reissues of patents covering the remainder of said term. There had already been one reissue, and the facts show that a second reissue was had, for the remainder of the term after this assignment, doubtless, to cover some defect. These reissues are authorized by the act of congress, and often occur. In a certain sense, when the patents thus originally issued are surrendered and others issued in their place, the whole may be regarded as the same letters patent. They cover the same term. The reissued patent covers no improvement or extension, but is intended to rectify some error, or remedy some defect, and accomplish the identical object intended to be accomplished by the letters originally issued. In this sense they are substantially the same letters patent. In this view the words "may be granted"

may have some significance as used in this instrument, and they are satisfied by applying them to any further letters patent that might be issued for the same term and to accomplish the same objects intended by those already issued. And in this instance there was a subsequent reissue for the remainder of the term, to which they might in fact apply. But upon a view of the whole instrument, to construe them as referring to a new term, and letters patent not yet in esse, would be doing great violence to the language. I have found no authority to justify such a construction. The language in the cases of Phelps v. Comstock [Case No. 11,075], Clum v. Brewer [Id. 2,909], and Case v. Redfield [Id. 2,494], is entirely different. The last case comes the nearest to the present; but in that, the language supposed to indicate an intention to include any extension or renewal that might be granted is found in the granting clause, and there are no limiting or restrictive words pointing unmistakably to the single term then unexpired, and the letters patent granted for that term. In the assignment from Nicolson to Taylor there are no apt words to indicate an intention that an interest in any extension or renewal should pass, while on the other hand there are words of limitation constantly referring back to the term already in existence, and to the letters patent issued for that term, which had alone been mentioned in the recitals and granting clause. It is highly improbable that parties contemplating a sale of an interest in an extension, or renewal, would have adopted the language used in this assignment. I am satisfied that it was not intended to assign any interest in any extension or renewal that might afterward be acquired by the patentee. The terms of the contract are fully satisfied by an interest in the term then granted and in the letters patent already issued, and any reissued letters for the same term.

Judgment, therefore, must be entered for the plaintiff.

[For other cases involving this patent, see note to Nicolson Pavement Co. v. Hatch, Case No. 10,251.

[NOTE. This case was taken to the supreme court upon writ of error. Mr. Justice Davis delivered the opinion of the court, holding that an assignment of an interest in an invention, secured by letters patent, being a contract, was to be constructed as any other contract, so as to carry out the intention of the parties thereto. Says the learned justice: "Taking the whole deed together, it is quite clear that it was intended to secure to Taylor and his assigns the right to use the invention in San Francisco, as long as Nicholson and his representatives had the right to use it anywhere else. * * * The words 'to the full end of the term for which the said letters patent are or may be granted' necessarily import an intention to convey both a present and a future interest, and it would be a narrow rule of construction to say that they were designed to apply to a reissue merely, when the invention itself, by the very words of the assignment, is transferred." The judgment was reversed, and a venire de novo awarded. 14 Wall. (81 U. S.) 452.]

## Case No. 7,274.

JENKINS v. PORTER et al.

[2 Cranch, C. C. 116.] [3]

Circuit Court, District of Columbia. Dec. Term, 1815.

BAIL.

Debt on a replevin bond.

THE COURT (nem. con.) refused to order the defendant to give special bail, although in the action of replevin, there had been judgment for a return, etc.

JENKINS (PYE v.). See Case No. 11,487.

JENKINS (SELF v.). See Case No. 12,640.

JENKINS (UNITED STATES v.). See Case No. 15,473.

## Case No. 7,275.

JENKINS v. WALKER et al.

[Holmes, 120; 5 Fish. Pat. Cas. 347; 1 O. G. 359; Merw. Pat. Inv. 124.] [1]

Circuit Court, D. Massachusetts. March 22, 1872.

INVENTION — ANTICIPATION IN SPECIFICATION OF PRIOR PATENT.

1. An invention of a compound to be used for a specified purpose is not anticipated by a description in a prior patent of a compound having physical properties which render it unfit for such use, and described as intended for a different, and not analogous, purpose.

[Cited in Clarke v. Johnson, Case No. 2,855.]

2. To anticipate an invention of a compound, the specification of a prior patent must state the relative proportions of the ingredients of the compound in such full, clear, and exact terms, as to enable one skilled in the art to make and use the described compound without experiment of his own.

[In equity. Bill by Nathaniel Jenkins against George W. Walker and others.

[Final hearing on pleadings and proofs. Suit brought on letters patent [No. 54,554], for an improvement in the manufacture of elastic packing, granted to complainant, May 8, 1866, and reissued August 3, 1869. [No. 3,579].

[The defendants claim to have manufactured the goods alleged to be an infringement under letters patent for an "improved rubber composition," granted to C. L. Frink, May 8, 1866.] [2]

Thomas W. Clarke, for complainant.

E. L. Sherman and J. J. Storrow, for defendants.

SHEPLEY, Circuit Judge. This is a bill in equity alleging an infringement of the

[3] [Reported by Hon. William Cranch, Chief Judge.]

[1] [Reported by Jabez S. Holmes, Esq., and by Samuel S. Fisher, Esq., and here compiled and reprinted by permission. The syllabus and opinion are from Holmes, 120, and the statement is from 5 Fish. Pat. Cas. 347. Merw. Pat. Inv. 124, contains only a partial report.]

[2] [From 5 Fish. Pat. Cas. 347.]

letters-patent granted to the complainant on the eighth day of May, 1866, and reissued on the third day of August, 1869, for a new and useful elastic packing for joints and valves exposed to destructive fluids. The substance of the complainant's invention consisted in the employment of an elastic packing for joints and valves, of a crude, burnt, refractory rubber compound, sufficiently elastic and indestructible to resist the solvent action of steam, or hot and corrosive liquids, and made from a composition containing forty per cent or more of refractory mineral matter, cemented together by vulcanized rubber. The term "refractory," as used in the arts, indicates the quality of resisting the action of heat and solvents. In this sense, Paris white, French chalk, and plumbago are refractory.

Prior to 1866, rubber-packing used for steam-packing for joints and valves did not in any degree possess or have the character of hard rubber. The kinds of rubber-goods in use before that time for packing steam joints and valves were, as represented by exhibits in the case: First, "pure packing," a soft rubber fabric, made in sheets; second, "plain packing," a soft rubber fabric, made in sheets, and having a cloth insertion; and, third, "mixed or fibrous packing," a rough-looking, soft rubber fabric, made of old scraps.

The answer of the respondents denies that the reissued letters-patent are for the same invention as the original letters-patent; and they say that the reissue was obtained by fraud, and is therefore invalid. There is no evidence in the case to support these allegations in the answer. The answer also denies that Jenkins was the original and first inventor of the thing patented, and denies any infringement of the reissued letters-patent. The defendants further allege, that the elastic packing, manufactured, sold, and used by the defendants, was manufactured under and according to letters-patent of the United States, granted to C. L. Frink on the eighth day of May, 1866.

Upon the issue of novelty, defendants rely upon the letters-patent granted in England to W. E. Newton, and dated April 24, 1854; and upon letters-patent of the United States to A. K. Eaton, and dated June 19, 1860. Newton's patent was for mingling plumbago with hard rubber compound, to be used in the manufacture of bearings for machinery, in order to prevent attrition or friction. It appears from the evidence in this case that the composition of matter described in the Newton specification, if made in the mode there described, would not have the physical properties of the compound described in the complainant's specification, because the presence of so large a proportion of sulphur, as indicated in the formula of the Newton patent, would render the valves susceptible to the action of the heat and solvents.

The patenting a material for one purpose does not necessarily invalidate patenting it for another different and not analogous purpose. Newton v. Vaucher, 6 Exch. 859.

The two patents are essentially different. The principle of the Newton patent is clearly the application of the hard rubber compound, for the purpose of diminishing the effect of attrition. The principle of the plaintiff's patent is the use of the crude, burnt, refractory rubber compound, to resist the solvent action of steam, or hot and corrosive fluids. The two inventions differ in principle; and there is a substantial difference in the product in which the invention is embodied, and the purpose to which that product is to be applied.

The same principles and considerations apply to the case of the Eaton patent. It is perfectly plain, from a comparison of the plaintiff's specification with the specifications in the Newton and Eaton patents, taken in connection with the fact that there is no evidence that under either of those patents a product was ever made having the physical properties of the plaintiff's compound, that these patents do not anticipate the plaintiff's invention.

Letters-patent, on the eighth day of May, 1866, being the day of the date of the complainant's patent, issued to C. L. Frink for a new and improved rubber-composition. He describes his invention as consisting in a compound made of india-rubber, sulphur, black-lead, or other suitable material, generally mixed with rubber, to give it consistency and to increase its weight, and metal filings (brass filings being used in preference), in such a manner that a compound is obtained which is not liable to stick when exposed to a great heat or steam and which is particularly fit for packing safety-valves, globe-valves, or other parts which are exposed to the action of steam, and which, when packed with ordinary rubber, require constant repairs. The only description which he gives of the manner of making his compound is as follows: "I mix the filings with the mass, simultaneously with the sulphur and black-lead, or clay, or other ingredients which are usually mixed with the crude rubber; and, when the composition is made, I vulcanize or cure the same in the ordinary manner. The quantity or proportion of filings to be mixed with the rubber is variable, according to the nature of the work for which the rubber is to be used. For packing small valves, about one part by weight of filings is sufficient." It is obvious, from inspection of this specification, that as the relative proportions of the rubber, sulphur, and plumbago are not given or indicated in any way, the description is not sufficiently clear and exact to enable others skilled in the art to make a rubber-compound of the ingredients therein specified, adapted for use as an elastic packing for joints and valves, and sufficiently indestructible to resist the solvent action of steam, or

heated and corrosive fluids. And this want of such full, clear, and exact description, which will enable others skilled in the art to make and use the same, is abundantly proved by the testimony of persons skilled in the art.

Henry W. Burr, who has been engaged in the rubber-business twenty-eight years, and is the superintendent of a rubber-factory, and is a thoroughly practical manufacturer and manipulator of rubber-compounds, testifies, that from the directions in the Frink patent he is not well skilled enough in the art to produce a valve-disc from that which will stand the heat. Dr. S. Dana Hayes, an eminent chemical expert, the state assayer of Massachusetts, and the consulting chemist of several manufactories of rubber-goods, testifies that he cannot tell, from reading Frink's specification, what the composition of the proposed compound was, nor what its physical characteristics would be. No evidence is offered in rebuttal of these statements.

It is evident that the success of the process, and the value of the product for the desired purpose, are entirely dependent upon proportions and temperatures: and proportions and temperatures are not even indicated in the Frink specification.

When the specification of a new composition of matter gives only the names of the substances which are to be mixed together, without stating any relative proportion, undoubtedly it would be the duty of the court to declare the patent to be void; and the same rule would prevail when it was apparent that the proportions were stated ambiguously or vaguely; for in such cases it would be evident on the face of the specification that no one could use the invention without first ascertaining by experiment the exact proportions of the different ingredients required to produce the result intended to be obtained. The specification must be in such full, clear, and exact terms as to enable any one skilled in the art to which it appertains to compound and use the invention; that is to say, to compound and use it without making any experiments of his own. Wood v. Underhill, 5 How. [46 U. S.] 1.

The record does not afford any satisfactory proof that Frink made a composition of matter like that which the plaintiff has patented, before the date of the plaintiff's invention. The complainant's composition of matter, according to his specification, consisted of rubber, from twenty to twenty-five per cent; gum-shellac, from ten to twenty per cent; Paris white, from twenty to thirty per cent; French chalk, from fifteen to twenty-five per cent; litharge, from eleven to eighteen per cent; lamp-black, from two to three per cent; sulphur, from one to three per cent. The analysis made by Dr. Hayes of the valve-seats used and sold by the defendants, and claimed by them to have been made under the Frink patent, contained rubber, 30.60 per cent; plumbago, 40.00 per cent; copper and zinc, 14.60 per cent; lead, 8.20 per cent; sulphur, 6.60 per cent.

Now, classifying in both patents plumbago, French chalk, and Paris white as the refractory mineral matter, and the rubber and shellac and sulphur as the cementing material, and the lead or litharge and brass-filings as sulphur-absorbents, the testimony showing that they combine with each other in vulcanizing, making another comparatively refractory ingredient, sulphuretted metal, —it appears that the proportions of the ingredients, which are substantially alike in the two formulas, are very nearly identical, except that the defendants use, in addition, about ten and a half per cent more of metal, and about three and a half per cent more of sulphur, which, combining as before stated, constitute an addition to or adulteration of the complainant's compound of fourteen per cent in excess of comparatively refractory mineral matter, consisting of the metals which have been partially mineralized by the sulphur. The defendants use substantially the same elements, compounded and treated on principles substantially the same as those of the patented article, and produce substantially the same product. If the addition of this percentage of sulphur, and also of brass-filings, to the complainant's compound, was any improvement, it would not authorize the use of the patented product improved upon, without license from the patentee, any more than the patent to Edwin L. Simpson, for his improvement in dental-rubber, for the purpose of avoiding the odor and taste of the sulphur used in the vulcanizing of dental-rubber, would have authorized him to use the invention of Nelson Goodyear. Decree for injunction and account.

[For other cases involving this patent, see note to Jenkins v. Johnson, Case No. 7,271.]

JENKINSON (KANE v.). See Case No. 7,607.

## Case No. 7,276.

In re JENKS.

[15 N. B. R. 301.] [1]

District Court, D. Minnesota. March 20, 1877.

BANKRUPTCY — ATTACHMENT — FEES OF SHERIFF.

1. A claim by a sheriff for fees and expenses in attachment proceedings begun within four months prior to the commencement of proceedings in bankruptcy will not, as a general rule, be allowed.

2. But where it is conceded that the attachment conserved the property and benefited the general creditors, the court will allow such claim.

In bankruptcy.

By A. Edgerton, Register:

Under the above bankruptcy a claim is presented of J. C. Becht, sheriff of Ramsey county, for service of an attachment upon the bankrupt's property previous to the fil-

[1] [Reprinted by permission.]

ing of the petition for adjudication of bankruptcy, and for the care and custody of property for thirty (30) days after such service of attachment. On the 13th of May, 1876, H. Bosworth & Sons, as plaintiffs, procured an attachment and summons against H. E. P. Jenks, the bankrupt. On the 1st of June, 1876, a petition for adjudication, etc., was filed, and on the 6th of June, an adjudication was made and warrant issued, and on the 13th of June the sheriff turned the property so attached over to the marshal, with the understanding that whatever the sheriff's legal rights might be as to the matter of costs, should remain the same as if the goods were in his possession; and his bill, amounting to sixty-four dollars and thirty cents ($64.30), is presented for allowance by the attorney for the attaching creditors. The attaching creditors abandoned their suit and relinquished all liens which they may have claimed to have upon the bankrupt's property, by proving their claim in the bankrupt court. But the expenses of the attachment are sought to be made out of the estate through a claim made by the sheriff, that he has a lien for his fee upon the property attached.

By the 14th section of the bankrupt law [of 1867 (14 Stat. 522)], it is provided that an adjudication of bankruptcy and assignment of the bankrupt's property to an assignee, dissolves all attachments made within four months before the filing of the petition in bankruptcy. It seems to me that a dissolution of the attachment is a dissolution of all liens upon the property by virtue of the attachment; that the sheriff should look to attaching creditors for his costs. There can be no doubt of his right to do so, and is it not his duty as well? When a creditor, knowing his debtor is insolvent, seeks to get a preference by attachment, instead of attempting to put the debtor into bankruptcy, he does it at his own risk, knowing that the debtor is likely to be, and ought to be thrown into bankruptcy. And if bankrupt proceedings are instituted to prevent a preference being obtained, and for a distribution among all the creditors pro rata, it is not right that creditors thus attempting to obtain preference over the rest, shall take from the estate the costs of such attempt for preference. If such a construction can be sustained, it is an invitation to all creditors to make an effort to obtain a preference in this way; it is saying to them that in any event the cost of the attempted preference will be taken out of the assets of the debtor's estate.

There has been some ruling to the effect that a sheriff has a lien upon the property attached up to the time of filing the petition in bankruptcy. But a recent decision by Mr. Justice Miller establishes to my mind the contrary doctrine. In the case of Bracken v. Johnson [Case No. 1,761] U. S. Cir. Ct. D. Iowa, Oct., 1876. In that case the attachment at the suit of Johnson was levied upon property of the defendant Brown, September 23d, 1872. On the 21st of January, 1873, a petition in bankruptcy was filed against Brown. On the 14th of February, 1873, Brown was adjudged a bankrupt. On the 25th of February, 1873, a judgment was rendered against Brown in favor of Johnson for two thousand two hundred and sixty-four dollars and fifteen cents. On the 28th of February, 1873, execution was issued, and on the 22d of March, 1873, the property was sold by the sheriff for two thousand three hundred and forty-nine dollars and forty cents, the costs of suit and sale being included, amounting to one hundred and seventy-seven dollars and fifty cents. On the 22d of March, 1873, the plaintiff Bracken was appointed assignee, and received his deed of assignment. He demanded a return of the property from Johnson, which was refused, and he commenced suit in the U. S. district court for the district of Iowa. The district court gave judgment for the defendant, and the assignee appealed to the circuit court of said district. The case was heard before Mr. Justice Miller of the supreme court, who reversed the judgment of the district court, and ordered judgment for the plaintiff (assignee) for the full amount received by the sheriff for the goods so sold, although it appeared that one hundred and seventy-seven dollars and fifty cents was for costs of said sale, and which, of course, included the sheriff's costs for levying the attachment, execution, and for poundage.

It may be said that the point as to the sheriff's lien did not arise in that case, but I do not see why the exact amount of costs should have been stated, unless that question was discussed in connection with it; of course it was a small item when compared with the original claim, but the fact that the amount of costs was stated, affords a strong presumption that the question was incidentally raised and discussed, and certainly the decision covers it. When the creditor attempted to get a preference by resorting to attachment, the learned judge remarked that he "was informed by the provisions of the bankrupt law that he initiated his attachment proceeding subject to its being rendered ineffectual by proceedings in bankruptcy within four months."

I disallow the claim, and at the request of the attorney for attaching creditors, certify the matter to the court for its consideration.

NELSON, District Judge. The opinion of the register in regard to the claim ordinarily presented for sheriff's fees in attachment proceedings is concurred in; but in this case it is conceded by a large majority of the creditors that the attachment conserved the property and benefited them. For this reason the claim should be allowed.

Ordered accordingly.

JENKS (BRADFORD v.). See Case No. 1,769.

## Case No. 7,277.

JENKS et al. v. COX.

[Holmes, 92.] [1]

Circuit Court, D. Massachusetts. Jan., 1872.

SEAMEN—WAGES—WHALING VOYAGE — ESTOPPEL.

1. A seaman, duly discharged at his own request from a whaling-ship at a foreign port, is entitled to be paid the pro rata part of his lay, reckoned according to the value of the catch at the home port.

2. Where the pro rata share of the lay of a seaman, duly discharged at his own request from a whaling-ship at a foreign port, is reckoned, against his protest, according to the value of the catch at such port, instead of at the home port, and settlement is made by the seaman on such valuation, because he can obtain no other, he is not estopped by such settlement from afterwards claiming the difference between the sum paid him and his pro rata share of his lay, reckoned according to the value of the catch at the home port.

[Cited in Coffin v. Weld, Case No. 2,953.]

Admiralty appeal [by Thomas L. Jenks and others] from a decree of the district court of Massachusetts in favor of [William Cox] the libellant.

T. K. Lothrop, for appellants.

George Marston, for appellee.

SHEPLEY, Circuit Judge. The libellant claims for a balance due to him for his one seventy-eighth part or lay in the proceeds of a whaling voyage in the bark Covington, of which the respondents were owners. The libellant was discharged at Honolulu in November, 1863, after having served faithfully as mariner and boat-steerer from the commencement of the whaling voyage in November, 1860, to the time of his discharge. The settlement was made before the consul at Honolulu; and the libellant was paid at consular rates, according to the price of oil then current in Honolulu, with a deduction of two and one-half per cent commission to the consul.

The question raised by the pleadings is, whether the libellant, under the circumstances of the case, is bound by the settlement at Honolulu, at prices and rates assumed by the consul there, or whether he is entitled to a settlement of the voyage at the home port, and at home prices. It is agreed in the case, that, if he is entitled to recover, he is to recover the sum of four hundred and seventy-eight dollars and fifty cents wages, being the amount of the judgment in the district court, and interest thereon to be added, that being the difference between the sum actually received by him on the settlement before the consul, and the amount he would have been entitled to receive upon an order upon the owners for his lay of the oil, taken at the time of his discharge, at the home prices.

In whaling voyages, the shipping-articles usually contain a clause, providing, that if any officer or seaman shall be prevented by sickness or death from performing the entire voyage, he shall be entitled to such part of the whole amount of his stipulated share as the time of his services on board shall be of the whole term of the voyage.

It has also been the usage and uniform practice, where seamen serve but part of the voyage, to ascertain the time they did serve from the shipping-papers or other proper documents, and to settle with them in the same manner as is expressed by the shipping-papers in relation to persons leaving the ship in consequence of sickness or death, unless there should exist a special contract or written agreement to the contrary.

Courts of admiralty have adopted the rule provided in the articles for cases of separation by death or sickness, by analogy, and as in itself just and reasonable, as the rule to be applied in other cases of separation from the vessel. But if there are circumstances showing that the pro rata settlement would not be just and reasonable, or if any other mode was fairly agreed upon at the time the man left the vessel, the pro rata settlement would not be adopted, the object of the court being to carry out the intention of the parties which they have not expressed. Hathaway v. Jones [Case No. 6,212]. It is not important to consider the testimony in the record in relation to the cause for which the seaman desired his discharge. It is immaterial whether he asked for it, as he claims, upon a well-grounded distrust of the seaworthiness of the vessel, or whether, as the respondents aver, he applied to the master to be relieved from his contract for the performance of the voyage, and to be discharged from the vessel solely because of his roving and restless disposition. In answer to an interrogatory as to the circumstances of his discharge, the master, whose testimony was taken in behalf of the respondents, answers, "He was discharged at his own request, by mutual consent." The master testifies in substance that, after advising the seaman to remain in the ship, and still finding him persistent in his desire to leave, he told him to come to the United States consul's office two days after that, and he would settle with him. The consent to the discharge was absolute and unconditional, and it was necessary that the discharge itself should be made before the consul.

Courts of admiralty will carefully scrutinize a settlement made with a seaman under such circumstances. Where each party acts freely, and the terms upon which the contract of service shall be dissolved are mutually agreed upon, each party understanding the state of the voyage at the time, and contracting for a given amount,—taking

[1] [Reported by Jabez S. Holmes, Esq., and here reprinted by permission.]

into consideration the pecuniary terms proposed, and the probabilities of the future,—the seaman will be held to abide the settlement thus made, however disadvantageous it may prove, on final settlement of the voyage, to have been to him.

The discharge by consent gave the libellant a right to his lay pro rata of the oil taken. The difference between the computations of the consul and the amount due the libellant upon a settlement at home is so great, that the libellant ought not to be deprived of that to which he was justly entitled, without positive proof that he has relinquished his claim by a settlement which was just and fair, made with a full understanding of the matter, and without any duress.

The libellant testifies that he went ashore on the day of discharge, and told the master for the second time that he wished an order on the owners. "He refused to give it to me. We then went to the American consul's, and I was discharged there; and, while being discharged, I told the American consul, Captain Jenks being present, that I did not think it right or just to pay me off Sandwich Island prices. The captain said he should not deviate; and therefore I was paid off Sandwich Island prices."

The master testifies as follows: "I told him to come to the United States consul's office two days after that, and I would settle with him. At the time appointed he came there and met me; the consul asked him if it was by mutual consent, and he said yes; he asked him if the bill was all right, read him the amount of it, and asked him if it was right, and he said yes. The consul reckoned up his bills for the voyage, and likewise figured his voyage. I gave him the money, and he paid the man off. He signed his clearance for all dues and demands on the ship at that time. That finished the interview, and I let him go." He also testifies that when Cox received the money he made no objection, made no remarks, did not say any thing, and utterly denies that Cox ever had any conversation with him at the consul's office, or anywhere, upon the subject of an order on the owners, or on the subject of the settlement, or the terms of the settlement. He testifies that he doesn't know that Cox examined or looked at the figures of the consul; that he had nothing to say about it; took his money, and went off. The consul asked him if it was right, and he said it was. The master also admits that he discharged ten or twelve other men during the voyage, and paid them by orders, when they asked for them.

It certainly does not seem probable that a settlement was made in the manner described by the master. It is difficult to believe that the settlement was made on the basis of Honolulu prices, instead of an order on the home port, without any thing being said either to the master or the consul, or by either of them, to the seaman upon the subject of the basis on which the settlement was to be made. The account given by the master is so improbable in itself, that it fails to convince the court that the libellant's statement is not correct, — that he protested against the payment, and only received it because he could get no other settlement.

There is no pretence that his rights were explained to him by the master or the consul, or any offer made to him to give him an order on the owners at the home port. We do not therefore think the settlement was made under such circumstances as would estop the libellant from claiming the balance due him, being the difference between the sum paid him and the pro rata share of his agreed lay at the home prices.

Decree affirmed, with costs. Judgment for libellant, with interest at six per cent.

## Case No. 7,278.

JENKS et al. v. GARRETSON.

[4 McLean, 258.] [1]

Circuit Court, D. Ohio. July Term, 1847.

PRACTICE—PLEADING—DEFAULT—PROOF OF PARTNERSHIP.

A default will not be opened, on motion, unless accompanied by a plea, sworn to under the rule of the court, denying the signature of the plaintiff [defendant], if the action be on a note. And the partnership shall also be admitted without proof.

At law.

Mr. King, for plaintiff.

Mr. Raymond, for defendant.

OPINION OF THE COURT. In this case the action was brought upon a note signed by G. W. Garretson, on which there was a judgment by default. The note, it seems, was signed by G. W. Garretson & Co.

A motion was made to open the default, without the usual affidavit, on the ground of the above misdescription of the note. The rule is as follows: "Ordered, that hereafter when a default is opened up on motion of defendant, it shall be held without special entry, as a condition of the permission to plead, that the defendant shall not question the citizenship of the plaintiff or defendant, and shall not require proof of the co-partnership of the plaintiff or defendant in the case, unless he shall forthwith file a special plea, verified by affidavit, and denying the partnership of either said plaintiff or defendant respectively, as set forth in the declaration." And the 36th rule declares "that the general issue, unless sworn to, shall admit the execution of the instrument on which the action was founded."

The court held that both of these rules applied to the case. Motion overruled.

[1] [Reported by Hon. John McLean, Circuit Justice.]

JENKS (GRAY v.). See Case No. 5,720.

JENKS (HIGGINS v.). See Case No. 6,468.

## Case No. 7,279.

JENKS v. LEWIS.

[3 Mason, 503.] [1]

Circuit Court, D. Maine. May Term, 1825.

ADMIRALTY JURISDICTION—APPEAL—TORT.

In suits for assaults and batteries on the high seas no appeal can be sustained from a decree of the district court, unless there be an ad damnum laid in the libel exceeding fifty dollars.

[Appeal from the district court of the United States for the district of Maine.]

This was a libel [by Lewis Jenks against Ansel Lewis, Jr.] for damages for an assault and battery committed on the high seas. No sum was laid as an ad damnum in the libel; and the district judge having given less than fifty dollars as damages [Case No. 7,280], the libellant brought the cause by appeal to the circuit court.

Mr. Davis, for libellant.

Mr. Longfellow, for respondent.

STORY, Circuit Justice. The general jurisdiction of the district court, as a court of admiralty, to entertain suits of this nature, is not contested; and, in my judgment, is not to be doubted. It is strictly a case of tort done on the high seas; and the jurisdiction of the admiralty over such torts has never been denied by the courts of common law; and it falls directly within the words of the statute of 13 Rich. II. c. 5, as "a thing done upon the sea." De Lovio v. Boit [Case No. 3,776]. The jurisdiction has been recognised and acted upon of late years in the high court of admiralty. The Ruckers, 4 C. Rob. Adm. 73; The Lowther Castle [1 Hagg. Adm. 384]. The difficulty in the cause arises altogether from a different source. The judiciary act of 1789, c. 20, § 21 [1 Stat. 83], allowed appeals from the district court "in causes of admiralty and maritime jurisdiction, where the matter in dispute exceeds the sum or value of three hundred dollars, exclusive of costs." By the act of 1803, c. 93 [2 Story's Laws, 905 (2 Stat. 244)], the right of appeal was given where the sum or value exceeds fifty dollars. In the case before the court no ad damnum is laid, and no particular sum claimed, so that the court cannot say what in reality is the sum or value in dispute. It cannot for this purpose look into the evidence, and thus ascertain what damages ought to be given upon the whole case, for that would be to exercise the entire appellate jurisdiction.

It is suggested, that in the admiralty there is no necessity to aver any ad damnum. I rather doubt that. My impression always has been, that such is the formal mode of proceeding in all cases of personal torts. The fourth title in Clerk's Praxis, which stated, that, at the foot of the warrant, a sum is stated as (Actio £500) refers only to the sum for which bail is to be taken upon the arrest. In England the warrant precedes the libel; and the very naming of a particular sum in the warrant shows, that the party asserts some definite claim "summa in quâ actio sit instituta." In our courts the libel precedes the warrant, and indeed is the foundation of it; and even in England, I apprehend, the libel always states an ad damnum of a specific sum. 4 C. Rob. Adm. 73, note 1; The Lowther Castle [supra]. But whatever may be the practice in the English admiralty, it cannot govern in a case depending upon our own statutes. In England, the appellate jurisdiction does not depend upon the sum or value in controversy. The appellate courts have general jurisdiction. It is otherwise here, for the appeal is limited by the sum or value in controversy. Now it appears to me, that no appeal can be sustained, in point of jurisdiction, by the circuit court, unless it is clearly shown, that the matter exceeds fifty dollars. Non constat, that this libellant ever claimed so much. The court cannot intend it; and having omitted to make a definite claim, I am of opinion, that the appeal must be dismissed. Appeal dismissed.

[1] [Reported by William P. Mason, Esq.]

## Case No. 7,280.

JENKS v. LEWIS et al.

[1 Ware (51) 43.] [1]

District Court, D. Maine. Nov. 16, 1824.

ADMIRALTY—PLEADING—ASSAULT AND BATTERY—PROOF.

1. An allegation of a combination between the master and mate to ill-treat and oppress a seaman, is not supported by proof that each of them separately assaulted and ill-treated him, without some presumptive evidence of concert between them.

2. The rules of pleading in the admiralty do not require all the technical precision which is required at common law, but they require that the cause of action should be clearly set forth, so that a plain and direct issue may be made up on the charge, and the evidence must be confined to the matter put in issue.

[Cited in The Rhode Island, Case No. 11,745; New Jersey Steam Nav. Co. v. Merchants' Bank, 6 How. (47 U. S.) 434; The Brothers, 7 Fed. 880; The Kendal, 56 Fed. 238.]

In admiralty.

C. S. Daveis, for libellant.

Fessenden and Deblois, for respondents.

WARE, District Judge. This is a libel by the cook against the master and mate of the brig Abeona, for combining to oppress and ill-treat the libellant, and various instances

[1] [Reported by Hon. Ashur Ware, District Judge.]

of assaults and other ill-usage are specified in the libel, both by the master and the mate. Upon an examination of the witnesses, it appears that every instance of assault complained of, was committed either by the master alone, or by the mate alone. No case was proved in which they were jointly concerned; and there is a total failure of direct evidence of any concert, agreement, or understanding between the respondents to harass or ill-treat the libellant; nor does a presumption of any considerable force arise in favor of the fact, from the whole series of torts. Each particular case was preceded by some real or imaginary provocation which was sufficient to account for the assault, if not to justify it, without recurring to any supposed understanding and concert between the officers, with a view to the general oppression or ill-treatment of the man. Now it is inconsistent with every principle of correct reasoning, when an adequate cause is shown, to attribute an effect to a different cause, which is unsupported by proof. The libel, therefore, considered as an action for a combination in the nature of a conspiracy, fails for want of proof. The counsel for the libellant then contends that it may be supported as an action for a joint assault. The objection to this is, that the libel, in its original structure, is not framed as for a joint assault. Several of the specifications are of assaults when only one of the respondents was on board the vessel, and there can be no pretence for charging this as the tort of the party absent, unless there is proof of a previous concert and understanding between the two, that is, unless the combination is first proved. The allegation of a combination therefore becomes a substantive allegation indispensable to the admission of the testimony in support of the greater part of the matter of the libel.

The rules of pleading in the admiralty do not require all the technical precision and accuracy which is necessary in the practice of the courts of common law. But they require that the cause of action should be plainly and explicitly set forth, not in any particular and sacramental formula, but in clear and intelligible language, so that the adverse party may understand what is the precise charge which he is required to answer, and make up an issue directly upon the charge. The evidence must be confined to the matters put in issue by the parties, and the decree must follow the allegations and proofs. The main allegation in this case, and that which gives unity to the libel, is a combination to oppress and ill-treat the libellant. It is the gravamen of the cause, and strictly no evidence is admissible unless it tend to prove this allegation. The libel might be amended so as to assume the form of a libel for a joint assault. But the evidence will not support such a libel. Every instance specified and proved is a separate assault either of the master or mate, and entirely disconnected, in every view, from all the others. My opinion is, upon the whole, that the present libel cannot be sustained, and must be dismissed, but it is dismissed without costs.

[An appeal was dismissed by the circuit court in Case No. 7,279.]

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JENNEGAN (UNITED STATES v.). See Case No. 15,474.

JENNIE CUSHMAN, The (STERLING v.). See Case No. 13,375.

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## Case No. 7,281.

JENNINGS v. CARSON.

[1 Pet. Adm. 1; [1] 4 Cranch (8 U. S.) 5, note.]

District Court, D. Pennsylvania. 1792.

PRIZE—JURISDICTION OF FEDERAL COURTS.

A neutral vessel captured by a privateer during the American war, and condemned in the court of admiralty of New Jersey. By the court of appeals of the U. S. condemnation reversed, and restitution, but not damages, ordered. Carson, one of the owners of the privateer, resided in Pennsylvania. The district court of Pennsylvania[2] has jurisdiction over the case, and sustained the suit against the executors of one of the owners of the capturing privateer.

[Cited in Davis v. The Seneca, Case No. 3,650; U. S. v. New Bedford Bridge, Id. 15,867; The Isabella, Id. 7,100; The Admiral v. U. S., 3 Wall. (70 U. S.) 612.]

[This was a libel by Richard Downing Jennings against the executors of Joseph Carson, deceased.]

Before PETERS, District Judge.

This is a case, in which the general principles are stated in the proceedings and exhibits. There are some circumstances, however, clearly ascertained by those exhibits, which I shall have occasion to mention in the course of the observations I shall make on the merits hereafter. The libel complains of the illegal capture of the sloop George [Robert Smith, master], and her cargo, the property of the libellant, then and now a subject of Holland, during the late war, to wit, in July, 1778, by the schooner privateer Addition, Moses Griffin, commander, belonging to the testator Joseph Carson, and others, who are named in the answer of Joseph Carson, in his life time. It is alleged, on the part of the respondents, that the vessel captured was employed in carrying goods, belonging to the subjects of Great Britain, contrary to the regulations and laws of the then

[1] [Reported by Richard Peters, Jr., Esq.]

[2] The jurisdiction of the district courts, in the several branches of judiciary authority allotted to them, is assigned by the 9th section of the "Act to establish the judicial courts of the United States." 1 Story's Laws, 53 [1 Stat. 73]. The words, important to this question are "and shall also have exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction."

congress. They rely on the libel and condemnation in the state court of admiralty of New Jersey. The verdict of the jury, ascertaining the facts, and the condemnation by the court, and order of sale and for payment of nett proceeds to the captors. The sale of the vessel and cargo at vendue, and the monies being received by the marshal of the court, in whose hands, it is said, they now remain, in depreciated paper, not having been distributed to and among the captors, and of course the respondents, or their testator, received no part thereof; and therefore they allege that the marshal only is chargeable to the libellant, and not the respondents or the testator. They insist that there was probable cause of seizure, and therefore the captors are not answerable in damages. They also plead an abatement to the jurisdiction of the court, because they assert that the subject of prize or no prize belongs to the admiralty of New Jersey, and not to this court, which has no cognizance of the question, nor has it power to effectuate its judgment against executors. On the part of the executors, particularly, an answer was put in denying their being chargeable for the torts of the testator, which as well as their consequences die with his person. But, on an explanation on the behalf of the libellant, that he claimed no damages for the tort merely as a tort, but sought for restitution of his property only, this point was abandoned by the advocates for the respondents. The libellant, to repel this defence, and denying in the usual form the facts as stated, sets forth the reversal of the judgment of the court of Jersey by the court of appeals of the United States on the 23d of December, 1780, which contains a direction to the latter court to make restitution of the property with costs but not damages. They also join issue on the point of jurisdiction; and distinguish between a suit commenced in the life-time of the testator, and one brought, in the first instance, against the executor. Five points were made by the advocates for the respondents: (1) The tort dying with the person. (2) The jurisdiction of this court is not competent, as it is not a prize court. (3 and 4) If a prize court, yet, as the cause originally attached in the court of Jersey, that was the only court in which the consequences are cognizable; and is alone competent to effectuate the decree of the court of appeals. (5) A capture with probable cause is not a subject of action for damages.

The first point being waved brings the question to the competency of jurisdiction, which, in order as well as necessity, should be the first point considered, because, if the court has no jurisdiction, it is nugatory to enquire into the merits of the cause.

On this point, as it first struck me, I confess I had doubts. The account given by Lord Mansfield of the arrangement of the court of admiralty in England, as in the Case of Lindo and Rodney, 2 Doug. 613, note (1 Williams, Abr. 463), produced hesitation; and my respect for the opinion of that great character, as well as the arguments of the advocates in the present cause, induced a deliberate consideration of the subject. The division of the court of admiralty, into two sides, prize and instance, until I saw this case, appeared new to me;[3] and it is allowed

[3] Notwithstanding this division of the court of admiralty of England was not generally known, because it had not then appeared so strongly marked, as to claim particular attention here, it is established from the earliest periods of their judicial history. English common lawyers (and too many here) are only occasionally called to investigations into admiralty subjects. The instance court is the appropriate and real, or ordinary, court of admiralty. The prize court is only brought into activity by wars, and the incidents produced by them. It would have been fortunate for that country, as well as others, if that court had been one of less business, and of course less distinguished by the incessant occasions for the exercise of its power. It is customary to issue a commission to the same person, who is the ordinary judge of the high court of admiralty, on the commencement of hostilities. The instance court takes cognizance of the general subjects of admiralty jurisdiction, and proceeds agreeably to the civil or Roman law, the laws of Oleron, and established "Usages and Customs of the Admiralty," as well as special and local regulations. The prize court has exclusive jurisdiction of captures, or prizes, in war, and local matters connected therewith. Its proceedings are generally according to the laws of nations; though in particular instances it is governed by local orders and occasional interferences of the executive authority, of disputable character, as they respect the laws of nations. The line of distinction between these departments of the court is preserved through all the proceedings. Appeals are distinct, and made to separate tribunals. From the instance, they are prosecuted before delegates, appointed by the king, by commission issuing out of chancery. By 8 Eliz. c. 5, the decision of the delegates is final. Those from the prize court lie to commissioners of appeal (mostly of the king's council) appointed by the crown for this special purpose only. By an arrangement, contrary to the spirit of their own constitutions, the greater proportion of these judges of appeals by their orders in council, make the laws on which they give judicial decisions. In 1748 the judges of the courts of Westminster were added to the commission for the dispatch of business, but by the 22 Geo. II. c. 3, no sentence given under a commission is valid, unless a majority of the commissioners present are actually privy counsellors. 3 Bl. Comm. 70. Their colonial courts are branches of the high court of admiralty, to which appeals lie from the instance side to the courts of admiralty in England, or from that of prize, to the lords commissioners of appeals. By a late arrangement (1801,) the British colonial courts of admiralty are placed on a footing more independent and just, both as it respects the judges and mode of appeal. See the act of the British parliament on this subject printed in the appendix of Rob. Rep. Cas. 299. When I declared this division of the court "appeared new to me," I should have said I did not recollect it. My mind had been abstracted from the subject, by a long occupation in the military and political affairs of our country. Having been register of the colonial court of admiralty before our Revolution, the knowledge of the English arrangement of the court, must have been once familiar to me; and habits of attention have since revived it, though it had been interrupted. It is certain, however, that the minutes or records of admiralty proceedings (in this country) were uniformly kept without regard to this dis-

not to have been generally known, if at all, to the common lawyers in England, before that case was determined. In this country it never was known, nor does it appear that any new commission was ever transmitted to the colonial judge of the admiralty from Great Britain before the Revolution, in cases of wars between that kingdom and its enemies. I have traced, from records and other authentic information, the proceedings of the admiralty court of Pennsylvania, for a period exceeding fifty years: and I have the best reasons for believing, that the practice in other colonies was similar; in all the proceedings, prize-suits are called suits civil and maritime. During the late war, when we assumed and effected our independence, the proceedings were unaltered in this point. I do not find that there is any such distinction in any other nation, except it should be found in Holland; and of this I much doubt. The authority, out of Bynkershoek, produced by one of the advocates for the respondent, founded on an ordinance of the Earl of Leicester, shews that there is a court there, whose authority is entirely confined to captures as prize, and it has no jurisdiction even of other maritime cases. This, therefore, is not applicable to a question concerning the powers of a court of admiralty; which is allowed, even in the Case of Lindo and Rodney to possess jurisdiction in all maritime cases: though in England it is said to act under a peculiar (and therefore, not a generally known) organization; I take it, therefore, for granted, because the contrary has not been shewn, that, in England alone, are these distinct branches of the same court to be found. In all the books of reports, in which cases of prohibitions to the admiralty are mentioned, precedent to the Case of Lindo and Rodney, these prohibitions are moved for and granted generally to the court of admiralty; though, in a case in Term Reports (long after the Case of Lindo and Rodney) the distinction is taken (3 Term R. 323; 1 Williams, Abr. 466), and the prohibition moved for to the prize court. This very instance shews it to be a novelty, in the common law courts there; for if it had been known as an old practice, the particular designation of the prize court, would have been unnecessary; and the prohibition would have been granted to the admiralty, generally, as it ever had been in former cases. Acting as we now do in a national, and not a dependent capacity, I cannot conceive that we are bound to follow the practice in England, more than that of our own, or any other nation.[4] Customs purely colonial were parts of our laws even in the times of our connections with Britain. I need instance only one, to wit, that of the mode of conveyance of femme coverts estates, contrary to the laws of England. [Davey v. Turner] 1 Dall. [1 U. S.] 11; [Lloyd v. Taylor] Id. 17. This is a case at common law, in which we then were, and now are, particularly called to follow their rules and practice in general. The admiralty proceeds by a law which considers all nations as one community, and should not be tied down to the precedent of one nation; though it were more clearly ascertained. I shall therefore conclude that, if the powers of an admiralty and maritime court are delegated by congress to this court, those of a prize court are mixed in the mass of authority with which it is invested; and requires no particular specification. They are called forth, if generally delegated, by the occasion; and not by repeated and new interferences of government. Nor do I believe that, even in England, any new authority is vested; though a kind of legal and solemn notice is given of a war, in which subjects for the prize authority of admiralty may occur. It does not begin with their wars, but was pre-existent; it does not end with the commencement of peace, for their books shew it to be exercised at any time afterwards. Government never interferes to put an end to it; how then can its power be repeatedly necessary to begin it? The fact is, it is inherent in a court of admiralty; and not lost, but torpid, like other authorities of the court, when there are no occasions for its exercise. But here the question arises: "Have congress, by their judiciary laws, vested this court with general or special admiralty powers?" Congress have authority delegated by the people in the constitution in "all cases of admiralty and maritime jurisdiction." The words of that part of the judiciary law affecting this subject, in which the authorities of this court are described, will be seen in the ninth section of that law: It "shall also have exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction, including seizures under laws of impost, navigation, or trade of the United States." It is said, prize or no prize is a question of a military, not a civil nature. But I find no such distinction in the books. 3 Bl. Comm. p. 69. Blackstone in his divisions of courts, does not class that of the admiralty as a military, but a maritime court; and it will appear, that the jurisdiction of prize is within its powers; though he points out, in cases of prizes in the then colonies, that appeals were to members of the privy council and others, in consequence

tinction. Several nations, I now find, have separate courts for prize decisions, other than the ordinary admiralty or maritime tribunals. France has a distinct court. Holland distinct courts, in several provinces. So also has Spain.

[4] This is a general, but not entirely an accurate remark. The practice and laws of the admiralty of England, as they existed before our Revolution, were particularly imperative to us. The arrangement of courts may be different; and there are exceptions where our usages, well established, differ from those of that country; wherein the "usages and customs of the admiralty," are not exclusively their own, but adopted from those, in many instances, of other nations.

of treaties and domestic arrangements. But he says, "The original court, to which this question is committed in England, is the court of admiralty, without any distinction as to the nature of its powers, whether instance or prize, military or civil. In book 3, p. 108, he mentions the exclusive and undisturbed jurisdiction of the court of admiralty, in cases of prize, and that court determines not according to British laws or practice, but, "according to the laws of nations." Should I confine myself merely to the enquiry, whether this could be classed under the description of a "civil cause," I should think there were grounds to support the idea of its being comprehended. In the Case of Atcheson and Everitt, Cowp. 382, some light is thrown on this view of the subject; because it appears, that a civil suit may, in substance, but not form, partake of criminal ingredients. So, by parity of reason, may a civil case of admiralty and maritime jurisdiction be mixed with or grounded in transactions of a military nature; but I do not think it necessary nicely to fix this point.[5] What is, perhaps, of most consequence, is to ascertain the intention of congress in distributing a power, clearly in them, to their judiciary department; and what was said by one of the advocates for the libellant strikes me as being just and proper, viz. that the construction should be made from a consideration of all the laws on the subject in pari materia. "The court shall also have cognizance, &c." that is, being invested with criminal powers in certain cases, it shall also have civil powers as opposed to criminal in admiralty and maritime cases. By recurring to the 12th, 13th, 19th, 21st, & 30th sections of the judiciary laws, it will appear that congress meant to convey all the powers, and in the words of the constitution, as they possessed them in admiralty cases; and actions or suits in these cases can originate only in the district courts. For the foregoing reasons, and some others which might be added, I am of opinion that this court possesses all the powers of a court of admiralty, and that the question of prize is cognizable before it. I have gone thus far into the discussion of this point, because I believe it is the first time it has been agitated in a federal court. I do, therefore, decree, adjudge and determine, that the plea to the jurisdiction of the court, as not being competent to determine prize questions, be, and the same is, hereby overruled. As to the question on the legality, equity and propriety of the court's interference in the present suit to effectuate the decree of the court of appeals, and all other questions save that on which I have determined, I give no opinion, but hold them under advisement (unless the parties agree that I shall proceed under the present defect of proof in some points, and under some doubts I entertain concerning them) that an appeal may be lodged in the superior court, wherein I confess I should prefer an ultimate decision in a cause said to be important in itself and extensive in its consequences.[6]

[NOTE. After this opinion, the same judge dismissed the libel, on the ground that the district court was not authorized to compel the execution of a decree of the late continental court of appeals. This decision was afterwards affirmed in the circuit court (April 11, 1798), but was reversed by the supreme court, at February term, 1799 (opinion not reported), so far as the same decreed that the district court had no jurisdiction to carry into effect the decree of the court of appeals, and the cause was remanded to the district court for further proceedings. Upon the second hearing, it was decreed in favor of the libellant, but this decree was reversed by the circuit court, and the libel dismissed with costs, May 10, 1804. Case No. 2,464. From this decree the libellant appealed to the supreme court, where the sentence was affirmed, in an opinion by Chief Justice Marshall. 4 Cranch (8 U. S.) 2. It was decided that the George and her cargo were, previous to the sentence, in the custody of the law, and that the court of admiralty, after an appeal from their sentence, possessed the power to sell the vessel and cargo and hold the proceeds.

[During the Revolution, and until the establishment of the present national constitution, the several states were vested with the sovereignty within their respective limits, exclusively of the

[5] The period elapsed since this decision has been abundantly productive of events, which centuries, in past times, would have been occupied in evolving. We have been too intimately acquainted with the British prize courts, to have any doubts now about their arrangement. They are, however, part of the admiralty jurisdiction. Their subjects are "maritime acquisitions, earned and become due on the high seas," and their jurisdiction attaches "ob causam à re maritima ortum." Being the only department of their judiciary not entitled to our admiration, they furnish instances in which judicial decisions are directed, and varied by executive interferences, in the form of arrettes, or orders of the king in council. They do not determine as they ought, in all cases, "according to the laws of nations," as Blackstone asserts; but, in too many points, according to the ebbs and flows of executive policy and opinion. These originate, are multiplied, or diminished, with the chances producing adverse or prosperous events in wars; and, by sudden and unexpected changes and severities, after relaxations of the rigors of their own regulations, neutrals are plunged into unforeseen difficulties, and frequent ruin. To them....who must become belligerent, or submit....the British law maxim is degradingly applicable, however indignantly felt.—"Misera est servitus, ubi jus est vagum, aut incognitum." Their instance court is still properly separated from that of prize. And, being occupied only in private transactions, it preserves its purity; and administers impartial justice.

[6] This case on the point of jurisdiction went up, by consent, to the circuit court. The judgment of the district court being affirmed, it came back, for decision upon its merits. But no decision was ever had, on the merits, by the district court. By consent it returned to the circuit court, which gave a decision in favour of the libellant; from which there is now an appeal depending, in the supreme court of the United States. This decision is now published, to shew that all the powers of a court of admiralty are vested in the district court. Some of the cases which follow have circumstances of a mixed character, requiring the jurisdiction to be complete on both the prize and instance sides of the admiralty court.

federative government, composed of their delegates in congress. The instrument called the "Articles of Confederation" was agreed upon under the pressure of war, invasion, and difficulty. Although it was made for their common safety, it was a bond so feeble that it had no coercive obligation. It was treated, when it came in collision with state prejudices or partial interests, as if it had been obtained by duress. The powers exercised under it were submitted to with a reluctance highly prejudicial and dangerous, when they assumed, even for the obvious benefit of the whole, any decisive authority or energy. Courts of admiralty were established in each state, by state authority. In many of the states the facts were triable by juries, as was the case in the suit against the sloop George in New Jersey. This novelty in admiralty proceedings was found, on experiment, to be incongruous and unsuitable. From these state courts of admiralty, an appeal lay to a court constituted for the purpose by congress, to the end (among other motives) that no decision should improperly affect the rights of subjects of nations with whom a good understanding was essential to our interests, as well as conformable to our wishes. That court was originally composed of members of congress; but it was finally filled by judges appointed by congress, but not of their body. Their decrees were too frequently disputed, and their execution impeded by the states or individuals affected by them, and some of them are not executed at this day. After the establishment of the present federal constitution, the admiralty powers were vested by congress in the district courts, wherein the jurisdiction originates. From these, appellate cognizance is given to the circuit courts, from which an appeal, for final decision, lies to the supreme court of the United States. Suits were instituted in several of the district courts, with a view to effectuate the decrees of the court of appeals, before mentioned to have been appointed, under the powers given by the Articles of Confederation. Some of these suits were carried up to the supreme court, where it was determined that the district courts had power to effectuate those decrees.]

JENNINGS (CARSON v.). See Case No. 2,464.

JENNINGS (DALTON v.). See Case No. 3,548.

## Case No. 7,282.

JENNINGS v. MULLER.[1]

The KATE MILLER.

Circuit Court, D. Connecticut. 1876.

NEGLIGENCE—TOW—LIABILITY OF TUG.

[1. It is culpably negligent for a tug in her home port to leave her tow beside a dock where, upon the ebbing of the tide, the latter will be in danger from a sunken obstruction. The Margaret, 94 U. S. 494, followed.]

[2. A general direction that the tow brace off from the dock will not excuse the tug when the latter was ignorant of the specific danger to which the tow was exposed.]

[3. The liability of a tug for injuries to her tow arises from the nature of the service, and exists although the contract of towage is not made immediately between tug and tow.]

[Appeal from the district court of the United States for the district of Connecticut.

[This was a libel by Ferdinand Muller and another against the steam tug Kate Miller (Charles Jennings and others, claimants) for injuries to tow. The district court rendered a decree for libellants. Respondents appeal.]

Mr. Warner, for appellants.
Mr. Seymour, for libellants.

JOHNSON, Circuit Judge. In the case of The Margaret [94 U. S. 494], Oct. term, 1876, the supreme court of the United States has restated the rules of law relating to the duties and responsibilities of tugboats. Mr. Justice Swayne, in giving the opinion of the court, says: "The tug was not a common carrier; and the law of that relation has no application here. She was not an insurer. The highest possible degree of skill and care were not required of her. She was bound to bring to the performance of the duty she assumed reasonable skill and care, and to exercise them in everything relating to the work until it was accomplished. The want of either in such cases is a gross fault, and the offender is liable to the extent of the full measure of the consequences. The port of Racine was the home port of the tug. She was bound to know the channel, how to reach it, and whether, in the state of the wind and water, it was safe and proper to make the attempt to come in with her tow. If it were not, she should have advised waiting for a more favorable condition of things. If what occurred was inevitable, she should have forecasted it, and refused to proceed."

Applying the principles thus stated to the case now in hand, the fault of the tug occasioned the loss for which the libellants have proceeded. The tug was in her own port; the Eugenia was not, but in a port with which her master was unacquainted. The tug undertook the duty of placing the Eugenia in safety at the dock to which she was bound. This duty resulted from her taking the tow in charge, and we think as by special agreement. She is to be charged with the possession of the common knowledge of the harbor, which the navigators of the harbor are shown to have possessed, generally. That those in charge of the tug, in fact did not possess this knowledge is in itself a fault for the consequences of which she is responsible. It was a fact well known to the navigators of the harbor of Bridgeport that the dock at the steel works was not a safe place in all its extent for a vessel to lie during the ebb tide. A former stone wharf had slid into the water and made a hummock, which might break a vessel's back or throw her outward upon her side as the tide fell. Of this fact the master of the tug was ignorant, and he thus placed the Eugenia in a position where she was exposed to these dangers. When the tide went out, she fell over upon her side, part of her deck load slid off into the water, and when the tide came in again,

[1] [Not previously reported.]

she filled and sank, or rather did not rise from the bottom where she was lying.

Some contention was had as to directions claimed to have been given by the captain of the tug to the Eugenia to breast off from the dock, and which it was claimed would have proved her safety from the injury which she sustained. To this it is a sufficient answer that the master of the tug, being ignorant of the danger to be guarded against, gave the direction without any reference to the real source of danger; and it was given and received as having no particular application to anything peculiar in the bottom of the place where the Eugenia was left. It was therefore not adapted nor intended to give any special warning or instruction as to the management of the Eugenia, and is a circumstance of no moment in the cause. The Eugenia came to the outside of the harbor of Bridgeport in tow of the Terror, under a contract with the Eastern Transportation Company from New York. The Kate Miller took her in tow, under a contract with that company from which she was to receive her pay for the service. It is, however, well settled that the obligation of the tug springs from her undertaking the towing of the vessel, and does not depend upon the contract being or not being with the vessel towed. It results from the relation which the tug assumes to the vessel towed, taking it into its entire control, by its possession of the motive and directing power. The Deer [Case No. 3,737]; The Brooklyn [Id. 1,938].

I concur entirely in the ruling expressed by Judge Shipman in deciding the case in the district court. I ought, perhaps, to add that I have examined the cases of The Belle [Case No. 1,269], and of Dowdall v. Pennsylvania R. Co. [Id. 4,038], recently decided by Mr. Justice Hunt, but do not find either of them relevant to the questions involved in this case.

There must be a decree for the libellants in the usual form, which, if necessary, may be submitted for settlement on notice.

## Case No. 7,283.

JENNINGS v. PIERCE et al.

[15 Blatchf. 42; 3 Ban. & A. 361.] [1]

Circuit Court, D. Connecticut. July 9, 1878.

PATENTS — EQUITY PLEADING — INSUFFICIENCY OF SPECIFICATION — EXPERIMENTAL USE.

1. In a suit in equity on letters patent, the defence of the insufficiency of the specification to enable the invention to be practised, must be set up in the answer, or it cannot be availed of.

2. The experimental use of an invention, by the inventor, as distinguished from its public use, considered.

3. Acts of an inventor, to determine the value, utility or success of his invention, are to be liberally construed, if the acts are not inconsistent with the clear intention to hold the exclusive privilege.

[This was a suit by Russell Jennings against E. N. Pierce and Charles E. Andrews for an alleged infringement of plaintiff's patent.]

Charles R. Ingersoll and John S. Beach, for plaintiff.

Charles E. Mitchell, for defendants.

SHIPMAN, District Judge. This is a bill in equity to restrain the defendants from an illegal infringement of letters patent [No. 56,869], which were granted to the plaintiff on July 31st, 1866, for an improved machine for swaging the heads of screw augers. The application for the patent was made December 19th, 1865. The answer avers that the alleged invention was in public use by the plaintiff and by others, with his knowledge and consent, for more than two years prior to his application for said letters patent, and denies that the defendants "have infringed or invaded any of his (the plaintiff's) rights." Infringement is not substantially contested. The dies of the plaintiff have been used by the defendants.

Upon the trial, the defendants claimed that the patent was invalid, because the description of the alleged invention and the manner of making and constructing the same, was not set forth in the specification in such full, clear and exact terms as to enable any person skilled in the art to which it appertains, to practise the invention or to make the patented machine. This defence was not set up in the answer, and, therefore, is not open to the defendants. Goodyear v. Providence Rubber Co. [Case No. 5,583], and [Providence Rubber Co. v. Goodyear], 9 Wall. [76 U. S.] 788.

The substantial question in the case is, whether the patented invention was in public use by the patentee for more than two years prior to the date of the application. The plaintiff procured, in 1855, letters patent for an improved hand-made auger bit. He thereafter commenced experiments, to determine whether auger bits could be headed by machinery, an important point being so to construct the mechanism, that heated cast steel could be swaged before the metal had time to chill. About January 1st, 1859, he came to the conclusion, as the result of experiments with cast iron dies, that this difficulty could be obviated, and that cast steel auger heads could be manufactured by swaging; and he then proceeded to perfect the mechanism, which consisted, in brief, of a die and mould, or a pair of dies, and the appropriate machinery by which the dies were operated. It is not necessary to describe, with accuracy of detail, the successive stages of development through which the perfected machine progressed. It will be sufficient to state the history of the invention very briefly. The cast iron dies which were used at first broke under the force of

[1] [Reported by Hon. Samuel Blatchford, Circuit Judge; reprinted in 3 Ban. & A. 361; and here republished by permission.]

the blow of the plunger. Cast steel was then tried. A hole was drilled in a solid block, having enough solid metal to form the three teeth of the die between the places which were drilled out. The teeth were formed by digging out the metal between and around the teeth. In order to drill the hole, the metal must be annealed, and it was thereby made soft. Consequently, the dies wore away under the pressure of the plunger, so that the head of the swaged bit was too large. To remedy this difficulty, a second set of dies were made, in which the bits which had been headed were again swaged, so as to reduce the size of the heads. This seems, however, to have been a temporary expedient. In consequence of the softness of the iron, the upper tooth was apt to bend, and the metal would roll under and fill up the space between the upper and the next lower tooth, so that the edge of the twisted blank could not enter this space, and it was necessary frequently to remake the teeth. To avoid this defect, one tempered detachable tooth was inserted in the die. In 1863, a solid block containing two, and afterwards three, detachable tempered teeth, was inserted in a space in the die which had been mortised out. But the teeth wore unevenly. Finally, after various plans, each tooth was inserted separately in its separate block, so that each tooth and its block could be removed. This improvement was made in 1865. During the same time, the press was also being altered and perfected. The last improvement was made in December, 1865, and the application for a patent was forthwith sent to the patent office. During all this period, the plaintiff was the owner of a factory, and carried on his business of manufacturing hand-made augers. He had a contract to manufacture three hundred bits of different sizes per day, but was not able to furnish that number. During nearly each month from February, 1859, to 1865, in the intervals of his experiments, he headed bits upon the machine, which, when made perfect, were delivered, with the hand-made bits, upon his contract. Prior to November 1st, 1863, a great many were imperfect and were wasted, and nearly all were worked over by hand, or went through the second set of dies. The plaintiff usually operated the machine himself, but some of his workmen, who were sufficiently skilled, occasionally worked on it also. During all this period, the plaintiff was devoting whatever time he could spare to experiments upon his invention. He applied himself diligently to the task of perfecting his machine, as his means and opportunities permitted. He ran the machine as an inventor, but he also tried to get from it what he could for his profit, by using it privately and with intentional and effectual concealment from the public. Its construction was kept secret. It was necessarily used in a room where there was a forge and where there were other workmen, but the public was carefully excluded, and the workmen were warned of the approach of strangers by the ringing of a bell which communicated with another part of the factory. When the machine was not used, it was covered with a cloth. Until 1864, its use was not profitable. In that year the machine produced better results than it had before, and, between November 1st, 1864, and July 10th, 1865, the dies were brought to such a state of perfection, as to satisfy the plaintiff that the process of forging bits by dies, at one operation, could be advantageously performed, as compared with the process of hand forging.

It is manifest that the use of the dies, and of the machine, in the state in which they were, from time to time prior to December, 1865, was mainly an experimental use, and that the plaintiff used them, as an inventor, for the purpose of perfecting the invention and of testing its value. The use for profit was incidental and subordinate to the experimental use, and the entire use may, with propriety, be considered as experimental. The use was not public use, within the meaning of the statute, that is, a use for profit, as distinguished from a use for experiment and for testing the value of the invention.

When the patent was applied for, the detachable teeth and detachable backs were not mentioned in the specification, and, so far as teeth and dies are concerned, the patent was granted for the invention as it stood prior to November, 1863, before the last improvements were added. It is claimed, that, if the invention, as patented, was in public use by the patentee, or on public sale, with his knowledge and consent, for more than two years before the date of the application, such patented invention had thereby become the property of the public, notwithstanding experiments were being made during such two years, and subsequent unpatented improvements were added prior to the date of the application. This is true. But the defendant has still failed in establishing that the invention, as patented, in the state in which the dies were prior to November, 1863, had been in public use more than two years prior to December 19th, 1865. The use of the invention, as patented, was experimental, for the purpose of testing its value.

Acts of an inventor, to determine the value, utility or success of his invention, are to be liberally construed, if the acts are not inconsistent with the clear intention to hold the exclusive privilege. "Public use of an invention, unless by the patentee himself, for profit, or by his consent and allowance, will not work a forfeiture of his title, as such forfeiture is not favored, unless it clearly appears that the use was solely for profit, and not with a view of further improvements, or of ascertaining its defects, or for any other purpose of experiment in reducing the invention to practice." Jones v. Sewall [Case No. 7,495]; Pitts v. Hall [Id. 11,192]; Agawam Co. v. Jordan, 7 Wall. [74 U. S.] 583. It

would be a harsh limitation of the statutory rights of an inventor, which should give to a naked infringer the privilege of using an invention, because the patentee had attempted, in good faith and in secrecy, to incidentally make his experiments of some pecuniary benefit, while he was patiently endeavoring, amid many failures, to remedy the defects of the machine, test its value, and ascertain whether it could be used advantageously, and whether it ever would be of any benefit either to himself or to the public. Courts have not favored this ground of forfeiture, and have required clear evidence to establish the fact that the use was not experimental. In this case, I am satisfied that the evidence is not of that character which has ordinarily been required to prove that an inventor had, by his own acts, forfeited his right to the exclusive ownership of the invention. Let there be a decree for an injunction and an account.

## Case No. 7,284.

JENNINGS v. WASHINGTON.

[5 Cranch, C. C. 512.] [1]

Circuit Court, District of Columbia. Nov. Term, 1838.

SLAVERY—NIGHTLY MEETINGS—PROHIBITION.

The corporation of Washington, under the power to restrain and prohibit the nightly and other disorderly meetings of slaves, free negroes, and mulattoes, has a right to prohibit them from being out after ten o'clock p. m.

Appeal from the judgment of a justice of the peace against the appellant [Mary Jennings], who was a free mulatto, for the penalty of $10, for being out after ten o'clock at night, contrary to a by-law of the corporation.

Mr. Dermott, for appellant, contended that the corporation had no authority to prohibit free persons of color from being out after ten o'clock at night. The charter only gives them power to restrain and prohibit disorderly meetings of free colored persons.

But THE COURT (nem. con.) was of opinion that the by-law in question was justified by the clause in the charter which gives the corporation power "to restrain and prohibit the nightly and other disorderly meetings of slaves, free negroes, and mulattoes." Judgment affirmed, with costs.

JENNISON (UNITED STATES v.). See Case No. 15,475.

## Case No. 7,285.

JENNY v. CRASE.

[1 Cranch, C. C. 443.] [1]

Circuit Court, District of Columbia. July Term, 1807.

EQUITY PRACTICE—INJUNCTION—SLAVE.

An injunction to prevent a person from taking away a colored woman, who has sued for her freedom in this court, will not be granted upon a mere statement of the plaintiff's apprehension.

Bill for injunction to prevent the defendant [George Crase] from taking away the plaintiff [a negress] out of this county, until he appears and answers a suit at law to try the right of freedom. Injunction refused. Defendant not a resident of the county of Alexandria, nor of the District of Columbia.

The plaintiff merely states her apprehension.

[1] [Reported by Hon. William Cranch, Chief Judge.]

JENNY (TABER v.). See Case No. 13,720.

## Case No. 7,286.

The JENNY JONES.

[Deady, 82.] [1]

District Court, D. Oregon. July 11, 1864.

SHIPPING—JETTISON OF CARGO—PILOT.

1. Where a jettison of cargo becomes necessary for the safety of the vessel, the owner and vessel are liable for the loss, if the peril of the ship is directly attributable to the want of diligence or skill upon the part of the master or crew.

[Cited in The Ontario, 37 Fed. 222.]

2. Where a vessel came into the Columbia river without a pilot and without any imperative necessity for so doing, and owing to the want of knowledge on the part of those in charge of her, as to the usual state of the tide and wind at that season of the year and time of day inside of Cape Disappointment, such vessel was thrown upon Sulphur Spit, and was compelled to throw over a part of the cargo, the owner and vessel were *held* liable for the loss, because the same was directly attributable to the unskillfulness and ignorance of the master in attempting to cross the bar when and as he did.

In admiralty.

David Logan, for libellants.

Lafayette Grover, for claimant.

DEADY, District Judge. Janion, Green and Rhodes, of Victoria, bring this suit to recover the value of certain goods shipped by them on the schooner Jenny Jones, from Victoria to Portland, and not delivered. The libel was filed July 6, 1864. The respondent and claimant, James Jones, appeared and answered the libel on July 7, and by consent of parties, the cause was set for trial at once. By the pleadings it is admitted, that the schooner, on May 10, 1864—the claimant being both owner and master—sailed from Victoria for Portland, having on board two hundred mats of sugar and ten hogsheads of ale belonging to the libellants, to be delivered to their consignees, Ladd, Reed & Co., at the latter port; that the claimant signed the usual bills of lading, and was to receive certain freight and primage for the carriage of the goods; and that the goods were never delivered. As an excuse for the non-delivery of the goods, the

[1] [Reported by Hon. Matthew P. Deady, District Judge, and here reprinted by permission.]

claimant pleads in his answer, "that on May 14, 1864, said schooner being properly in the pursuit of her voyage, by the dangers and perils of the sea, stress of weather and the unavoidable causes of accident connected therewith, and without negligence of the respondent, was thrown upon the shoals and a sand spit at the entrance of the Columbia river, * * * in the midst of the breakers therein, and then was momentarily in danger of total wreck of said schooner, and loss of all her cargo, and the crew and passengers," and that to save the vessel, crew and passengers, the claimant then and there caused the goods of the libellant, together with other goods on board, to be thrown overboard. The answer also denies negligence, and that the goods were of the value alleged in the libel—$858.70. On the trial it was admitted that on the day of the wreck, May 14, the pilot boat of the Columbia river bar, was inside the bar, and that the pilot thereon saw the schooner approaching, and would have gone out to her, but the wind would not permit; and, also, that the goods were of the value alleged in the libel. The bills of lading were produced and contained the clause: "the dangers of the sea only excepted." A number of witnesses have been examined, including the claimant, and one of the crew of the schooner—Richard Downie—touching the propriety of the schooner's attempting to cross the bar when she did without a bar pilot, and the necessity of the jettison.

On the argument, it was practically admitted by counsel for libellants, that after the schooner struck or grounded, it was necessary to throw over the cargo to get her off and save the lives of the passengers and crew. The schooner was heavily laden with pig iron, the goods of the libellants were stowed on top, and it was necessary to throw out most of the cargo, to lighten the vessel over the sand spit on which she grounded. The right to recover turns upon the question of whether the schooner was properly navigated in crossing the bar as she did. The evidence bearing upon the question, establishes the following facts: That the Jenny Jones, with assorted cargo and twenty passengers, after a voyage of three days from Victoria, made the offing near the mouth of the Columbia river, about seven o'clock p. m. of May 13; that the pilot boat was inside of Baker's Bay, but could not be seen from the schooner; that there was a smart northwest breeze outside, and the vessel was in good condition and well provided, so far as appears; that the schooner stood off the mouth of the river until half-past four o'clock in the morning, when she stood in for the bar with a fresh breeze from the northwest, where she arrived about six o'clock, and sailed in the north channel, having about twenty minutes before set a signal for a pilot, without, however, delaying on that account; that about a mile inside the bar and near Cape Disappointment, it is necessary to haul to the northward, and at this point the wind died away, and the schooner met the ebb tide with very heavy rollers, two or three of which struck her on the port bow, and drove her over on Sulphur Spit, on the south side of the channel; that finding the schooner going on to the spit sideways, the sailing-master, Spenser, turned her head on, in the hope of being able to drive her across it into the south channel, but the water was too shallow, and the schooner grounded at about half-past seven o'clock; that about seven o'clock p. m. of the same day, after throwing over about two thirds of the cargo, the vessel with the flood tide and a fresh breeze, got over the spit into the south channel, and reached Astoria that evening, leaking and considerably damaged. That from the nautical almanac it appears that on May 14, flood tide on the bar would commence about one o'clock a. m. and run for six hours, and again about one o'clock p. m. and run for same time; that, in fact, the duration of the flood tide on the Columbia river bar is governed by the stage of the water in the river, and the strength and duration of the northeast winds, and that sometimes owing to these causes the flood tide is scarcely perceptible; that during some weeks in the months of May and June, owing to the melting of the snow in the mountains, there is always high water in the Columbia river, and a strong current outward at the mouth; that this year the rise in the Columbia came early, and was stronger than usual at the time the schooner came in, and for that reason the flood tide did not run more than four or five hours on the morning of May 14; that although a northwest wind is a fair one for a vessel bound in, yet in the morning, in the spring season, it often dies away near Cape Disappointment, and then you meet a northeast wind inside; but in the afternoon a vessel is most likely to carry the northwest wind to Astoria, several miles above Sulphur Spit, at which point the dangers of the navigation cease, and not before; that the claimant is not an experienced seaman, and has but little knowledge of the Columbia river bar, but that he relied upon Spenser, his sailing-master, who had taken the schooner out over the bar in April previous, and about a year before had taken some small craft in and out a few times; and that several persons of more or less experience in crossing the bar, testified on the trial, that under the circumstances they would have done as the claimant did, and attempted to bring the schooner in without a pilot.

Upon these facts the question arises, was the jettison the result of unavoidable accident, or may it fairly be attributed to the want of skill and prudence in the navigation of the vessel? The contract and business of the claimant was that of a common carrier, and the law wisely imposes upon him the duty of using all reasonable skill and prudence in the performance of his undertak-

ing. The clause in the bill of lading—"the dangers of the sea only excepted," does not limit the liability of the carrier. The law, in exempting a common carrier from responsibility for unavoidable accidents, silently attaches such a clause to all contracts for the carriage of goods for hire. But if the loss is directly attributable to human agency, then it is not caused by unavoidable accident, whatever may be the immediate cause of such loss. For instance, although it be admitted that the loss of the goods was unavoidable at the moment they were thrown over, yet if the goods were placed in this peril and necessity by the want of ordinary diligence—reasonable skill and prudence—in navigating the schooner under the circumstances, the loss is directly attributable to human agency, and the carrier is liable. Story, Bailm. § 512. Was the master justifiable in coming in without a bar pilot? As far as the pilot is concerned, he had a legal right to do so, but so far as shippers are concerned, if he omitted to take a pilot, except under circumstances of imperative necessity, he took the risk of all accidents which are attributable to that cause. Under such circumstances the master, owner and vessel are liable to the shipper for any injury resulting from a want of that knowledge which might have been obtained by the employment of a pilot concerning the condition of the tides, currents, winds, shoals, or other matters affecting the navigation of the river. There was no imperative necessity for bringing the schooner in without a pilot. Taking half tide as the proper time to come in, so far as the tide is concerned, the schooner should not have attempted to come in before four o'clock a. m., May 14. This was about daylight when the schooner was yet some distance at sea. But for another reason it was not proper to attempt an entrance until the afternoon of that day, because in the morning, a vessel was liable to lose the wind behind Cape Disappointment, and at the same time meet a strong ebb tide by reason of the unusual current in the river. I do not think the master ought to have expected a pilot to take him in before the floodtide in the afternoon of May 14, as that was really the first time it could be safely undertaken after the schooner reached the bar. It appears that it is not unusual for a vessel to lay off the mouth two or three days for a pilot. If there was a steam tug on the bar, as there ought to be, there would be no necessity for delay in piloting in a vessel, except in rare instances.

Counsel for claimant maintain that Spenser is shown to have been a competent pilot, although not a licensed one, and that is sufficient. The evidence upon this point does not satisfy me of that fact. The master testifies that he signaled for a pilot twenty minutes before he went in, and unless this was intended at the time as a mere make-believe, it indicates pretty plainly that he thought he needed one. Spenser may have been as able, with the assistance of a chart, to follow the channel, as any one. But he does not appear to have been acquainted with the local causes that affected the flow of the tide, or the peculiarities of the wind at certain seasons of the year and times of day, and upon knowledge of these, and the like, depends, in a great measure, the competency of a bar pilot. But admitting that Spenser was competent to navigate the schooner on the occasion, with reasonable skill and prudence, did he do so? I think not. He was probably ignorant of the impropriety of attempting to cross the bar on the last of a flood tide, because he was unaware of the unusually strong current in the river, and the prevalence of the northeast wind on the inside. But all these facts were known to the local pilots, and if the master had availed himself of this knowledge by the employment of one of these, as he was bound to, the loss, so far as can be seen, would not have occurred. Upon the concurrent testimony of the witnesses as to the usual condition of the tides, current and winds, at that season, it appears quite probable that the vessel came in at an improper time of the day and stage of the tide, and the result of the experiment proves such to have been the fact. The freshet in the Columbia was earlier than usual this year—a fact of which Spenser appears to have been ignorant. Had this been otherwise the flood tide might have lasted until the schooner reached Astoria, and thus carried her by the spit after she lost the northwest wind. I find that the jettison of the libellant's goods, although unavoidable at the time, was nevertheless the direct consequence of the conduct of the master, in entering the river at an improper time of tide and wind, which might have been avoided by waiting a reasonable time for a qualified pilot, and that therefore the claimant and schooner are both liable to the libellants for the value of the goods with legal interest from the time they should have been delivered—say May 20, 1864.

It will be observed, that in coming to this conclusion, I have not given much heed to the testimony of certain witnesses, who declared that if they had been in command of the schooner, under the circumstances, they would have brought her in without waiting for a pilot. They might have done so, and doubtless think they would, but if they had, and a similar loss of cargo had been the consequence, they would have been liable for it. The law imposes a certain obligation upon a common carrier. He must use ordinary diligence to avail himself of the knowledge and means necessary to transport safely the goods bailed to him. Whatever these witnesses may think or say they would have done under like circumstances, it is manifest to my mind that the risk incurred in bringing the schooner in when she was without a competent pilot, was unnecessary, and betrayed a reckless disregard of duty or a want of rea-

sonable skill and knowledge on the part of the claimant. Decree, that the libellant recover the sum of $858.70, with legal interest from May 20, 1864, with costs.

## Case No. 7,287.

The JENNY LIND.

[3 Blatchf. 513; [1] 35 Hunt, Mer. Mag. 452.]

Circuit Court, S. D. New York. Sept. 10, 1856.

ADMIRALTY—PARTIES—MORTGAGE ON VESSEL—DEFAULT—POSSESSION.

1. It is a common practice, in equity and admiralty courts, to permit a party who becomes interested in the subject matter of a litigation during its pendency, to come in and protect his interest, if application is made within a reasonable time.

2. Where, the day after the levying of an attachment issued by the district court, on a libel in rem against a vessel, there was a default in the payment of an instalment due on a mortgage on the vessel, *held*, that such default gave to the mortgagee the right to the possession of the vessel, and that it was proper to permit him to come in and defend the suit.

[Cited in Chester v. Life Ass'n of America, 4 Fed. 492; The Two Marys, 10 Fed. 925, 12 Fed. 154.]

3. Under the statute of New York (2 Rev. St. p. 493, § 2), which gives a lien on a domestic vessel for supplies furnished to it, but provides, that if the vessel departs from the port at which she was when the debt was contracted, to some other port within the state, the debt shall cease to be a lien at the expiration of twelve days after the day of such departure, daily voyages with passengers and freight, from New York to Haverstraw, touching at Sing Sing and Tarrytown, are departures, within the meaning of the statute.

[Cited in The Arctic, 22 Fed. 127.]

[Appeal from the district court of the United States for the Southern district of New York.]

This was a libel in rem, filed in the district court, to recover for a running account of stores furnished to the steamboat Jenny Lind, commencing April 29th, 1854, and ending October 19th, 1854, and amounting in the aggregate to $156.27. The claimant [Dennis Harris] was mortgagee of the vessel, and, on application to the district court, was allowed to come in and defend, and obtained a discharge of the vessel from the attachment, on giving the usual bond. The district court dismissed the libel, and the libellant [Albert Van Winkle] appealed to this court.

Dennis McMahon, for libellant.

William J. Haskett, for claimant.

NELSON, Circuit Justice. The default in the payment of one of the instalments due on the mortgage occurred on the 21st of October, 1854. This gave to the mortgagee the right of possession, and happened the day after the levying of the attachment under the libel. It has been urged that, as the claimant had no present right to the possession at the time the vessel was seized, he was improperly allowed to come in and defend. The position cannot be maintained. A party becoming interested in the subject matter of the litigation, after the institution of the suit, may be admitted to come in and protect his interest, if application is made within a reasonable time. This is a common practice, both in the admiralty and equity courts; and it would be very unjust, besides leading to vexatious litigation, were the rule otherwise. The party would necessarily be driven to a cross suit.

It was also urged, that a mortgagee had not such an interest in a vessel, as would authorize him to appear and defend. How this would be, in a case where the right to the possession did not exist, it is not material to determine. In this case, the right of possession existed; and, not only so, but the vessel was reduced to actual possession, and the mortgagee had a right to hold it for the satisfaction of his debt.

It was also urged that, assuming that the mortgagee had the right to come in and defend, for the purpose of protecting his interest; still the libellant has shown a valid lien upon the vessel, which the court should enforce. The Jenny Lind was a domestic vessel, and a lien for the stores depends upon a local law. The statute of New York, giving the lien (2 Rev. St. p. 493, § 2), provides that, if the vessel shall depart from the port at which she was when the debt was contracted, to some other port within the state, the debt shall cease to be a lien at the expiration of twelve days after the day of such departure. During the period within which this account accrued, the Jenny Lind was engaged in the daily transportation of passengers and freight from New York to Haverstraw, touching at Sing Sing and Tarrytown, Westchester county. It has been repeatedly held, that voyages to this extent were departures, within the meaning of the statute; and, if the twelve days elapsed before the libel was filed, the lien ceased.

I think that the decree below, dismissing the libel, was right, and should be affirmed.

[1] [Reported by Samuel Blatchford, Esq., and here reprinted by permission.]

JENNY LIND, The (WILLIAMS v.). See Case No. 17,723.

JENSEN v. The UNA. See Case No. 14,331.

JENTHER (UNITED STATES v.). See Case No. 15,476.

## Case No. 7,288.

JERBY v. ONE HUNDRED AND NINETY-FOUR SLAVES.

[Bee, 226.] [1]

District Court, D. South Carolina. May, 1806.

SALVAGE—CARGO OF SLAVES.

One fifth decreed, the danger not having been very great, and it being easier to remove negroes than any other sort of cargo.

[1] [Reported by Hon. Thomas Bee, District Judge.]

In admiralty.

Before BEE, District Judge.

The brig Swan, Smith, master, on the 10th instant, early in the morning, got aground at the distance of six miles from the shore of Bull's Island, on this coast. She had on board a cargo of 194 slaves. At nine o'clock in the morning of the same day, she was seen by Captain [William] Jerby of the schooner Victory, who, observing signals of distress, bore down to the vessel, and, after some conversation, agreed to take the crew and cargo of negroes on board his schooner. The boat and crew of each vessel assisted in nearly equal degree, and the business was completely effected by eight o'clock in the evening: on the following morning at ten o'clock they all arrived safe in Charleston. It appeared in evidence that another vessel had passed them previously without affording relief. It was also in proof, that before the Victory came in sight, the supercargo of the brig had gone to Charleston in the small boat, to procure assistance, and returned the next morning with two vessels for that purpose; but, on finding the brig abandoned, he came back to Charleston. The negroes saved have been appraised by order of the court, and are valued, with the consent of parties, at thirty-eight thousand eight hundred dollars. The service rendered upon this occasion was great, and, at the time, was considered by the captain and crew of the brig as essential to the preservation of their lives, and those of the negroes. Another vessel had neglected the signal of distress; and it is hardly possible that the negroes could have been preserved during the night, that succeeded their deliverance; for the waves beat over the brig in such a way that many of them must have been washed overboard. The supercargo would have returned too late to effect what was done by the people of the Victory: Captain Jerby must be considered, therefore, as the means of rescuing them from most imminent peril. The risque, indeed, does not appear to have been great, for the vessels kept at a safe distance from each other. Twelve hours were sufficient for the business, and the schooner did not go at all out of her course. From the nature of the cargo, too, it is evident that the trouble of conveyance from one vessel to the other was little in comparison to that of hoisting goods out of the hold of a vessel, and putting them on board another lying alongside; besides that, in the latter case, much damage is risqued to the vessel of the salvors, if the sea, as upon this occasion, run high.

This case resembles that of Taylor v. Twenty-Five Thousand Dollars [Case No. 13,807], more than it does any other decided by me. Some that have been quoted were instances of derelict, saved by great labour and risque; and in such I have given one half of the value by way of salvage. But the circumstances here will not justify any such proportion. In the case of The William Beckford [3 C. Rob. Adm. 355], decided by Sir William Scott, greater exertions were made, and more danger incurred; yet among the numerous salvors not quite a seventeenth part was divided. In Taylor's Case [supra], the amount saved was 25,000 dollars; the time employed was nearly the same as in this instance; and the risque certainly greater. I decreed one fifth by way of salvage, and all parties were satisfied. I acted then with great deliberation, and I have carefully compared the circumstances of that case with this. Seeing no reason to deviate from the principles there established, I decree the same proportion of one fifth to the libellant on the present occasion. Let costs of suit be paid by the claimant.

## Case No. 7,289.

The JEREMIAH.

[10 Ben. 326.] [1]

District Court, S. D. New York. March, 1879.

COLLISION AT SEA OFF BARNEGAT — SAILING VESSELS—EVIDENCE—REFERENCE.

1. A collision took place in the night between a schooner and a brig, off Barnegat. The wind was E. N. E. and the schooner was sailing N. by E. and the brig was sailing S. by W. The schooner alleged that she saw the brig a little on her lee bow; that she kept her course; that the brig luffed and came into her, striking her on the port side. The brig alleged that she made the schooner a little on her starboard bow, being about three-quarters of a mile away, and showing no light; that the brig then luffed about three points; that the schooner then also changed her course across the bows of the brig and thus caused the collision. *Held*, that the evidence of the witnesses on the brig as to a change of course on the part of the schooner did not overpower the positive evidence of the master of the schooner, who was at her wheel, that her wheel was not changed, but that she kept her course.

2. What the witnesses from the schooner testified as to what they saw of the navigation of the brig agreed with the evidence from the brig as to what she did, except as to the time when it was done.

3. The story of the brig's witnesses as to the alleged change of course of the schooner was not sustained.

4. The evidence of the master of the schooner as to the position of the brig when she was seen was more to be relied on than was the evidence of the men on the bow of the brig as to the position of the schooner when seen, because he had the masts of his vessel to range her by.

5. On the evidence, the collision was due to careless observation on board the brig, and to the change of course which she made by luffing, instead of porting, and she was in fault and was liable.

In admiralty.

D. McMahon, for libellants.

W. R. Beebe, for claimants.

[1] [Reported by Robert D. Benedict, Esq., and Benj. Lincoln Benedict, Esq., and here reprinted by permission.]

CHOATE, District Judge. This is a libel by the owners of the schooner P. A. Sanders against the brig Jeremiah to recover damages for the loss of the schooner by a collision with the brig. The collision took place about six miles off the Jersey coast, a little to the north of Barnegat, about three o'clock in the morning of the 16th of March, 1876. The schooner was bound on a voyage from Virginia to New York with a load of wood. The brig was bound on a voyage from New York to Cardenas and was light.

The case, as stated in the libel, is that the night was clear and starlight, the wind blowing about a five-knot breeze from or about E. N. E.; that the schooner was close-hauled, sailing by the wind about N. by E.; that the brig had the wind free and all sail set; that when the brig was first seen she was to the leeward of the schooner, bearing directly down on her, but so as to have cleared the schooner by keeping off a little; that instead of doing so she came directly down on the schooner, striking her on the port side between the foremast and the forerigging; that the collision was caused by the negligence of those in charge of the brig, by not keeping a good lookout and in not keeping off, and in a general recklessness in her navigation. The answer of the brig is that the night was clear, the wind about E. N. E., a four-knot breeze, the brig on a course S. by W.; that the lookout reported a vessel on the starboard bow; that they saw her sails, but no light, and she was then about three-quarters of a mile away; that she bore about half a point on the starboard bow of the brig, and immediately the mate, whose watch it was, gave an order to luff, which was done, and she came up about three points, thus bringing the schooner three to three and a half points on the starboard bow of the brig; that owing to this change of course it became necessary to haul in the braces, and the lookout was called to assist in doing so, and that this had scarcely been completed when it was discovered that the schooner had changed her course and was standing directly across the bows of the brig and was only a few feet distant from her, and instantly thereafter the collision took place; that the collision was caused by the fault of the schooner in not keeping her course, in not keeping a good lookout, and in changing her course and standing across the bows of the brig, and in not having proper lights, and in not having them properly burning.

Captain Leek, the master of the schooner, was at the wheel, and he testifies that he was sailing by the wind close-hauled, heading about N. by E.; that he had two men forward, one of whom, Wright, was acting as lookout; that the lookout reported "a vessel to leeward;" that almost at the same moment he saw the vessel approaching, about a point to leeward; that he could see her sails, but not her lights; that she was perhaps three hundred yards off; that he kept on his course, merely trying to keep her as close as possible to the wind; that she will not sail nearer than five points to the wind; that instead of keeping off the brig luffed and ran into him; that both his lights were set and burning brightly; that he took them down and blew them out after the collision. The two other men on the deck of the schooner were colored men from the Eastern Shore of Maryland; one of them, Wright, was called as a witness by the libellants. The other was not called, and it was shown that all reasonable efforts to find him had failed. Wright, who was evidently a very unintelligent person, testified that he was acting as lookout; that he was forward on the deck load; that they were, at the time of the collision, sailing close-hauled, N. by E., the wind being E. N. E.; that the first he saw of the brig was about a hundred yards ahead of them a little on the lee bow; that he sung out to the captain "a schooner on our lee bow," and that then he started and ran aft; that when he first saw the brig she was bound down the coast and he could see both her lights. He says that the brig struck the schooner on her lee bow. When asked which bow was his lee bow, he answered the starboard bow; he testified that he saw the captain take down and blow out the schooner's lights after the collision. He said that the deck load was nine feet high, and that from where the captain stood at the wheel he could not see anything forward on account of the deck load; that as soon as he reported the light he went aft, and before he got aft the vessels were together. He further said that the wind struck on the port side of the schooner. It is evident that unless the schooner changed her course just before the collision, this witness has confounded port and starboard, for it admits of no question that the wind had, until just before the collision, been on the starboard side of the schooner, and her port side was her lee side. And all the witnesses agree that she was struck on her port side.

On the brig it was the mate's watch. The mate and two men were on deck, and they were all called as witnesses by the claimants. Anderson, the man at the wheel, testified that he was steering S. by W. by compass; that they were sailing about four miles an hour, the wind being E. N. E., and they had all sail set; that the lookout sung out "a vessel on the starboard bow;" that the mate was standing about three feet from him and went forward, and after going forward ordered him to luff; that he obeyed the order and luffed up three points and steadied on that course; that after he luffed, the mate and lookout went to brace the foreyards; that he did not see the schooner till they were together; that after he luffed he did not change his course till the collision. Brown, the lookout, testified that when he first saw the schooner she was a mile or a mile and a half off, bearing a point to a

point and a half on the starboard bow; that he sung out to the mate "a vessel on the starboard bow;" that the mate came forward and looked and told the man at the wheel to luff; that the brig did luff; that he was then called away by the mate to help haul in the braces, and the next he saw of the schooner she was across their bows at the very instant they came together; that when he first saw the schooner he saw her sails and both bows, but no lights; that they seemed to be coming nearly head and head to each other then; that he didn't look at the schooner from the time he left the forecastle deck to help haul in the braces till she lay across his bows. Brown, the mate, testified that the brig was heading S. by W. right down the coast; that the lookout reported a vessel on the starboard bow; that he went forward and saw the vessel a little on the starboard bow, about half a point, about a mile off; that he saw no light, but saw her sails; that he ordered the wheelsman to luff; that he luffed three points and a half, good; that he looked at the vessel till his vessel came to; that the schooner was on a N. by E. course, the regular course up the beach as near as he could judge; that it became necessary to haul in on the braces, and he called off the lookout to help him do it; that then the vessels were three-quarters of a mile apart; that after hauling in the braces he looked to leeward and there saw the schooner twenty feet off crossing their bow from their starboard to their port; that she was heading straight across their bow. The captain of the brig, who was below, came up on the noise of the collision, and testified that his vessel was then heading S. S. W. by the compass; and that the schooner was heading E. N. E. as near as he could judge.

It is perfectly evident that if the story of those on the brig is true and the schooner kept on her course, no collision could have taken place; that the brig, being on the windward or starboard hand of the schooner and then luffing three points, the two vessels would have got further and further out of each other's way every instant and would have passed each other at a considerable distance, if they were, as those on the brig say, not less than three-quarters of a mile apart when the brig luffed. But it is the theory of the claimants that after the brig luffed the schooner ported, came up in the wind and went off on the other tack and thus intercepted the course of the brig and stood across her bows. And it is the claim of the brig, in explanation of the fact, that those in charge of the brig kept no lookout for the schooner after luffing, that this manoeuvre of the brig was made at such a safe distance that the brig had a right to pass on either side, and that after luffing the vessels were not in a position relatively to each other such as to involve danger of collision, and that therefore, and because it was the duty of the schooner to keep on her course, the brig was not chargeable with any further duty of observing her movements. It is clear that this is the only theory that can explain the collision, if the schooner changed her course at all, and if the story of those on the brig is correct, for if the schooner made any other change it is demonstrably impossible for the two vessels to have come together; clearly so if she had starboarded and kept off more to the northward, and equally clearly if she had ported and come up in the wind but had not filled away on the other tack, for she would have lost her headway and never could have overtaken the brig.

But the difficulty with this theory of the collision is that it has no support, either in probability or proof. It is not pretended by those on the brig that they saw any such manoeuvre on the part of the schooner. They all admit that they did not look at her or see her after luffing till the vessels were actually in collision, and when they luffed she was standing north by east. If the witnesses from the brig are entirely truthful it was a genuine surprise to them when they saw the schooner's bow right under the bows of the brig, and upon the observations they had made of her position and course and their own, and their calculations as to the effect of their luffing, and of her expected keeping on her course, she should have already passed under their stern and been far to leeward. So far as they are concerned, therefore, this theory is a mere conjecture, based upon the supposition that they had made no mistake of observation or judgment. Such theories proposed by parties so obviously careless as these men were, are entitled to little favor unless backed up by strong proof or probability drawn from the entire evidence. In the brief observation they took of the schooner they did not see or did not observe her lights—they thought she was three-quarters of a mile away. Without seeing her lights their judgment as to her course and movements was necessarily very liable to error, yet basing their own manoeuvre on such observation and judgment of distance and course, they luffed, and then, trusting that they had done enough, failed wholly to keep any lookout for this or any other vessel, calling the lookout away for other ship's duty. This was gross carelessness which suggests of itself a prior inaccurate and careless observation of the schooner's position and movements. The theory is also utterly inconsisent with the positive testimony of those on the schooner as to her movements. Capt. Leek, who was at the wheel, swears positively that he kept her by the wind, heading N. by E.; that he saw the brig near at hand on the lee bow when she was reported; that the brig luffed and ran into him. The facts testified to by Capt.

Leek are such that he must have told a deliberate falsehood if the schooner in fact went up in the wind and stood off on the other tack, changing to the eastward and southward ten points, as she must in that case have done. So far as his testimony is concerned it is not a mere question of accuracy of observation or of memory, but of truthfulness. It is also impossible to reconcile this theory with the testimony of Wright the lookout. It is true that Wright says that the starboard side was the lee side and the booms of the schooner swung to starboard, and on this statement the claimants' counsel greatly relies in the support of his theory of the case that the schooner was standing on the other tack, which would have made her starboard side her lee side and would have accounted for her boom's swinging to starboard. But an attentive reading of this witness's deposition shows a hopeless confusion of mind as to the use of the words "lee" and "starboard," and upon that deposition alone it might be concluded with great probability that he had by mistake used these words erroneously. Thus, he says the brig struck the schooner's lee bow. It is admitted her port bow was struck. Therefore he cannot really have understood or intended to say that the starboard side was the lee side at the time of the collision. All the evidence in the case was taken by deposition, which does not afford the same opportunities for correcting mistakes in testimony, as in case of testimony given before the court when the parties and witnesses are all present. But independently of this it is clear that Wright's testimony as a whole does not support the claimant's case. As he recollected the circumstances of the collision the whole thing was almost instantaneous. The schooner was standing on her course close-hauled by the wind, heading N. by E. when he saw and reported the brig to leeward. He ran aft and before he got there the collision occurred. He may be mistaken in the length of time and the distance of the two vessels apart when he first saw the brig. He is so unless all the other witnesses who testify to distance are mistaken. But he does not say the schooner came up in the wind or went off on the other tack, and such a movement is inconsistent with what he tells us that he did observe. Moreover, the exigency of the claimant's case requires that if the schooner made this movement at all she should have made it instantly after the brig luffed. Except upon that supposition she never would have overtaken the brig, especially considering the time she would lose in putting about and getting filled away and the advantage the brig had in being already to the windward and getting steady on her new course before the schooner changed. The change of the brig three points further to the south and east and of the schooner ten points to the east and south, in all a change in their relative courses of thirteen points, would, if they were before on nearly opposite courses, as seems to be conceded, bring them on converging courses, making an angle of only three points with each other, and as they were three-quarters of a mile apart when the change was made, on claimants' theory they would, if they came together at all, each have to run at least a mile before meeting each other. This is fatally irreconcilable with the whole tenor of Wright's account of the matter as well as Capt. Leek's. This theory of the claimants is also irreconcilable with all the probabilities of the case. The schooner had no sufficient motive to stand off on the other tack. She was well clear of the land and on her proper course, and the position of the brig and the well-understood duty of the brig to keep off as the schooner saw her position, would have made it an unnecessary and foolish movement on the schooner's part. It is not supported but rather refuted by the testimony of those on the brig as to the way the vessels came together. But further detail is needless. One circumstance which claimants rely on is that the brig's starboard bow port was knocked in. Whether this was done at the instant of collision or afterwards is not directly testified to. The claimants' counsel insists that on libellants' theory the brig's port bow was more directly exposed to injury from the angle at which, on the theory of the libellants, they must have come together. This is undoubtedly so, but the circumstances of the case afforded ample opportunity for the starboard bow port of the brig to be knocked in. The vessels were locked together half an hour, the stem of the brig having crushed in the side of the schooner. The sea meanwhile was rough and rising. As the captain of the brig says, they were "chawing" and "pounding" together all this time. It is not probable that they stood perfectly still. No injury shown to either bow of the brig was an unlikely result of this "chawing and pounding" process.

The theory of the claimants being then dismissed as wholly improbable and unproved, there is no rational explanation of the collision, except that positively testified to by the master of the schooner. It involves no intentional false statement by any witness. It only involves such carelessness of observation and error of judgment on the part of those in charge of the brig as we very frequently find, and must impute to one party or the other in collision cases, and which, are, indeed, themselves the ordinary causes of collisions. The mate and lookout, even if their memory is entirely accurate, may have easily, through carelessness of observation or mere error of judgment, thought the schooner was a little on their starboard bow, when, in fact, she was a little on their port bow. A man

at the wheel, as the captain of the schooner was, may, of course, misrecollect or misstate what he saw; but he cannot be mistaken at the time as to whether an object seen forward is on his port or starboard bow. His observation is aided and held to exact accuracy, by the range of the vessel's masts and bow immediately before him. He knows with certainty at the time whether he has to look to the right or the left to see the object. The element of error in observation is therefore eliminated from his testimony as to such a fact. It is otherwise with witnesses who stand on the bow of the vessel and see an object almost directly ahead. Their judgment as to whether it is a half point or a point on the one side or the other, may easily be mistaken, unless it appears that they take special pains to take the range of the vessel's course. These two witnesses vary between themselves by one point as to the bearing of the schooner. The liability of witnesses to misjudge distances in the night time, at sea, is too well known to excite remark. Everything which the master of the schooner says he saw the brig do, those on the brig admit that they did. The only difference is as to the time when it was done. The alleged contradiction of the master of the schooner by the look-out, Wright, as to the height of the deck load, and as to whether the master could see over it, is entitled to very little weight. The master testifies that there was a raised stand by the wheel for the purpose of enabling the man at the wheel to see forward; that his booms were raised so as not to be in the way; that he did see. With all the proofs of recklessness in navigation which collision cases afford, it is a little too improbable that the officer of the watch, who is responsible for the navigation of the vessel, should undertake to steer her with no means, in case anything is reported forward, of ascertaining what he must do without leaving his wheel. On this point I think the weight of evidence is that Wright is mistaken.

The true and only theory of this collision, then, is that the schooner made the brig on her lee bow; that she stood on her course close-hauled by the wind; that the brig, instead of keeping off, as she was bound to do, luffed up across the schooner's bows; that those in charge of the brig were careless and negligent, first, in their observation of the position of the schooner; and, secondly, in not keeping off and in luffing; and, thirdly, in not keeping a good lookout after luffing; that they mistook the distance of the schooner when they luffed, and that their carelessness was the sole cause of the collision. The proof of the alleged negligence on the part of the schooner in not having proper lights, in changing her course and crossing the bows of the brig and in not keeping a good lookout, has wholly failed. As the brig has been sold, and her proceeds in the registry are admitted to be insufficient to satisfy libellants' damages, there seems to be no necessity for a reference. Decree for libellants, with costs.

[Libels against the brig for salvage and other services were considered in Case No. 7,290.]

## Case No. 7,290.

### The JEREMIAH.

[10 Ben. 338.] [1]

District Court, S. D. New York. March, 1879.

PRIORITIES—COLLISION—SALVAGE AGREEMENT—REPAIRS—COSTS.

1. A brig came in collision with a schooner at sea off Barnegat. The two vessels were interlocked by the collision. A tug came to their assistance and the brig agreed to give her $100 to pull her away from the schooner, which was done. The tug then undertook to tow both vessels, but was unable to, and the master then agreed with the master of the tug to give $1,000 to be towed back to New York, which was done in about ten hours. The weather at the time was rough, with an easterly wind increasing. After the brig reached New York some repairs were put on her and she sailed on a voyage, and on her return was libeled and sold for seamen's wages. A libel was also filed against her by the owners of the schooner to recover the damages sustained by them in the collision. And the owners of the tug filed a libel against the proceeds to recover the $1,000 which was agreed to be paid for salvage. And the parties who did the repairs also filed libels to recover the amounts due them, the brig having been a foreign vessel. The owners of the schooner having recovered a decree for their damages, which exceeded the amount remaining in the registry of the court after payment of the seamen's wages, contested the claims of the owners of the tug and of the material men. *Held*, that the salvage claim had priority over the collision claim.

2. On the facts, the agreement to pay $1,000 for the salvage must be set aside as exorbitant and extorted from the master of the brig by stress of circumstances, and the amount to be paid the tug for the service be reduced to $500.

3. The claims of the material men and of the owners of the tug must be first paid out of the proceeds and the remainder paid to the owners of the schooner.

4. As the owners of the tug and the material men had appeared by the same counsel and proctors, only one bill of costs must be taxed.

In admiralty.

W. R. Beebe, for salvors and material men.
D. McMahon, for owners of schooner.

CHOATE, District Judge. The first of these cases is a libel brought by the owners of the steam-tug H. W. Edye, to recover the sum of a thousand dollars for alleged salvage services rendered to the brig Jeremiah, in pulling her apart from the schooner P. A. Sanders, with which vessel she was in collision [see Case No. 7,289], and afterwards in towing her into the port of New York in a crippled condition. The other cases are libels and petitions of parties having mari-

[1] [Reported by Robert D. Benedict, Esq., and Benj. Lincoln Benedict, Esq., and here reprinted by permission.]

time liens for supplies, towage and other services against the brig, which was a foreign vessel.

On the morning of the 16th of March, 1876, the brig came into collision with the schooner above named, about six miles off the Jersey coast, a little to the north of Barnegat light. The collision took place about three o'clock in the morning, and the brig was unable to disengage herself from the schooner. The tug H. W. Edye was cruising about, looking for business, and seeing the vessels in collision, came up and offered assistance. An agreement was first made between the master of the tug and the master of the brig to pull the brig free for a hundred dollars. This was done. An attempt was then made by the tug to tow the schooner, the intention then being to tow the vessels both in together. But this intention was abandoned, as the schooner was found very difficult to tow, being full of water, but kept afloat by her cargo of wood. The master of the tug then negotiated with the master of the brig as to the terms on which he would tow the brig back to New York, from which port she had sailed on a voyage to Cardenas. After several offers made by the master of the brig had been refused, the master of the tug finally agreed to tow her in for a thousand dollars, including the hundred dollars already agreed to be paid for pulling the vessels apart. Accordingly the tug towed her in and brought her to a pier in this harbor in ten or eleven hours after getting under way. The brig has been sold under a decree of this court to pay seamen's wages, and the surplus, about three thousand five hundred dollars, has been paid into the registry. The owners of the schooner, who claimed damages against the brig exceeding her value, by reason of the collision, which was caused, as they say, by the fault of the brig, appear and defend this libel, on the ground that the amount claimed as salvage is greatly excessive, and they also claim that their own damages on account of the collision are entitled to a preference.

As to the claim of the respondents that the damages on account of the collision are entitled to preference, it is clearly unfounded. It is true that the claim had attached before the service of the tug was rendered, but surely those who have acquired a claim in rem against a vessel for a collision stand in no better position towards subsequent salvors than they would have stood if the law, instead of giving them a lien against the vessel, had by mere operation of law invested them with the absolute title to her. Clearly, in that case, as owners, their interest would be subject to the right and claim of the salvors. The interest of these respondents has been rescued from danger and risk of loss by the salvors, as truly as if their interest were a title to the vessel instead of being merely a lien upon it.

As to the claim for salvage, the facts were that the two colliding vessels had been together half an hour, and so far had been unable to separate themselves. They were about thirty-eight miles from Sandy Hook. The weather was bad, wind E. N. E. and blowing hard, with signs of its rising. The brig, when pulled away from the schooner, was so far crippled in her sails, spars and rigging, that it was doubtful if she could get back to port without help. She was wholly disabled from prosecuting her voyage. She was within about five miles then of the Jersey shore, which was of course a lee shore. Her starboard bow port, which was within three feet of the water line, was knocked out, and every time she went down into the sea she shipped considerable water, but she did not leak otherwise and her pumps were in good order. An attempt of the crew to close up this hole had been unsuccessful. There was no other tug or vessel in sight at the time the agreement for towage was made. It is claimed by the libellants that the brig was in great danger of filling and going down on account of this injury to her bow, and that she would also have probably been unable to keep off the shore, towards which the wind and the currents were then setting her; that these dangers were increased by the symptoms of heavier easterly weather then observed. From these causes the brig was undoubtedly in some danger, but, I think, upon the testimony, her position was far from being so critical as the libellants claim. Her value, when she sailed on that voyage, had been about eight thousand dollars. After receiving repairs of trifling amount she sailed again for Cuba, and on her return was seized on a libel for seamen's wages and sold under a decree of this court for $4,025. She had no cargo at the time of the collision. The tug was in the course of her usual employment; she encountered no risk or danger in the service rendered, unless indeed it was the risk of not being able to bring the vessel in at all, which, under the circumstances, cannot be considered a risk of any appreciable amount. The usual charge for towage by such a tug, in and about the harbor of New York, is shown to have been ten dollars an hour. For towing vessels in from the sea there appears to be no settled rate. The master of the brig testified that they always got all they could. It is the duty of the court to moderate, according to the principles of fairness and justice, contracts thus made with parties in distress, if they appear to be extortionate. On all the evidence, I think five hundred dollars a full and fair compensation for the entire service rendered to the brig, giving full force to all the evidence of the peril from which she was rescued and her value, and that the agreement to pay a thousand dollars was extorted from the master of the brig under stress of his necessities.

The claims of the various other libellants

and petitioners are for services and supplies rendered and furnished to the brig on her credit after she was brought back to New York, where she was repaired, and from whence she sailed on another voyage before she was libelled for the collision or for salvage. The attempt to show that there is another fund, the freight, out of which they may be satisfied, was not successful. The surplus in the registery must be applied to the payment of these liens, amounting to about $392, the salvage $500, and the balance will go to satisfy the decree in favor of the owners of the schooner P. A. Sanders. As all these libellants and petitioners appeared by the same counsel and proctors, but one bill of costs will be taxed. Decree accordingly.

JERNEGAN (UNITED STATES v.). See Case No. 15,477.

## Case No. 7,291.

JEROME et al. v. FLOATING-DOCK.

[3 Hughes, 508.] [1]

Circuit Court, D. Maryland. Jan. 14, 1879.

COLLISION—INEVITABLE ACCIDENT—APPORTIONMENT OF LOSS.

Damage from collision by inevitable accident, each party to bear his own loss.

[Appeal from the district court of the United States for the district of Maryland.]

[This was a libel by Augustus Jerome and others against the floating-dock of William T. Clark for damages by collision to the schooner Ida C. Latham.]

BOND, Circuit Judge. This cause coming on to be heard upon the libel and answer filed, with the proofs and testimony taken therein, was argued by counsel, and thereupon, after due consideration, the court doth find the facts to be: 1st. That on the seventeenth day of September, 1876, the schooner Ida C. Latham, a vessel of the burden of 492 tons, was lying securely moored at her wharf in the harbor of Baltimore, when at about the hour of six o'clock in the afternoon she was struck in her stern by the floating-dock belonging to William T. Clark, torn from her moorings, and much damage inflicted upon her. 2d. That the floating-dock of Clark was moored to a wharf securely, and with sufficient care to resist the effect of any storm of wind or sea ever known before in that harbor. 3d. That the day being Sunday the hands who work at the dock had gone home, there being no shelter on it for the men. 4th. That about four o'clock the wind began to blow from the southeast, and in an hour increased to a gale of such violence as to make the water rise in the harbor to a height greatly beyond the point ever before known there. 5th. That the dock was fastened by hawsers and chains to piles driven through the wharf into the bed of the basin, but the water rose so high that it lifted the dock above the piles to which it was fastened; this caused the hawsers to slip over the top of the piles, and the dock was driven violently across the basin to where the schooner Ida C. Latham was moored, and colliding with her damaged her to the amount of one hundred and seventy dollars. 6th. And the court finds that the collision was caused by the unprecedented character of the storm at the time, and not by the want of prudence, skill, or care of the owners or crew of the dock. That it occurred by the act of God, and not from negligence or want of precaution. And the court doth find the law to be that in case of collision arising under the above facts each party must bear his own loss. It is ordered that the decree of the district court be reversed, and that the libel be dismissed, each party paying his own costs.

[1] [Reported by Hon. Robert W. Hughes, District Judge, and here reprinted by permission.]

JEROME (McCORMICK v.). See Case No. 8,721.

JEROME (PLATT v.). See Case No. 11,217.

JEROME (WORTHINGTON v.). See Case No. 18,054.

JERRETT v. HONE. See Case No. 7,311.

JERSEY BLUE, The (SOMERS v.). See Case No. 13,169.

## Case No. 7,292.

In re JERSEY CITY WINDOW GLASS CO.

[1 N. B. R. 426 (Quarto, 113); [1] 7 Am. Law Reg. (N. S.) 419; 1 Am. Law T. Rep. Bankr. 61.]

District Court, D. New Jersey. April 8, 1868.

INVOLUNTARY BANKRUPTCY—ACT OF BANKRUPTCY—PETITION—LEAVE TO AMEND.

1. The suspension of payment by a manufacturing company, and non-resumption of payment within fourteen days, does not of itself constitute an act of bankruptcy unless such suspension is fraudulent.

[Cited in Re Leeds, Case No. 8,205. Criticised in Baldwin v. Wilder, Id. 806. Cited in Re Hercules Mut. Life Assur. Soc., Id. 6,402.]

[Cited in Re Kenyon, 1 Utah, 47.]

2. Leave granted to amend the petition by the insertion of the word "fraudulent" in the allegation as to suspension of its commercial paper.

[3. Cited in Re Ballard, Case No. 816, to the point that the suspension and non-resumption of payment of commercial paper for fourteen days is prima facie evidence of fraud, and casts upon the debtor the burden of proof.]

In behalf of the debtors it was insisted in this case that as the suspension of payment, by the company, and their non-resumption

[1] [Reprinted from 1 N. B. R. 426 (Quarto, 113), by permission.]

within fourteen days, was not alleged to be fraudulent, no act of bankruptcy had been committed. In answer, counsel for petitioner referred to the opinion of Judge Hall of the Northern district of New York,—In re Wells [Case No. 17,387],—and also to the opinion of the district judges of South Carolina and Minnesota, by all of whom it was held, that a fraudulent stoppage of payment was in itself an act of bankruptcy, without reference to resumption, and that a mere suspension, without fraud, continued for fourteen days, was another and distinct act of bankruptcy.

J. Dixon, for petitioner.
J. F. Randolph, for defendant.

FIELD, District Judge. The only act of bankruptcy alleged in the petition is that the Jersey City Window Glass Company suspended payment of their commercial paper, and did not resume within a period of fourteen days. There is no allegation that this suspension and non-resumption were fraudulent. This, it is contended, is an act of bankruptcy within the meaning of the thirty-ninth section of the bankrupt act [of 1867 (14 Stat. 536)]. I am aware that this construction has been sanctioned and adopted by the judges of several of the district courts. My attention has been more than once called to the opinion of Judge Hall of the Northern district of New York; but with all my respect for his learning and ability, I have never been able to bring my mind to the conclusion which he has reached. The language of the clause under consideration is: "Who being a banker, merchant, or trader, has fraudulently stopped or suspended, and not resumed payment of his commercial paper, within a period of fourteen days." It is insisted that here are two distinct acts of bankruptcy created and described; the first, a fraudulent stopping, which is in itself an act of bankruptcy, and upon which proceedings may at once be instituted; and the second, a mere suspension of payment, without any fraud, and which only becomes an act of bankruptcy by being continued for a period of fourteen days. It is possible, I admit, to read this clause in such a way as to make it seem to bear such a construction. But it can only be done by making a distinct pause after the word "stopped," and then reading in one breath the remaining part of the sentence. But is that the way in which any one would ever think of reading it? Is it the natural and ordinary way? Would not such a construction, to say the least, be a strained one? Would it not be doing violence to the language, and wresting it from its obvious sense and meaning? And would it not make the whole sentence, not only very awkward, but a very ungrammatical one? In this respect, it would be in striking contrast with the rest of the act, in which, as it seems to me, much more attention has been paid to clearness of expression, the correct use of language, and the rules of grammar, than is usual in acts either of our national or state legislatures. But why depart from the plain and obvious meaning of the language employed, and resort to a construction so forced and unnatural? For the purpose, it is said, of carrying out the general intentions of congress in the passage of the bankrupt law. Now it is very well known that this law is in a great measure based upon the English statutes of bankruptcy. Almost every act of bankruptcy enumerated in the thirty-ninth section is to be found in the English statutes, where they are described in substantially the same terms. If, then, the fraudulent stopping of payment by a banker, merchant, or trader of his commercial paper, and the suspension without fraud for a period of fourteen days, were two distinct and well known acts of bankruptcy under the English law, we might naturally expect to find them in our own act, and might very well imagine that we had found them, in the clause referred to, although certainly not very clearly expressed. But it so happens that there are no such acts of bankruptcy known in the English law. It is true that by their bankrupt acts, the suspension of payment by a debtor is resolved into an act of bankruptcy, by summoning him before the court of bankruptcy, and if such debt is not paid or arranged to the satisfaction of the creditor within a prescribed time, such non-payment or non-arrangement constitutes an act of bankruptcy. But a fraudulent stopping alone, whether followed by a resumption or not, is an act of bankruptcy never before heard of. If, therefore, it was intended by the framers of our act to make this for the first time an act of bankruptcy, it might be presumed that they would have declared their intention in clear and unmistakable language. Certain it is, that we ought not to wrest their language from its plain and obvious meaning in order to infer that they had any such intention. But what is meant by a fraudulent stopping? Does it mean that the debtor is unable to pay, that he is insolvent? If so, he ought to stop. He has no right under these circumstances to pay one creditor to the exclusion of another. This of itself would be an act of bankruptcy. It must mean, therefore, if it means anything, an unwillingness to pay, although he has the means of doing so. But suppose he pays the day after his commercial paper arrives at maturity. Would not that negative the idea of fraud? Must we not wait, therefore, to see whether payment is resumed within a reasonable time, before we pronounce the original suspension to be fraudulent? Undoubtedly the stopping payment might be accompanied by circumstances which would clearly indicate a fraudulent purpose; such, for instance, as the concealment or removal of property or

the fraudulent sale or conveyance of it. But these would be in themselves independent acts of bankruptcy, upon which proceedings might be instituted. But how the mere act of suspension, if followed by resumption within a few days, could be deemed fraudulent, I do not very well see. I do not believe, therefore, it was the intention of congress to make the stopping of payment, under any circumstances, an act of bankruptcy in itself, and without reference to resumption. If the debtor is perfectly solvent, and if he resumes payment within the fourteen days, so that no one is defrauded, why should he be adjudged a bankrupt?

What, then, is the true meaning and intent of the clause in question? I understand it to mean, according to the obvious sense of the language made use of, that when a banker, merchant, or trader fraudulently stops or suspends payment of his commercial paper, and does not resume within fourteen days, he commits an act of bankruptcy. To constitute the act, there must be a stopping or suspension of payment, and also a non-resumption within fourteen days, and such suspension and non-resumption must be fraudulent in the sense in which that term is here employed. If the debtor is able to pay, if he has the means of paying, and does not do so, then undoubtedly he commits a fraud upon the creditor who holds his paper. And if he is unable to pay, if he is insolvent, then he commits a fraud upon his other creditors, by not having himself declared a bankrupt, and making a surrender of his property to be equally distributed among them. It will be seen that this act of bankruptcy is confined to bankers, merchants, and traders, and that it extends only to the non-payment of commercial paper, that is, to negotiable securities, to bills of exchange and promissory notes. These are securities of a peculiar kind, well known to the law, and held in high respect. There is an especial dishonor attached to their non-payment. There is a sort of commercial sanctity about them. They are intended to pass from hand to hand; they are valuable instruments of commerce; they perform many of the functions of money. If, therefore, a banker, merchant, or trader suffers paper of this description to be dishonored, and does not resume payment within fourteen days, it argues such a state of insolvency on his part, as to make it a fraud upon his creditors not to surrender his property for equal distribution among them. Such a suspension and non-resumption may well be termed fraudulent. I do not mean to say that it would be conclusive evidence of fraud, but it would certainly be prima facie evidence, and it would cast upon the debtor the burden of proving that he was perfectly solvent, and that such suspension and non-resumption would not have the effect of defrauding either the holders of his dishonored paper, or any of his other creditors. Such a construction of the clause in question makes the whole consistent and intelligible, and would render it somewhat analogous to that provision of the English bankrupt law, to which I have adverted.

It would be difficult to imagine any case better calculated than the one now before the court, to illustrate the justice and propriety of such a provision. It is alleged on the part of the debtor, and not denied by the counsel of the company, that they have issued a series of promissory notes, falling due at successive periods, and that they are utterly unable to pay them. It is admitted, also, that they had it in contemplation to apply by their petition to be declared bankrupts, but that upon taking the advice of counsel they concluded not to do so. Now it would be a serious defect in our bankrupt act, if no provision were made by which the creditors of such a company could compel them to surrender all their estate and effects for the benefit of their creditors, without proving any other facts than their continued suspension and utter insolvency. If, therefore, it had been alleged in this case that such suspension and non-resumption within fourteen days were fraudulent, I should have had no hesitation in declaring it to be an act of bankruptcy. I see no objection, however, to allowing the petition to be amended by the insertion of that word.

## Case No. 7,293.

### The JERUSALEM.

[2 Gall. 191.] [1]

Circuit Court, D. Massachusetts. Oct. Term, 1814.

BOTTOMRY BOND—FOREIGN EXECUTION OF—JURISDICTION OF ADMIRALTY COURTS.

1. The admiralty courts of the United States will entertain jurisdiction in rem, to enforce a bottomry bond executed in a foreign country, between subjects of a foreign country, when the ship is within the territory of the United States.

[Cited in Ex parte Lewis, Case No. 8,310; Steele v. Thacher, Id. 13,348; Phillips v. The Thomas Scattergood, Id. 11,106; The Bee, Id. 1,219; The Gold Hunter, Id. 5,513; Leland v. The Medora, Id. 8,237; Davis v. Leslie, Id. 3,639; One Hundred and Ninety-Four Shawls, Id. 10,521; The Alida, Id. 199; New Jersey Steam Nav. Co. v. Merchants' Bank of Boston, 6 How. (47 U. S.) 421; Patch v. Marshall, Case No. 10,793; Lorway v. Lousada, Id. 8,517; The Maggie Hammond, 9 Wall. (76 U. S.) 457; The Kate Tremaine, Case No. 7,622; The Hermine, Id. 6,409; Thomassen v. Whitwell, Id. 13,928. Quoted in The Belgenland, 114 U. S. 355, 5 Sup. Ct. 865.]

See The Aurora, 1 Wheat. [14 U. S.] 102; The Packet [Case No. 10,654]; The Mary [Id. 9,187]; Ross v. The Active [Id. 12,070]; Wilmer v. The Smilax [Id. 17,777]; Drinkwater v. The Spartan [Id. 4,085]; The Marion [Id. 9,087]; 3 Kent, Comm. (5th Ed.) 167–170.

[1] [Reported by John Gallison, Esq.]

2. In what cases suits will be maintained between foreigners in our courts, and in what cases they will be remitted to their domestic forum.

[Cited in Becherdass Ambaidass, Case No. 1,203.]

3. The jurisdiction of the admiralty depends, not on the character of the parties, but on the subject matter, whether maritime or not.

4. An attested copy of a bottomry bond, executed in a distant foreign country, being produced by the libellant, a continuance was allowed, under the circumstances, to enable him to procure the original.

This was a libel against the polacre Jerusalem, a Greek ship, owned in part and commanded by the claimant [Catara].[2] The libellant, Hugon Couturier, alleged, that on the 30th day of May, 1812, he lent nine thousand nine hundred and fifty three dollars to the claimant, for the victualling, loading, and repairing of said ship, then lying in Smyrna, for which sum Catara, by his writing obligatory of the same date, a copy of which was produced, hypothecated to him her hull, tackle, cargo and freight. The premium was to be twenty per cent. if a sale should be effected in Malta or Sicily, thirty per cent, if in Majorca, Minorca, or other port of Spain, and forty per cent. if in Lisbon; the principal and interest to be paid, on the safe return of said vessel to Smyrna, or after the sale of her cargo at any other place. The libel then averred, that the ship had not returned to Smyrna, but had proceeded to New York, where her cargo was sold, and afterwards arrived at Boston where she, then was. The parties were both subjects of the Sublime Ottoman Porte, and the instrument of hypothecation was executed within the dominions of their sovereign. The claimant appeared under protest, denying the jurisdiction of the court, and setting forth the alienage of the parties.

Mr. Hubbard, for libellant.

The jurisdiction of the admiralty extends to all cases of bottomry, and it is no objection to that jurisdiction, that the contract was made in a foreign country, and between foreigners. Hall, Adm. pt. 1, p. 25; Thomson v. The Nanny [Case No. 13,984]; [Mason v. The Blaireau] 2 Cranch [6 U. S.] 264; 2 Brown, Adm. 119; The Jacob, 4 C. Rob. Adm. 245; The Gratitudine, 3 C. Rob. Adm. 245; Emerig. Mar. Loans, 187; 2 Emerig. Ins. 383; 5 Vinn. 859, 886; Huberus, lib. 5, tit. 1, note 50; 2 Domat, 674; Bynk. De Foro Leg. c. 4; Casar. Disc. 43, § 53; Id Disc. 179, § 52, "Hypotheca sequitur rem Hypothecatum tanquam lepra leprosum."

Mr. Blake, Dist. Atty., for claimants.

It is not denied that this court possesses, as a court of admiralty, all the jurisdiction, which belongs to the admiralty courts in England, and if in that country jurisdiction would be sustained in a case like the present, I shall not be disposed to contest it here. But it is believed, that on examination it will be found, that in cases between foreigners, the jurisdiction of those courts is never exercised, either as to the person or thing, except to the single case of salvage; an exception, which is founded exclusively upon reasons of policy. [Mason v. The Blaireau] 2 Cranch [6 U. S.] 248, 249, 264; The Two Friends, 1 C. Rob. Adm. 271.

The admiralty jurisdiction is confined to cases, the character and circumstances of which are such, as to make them properly the subjects of that jurisdiction, and to admit of its being exercised without inconvenience. Vatt. bk. 2, c. 7, §§ 84, 85; Id. c. 8, §§ 103, 104. The courts of one country never take cognizance of controversies between the subjects of another, unless they concern lands lying within the country, to which the court belongs. In cases of bottomry, indeed, if it appear from the instrument itself, that the voyage is to be terminated, and the money paid, in a foreign country, where the contract is sought to be enforced, the parties may then be considered as submitting, by the contract itself, to the jurisdiction of the foreign court. But the instrument, upon which this libel is founded, does not contemplate a voyage to the United States. The voyage is described as to the West generally, and different rates of premium are provided with a view to the ship's discharging, in several different places, the most distant of which is Lisbon. It was intended to end the voyage in Smyrna. There is no analogy between this case, and those of salvage or rescue. Bottomry is a contract entirely municipal, and to be governed by the laws of the country, where it is made. The courts of that country only can determine the principles, upon which the rights of the parties are to depend; the process to be used, and the disasters, which shall excuse from payment. No case can be found in England, or our own country, where jurisdiction has been sustained between foreigners on a bottomry bond, unless by the assent of parties, or when the voyage was there to terminate. But even admitting that the comity prevailing among the nations, which compose the European commonwealth, would induce them to exercise such jurisdiction, in respect to one another, still this reason will not extend to the Ottoman empire. The Jerusalem is the first Greek ship that has visited our shores. To compel a sale of her would be received as a declaration of war. It would be highly impolitic to interfere in a case like the present, where the ship is of considerable value, and the owner a man of some note and consequence among his countrymen; more especially, as he has been long struggling to extricate his ship, and to carry her to the very door of this libellant. The same strict rules of law are not to be applied to the subjects of the Ottoman empire, as to those of other nations (The Ma-

[2] See case of Kleine v. Catara [Case No. 7,869.]

donna del Burso, 4 C. Rob. Adm. 169), and it is confidently hoped, that the circumstances of this case are such as will induce the court, if there be the smallest doubt of its jurisdiction, to send the parties to the tribunals of their own country.

Mr. Prescott, in reply.

In cases of this nature, the court is governed by the rules of the civil law which are universal in their application. No principles are more generally known and received, than those which relate to the contract of bottomry. Commercial usage has made it cognizable every where. The remedy may, it is true, be personal, but in this case the thing pledged is the object of the suit. It resembles a real action, in which the tenant in possession is sued, but it is the land only, that is sought to be recovered. No good reason can be given, why the court should decline to interfere. Is there any thing in the nature of the contract? It is a maritime contract, which may be executed every where; upon which a court sitting in America, in England, or in France, is competent to decide. It is a stronger case than that of two foreigners making a contract to be executed here, which it is admitted might be enforced in our own courts. The ship is pledged for the payment of the money, whenever the voyage ends, or is deviated from. If a person, whose credit is pledged, may be followed, shall not the creditor be permitted to follow the thing pledged? The money is due, either because the voyage is terminated, or because there has been a deviation.

(STORY, Circuit Justice. In this preliminary inquiry, it must be presumed that the voyage has been completed, and the money become due.)

Mr. Blake contended, that this being a fact, which entered into the question of jurisdiction, it could not be taken for granted, but must be inquired into by the court.

(STORY, Circuit Justice. On a question of jurisdiction, the court will not inquire into the completion or non-completion of the voyage; that question belongs to the merits, and will be settled on a hearing, if the court should decide, that it has a right to hear.)

STORY, Circuit Justice. It is not necessary, in this stage of the cause, to inquire into the exactness or regularity of the allegations of the parties. A preliminary question, as to the right of this court to adjudicate upon the merits of the case, has been brought forward upon a protest to its jurisdiction, and after an ample discussion, remains now to be decided.

The question in short is this, whether the courts of the United States, in the exercise of their authority over causes of admiralty and maritime jurisdiction, have cognizance of maritime suits in rem between foreigners, whose permanent domicil is in a foreign country, when the specific property is within our territory. I state this as the general question, although in the acts of court the parties have alleged facts, which, if proved, might perhaps somewhat narrow the discussion. But it is fit, that the general principle, that governs this class of cases, should be extracted from the embarrassment of minute circumstances, examined in its more extended application. Whatever may be the case as to other maritime contracts, respecting which I affirm or deny nothing, it cannot be doubted, that the contract of bottomry is one, over which the admiralty exercises an undisputed jurisdiction. It is indeed, the only tribunal capable of enforcing a specific performance in rem by seizing into its custody the very subject of hypothecation. To its guardian care, I may without rashness affirm, the whole commercial world look for security and redress, and without its summary interference, maritime loans would, in all probability, become obsolete. A jurisdiction so ancient and beneficial, which exercises its powers according to the law of nations, and those rules and maxims of civil right, which may be said to form the basis of the institutions of all Europe, ought not to be restrained within narrow bounds, unless authority or public policy distinctly requires it.

It is argued, that the courts of a country cannot consistently with the law of nations, take cognizance of any controversy between foreigners, who are not domiciled within its territory; and Vattel (book 2, c. 7, §§ 84, 85; book 2, c. 8, § 103) is cited in support of the position. It is true, that Vattel contends that personal controversies between foreigners, or between a foreigner and a citizen, are to be determined by the judge of the place, where the defendant has his settled abode, or where he is, when any sudden difficulty arises. But this rule is so far from being universally acknowledged, that many nations exercise jurisdiction over the property and persons of foreigners found transiently in their territory, not only in favor of citizens, but also of other foreigners. Vinn. Comm. Inst. de Actionibus, lib. 4, tit. 6, p. 777, §§ 8, 9; 2 Hub. lib. 5, tit. 1, § 46; De Carriere v. De Calonne, 4 Ves. 577. The rule seems indeed exclusively drawn from the civil law. But, however the case may be, as to remitting the defendant to his domestic forum in personal controversies, it is very clearly settled, that in proceedings in rem, or the real actions of the civil law, the proper forum is the locus rei sitae. Indeed, it seems to have been a question among civilians, whether the action in rem could be brought before any other tribunal. 8 Vinn. Comm. Inst. de Actionibus, lib. 4, tit. 6, p. 777; 2 Hub. lib. 5, tit. 1, p. 728, § 50; Heinec. Ad. Pandect, lib. 5, tit. 1, § 36; Bynk. De Foro Leg. c. 4; Casar. Disc. 43, § 53; Id. Disc.

179, § 52; 2 Emer. Des Contrats a la Grosse, c. 9, § 2; Id. p. 528, § 4.

With reference, therefore, to what may be deemed the public law of Europe, a proceeding in rem may well be maintained in our courts, where the property of a foreigner is within our jurisdiction. Nor am I able to perceive how the exercise of such judicial authority clashes with any principles of public policy. The refusal might indeed well be deemed a disregard of national comity, inasmuch as it would be withholding from a party the only effectual means of obtaining his right. And, accordingly, it has been held, that it is a good cause of reprisal for a sovereign not to compel his courts to execute the sentence of a foreign court, where the person or goods sentenced are within his jurisdiction. 2 Brown, Adm. 120. It is argued, that the exercise of such authority would be highly inconvenient, inasmuch as this contract, like many other maritime contracts, is differently regulated in different countries, and therefore the construction of the contract, as well as the remedy on it, might in many cases essentially differ. And it is urged, that on this ground courts of law uniformly refuse to interfere, in respect to the contracts of foreigners made with their own seamen for marine services. I am not aware, that the inconvenience is so great as has been represented. It is a general rule, that foreign contracts are to be construed according to the law of the place where they are made, or to be executed. And I do not perceive the hardship of compelling a party to perform his engagements according to the construction, which the courts of his own country would put upon them. In respect to maritime contracts, there is still less reason to decline the jurisdiction, for in almost all civilized countries, these are in general substantially governed by the same rules. Almost all Europe have derived their maritime codes from the Mediterranean; and even in this country we take a pride in conforming our decisions to the rules of the venerable Consolato del Mare.

As to the case alluded to, of the contracts of seamen for wages, I am not aware that any authority countenances the position, to the extent in which it is laid down. Where the voyage has not terminated, or the seamen have bound themselves to abide by the decisions of the tribunals of their own country, foreign courts have declined any interference, and remitted the parties to their own tribunals for redress. But where the contract has been dissolved by the regular termination of the voyage, or by the wrongful act of the other party, the cases are not unfrequent, in which foreign courts have sustained the claim for mariners' wages. Limland v. Stephens, 3 Esp. 269; Hulle v. Heightman, 4 Esp. 75, 2 East, 145; Sigard v. Roberts, 3 Esp. 71; Thompson v. The Catharina [Case No. 13,949]; Willendson v. The Forsoket [Id. 17,682]; Moran v. Baudin [Id. 9,785]; Weiberg v. The St. Oloff [Id. 17,357]; Thomson v. The Nanny [Id. 13,984]. And although the doctrine in Gienar v. Meyer, 2 H. Bl. 603, and the intimations in The Two Friends, 1 C. Rob. Adm. 271, look the other way, it does not seem to me that they outweigh the authorities on the other side, even supposing (which is not admitted) that they are not to be reconciled.

It is admitted, that suits for salvage have been entertained between foreigners in the admiralty, and it is urged that these form exceptions to the general rule, as cases standing upon the jus gentium, or upheld by the consent of the parties. Independent, however, of the principle, that consent can never give a jurisdiction to a court, which it cannot otherwise sustain, the decisions on this subject evidently proceed upon the ground, that the court has a competent capacity, and leave the policy of its exercise to be judged of by the circumstances of the particular case. The Two Friends, 1 C. Rob. Adm. 271; Mason v. The Blaireau, 2 Cranch [6 U. S.] 240. And although Sir W. Scott intimated, in The Two Friends, that if there was the slightest disinclination of the parties to submit to the jurisdiction, he should not incline to interfere; yet he evidently refers to cases, where all the foreign parties decline the jurisdiction (as might happen in cases like that before him), and not to cases, where the jurisdiction was sought by one of them. And the whole current of his reasoning strongly leans in favor of the policy of sustaining the general jurisdiction of the admiralty over foreigners. In the same case, it was asserted by counsel, and not denied, that the admiralty frequently entertained bottomry suits between foreigners. And, accordingly, we find that in The Gratitudine, 3 C. Rob. Adm. 240, and The Jacob, 4 C. Rob. Adm. 245, both of which cases were contested on other points with great ability, the court sustained the jurisdiction and decreed in favor of the bottomry holders. It may be said that the question of jurisdiction passed without objection; but it is difficult to conceive, that it could have escaped the attention of the court and of the bar, if it had been deemed tenable. It has been argued, that these were cases where the voyage ended within the British dominions, and therefore are distinguishable. But I know of no principle, which sustains this distinction. It was not the case of a contract made with reference to the laws, and to be executed within the dominions, of Great Britain. The most that can be said is, that there the lien first attached absolutely upon the property. In the latter case, however, this lien grew out of a former voyage, and was applied to reach proceeds of freight, which accrued in a subsequent voyage. The ground then of the jurisdiction could not have been, that the voyage terminated in Great Britain, but that

the proceeds were within the reach of the court.

And this leads me to the consideration, that the jurisdiction of the admiralty, in matters of contract, depends not on the character of the parties, but on the character of the contract, whether maritime or not. When once its jurisdiction, therefore, rightfully attaches on the subject matter, it will exercise it conformably with the law of nations, or the lex loci contractus, as the case may require. It will enforce a foreign maritime judgment between foreigners, where either the property or the person is within its jurisdiction. 2 Brown, Adm. 120. Yet the objection to such proceedings, so far as touches the remedy, applies as forcibly here as in other maritime causes.

It has been urged, that whatever may be the propriety of interfering in cases arising between the subjects of the powers of Europe, the court ought studiously to abstain where the parties are subjects of the Sublime Ottoman Porte. It is certainly true, that in prize causes an indulgence is granted to the subjects of the Ottoman empire, which is not allowed to any foreigners of Christian Europe, in consideration of the peculiarities of their situation and character, and of their not being professors of exactly the same law of nations with ourselves. The Madonna del Burso, 4 C. Rob. Adm. 169. But in matters of contract between such persons, or between them and other foreigners, I am not aware that courts have thought themselves at liberty to act otherwise, than by the general rules applicable to all forensic business; especially where one subject of the empire has asked for redress against another, and upon a maritime contract, the stipulations of which seem to require a summary interference, and to recognize an acquaintance with the general maritime codes of Europe.

On the whole, I am of opinion, that the rule of the civil law, "in actionibus in rem speciale forum tribuit locus in quo res sitae sunt" (Vinn. Comm. Inst. de Actionibus, lib. 4 tit. 6, p. 777; Heinec. Comm. in Pand. pt. 2, p. 147, § 36), applies to this case; that there is no solid ground against the exercise of the jurisdiction, and in the language of Sir W. Scott, on another occasion (The Two Friends, 1 C. Rob. Adm. 271, 280), I will add: "I go farther, and say, that I think there is great reason for it, because it is the only way of enforcing the best security, that of the lien on the property itself."

I have thus far considered the case upon general principles; and if I had felt any difficulty in the conclusion, which I have already stated, I should have felt none, when the contract itself carries on its face a stipulation, that the voyage was to terminate in a foreign country; and therefore that a suit in rem in such a foreign country would not only be sustained (as the claimant's counsel has admitted) but was evidently within the contemplation of the parties. Where the parties have, therefore, waived the benefit of the exclusive jurisdiction of their own tribunals, the whole reasoning, upon which they should be remitted to such forum, falls to the ground. To remit this cause from the present to another foreign forum, I imagine would be "but to change postures on an uneasy bed."

There is also another fact alleged, and which, if true, brings this case directly within the authorities cited, and that is, that the voyage really ended in the United States. The voyage stated in the bottomry bond is from Smyrna to the West; and a different rate of interest is payable, as the cargo shall be discharged in Malta, or Sicily, Majorca, Minorca or other port in Spain or in Lisbon. And the claimant expressly stipulates to make payment in Smyrna, on his safe return, or in any other places where the obligation should be presented to him, after the sale of the cargo then on board. And the allegation of the proponent states, that the cargo was wholly sold, part in the United States, and part at the Havanna. But I forbear to dwell on this and other peculiarities, because I am entirely satisfied to rest the cause on the soundness of the general doctrine. I overrule the protest of the claimant to the jurisdiction of the court, and assign him to answer peremptorily to the libel of the plaintiff.[3]

Prescott & Hubbard, for libellant.
G. Blake, for claimant.

At a subsequent day of the term Blake read the answer in chief of Catara, which, among other things, denied that the instrument of hypothecation relied upon was his deed. The replication averred the bond to be the deed of Catara. A copy of the contract in the handwriting of the Swedish consul at Smyrna, and attested by him as a true copy, was produced by the counsel of the libellant, and upon this they founded a motion for a continuance, to afford them time for procuring the original.

Mr. Blake, Dist. Atty., opposed this motion. He represented to the court the extreme hardship of this case, and contended, that there had been such remissness and laches in not procuring the original, that no postponement ought to be granted to the libellants for this cause; that three originals were executed, and probably delivered to the obligee; that one of these might have been sent at the same time with the copy; that it would be impossible to obtain the original from Smyrna in any reasonable time, and that the libellant had therefore commenced this action prematurely, and ought not be permitted to hold the claimant in fetters for so long a time, as must necsarily elapse.

STORY, Circuit Justice, said, he did not wish to hear the other side; that the principles of law were clear; that admitting three

[3] See the case of The See Reuter, 1 Dod. 22.

originals to have been executed, it would have been difficult, considering the nature of this voyage, for the libellant to obtain such intelligence, as would enable him to determine, to what place the originals should be sent; that the hardship was common to both parties; and that the court could not be influenced by the distressed situation of Catara, however it might be deserving of pity; that, at common law, it was the practice to allow time for procuring originals, as in cases of bills of exchange; that there did not appear, in this case, to have been any laches on the part of the libellant, and there being evidence to satisfy the court of the existence of an original, the cause must therefore be continued. If, as was alleged, the vessel was in a perishing condition, an order of sale might be made, upon a proper application for this purpose.

[The vessel was subsequently sold under an order of court, and a petition for an allowance for repairs out of the proceeds was granted, in preference to the bottomry interest. Case No. 7,294.]

NOTE. The following extract from Sir Leoline Jenkins's argument for the bill to ascertain the jurisdiction of the admiralty (Works, vol. 1, p. 82), is not inapplicable to some of the subjects discussed in the foregoing case. "An English merchant here owes money upon a foreign contract to a Spaniard; he sues for it in the admiralty, but the English defendant flies to the common law, and has a prohibition. The Spaniard in his trial at law, produces the contract in the form usual beyond sea. The defendant pleads non est factum; how can the party be relieved against this plea? For the original contract, subscribed by the contractors and the witnesses, is a record, that the notary in Spain will not part with, without forswearing himself and losing his office. The copy exemplified will be no evidence to a jury, nor can the notary and the witnesses be had and heard viva voce, without a thousand contingencies; whereas the Spaniard exhibiting his instrument upon oath, for a true and real instrument, in the admiralty, the adversary must either confess or deny it; if he confess the instrument, (as notarial instrument seldom are denied) there is so much in proof before the court as to judge of the contents of it; if it be denied, the plaintiff may have a commission into Spain pro scrutinio, and the copies exhibited here may be inspected, and compared with the original remaining in the notary's hand. And the magistrates of the place will certify, that the notary is a public and authentic person there, to whose acts credit is given in judgment, and then that instrument is before the court in due form of proof."

## Case No. 7,294.

The JERUSALEM.

[2 Gall. 345.] [1]

Circuit Court, D. Massachusetts. May Term, 1815.

MARITIME LIENS—MATERIAL MEN—PREFERENCE—COSTS.

1. The admiralty has jurisdiction of suits in favor of material men.

[Cited in Zane v. The President, Case No. 18,201; Steele v. Thacher, Id. 13,348; The Stephen Allen, Id. 13,361; The Wave, Id. 17,297; Davis v. New Brig, Id. 3,643; Thackarey v. The Farmer of Salem, Id. 13,852; Phillips v. The Thomas Scattergood, Id. 11,106; The Calisto, Id. 2,316; Brown v. Noyes, Id. 2,023; U. S. v. New Bedford Bridge, Id. 15,867; Ludington v. The Nucleus, Id. 8,598; The Celestine, Id. 2,541; Parmlee v. The Charles Mears, Id. 10,766; The Richard Busteed, Id. 11,764; The Hendrik Hudson, Id. 6,358; The Champion, Id. 2,583.]

See Bulgin v. The Rainbow [Case No. 2,116]; The Charles Carter, 4 Cranch [8 U. S.] 332. See, also, Stevens v. The Sandwich [Case No. 13,409]; North v. The Eagle [Id. 10,309]; Clinton v. The Hannah [Id. 2,898]; Shrewsbury v. The Two Friends [Id. 12,819]; The Aurora, 1 Wheat. [14 U. S.] 105; The General Smith, 4 Wheat. [17 U. S.] 438; The Robert Fulton [Case No. 11,890]; Woodruff v. The Levi Dearborne [Id. 17,988]; Peyroux v. Howard, 7 Pet. [32 U. S.] 341; The St. Jago de Cuba, 4 Wheat. [17 U. S.] 409; The Nestor [Case No. 10,126].

2. A tradesman has a lien on a foreign ship, lying in a port of the United States, for repairs made by him on board, and such lien will be preferred, in point of right, to a bottomry interest, which is prior in point of time, if it appear that the repairs were indispensable.

[Cited in Ex parte Lewis, Case No. 8,310; Zane v. The President, Id. 18,201; The Mary, Id. 9,187; The Gold Hunter, Id. 5,513; Davis v. Child, Id. 3,628; The Alida, Id. 199; The Washington Irving, Id. 17,244; The Dan Brown, Id. 3,556; The Rapid Transit, 11 Fed. 322; The J. W. Tucker, 20 Fed. 133; The Scotia, 35 Fed. 908.]

3. Practice, as to taxation of costs, in case of a claim on proceeds, where other parties are interested.

[Cited in Westcot v. Bradford, Case No. 17,429; The J. W. Tucker, 20 Fed. 135.]

The Greek ship Jerusalem having been libelled in a case of bottomry, and sold under an interlocutory order of this court [Case No. 7,293], an act on petition was interposed on behalf of Henry Dewhurst, praying an allowance out of the proceeds, in preference to the bottomry interest, of a sum due him for repairs of the ship since her arrival in the port of Boston. The circumstances attending the voyage of this ship will be found detailed in the case of Kleine v. Catara [Case No. 7,869].

A. W. Fuller, for libellant.

This case is to be distinguished from the ordinary cases, in which the lien for repairs is lost by parting with the possession of the thing repaired. The libellant never had possession or control of the ship. He merely went on board, and made some necessary repairs of the pumps. It was impossible for him to remain on board until he was paid. He has not, therefore, voluntarily relinquished his lien. The lien for repairs must take precedence of the bottomry bond. The repairs were necessary to preserve the ship, even if she were to remain in the harbor till she could be sold. It must be presumed that the ship was actually sold, in consequence of the repairs, for as much more as would pay for them. It has been holden, that the lender on bottomry is liable

[1] [Reported by John Gallison, Esq.]

to general average (Marsh. Ins. 760), and entitled to salvage (Id. 764). This may be considered a continuation of the original voyage. Hernaman v. Bawden, 3 Burrows, 1844; 1 Ld. Raym. 397, 632. But if the court should be of opinion, that this is not a continuation of the original voyage, and that the bottomry bond was forfeited, the lender on bottomry is nevertheless interested in the preservation of the ship. He may have no other means of securing his money; for it is to be presumed, that the borrower on bottomry would not pay marine interest, if he were responsible enough to obtain money on his personal security alone. Again, freight earned in a subsequent voyage is holden to pay the bottomry bond of a former voyage. The Barbara, 4 C. Rob. Adm. 1; The Jacob, Id. 245, 250. There is a distinction between repairs made on a ship in the place where the owner resides, and those made on a foreign ship. In the first case, the repairs are made on the credit of the owner, and there is no lien on the ship. In the latter case, the credit is given to the ship alone, and the mechanic has a specific lien on the ship for payment. Abb. Shipp. 115, 95, 149, 160; Watkinson v. Bernadiston, 2 P. Wms. 367; Ex parte Shank, 1 Atk. 234; Lister v. Baxter, 2 Strange, 695; The John, 3 C. Rob. Adm. 288; Buxton v. Snee, 1 Ves. Sr. 154; Farmer v. Davies, 1 Term R. 109; Westerdell v. Dale, 7 Term R. 312; Rich v. Coe, Cowp. 636; Hussey v. Allen, 6 Mass. 165; Gardner v. The New Jersey [Case No. 5,233]; Stevens v. The Sandwich [Id. 13,409]. In some of the United States, legislative provision has been made, to secure the mechanic, and in other states the courts have intimated their intention to support so equitable a lien. Woodruff v. The Levi Dearborne [Case No. 17,988].

On the part of the respondent, the cause was submitted without argument.

STORY, Circuit Justice. The question here does not singly depend upon the right of the admiralty to entertain suits in favor of material men. If there be any persons, who doubt that jurisdiction, I beg not to be comprehended in the number. In my judgment, and I speak after having given the subject a very grave consideration, the admiralty has always rightfully possessed jurisdiction over all maritime contracts; and the decisions of the courts of common law, prohibiting its exercise, are neither consistent in themselves, nor reconcilable with principle. In the struggle between the courts of common law and the admiralty, which originated in the same spirit, that attempted to break down the whole system of equity, it cannot be denied, that the former have manifested a great degree of jealousy, and hostility, fostered by strong prejudice and a very imperfect knowledge of the subject. It is not, therefore, to be wondered at, that in such an unequal contest, where the power was all on one side, the admiralty should have lost many of its inherent rights. In more modern times, when the jurisdiction of the admiralty has been better understood, a more liberal policy has been pursued, and, where they have not been fettered by authority, judges have been more indulgent in allowing its exercise. The true doctrine was always asserted by the learned judges of the admiralty, and has been recently recognized by Mr. Justice Buller; that the jurisdiction as to contracts depends not upon the locality, but upon the subject matter, of the contract. Menetone v. Gibbons, 3 Term R. 267. And I have not the slightest hesitation in holding, that the admiralty has perfect jurisdiction over all maritime contracts. The decisions at common law, on the subject of its jurisdiction, have nothing to recommend them, and certainly are not binding on us. The constitution and laws of the United States have confided to the courts of the United States cognizance of "all civil causes of admiralty and maritime jurisdiction," and what is the true limit of this jurisdiction must be judged of, not by hasty decisions upon prohibitions, but by the history, practice and law, of the admiralty, as it is found expounded, with admirable learning and sagacity, by the judges who have presided in that court.[2] In respect to material men, the jurisdiction has been enforced and exercised by Mr. Justice Winchester, than whom no man in the United States ever better understood the true principles and doctrine of the admiralty law. Stevens v. The Sandwich [Case No. 13,409]. Until I am taught a different rule by the highest tribunal, I shall continue to assert the original inherent powers of the admiralty in the full extent, in which they were recognised in England until the unhappy controversies with the courts of common law.

Admitting the jurisdiction, the next question is, whether the petitioner be entitled to the relief prayed for. This depends upon the consideration, whether he have a lien or not upon the ship for the repairs. It will be recollected that this is a foreign ship, and that, by the general maritime law, every contract of the master for repairs and supplies imports an hypothecation. It has been supposed, that the rule of the common law is different. But it has never yet been extended to cases of repairs of foreign ships, or of ships in foreign ports. I hold, therefore, that the contract for repairs in this case, being of a foreign ship, is to be governed by the maritime law, and created a lien.[3] Whether, in

[2] See Exton, Godolphin, Zouch, and Jenkins, on the admiralty jurisdiction, passim.

[3] The John, 3 C. Rob. Adm. 288; North v. The Eagle [Case No. 10,309]. The supreme court of the United States have recently held that material men have a lien on a foreign ship for repairs done. The Aurora, 1 Wheat. [14 U. S.] 96, 103; Hussey v. Christie, 13 Ves. 594; contra, Id., 9 East, 426; Acc. Ex parte Halkett, 3 Ves. & B. 135; De Lovio v. Boit [Case No. 3,776]; 2 P. Wms. 367.

case of a domestic ship, material men have a lien for supplies and repairs furnished at the port where the owner resides, I give no opinion. There are great authorities on both sides of the question, though upon principle, independent of common law authorities, it does not seem to me, that there is much room for doubt. See Woodruff v. The Levi Dearborne [Case No. 17,988]; Stevens v. The Sandwich [Id. 13,409]; Gardner v. The New Jersey [Id. 5,233]; Hussey v. Christie, 9 East, 426; Abb. Shipp. pt. 2, c. 3, § 9, etc.; Rich v. Coe, Cowp. 636; Farmer v. Davies, 1 Term R. 109; The John, 3 C. Rob. Adm. 288; Pritchard v. The Lady Horatia [Case No. 11,438]. Be this as it may, it cannot affect the jurisdiction of the admiralty in such cases, for that stands altogether independent of the doctrine of liens, and may be enforced as well by process in personam, as in rem. If then the repairs in this case were a lien on the ship, it remains to consider, whether they constitute a privileged lien, entitled to a preference over a bottomry interest; for the proceeds now in court are insufficient to answer both claims. In point of time the bottomry interest first attached, and the right became absolute by a completion of the voyage, before the repairs were made. Upon general principles, then, the rule would seem to apply, "qui prior est tempore, potior est jure." But it is to be considered, that the repairs were indispensable for the security of the ship, and actually increased her value. They are, therefore, not like a dry lien by way of mortgage or other collateral title. The case is more analogous to that of a second bottomry bond, or the lien of seamen's wages, which have always been held to have a priority of claim, although posterior in time, to the first bottomry bond. Let a decree be entered for payment of the sum claimed by the petitioner out of the proceeds of the sale.

After the decree was pronounced, Mr. Fuller moved the court for a direction to the clerk, as to the costs to be taxed in this case.

BY THE COURT. In a case, like this, of a claim on proceeds in the custody of the court, where other parties are entitled, nothing can be allowed beyond that, for which there is a specific lien, and the actual charges of court. No attorney's fee can be allowed.

## Case No. 7,295.

The JESSE J. COX.

[Blatchf. Pr. Cas. 196.] [1]

District Court, S. D. New York. July, 1862.

PRIZE—VIOLATION OF BLOCKADE.

Vessel and cargo condemned as enemy property, and for a violation of the blockade.

In admiralty.

[1] [Reported by Samuel Blatchford, Esq.]

BETTS, District Judge. This schooner was captured as prize by the United States gunboat Cayuga, on the 25th of March, 1862, in the Gulf of Mexico, and was sent for adjudication to this port, where she was libelled on the 6th of June last. The attachment was duly served and notice given by the marshal, according to law, on the 24th of June last. The facts established by the preparatory proofs and the papers found on board of the vessel are, that the vessel was registered at Mobile, March 17, 1862, under the oath of a resident in the Confederate States, as the property of him and an association of owners there resident. Shipping articles were filed at the custom-house in Mobile, on the 19th of March, between the master and crew of the vessel, for a voyage from the port of Mobile to a place not named, but left blank in the articles; but the manifest of the cargo, dated the same day, was from Mobile to Havana. The master was put in charge of the vessel about the 15th of March, to run her from Mobile to Havana. Her cargo was cotton and turpentine, shipped and owned at Mobile by the owners of the vessel. She left Mobile under the Confederate flag, and was captured, on the 28th of March, about two hundred miles out of the port, and was taken by the captors to Ship Island, where the vessel was appropriated to the military use of the United States, by order of General Butler, then in command of the United States forces at that place, and the cargo was transmitted to, and delivered at, this port.

Upon these facts, it is clear that the vessel and cargo were at the time of capture enemy property, and that the vessel was under the enemy flag, and had broken the blockade of Mobile in entering upon her voyage. Judgment of condemnation and forfeiture accordingly is rendered. [a]

## Case No. 7,296.

The JESSE WILLIAMSON, JR.

The BLANCHE PAGE and The JAMES A. BURDEN.

[17 Blatchf. 106.] [1]

Circuit Court, S. D. New York. Aug. 28, 1879.

COLLISION—TOW—LIGHTS.

1. Under rule 4 of the statutory navigation rules (Rev. St. § 4233), requiring "steam vessels, when towing other vessels," to "carry two bright white mast-head lights vertically," and requiring that each of those mast-head lights shall be of the same character and construction as the mast-head lights prescribed by rule 3, a steam-tug, which has no mast, and cannot carry a light at her mast-head, must carry two bright white lights vertically, of a character to be visible five miles away, on a dark night, with a clear atmosphere, and so constructed as to show a uniform and unbroken light ahead, and from ten points on one side to ten points on the other, of the tug.

2. Whether, if two lights of a power equal to what is required for mast-head lights are sus-

[1] [Reported by Hon. Samuel Blatchford, Circuit Judge, and here reprinted by permission.]

pended vertically on the flag-staff at the stern of a tug, in such a manner as to show a uniform and unbroken light ahead over an arc of twenty points of the compass, they would be the legal equivalent of two mast-head lights, quere.

3. If circumstances are such as to make it proper for a steam tug to keep a tow 400 or 500 feet behind her, she should be specially careful not only to notify approaching vessels that a tow is following, but. as near as may be, where it is.

4. Whether rule 9 of the board of supervising inspectors appointed under the authority of the act of February 28, 1871 (16 Stat. 440; Rev. St. §§ 4405, 4412), has the force of law in respect to the lights to be carried on canal boats and barges, while being towed by steam vessels, quere.

[Appeal from the district court of the United States for the Southern district of New York.]

These were cross libels filed in the district court, in admiralty, for a collision. John H. Starin, as owner of the barge James A. Burden, sued the schooner Jesse Williamson, Jr., for damages to the barge while being towed by the steam tug Blanche Page, through a collision between the barge and the schooner. William H. Sise and others, as owners of the schooner, sued the tug and the barge, for damages to the schooner by the same collision. The district court dismissed the libel against the schooner, and gave a decree for the libellants in the suit against the tug and the barge. Starin, the owner of the tug as well as of the barge, appealed to this court, in both suits.

The decision of the district court (BLATCHFORD, J.) was as follows:

"On the evening of the 2d of November, 1875, after dark, the schooner Jesse Williamson, Jr., collided with the barge James A. Burden, which was in tow, on a hawser, of the steam tug Blanche Page. The bowsprit of the schooner entered the port side of the cabin in the after part of the deck of the barge, and upset a stove which had fire in it, and the barge took fire and burned up, with her cargo. The schooner, also, was injured. John H. Starin, the owner of the barge and of the tug, sues the schooner to recover for the loss of the barge, and of her cargo, which the barge was carrying on freight. The owners of the schooner sue the tug and the barge to recover for the damage done to the schooner. The collision took place a short distance to the westward of Throgg's Point, the schooner being bound to the eastward, and the tug and barge to the westward. The libel in the suit against the schooner sets forth, that the hawser by which the barge was towed was about 80 fathoms long; that, after the tug had passed around Throgg's Point, the schooner was discovered by those in charge of the barge, to the leeward of the tug, and showing only her red light; that, at that time, the barge was following after the tug almost in a straight line, but heading a little to the windward of her, the wind being from the northwest or thereabouts; that the schooner passed the tug, on the port hand of the tug, at such a distance that she could easily have cleared the barge also, if a proper lookout had been kept, so as to see the barge, or if proper care had been taken in reference to the navigation of the schooner; that, as soon as the schooner was seen by the master of the barge to be approaching the barge in such a way as to render a collision probable, the helm of the barge was put hard-a-port, and the schooner was loudly hailed to keep away from the barge, which it was even then possible for her to do by porting her helm, but, without making any such change, she kept on, and ran into the barge; that the tug and the barge had all the regulation lights properly set and burning brightly; and that the collision was caused by the negligence and carelessness of those in charge of the schooner, in that, among other things, she had no lookout properly performing his duty, and she did not continue her course to pass the barge on the port hand, as there was ample room for her to do, there being nothing whatever in her way, and she did not take proper measures to avoid the barge by changing the course she was on when she was hailed. The answer of the schooner alleges, that, when the schooner was about two miles to the westward of Throgg's Neck, and sailing on an easterly course, in about the middle of the channel, she discovered the green light and the white light of a vessel about one point over her port bow, and apparently distant about 2½ or 3 miles, which lights approached the schooner, and shortly changed, showing both green and red lights; that, when still nearer to the schooner, said vessel closed her green light, and showed the red and white only; that, at that time, said vessel and the schooner (which was moving at the rate of about six knots an hour) had approached so that said red light bore over the schooner's port bow, and distant about half the distance between the schooner and the New York shore, and had gone so far by the course of the schooner, as to be entirely out of her track; that, within a short time afterwards, the lookout on the schooner discovered a barge, which proved to be in tow of said vessel, (which was a tug,) on a very long hawser, (of about 100 fathoms in length,) which barge was far to the southward of the course of the tug, and heading nearly across the channel, into which position the wind and tide had carried her, in consequence of the neglect and mismanagement of those in charge, and the length of the hawser by which she was towed, and the change of course of the tug in rounding Throgg's Point; that there were no lights visible on the barge and no lookout; that, immediately on discovering her, the schooner was ported; that the schooner had all the regulation lights properly set and burning brightly, and a careful lookout properly stationed and attentive to his duties; and that the collision was caused solely by the

carelessness and negligence and improper seamanship of those in charge of the tug and barge, in, among other things, towing the barge on a hawser of undue and unsafe length, and not having any light on, or lookout or proper person in charge of, the barge. The libel of the owners of the schooner contains the same averments as their answer to the libel of the owner of the barge. The answer of the owner of the tug and the barge, which was filed after the other three pleadings had been filed, avers, that the tug and the barge had come around Throgg's Point on the starboard side of the channel and as near to the starboard edge of the channel as was prudent; that, after the tug and the barge had just passed around Throgg's Point, the schooner was discovered, by those in charge of the tug and those in charge of the barge, to the leeward of, and ahead of, the tug, bound eastward and showing only her red light; that the barge in tow of the tug was following after the tug, almost directly behind her, but heading a little to the starboard of her; that it was not possible for the tug and the barge to have passed on the other side of the schooner; that, at the time, the tug had all the regulation lights properly set and burning brightly, and indicating that she had a vessel in tow, and the barge had the regulation light also properly set and burning brightly; and that there was negligence in the schooner, causing the collision, in that she did not take proper measures to avoid the barge by porting her wheel, and changing the course she was on, in time to avoid the barge, and in that, although she was approaching the tug and the barge on their port hand, in such a way as to head for the barge, and in such a way that the tug could not possibly draw the barge out of the way, and that the barge could do nothing to avoid her, except to port her wheel, which she did, the schooner kept on her course toward the barge until she struck. In other respects, the answer of the owner of the tug and the barge contains the same averments that his libel does.

"The libel of the owner of the barge, in averring that the tug and the barge had all the regulation lights properly set and burning brightly, does not state what lights either vessel had. This averment is contained in the third article of such libel. The answer to that libel denies all the allegations contained in such third article, except as specifically admitted. There is no admission of the allegation as to the lights on the tug and the barge, except what is found in the statements in the answer, above recited, respecting the green light, the red light and the white light, of the tug. The answer states, that there were no lights visible on the barge, and, while it alleges fault in the tug and the barge, in that the barge had no light, it does not allege, as a fault in the tug, that the tug did not have all her proper lights, or did not have the proper lights to indicate that she had a vessel in tow. So, too, the libel of the owners of the schooner mentions the red, the green and the white lights of the schooner, and avers that there were no lights visible on the barge, and alleges that the collision was the fault of the tug and the barge, in that the barge had no light, but it does not allege any want of proper lights on the tug. The answer to such libel alleges that the tug had all the regulation lights properly set and burning brightly, and indicating that she had a vessel in tow, and that the barge had the regulation light (in the singular) also properly set and burning brightly, but it fails to state what lights the tug had or where they were placed, or what the lights were which indicated that she had a vessel in tow, or where they were placed. The tug had two common globe lanterns, with white lights, one above the other, about 2 feet apart, about 4 feet from the top of her flag-staff aft, and she had a white head-light, and red and green lights. Those flag-staff lights aft on the tug were not noticed by any one on the schooner. The barge had two globe lanterns, with white lights, similarly arranged on her flag-staff aft. They were not noticed by any one on the schooner. The pleadings on the part of the schooner are very unsatisfactory. If the schooner failed to see any towing lights on the tug, and so failed because the tug did not have proper towing lights, and thus was brought suddenly, and without receiving proper warning, into the presence of the barge, and that was believed by the schooner to have been a cause contributing to the collision, it was to be expected that averments to that effect would be found in such pleadings. But there are none of such averments. The failure to see the lights aft on the flag-staff of the tug, and the failure to aver in the pleadings that they were not seen because they were not proper towing lights, would show that there could be no issue regarded as raised as to whether such lights were proper towing lights, if only the averment had been made in the libel suit of the owner of the barge, (which was the first pleading filed,) that the tug had such lights as proper towing lights. But, the averment of that libel is only that the tug had all the regulation lights, and that averment is denied by the answer of the schooner. On the whole, I think the question must be examined as to whether the lights which the tug had as towing lights were the proper regulation towing lights. Rule 4 of the 'Rules for preventing collisions on the water' contained in section 4233 of the Revised Statutes, provides as follows: 'Steam vessels, when towing other vessels, shall carry two bright white mast-head lights vertically in addition to their side lights, so as to distinguish them from other steam vessels. Each of these mast-head lights shall be of the same character and construction as the mast-head lights prescribed by rule 3.' Rule 3 shows that, by a 'mast-head light,' as

spoken of in rules 3 and 4, is meant a light at the foremast-head, in a steam vessel which has a foremast; that each of the two towing lights in such a steam vessel is to be a bright white light, of such a character as to be visible on a dark night, with a clear atmosphere, at a distance of at least five miles, and so constructed as to show a uniform and unbroken light over an arc of the horizon of twenty points of the compass, and so fixed as to throw the light ten points on each side of the vessel, namely, from right ahead to two points abaft the beam on either side; and that the two lights are to be arranged vertically, and are to be in addition to the green and red side lights. Rule 4 states the object of this arrangement of white lights to be to distinguish towing steam vessels from other steam vessels. This tug did not carry sail and had no foremast. She was, however, such a steam vessel as is spoken of in rule 7, and was required to carry the red and green side lights, and, in addition thereto, a central range of two white lights, the after light being carried at an elevation of at least 15 feet above the light at the head of the vessel, the head light being so constructed as to show a good light through 20 points of the compass, namely, from right ahead to two points abaft the beam on either side of the vessel, and the after light so as to show all around the horizon. Such central range of two lights the tug was bound to carry, as a steam vessel, when not towing, and she was bound, when not towing, to carry two lights at her head, arranged vertically. 'The light at the head of the vessel' prescribed in rule 7, is the equivalent of the light 'at the foremast-head' prescribed in rule 3, and, where a towing steam vessel of the class mentioned in rule 3 is required, by rule 4, to carry two bright white mast-head lights arranged vertically, to distinguish her from other steam vessels of her class, a towing steam vessel of the class mentioned in rule 7 is required, by rule 4, to carry two head lights arranged vertically, to distinguish her from other steam vessels of her class. I considered this question in the case of The U. S. Grant [Case No. 16,803], very fully, and arrived at the conclusion, that, under provisions of law such as are now found in section 4233 of the Revised Statutes, a steam tug, when not towing, is bound to carry a light at the head of the vessel, and an after light in a central range, and is bound, when towing, to carry two lights at her head, and to carry them vertically, that is, one above the other, and to dispense with the after light, but still to carry the green and red lights. The steam tug, in the present case, did not have two head lights arranged vertically. She had only one head light. The idea of the statute is, that one white head light shall indicate a steam vessel not towing, and two white head lights shall indicate a steam vessel towing; for, it expressly forbids sail vessels, whether under way or being towed, from carrying any white head light. As there is to be a white head light, in the front of the vessel, at her head, conspicuous, first to be seen, when she is not towing, so there are to be two of them, arranged vertically, one above the other, in the front of the vessel, at her head, conspicuous, first to be seen, when she is towing. The object is, that a tow shall be indicated to other vessels by the lights on the tug, at the earliest possible moment, so that they may give both tug and tow a sufficiently wide berth. For that purpose, the towing lights are to be head lights, and each is to be of the brilliancy and size and in the position of the usual head light. In the present case the tug ought not to have had any light on her flag-staff aft. The two globe lanterns she had aft were not proper towing lights. They were not head lights, and were not calculated to attract attention, and it is not shown that they were of a brilliancy equal to that of the head light. If the tug had had proper towing lights at her head, in the same position with the head light which she did have, it is quite clear that they would have been seen by the schooner as soon as the head light of the tug was seen. That was seen by the schooner a long distance off, and so were the red and green lights of the tug. The fact that the two after lights on the tug were not seen from the schooner indicates that they must have been very feeble lights. The schooner had no proper notice that the tug had a vessel in tow, and the failure to give such notice was a fault in the tug, which contributed to the collision. The barge and the tug, as one vessel, and that a steam vessel, were bound, as between either of themselves and the schooner, to keep out of the way of the schooner, if the schooner, on the one hand, and the barge and the tug, on the other, were proceeding in such directions as to involve risk of collision, although the barge was being towed astern of the tug; and it was the duty of the schooner, as well as her privilege, to keep her course, unless there were special circumstances rendering a departure from these requirements necessary, in order to avoid immediate danger. The Cleadon, 14 Moore, P. C. 92, 97; The Warrior, L. R. 3 Adm. & Ecc. 553; The Civilta [Case No. 2,775]; The U. S. Grant [supra]. The evidence shows, I think, that the schooner did not change her course so as to embarrass the tug or the barge. She cleared the tug and she had no reason to suppose the barge was being towed behind the tug. The lights which the barge had were as feeble to indicate her presence as were the after lights on the tug to indicate there was a tow. The fact that the schooner saw the head light and side lights of the tug and did not see the two lights aft on the barge, indicates that those lights were defective, as a warning to the schooner, either in position, or size, or brilliancy. The obligation

resting on the barge and the tug, to keep out of the way of the schooner, imposes on them, as the schooner did not change her course to their embarrassment, the necessity of showing affirmatively that the schooner committed a fault in not changing her course, or that there were special circumstances which required her to do something which she did not do, or to avoid doing something which she did.

"The libel of the barge sets forth, as a fault in the schooner, that she had no lookout properly performing his duty. The mate of the schooner, with two seamen, Blake and Saunders, were forward on the lookout, when the lights of the tug were first seen from the schooner. The master was aft by the wheel, and a seaman, Frisbie, had the wheel. The schooner was heading east. The mate reported to the master a green light on the port bow 'way ahead.' In a few minutes he reported it was a steamer showing a white bow light, and green and red lights, coming nearly for the schooner, and then he reported that she had hidden her green light and showed only her red light and her white light. The master then called the mate aft, and he came aft, and then the master went forward himself, telling Frisbie to keep the schooner east by south, which was done. The master then sent aft the two men who were forward, to get ready to haul aft the main sheet, preparatory to turning Throgg's Point. They started aft, but, before they got aft, the master saw the barge rise up before him. He ordered his wheel hard-a-port, and the order was obeyed, but the barge and the schooner collided. The schooner, from the time she sighted the tug, made no change towards the tug and the barge. She changed one point away from them, from east to east by south, and afterwards, by hard-a-porting, she changed more away from them. From these circumstances, and from the way in which the vessels struck each other, it is manifest that the barge was not moving either west or west by north, but was moving crosswise of those courses, to the northward. I am not satisfied, from the evidence, that the master, or any one else on the schooner, ought to or could have seen the barge any sooner than she was seen, or that there was any deficiency in the lookout on the schooner, which contributed to the collision. The libel of the barge also alleges fault in the schooner, in that she did not continue her course to pass the barge on the port hand. If this means, that, after sighting the tug, the schooner changed towards the tug and barge, the evidence shows the contrary. Such libel also alleges that the schooner took or kept such a course that she collided with the barge. The evidence shows that she changed her course away from the barge, as soon as she sighted the barge, and that there was no fault in her in not seeing the barge sooner. The libel of the barge also alleges, that the schooner was in fault because she did not change her course by porting, when she was hailed from the barge. It appears that she heard no hail, and it does not appear that she ought to or could have heard any hail which the barge made, and it is shown that she did port as soon as she discovered the barge. The answer of the tug and the barge contains no averments as to fault in the schooner, which are not covered by the foregoing observations. In the suit against the tug and the barge, there must be a decree for the libellants against both vessels, with costs, with reference to ascertain the damages. In the suit against the schooner, the libel is dismissed, with costs."

This court found the following facts: "About half-past seven o'clock in the evening of November 2d, 1875, a collision occurred in the East river, near Throgg's Neck, between the schooner Jesse Williamson, Jr., owned by the libellants in the second suit, and the barge James A. Burden, in tow of the tug Blanche Page, both owned by the libellant in the first suit. The evening was clear, but dark, and the moon had just set. The wind was heavy from the northward and westward. The schooner was loaded with coal and on a voyage from Port Johnson, New Jersey, to Portsmouth, New Hampshire. Her crew consisted of a captain, mate, three seamen and a cook. Her regulation lights were properly set and burning. The tug was on her way from New Haven to New York, and towing the barge astern, by a hawser at least seventy or eighty fathoms long. The length of the barge was one hundred and twenty or one hundred and thirty feet. The lights of the tug were as follows—a white head light forward; a red light on the port side; a green light on the starboard side; and two white globe lanterns on the flag-staff aft, hung one above the other. The lights aft were not of a character to be visible on a dark night, with a clear atmosphere, at a distance of five miles, and were not otherwise constructed, or fixed, as mast-head lights. The barge had two white globe lanterns hanging one above the other from her flag-staff, burning dimly, but no other lights whatever. The speed of the tug, with her tow, was five or six miles an hour, and that of the schooner somewhat more. The usual course from the east around Throgg's Neck, is southwest by south to the point, and then around the buoy, to west-northwest. In this case, the tug, when she rounded the buoy, hauled a point, or a point and a half, further north, on account of the wind. The schooner was steering so as to make Throgg's Point as close as she could with safety, because, when she rounded the point, she would be compelled to come up more into the wind. She had on deck her captain, mate, and three seamen. The mate was on the lookout and the two seamen were forward with him. The captain was aft and the third seaman was at

the wheel. The mate, on the lookout, saw and reported the green light of the tug off the port bow, then the white head light, then the red light, and finally the green light shut out. No other lights were seen. After this the captain called the mate aft and went forward on the lookout himself. Soon after getting forward he sent the seamen to tend the main sheets, on rounding the point The schooner passed the tug port to port, at a safe distance, and steadily kept her course. The red light of the schooner was seen from the tug about the time of passing the buoy. This was when the tug's lights were first discovered from the schooner. The vessels could not then have been more than a mile apart, if as much as that. The red light of the schooner was alone seen from the tug. Immediately after the seamen were sent aft, the captain saw the hull of the barge loom up close by, out of the darkness, and angling across the schooner's bow. He saw no lights. This was the first time that the barge, or anything on her, had been seen from the schooner. The wheel was at once put to port, but not in time to avoid a collision. The schooner struck the barge on the port side, fifteen or twenty feet forward of the stern. The blow knocked down the stanchions and joiner work, which caught fire from a stove. The barge was partially burned and sunk, with her cargo on board. As soon as the man at the wheel of the barge saw, by the way the schooner was coming, that a collision was possible, he ported his wheel, and then, when the schooner lapped the barge, starboarded it, hoping to swing the stem off. The commissioner's report as to damages is supported by the evidence. Rule 9 of the rules and regulations of the supervising inspectors appointed under the authority of the act of February 28, 1871 (16 Stat. 440; Rev. St. §§ 4405, 4412), is as follows: 'Steam vessels, when towing other vessels, shall carry two bright white mast-head lights vertically, in addition to their side lights, so as to distinguish them from other steam vessels. Each of these mast-head lights shall be of the same construction and character as the mast-head lights which other steam vessels are required to carry; and, in addition to the lights herein referred to, when engaged in towing canal-boats and barges, or both, as is customary on the Hudson and other rivers, white lights shall also be carried on the extreme outside of the tow on either hand, and also on the extreme after part of the same.' This rule was approved by the secretary of the treasury."

George A. Black, for schooner.
Robert D. Benedict, for tug and barge.

WAITE, Circuit Justice. The only question which I think it necessary to consider in this case is, whether the tug carried "two bright white mast-head lights vertically," or their legal equivalent. Rule 4 of the statutory navigation rules (Rev. St. § 4233), provides, that "steam vessels, when towing other vessels, shall carry two bright white mast-head lights vertically, in addition to their side lights, so as to distinguish them from other steam vessels. Each of these mast-head lights shall be of the same character and construction as the mast-head lights prescribed by rule 3;" that is to say (rule 3) "a bright white light, of such a character as to be visible on a dark night, with a clear atmosphere, at a distance of at least five miles, and so constructed as to show a uniform and unbroken light over an arc of the horizon of twenty points of the compass, and so fixed as to show the light ten points on each side of the vessel, namely, from right ahead to two points abaft the beam on either side." Such a light must be carried at the foremast-head of an ocean-going steamer, or a steamer carrying sail. Steam vessels not carrying sail and navigating bays, lakes, rivers, or other inland waters, are required, by rule 7, to carry, in addition to their colored lights, "a central range of two white lights, the after light being carried at an elevation of at least fifteen feet above the light at the head of the vessel. The head light shall be so constructed as to show a good light through twenty points of the compass, namely, from right ahead to two points abaft the beam on either side of the vessel, and the after light so as to show all around the horizon."

This tug could not carry a light at her mast-head, for she had no mast, but she could carry two bright white lights vertically, of a character to be visible five miles away on a dark night, with a clear atmosphere, and so constructed as to show a uniform and unbroken light ahead, and from ten points on one side to ten points on the other of the vessel. This would be a light of the character and construction which ocean steamers, and steamers carrying sail, are required to have at the foremast-head. I deem it unnecessary to decide, in this case, whether, if two lights of a power equal to what is required for mast-head lights, are suspended vertically on the flag-staff at the stern of a tug, in such a manner as to show a uniform and unbroken light ahead over an arc of twenty points of the compass, they would be the legal equivalent of two mast-head lights; for, I am clear, that, unless there are two lights of that power and efficiency, carried vertically somewhere on the vessel, rule 4 is not complied with.

That such lights were not carried on this tug is very apparent from the evidence. It is conceded, that ordinary globe lanterns only were used. The mate, when acting as lookout on the schooner, must have been vigilant. He saw, first, the green light, then the white at the head, then the red, and then the green shut in, as the tug approached and rounded the buoy, and put herself on

her course down the river. The head light was seen, while those from the flagstaff were not. The presumption is, that the light ahead was such as was required by rule 7, and, therefore, of the same character and construction as that prescribed by rule 3, for the mast-head. As that light was seen, the conclusion is irresistible, that the stern lights were not of the same power, or were not so placed as to present the view which the law required. This, under the circumstances, is not only a fault in law, but a fault in fact. The schooner, while, to my mind, in all particulars vigilant, was not actually informed that she was to meet a tow, until the hull of the barge loomed up out of the darkness, immediately ahead, almost at the very moment of the collision. Clearly, if the circumstances are such as to make it proper for a tug to keep a tow four to five hundred feet away from her, she should be specially careful not only to notify approaching vessels that a tow is following, but, as near as may be, where it is. A sailing vessel must hold her course while a steamer is keeping out of her way in passing, but this obligation continues only so long as the steamer is passing. The sailing vessel should, therefore, be told where the steamer is, and as, for the purposes of this rule, the tug and her tow are to be considered as one vessel, and that the tug, it is necessary that the required information should extend to both tow and tug. In the day time, the tug may assume that both will be seen from the sail vessel, and act accordingly; but, at night, and in the dark, this is impossible, and, consequently, the law has supplied a system of arbitrary signals, intended to make up for the loss of vision by day. If these signals are omitted, and the sailing vessel comes into collision for want of them, the loss must fall on the tug, where the fault lies.

There can be no doubt that this collision was caused, in part, at least, by a want of proper towing lights. Had the schooner been told, in the appropriate way, of the approach and presence of a tug and tow, she would have watched as well for the tow as the tug, and, if she had found the tow driven out of its course, as this one undoubtedly was, by force of the wind, or otherwise, she would have taken some measures herself to prevent a collision. From the manner in which this schooner was navigated, I have no doubt whatever, if she had known that a tow was following the barge, the loss never would have happened. She was keeping up as close to Throgg's Point as she could, in order to take advantage of the wind and save herself from going off too much to leeward, when she got by. There was room enough for her to keep off; and there can be no reasonable doubt that she would have done so had she known it was necessary. Not knowing of the barge, she held her course, as she certainly had the right to do, with the information she had. In this I recognize fully the rule, that. while a tug must keep herself, as well as her tow, out of the way, a sailing vessel is not permitted to run down a tow, if it gets beyond the control of a tug, and she can, with reasonable effort, avoid it.

Holding, as I do, that a tug, while towing in inland waters, must exhibit vertically two bright white lights, of equal power with the mast-head lights of sea-going steamers, so fixed as to present a uniform and unbroken light right ahead and ten points on either side, and that this tug was in fault in this particular, it is unnecessary to inquire whether rule 9 of the board of supervising inspectors has the force of law, as a rule of navigation. By section 4412 of the Revised Statutes, the board has the right to "establish such regulations, to be observed by all steam vessels, in passing each other, as they shall. from time to time, deem necessary for safety," and, by section 4405, these rules, when approved by the secretary of the treasury, "have the force of law." The statutory navigation rules (section 4233, Rev. St., rule 8), prescribe lights for sailing vessels while being towed, but omit any provision for canal-boats, barges, &c., when towed, as is customary in rivers and other inland waters. This is an important omission, and, if there is really any doubt as to the power of the board to bind towing steamers by this rule, in passing sailing vessels, the necessary legislation to remedy the defect should at once be obtained. The absolute necessity there is for some such rule must certainly be acknowledged, if tugs are permitted to separate themselves long distances from their tows, and then make up the tow of any size or form they please.

I see no reason for disturbing the report of the commissioner as to the amount of damages. A decree may be prepared, dismissing the libel of Starin, with costs in both courts, and in favor of Sise and others, for $1,076 74, and interest on $627 86 from November 26th, 1875, and on $446 88 from November 20th, 1877, at six per cent., that being the amount allowed by the commissioner.

[NOTE. A motion for judgment against the sureties on the appeal bond was denied. Case No. 7,297.

[After the attachment of the vessel in the district court, a stipulation in the sum of $2,100, as her appraised value, was given. When, therefore, the libellant appealed to the supreme court, the appellees moved to dismiss the appeal for want of jurisdiction. It was held that as the matter in dispute did not exceed the sum or value of $5,000, exclusive of costs (section 3, Act Feb. 16, 1875; 18 Stat. 316), the court had no jurisdiction. The appeal was dismissed. Opinion by Mr. Justice Blatchford. 108 U. S. 305. 2 Sup. Ct. 669.]

## Case No. 7,297.

The JESSE WILLIAMSON, JR.

[17 Blatchf. 220.] [1]

Circuit Court, S. D. New York. Oct. 11, 1879.

ADMIRALTY—APPEAL—SURETY—JUDGMENT.

Where, in a suit in rem, in admiralty, in the district court, the libellant, after a decree dismissing the libel, appeals to this court, and this court dismisses the libel, and the sum claimed in the libel is sufficient to allow of an appeal by the libellant to the supreme court, which may be a supersedeas, no summary judgment can be rendered by this court against the sureties in the appeal bond executed on the appeal to this court, until after the expiration of ten days after the rendering of the decree by this court.

[Appeal from the district court of the United States for the Southern district of New York.]

In admiralty.

Benedict, Taft & Benedict, for sureties.

Scudder & Carter, for claimants.

BLATCHFORD, Circuit Judge. As the decree of this court in this case dismisses the libel [Case No. 7,296], and as the libellant, in his libel, claims damages to the amount of over $27,000, and as the district court has dismissed the libel, it follows that this is a case in which the libellant can appeal to the supreme court and can have his appeal operate as a supersedeas and stay of execution. As the bond of the sureties on the appeal to this court is, in its condition, the same as that in the case of The New Orleans [Case No. 10,181], just decided, it follows, that the motion for judgment in this case against said sureties must be denied, for the reasons assigned in the decision in that case.

## Case No. 7,298.

The JESSIE RUSSELL.

[9 Ben. 181.] [2]

District Court, E. D. New York. June, 1877.

DAMAGE—TUG AND TOW—STALE CLAIM.

Where a tug was taking a boat through a drawbridge, and the boat struck one of the piers and damage ensued, to recover for which action was not brought till after three years had elapsed, and the ownership of part of the tug had gone into hands of other parties without notice, and material evidence lost: *Held*, that the delay in enforcing the right of action for recovery was not justified, and the claim must be *held* to have become stale.

In admiralty.

BENEDICT, District Judge. This is an action to recover the value of a canal boat, alleged to have been sunk through the negligence of the tug Jessie Russell while towing her through a bridge on Newtown creek.

The time when the accident is said to have occurred was September 20, 1873. The action was commenced July, 1876. The reasons assigned for this great delay are not satisfactory to my mind, and during this period a part of the boat has changed hands, and, at the time of commencing the suit, was owned by an innocent party who had bought without notice.

By reason of the delay it has been rendered impossible to present to the court evidence in regard to the condition of the canal boat at the time, that would have been easily found if the action had been brought soon after the boat had sunk. The actual condition of the boat is a material question in the enquiry.

I am, therefore, of the opinion that under the circumstances of this case, the demand should be held to have become stale, and for that reason not enforceable in this court. Libel dismissed, but without costs.

[1] [Reported by Hon. Samuel Blatchford, Circuit Judge, and here reprinted by permission.]

[2] [Reported by Robert D. Benedict, Esq., and Benj. Lincoln Benedict, Esq., and here reprinted by permission.]

## Case No. 7,299.

JESSUP v. ATLANTIC & G. R. CO.

KELLY et al. v. SAME.

[3 Woods, 441.] [1]

Circuit Court, S. D. Georgia. April Term, 1879.

LIENS—RAILROAD MORTGAGE—FORECLOSURE—PRIORITIES.

1. The laws of Georgia give no liens superior to a mortgage lien, except for taxes and to laborers and material men who take the proper steps to perfect their liens. *Held*, therefore, that in distributing the earnings of a mortgaged railroad, while the same were in the hands of a receiver, and the proceeds of its sale, the court would give priority only to those laborers and material men who had perfected their liens according to the state law.

[Cited in Farmers' Loan & Trust Co. v. Kansas City, W. & N. W. R. Co., 53 Fed. 193.]

2. Claims on a railroad company for through fares and freight, for which it may have been accountable, in part, to connecting lines, are nothing more than open accounts, which stand on the same footing as other unsecured debts.

[These were bills by Morris K. Jessup and by Eugene Kelly and others, trustees, against the Atlantic & Gulf Railroad Company.] Heard on petitions of various intervenors pro interesse suo to be paid their claims for services, materials, etc., performed and furnished before the appointment of receivers, out of the earnings of the road made since the receivers were appointed, or out of the proceeds of the road when sold.

Geo. A. Mercer, Wm. Garrard, H. B. Tompkins, T. M. Norwood, H. C. Cunningham, R. R. Richards, J. R. Saussy, A. P. Adams, S. B. Adams, Collier & Charlton, and Kingsbury & Hammond, for petitioners.

[1] [Reported by Hon. William B. Woods, Circuit Judge, and here reprinted by permission.]

W. S. Chisholm and Robert Falligant, for trustees.

H. R. Jackson, A. R. Lawton, and W. S. Basinger, for receivers.

BRADLEY, Circuit Justice. The trust-deeds in this case authorize the trustees, when default is made in the payment of interest on the bonds secured thereby, to enter upon and take possession of the mortgaged property, consisting of the railroad, built or to be built, with all its appurtenances and equipments, and machinery connected therewith, and to operate the same, and receive all tolls, income and profits thereof, for the benefit of the bondholders, after deducting all proper expenses; and, in due time, and after proper notice, to sell the road and property. The laws of Georgia give no liens upon mortgaged property superior to the mortgage lien, except for the taxes due on the property and to laborers, mechanics and material men who take the proper steps to protect their liens. We think that we should follow the law and practice of the state in this respect. But in requiring the liens to be perfected, we do not mean that the parties should have taken any judicial steps in order to enforce their liens; but that they should have performed those preliminary requirements which entitle them to a judicial enforcement of the liens. If the statute requires the lien to be recorded, that should have been done in the time required by law. If it requires an oath to be taken verifying the lien, that should have been done within the time required. Having done this, then application to this court may stand in lieu of proceedings in the county courts or otherwise. We think, also, that the claims for moneys received by the Atlantic & Gulf Railroad Company on through fares and freight, for which it may have been accountable, in part, to connecting lines, are nothing more than open accounts, which stand on the same footing as other unsecured debts of the company.

A general clause may be inserted in the decree declarative of the views which we have expressed, and the liquidation and ascertainment of the claims themselves which, according to our views, are entitled to a lien, may be reserved for further order upon the foot of the decree now to be made. In drawing the decree the directions for a sale of the property should provide for payment into court of a sufficient sum to meet the liens that are prior to the mortgages, and to defray all expenses and charges of litigation. The counsel in the cause will be able to approximate the amount required for this purpose. If the amount specified should be insufficient, the deficiency would have to be made up by the purchasers of the road in case they are allowed to pay their bids in bonds of the company. The bonds can remain uncanceled until the matter is determined.

## Case No. 7,300.

JESSUP v. CHICAGO & A. R. CO. et al.

[7 Chi. Leg. News, 229.]

Circuit Court, N. D. Illinois. April, 1875.

TAXATION—RAILROADS—CAPITAL STOCK—RETURN—MODE OF ASSESSMENT.

1. The rule adopted under the act of March, 1872, by the board of equalization of this state to ascertain the value of the capital stock of railroad companies, has led to the imposition of taxes upon property which in fact had no existence, and cannot therefore be sustained. It was illegal and oppressive.

2. The act provides for returns under oath of all the property of such corporations, together with the value thereof. The action of the board in disregarding these returns and raising the values of the property, as was done, without evidence, without a hearing or a chance to be heard, of the parties interested, was a violation of the rights of the corporations, and as such cannot be sustained by a court of equity.

3. Under the constitution of this state, the franchise of a corporation can be taxed as well as its property, but it should be a tax against the corporation for the use of the franchise, and it must be uniform as to the class on which it operates, and by general law.

4. The constitution of this state requires that taxes shall be assessed in proportion to the value of the property of each person and corporation. The mode adopted of assessing the property of railroads by the board of equalization of this state in its distribution along the line of the roads of the property assessed, operated so as to prevent this principle from taking effect in the case of county and municipal taxes, causing the property in one county to pay such tax in another.

5. The distinctions pointed out between the capital stock of a corporation and its capital, and some of the true principles of taxation stated.

6. As in this case there are immense pecuniary interests of non-residents held in this state which have been affected by some of the rulings of the supreme court of this state on the action of the state board of equalization, this court for the present refuses to follow those rulings, believing they are erroneous, until required to do so by the supreme court of the United States.

[This was a bill by Morris K. Jessup against the Chicago & Alton Railroad Company to restrain the collection of certain taxes.]

DRUMMOND, Circuit Judge. Numerous bills have been filed in this court, and in the circuit court of the United States for the Southern district of Illinois, the object of which is to restrain the collection of taxes which have been assessed, and are sought to be levied upon the capital stock and corporate property of corporations in the two districts. In what shall be said at the present time, much will apply to other bills which have been filed in the courts, but as it may be necessary to select some case to serve as a centre around which to group the views we entertain upon the subject, it may be proper to state the facts in the principal case. The bill alleges that the Chicago and Alton Railroad Company had, in its own right, and by virtue of contracts made with the Joliet and Chicago Railroad Company, the Alton and St. Louis Railroad Company,

the St. Louis and Jacksonville Railroad Company, and the Louisiana and Missouri River Railroad Company, various railroad tracks, with rolling-stock and all the usual property employed in the operation of railroads, and that it was using the same in the transportation of persons and property on its road, and the connecting lines; and that, as required by the act of March, 1872, of this state, the Chicago and Alton Railroad Company, with other companies, made and filed with the proper officer, in May, 1873, a sworn list of all its property, setting forth in what the property consisted, and its value. The bill also states that certain officers, town and county assessors, without authority or notice, made additions to the listed value of some of the property; that, then, the county boards of equalization made certain described additions, and that the returns thus revised and equalized, were certified to the auditor of public accounts, who, as required by law, submitted them to the state board of equalization. The bill then sets out various acts of the state board which it claims to be illegal; that, without re-assessment or re-valuation, it added to and deducted from the assessed value of the property as returned, so as to equalize the value of the property with the value of the same class of property, in other counties, and that it changed the aggregate value of the railroad track, it being in different counties, from $1,369,736.90, as returned, to $4,041,729, and distributed it in the several counties without regard to the actual value therein. The rolling stock, as returned, was of the value of $664,447.93. The board changed it to $1,174,784, which amount was distributed in the same manner, and the board also assessed to the several companies with which the Chicago and Alton Railroad Company made contracts, large sums for rolling stock, when, in point of fact, they had none. The bill then states the rule adopted by the board, for ascertaining the value of the capital stock, over and above the tangible property under the act of March 30, 1872. The board assessed the value of the capital stock of the Chicago and Alton Railroad Company, and all the companies heretofore referred to, with which that company had made contracts; and this was done without notice or hearing, or opportunity to be heard; and the taxes have been extended and levied against the various railroads, in conformity with the rules adopted by the board, for the year 1873, for state, county, town, village, city and special taxes. These seem to be all the allegations of the bill, to which it is necessary to refer. As no denial has been made of them we have to assume they are true; and the question is, do they show a proper case for the interposition of a court of equity, to prevent the collection of the taxes?

The rule laid down by the supreme court of the United States is, that a court of equity will not restrain the collection of a tax, merely because it is illegal; there must be some other independent fact, recognized as a proper ground of jurisdiction. As relief would have to be sought in this case, in a multiplicity of suits against the various collectors, it comes within the rule of the supreme court of the United States. Dows v. City of Chicago, 11 Wall. [78 U. S.] 108. The plaintiff, as a shareholder in the Chicago and Alton Railroad Company, also brings himself within the principle of the case of Dodge v. Woolsey, 18 How. [59 U. S.] 361. The assessment and levy of taxes is an essential faculty of all governments. Upon it the state depends for the exercise of all its functions, and the support of its various officers, legislative, executive and judicial. While the power is indispensable, its exercise is attended with very serious consequences to the citizen. It may take and dispose of his property, in a summary way, in order to raise the necessary means to carry on the government. Still, it is not an absolute power; there are some constitutional restrictions imposed as a protection against its abuse. A tax upon property is the chief source of revenue in this state, but that tax must be levied by valuation, so that every person or corporation shall pay a tax in proportion to the value of the property owned. If it is a tax upon a class of persons, or on those using franchises, it must be by general law, and uniform as to the class on which it operates. Const., art. 9, § 1. It would seem, therefore, that a property tax, assessed for county or municipal purposes, must be by valuation of the property actually or constructively within its territorial limits.

The law already referred to, required the capital stock of all corporate companies of this state, to be so valued, by the board of equalization, as to determine its fair cash value, including the franchise, over and above the assessed value of their tangible property; and the board was authorized to adopt such rules to that end, "as to it may seem equal and just." When the tangible property, or capital stock was assessed, the shares of the capital stock were not to be assessed. Sections 3, 4. In order to ascertain the value of the capital stock and franchise, the board adopted, under this law, the following rule: The value of the shares of the capital stock, and the value of the debt of the company, (excluding the debt of current expenses,) were added together; their sum constituting the value of the capital stock and franchise. In order to ascertain the amount of this, over and above the tangible property, the value of the latter was to be deducted from the sum. The rule does not, in terms, provide for the case of companies (many of which we have before us) where the shares have no value whatever, or, if it does, the results arrived at show the injustice of the rule; because, according to

the allegations of many of the bills before us, the board has found large amounts as the value of the capital stock, including the franchise, over and above the value of all the tangible property of companies, in which the shares of capital stock have no value whatever, and where the companies are not only largely in debt but actually insolvent.

The capital stock of a company is usually divided into a certain number of shares. Technically, the shares may be said to be different from the capital stock, though those who own the shares own also the capital stock, that is, they own the sum of what makes the capital stock. Though it is sometimes expressed differently, it would be more correct to say that the shareholders own the capital stock, and the corporation the capital, or corporate property, for, in a true sense, the corporation cannot be said to be the owner of its capital stock, but only of the tangible property, assets and franchise, which constitute its capital. If, when we speak of "the corporation," we mean the property which it owns, including the franchise, the term is intelligible. In this sense, the distinction between the shares of the capital stock and the capital stock itself, is entirely clear, but, if we discriminate between the corporate property and the capital stock, what power has the corporation over the capital stock? It cannot sell it, as distinct from the property and the franchise. It cannot sell a fractional part of the shares into which it is divided. It can dispose of the property of the corporation, and so, indirectly, impair and perhaps destroy, the value of the capital stock, but the capital stock, as such, it cannot control; that belongs to the shareholders.

There would seem to be a want of precision of language in the opinions of some of the courts and text-writers, in the use of the words "capital stock," as applicable to the right of property in the corporation. It should be, not "capital stock," but "capital;" that is, the property or means of the corporation, including the franchise. This will be the more apparent, if we consider the effect of a levy of a tax upon the shares, and on the capital stock of the corporation. It will be found that if the shares are taxed, and the capital stock, as the sum of the shares, is also taxed, the property is taxed twice; and this the law of 1872 concedes, by providing that where the capital stock is taxed, the shares shall not be, thus obviously recognizing them as, essentially, the same as subject to taxation. There can therefore be no doubt that where the shares, as such, are not taxed, the sum of the shares, as capital stock, can be, provided that by "capital stock," the corporate property is meant. But we apprehend the rule in each case must be the same. If the shares are to be taxed, the taxation must be according to their value. A share worth ten cents on a dollar, in one corporation, cannot be taxed the same as a share in another worth one hundred cents, and if the share has neither a market or an actual value, it cannot be taxed. So, as to the sum of all the shares, which, with the franchise, is sometimes called the capital stock; if worthless, it cannot be taxed. If the capital stock means the corporate property then to tax both is in effect a double tax, and though technically a tax upon the shareholders as such and a tax on the corporate property may be sustained, yet it is inequitable, because in a just sense the shares represent the corporate property. The law declares that the board of equalization is to ascertain the cash value of the capital stock, including the franchise, over and above the assessed value of the tangible property. It would appear that by the act the franchise is to be regarded as property, and, as such, is to be included with the property designated by the name of "capital stock," but it seems to us that a fair construction of the first section of the ninth article of the constitution indicates that where a tax is to be imposed upon a corporation as owning property, the franchise must be taxed, if at all, under the last clause of that section. Although a franchise may, in some cases, possess great value, it may, in others, have only a nominal value. It is something indefinite—intangible; in most instances, of such a character that no fixed valuation can be placed upon it, and therefore, if it is to be, as such, the subject of taxation (as undoubtedly it can be), that taxation must be by general law upon the corporation using it, and uniform as to the class on which it operates. According to that rule, a tax upon a franchise, although its value may be indefinite, may still be said to be just, and to operate fairly upon all persons and corporations using it. The construction which has been given to this clause of the constitution by the board of equalization, and indeed it may be said, by the legislature, has been the source of most of the difficulties that have arisen in the valuation of what is termed the "capital stock of a company." Because they have included the franchise as a part of the valuation, it is difficult, if not impossible, to ascertain by any fixed rule of interpretation, or by the application of any of the facts which arise in a particular instance, the true amount or value of the property to be taxed; because it will be found that there is no possible way of reaching the conclusion at which it appears the board of equalization has, in numerous cases, arrived, than by holding that the franchise itself, and nothing else represents the great value they have placed on the capital stock.

The value of the shares of corporate stock depends upon various considerations—prospective as well as present profits—debts, assets and the franchise. It is manifest that the value of the shares may be nothing, but both debts and assets large, and yet it is difficult to understand how, in such a case,

the capital stock, including the franchise, can be of any value except a nominal value. This may be said to be the normal condition of many of our Western railroad corporations, their capital stock properly so called, being annihilated and nothing left but debts and tangible property, including what we call the franchise. In such cases, to impose a tax upon imaginary property valued at millions, as capital stock independent of the tangible assets, shocks all our notions of right and of equity. The true theory of the taxation of property is, to tax it only once at one time, and to deduct from what a man has what he owes. But there is no legal objection to a law which taxes what he has, without regard to his debts, and it is entirely competent for the legislature to assess a tax upon all the tangible property and assets of railroads, irrespective of the debts owed by them, but it is impossible to comprehend how their debts can be added to anything which they possess, so as to increase the taxable property of the corporation. The law authorized the board to adopt such rules and regulations, as to it seemed just and equitable, but it can scarcely be claimed that such authorization gave the board absolute power to adopt any rules. The rules must be such as do not illegally impair the rights of the citizen to his property and its use. If, by the rules established a tax is imposed, not warranted by law, or upon property which has no existence, in law or in fact, it cannot be permitted to stand.

In the particular case we are considering, the Chicago and Alton Railroad Company owed a bonded debt, chiefly to non-residents, of $4,422,000 and the other companies with which it had made the contracts named, also owed large sums. The board assessed the value of the capital stock of the Chicago and Alton Railroad Company, at $6,312,639; the value of the capital stock of the Joliet and Chicago Railroad Company at $533,907; that of the St. Louis and Jacksonville Railroad Company at $479,577; and that of the Alton and St. Louis Railroad Company at $387,892; all over and above the tangible property and assets; and, according to the rule established by the board in this and in other cases, the value of the debt was added to the value of the shares of the capital stock. We can understand that the debts which they owed, were property in the hands of their creditors —whether in bonds, mortgages, or whatsoever shape they might be. They were credits in the hands of the parties to whom the debts were due, and, as such, they might be taxed, but, certainly it is an anomaly to hold that they can be taxed in the hands of creditors and, at the same time, taxed as property owned by the corporation, because whatever disclaimer may be made on the subject that, judging by the bills before us, seems to have been the practical result of the course pursued.

It follows from what has been said, that in our opinion, the rule which was adopted by the board of equalization to ascertain the value of the capital stock was, in many instances, erroneous, and under the allegations which have been made in all the bills that have come under our notice, filed in court, it has operated to cause an assessment and levy to be made upon property which had no existence. No more striking illustration could be given of this fact than a case we have within our own cognizance, In re Rockford, R. I. & St. L. R. Co. [Case No. 11,978], all the property of which has long been in the possession of this court. Here was a corporation owing ten millions of dollars, whose whole tangible property, upon which any value could be placed, was not worth one-fifth of its bona fide debts. That road was required to pay a tax upon more than a million of dollars, as capital stock, over and above its tangible property. Now it is as clear as the truth in any mathematical problem that there was a tax of some thousands of dollars imposed in this instance on property that in fact had no existence. And the creditors of this company are not only deprived of their just debts, except a small pro rata proportion, but are obliged, in order to preserve what little to them is left, to pay, independently of the tax on the tangible property, a tax upon the stock of the corporation which has no appreciable value, unless the franchise is included and valued at that large sum; and it is manifest that, under such circumstances, the franchise, independent of the actual corporate property, has no other than a nominal value. Another still more striking illustration is the case of the Peoria & R. I. R. Co. [unreported], whose property is also in this court. An insolvent corporation was here assessed for more than $1,700,000 as capital stock over and above its tangible property,—a road only ninety miles long. We are asked to sanction a rule of the board of equalization that leads to such results. It is not a case of mere irregularity, but one where, in many instances, enormous values have been fixed upon imaginary property, and where creditors, most of whom are non-residents of this state, have been required to pay these taxes, in addition to the great losses they have already suffered, by investing money in this state. This view gives additional strength to what has been said to the kind of tax which should be imposed for the use of a franchise. It is said that it is much more easy to find fault with the rule which was adopted by the board of equalization, than to suggest another which would operate fairly in all cases. It would seem that where the shares of the capital stock have little or no value, and where the debts of the corporation were equal to or largely in excess of, its tangible property and assets, there can be no difficulty in declaring, that the capital stock of the cor-

poration as such, had no taxable value, independent of the tangible property; and would seem equally clear that in the case of an insolvent corporation, which is the condition of most of the railroad companies in this court, there could be no error in saying there was no capital stock independent of the tangible property and assets, which could be taxed. But, however this may be, it seems beyond controversy that a rule which adopts as one of the means of ascertaining the value of the property subject to taxation, the value of the debts of the company, necessarily, lead to erroneous conclusions. There is, however, a very easy way out of all the difficulties which have been suggested, and that is to tax all the property a corporation has. It is here; it can be found, counted and valued just as well as in the case of an individual. The shares held by residents can be legally taxed. The corporations can be taxed for using the franchise in the manner pointed out in the constitution. The tangible property, assets and credits of the company can be taxed. What more is there left? It is only in the search for property which does not exist that difficulties meet us on every hand.

The course pursued by the board of equalization, in reaching its conclusions as to the value of the capital stock, as well as that of the tangible property, seems to us to be peculiarly objectionable, and of such a character as not to commend it to the favor of a court of equity. The law required that every person, company or corporation, owning, operating or constructing a railroad in the state, should return sworn lists or schedules of his or its taxable property, and make out and file with the proper authorities a statement showing the property held for right of way, the length of the main and all side and second tracks and turnouts in each county, city, town and village, in which the railroad existed; in a word, that the officers of the railroad company should return schedules of all the property of every kind, and specifying the nature of the property, as well as its value. These returns were to be under oath, as prescribed by law. As stated in the bills which have come under our observation, all this was done in every instance, so that there was placed before the proper authorities, the specific character and value of the property of the corporation. After all this was done, the board of equalization, without notice to the parties, without a re-assessment or re-valuation, without any hearing, and without giving the parties an opportunity to be heard, arbitrarily raised the value of property, in some instances doubling, and more than doubling, its value, without hearing any additional evidence, without itself possessing any peculiar knowledge upon the subject, and immediately, as it appears, before its final adjournment. Can it be contended that such a proceeding as this, under the circumstances which have been detailed, can be sanctioned by a court of equity?

The state board of equalization is said to have been a judicial or quasi judicial body. If so, it was a judicial tribunal that not only decided without notice to the parties without giving them a hearing or opportunity to produce evidence, but contrary to the very evidence which the law prescribed should be adduced before it. That is what, according to the allegations of these bills, this board of equalization did. It may be justly said, we think, that where such a tribunal appears to have reached the results which have been brought before us, and caused the imposition of a tax which ought not to be paid, it is an imperative duty of a court of equity, if it has the power, to prevent the doing of so great an injustice. It is of the essence of every judicial tribunal, in order to bind parties sought to be affected by his judgment, that they should be heard and have the opportunity of adducing evidence before it. We think in this respect the board violated the rights of the railroad companies and of their stockholders and creditors.

The constitution of this state declares that the rolling-stock and all other movable property belonging to any railroad company shall be considered personal property. The principal property of a railroad company consists, ordinarily, of the right of way, the railroad track, the stations and other houses and warehouses, the shops connected with the operation of the road, and the various rolling-stock. These bills show that in the assessment and levy of the taxes against the railroad company, the whole property, real and personal, has been distributed along the line of the road; which results in such a levy and assessment of taxes for county and municipal purposes, that property belonging to the railroad in one county, pays a tax in another; for example, if ten miles of the line of a road is situate in one county, in which the road has in addition, property of immense value, as warehouses, station houses and shops for the repair and manufacture of its various machinery, and has ten miles of the line of its road in another county, in which it has none of that kind of property, the distribution which has been made (to say nothing of the difference in rails, as of steel or iron, and right of way) causes taxes for county and municipal purposes assessed on the railroad property in the two counties to be substantially the same. We do not see how all this can be reconciled with the provisions of the constitution which declares that, in the imposition of taxes, every person and corporation shall pay a tax in proportion to the value of his or its property. There may be difficulties connected with the assessment and collection of the taxes upon the rolling-stock, and the movable property of the company, but there can be none as to the fixed property in

the various counties in the state through which the railroad runs.

We have reached these conclusions with great hesitation, and the more because we have found that we differ, in some respects, from the opinion of the supreme court in this state, but the consequences to the property and rights of non-residents by the action of the board of equalization are so very grave, and the injustice, to use no harsher term, which has been done to the property and rights of non-residents has been so great that we feel we cannot, consistent with our own sense of duty, yield our convictions to the opinion of the supreme court of this state, until the supreme court of the United States shall say that we must do so; and it has been mainly with the view of giving the parties who may desire it, the opportunity to test the sense of the latter tribunal, that we have come to the conclusion that we shall sustain the injunctions which have been awarded in the various cases before us.

JETT (BACKHOUSE v.). See Case No. 710.

## Case No. 7,301.

The JEUNE EUGENIE.

[Nowhere reported; opinion not now accessible.]

## Case No. 7,302.

In re JEWELL et al.

[19 N. B. R. 383.] [1]

District Court, S. D. New York. June 25, 1879.

LANDLORD AND TENANT—ALTERATIONS—REPAIRS—DUTY OF TENANT TO SURRENDER PREMISES IN GOOD CONDITION—DAMAGES—EVIDENCE OF EXPERTS.

1. The bankrupts were lessees of a building under a lease which permitted them to make such alterations as were requisite to their business, "subject to the clause here following," which provided that at the expiration of the term the lessees would quit and surrender the premises in as good state and condition as reasonable use and wear thereof would permit, damages by the elements excepted. *Held*, that the true construction of these clauses is, that if alterations were made which injuriously affected the state and condition of the building as it was before they were made, it should, at the expiration of the lease, be restored to its former condition in respect to the changes so made; that the fact that the lessor, in anticipation of the expiration of the lease, relet the building to a tenant whose business was such as to make the building as altered convenient for him, does not affect or impair his cause of action against the bankrupts for a breach of their covenant.

2. On the question as to how much the building has been injured by the alterations, the opinions of experts familiar with the market value of similar premises, and especially with the rental value of such property, are competent.

[In bankruptcy. In the matter of Abraham Jewell and others.]

[1] [Reprinted by permission.]

Jacob F. Miller, for petitioner.

Chas. W. Marsh, for opposing creditors.

CHOATE, District Judge. The bankrupts were lessees of a building for the purpose of carrying on the business of manufacturing lard oil and perfuming lard, under a written lease, which permitted them "to make such alterations to the building requisite to said business, subject nevertheless to the clause here following." The clause referred to was "and at the expiration of the said term, the said party of the second part will quit and surrender the premises hereby demised in as good state and condition as reasonable use and wear thereof will permit, damages by the elements excepted." I think the true construction of these two clauses is, that if alterations were made which affected injuriously the state and condition of the building as it was before making the alterations, it should, at the expiration of the lease, be restored to its former condition in respect to the changes so made. I do not see how otherwise any meaning is given to the words "subject nevertheless to the clause here following." The lessor permits any alterations, however injurious, that the lessees may find "requisite to the business." The parties do not attempt to specify in advance what such alterations shall be, but, to secure the lessor against loss in the working of this license, he expressly provides that notwithstanding such alterations "the premises hereby demised,"—that is, the building substantially as it then was—should be surrendered at the expiration of the term in the same state and condition, reasonable use and damage of the elements alone excepted. The construction contended for by the opposing creditors, that the covenant is only to surrender the premises as they may be altered in good state and condition, seems not to me to give full effect to all parts of the instrument, nor consistent with the intent of the parties appearing therein. The fact that, in anticipation of the expiration of the lease, the lessors relet the building to a tenant whose business was such as to make the building, as altered, convenient for him, seems not to affect or impair the cause of action which the lessor has against the bankrupts for breach of the covenant. The lessees were, as the lessor knew, disabled by their bankruptcy from performing their covenant, and he did not waive any rights by letting the premises to a tenant who happened to want them as they were. It is not for the bankrupts who have broken their covenant to say to the lessor in excuse: "You do not need the restoration of the building to its former condition, which we agreed to make, for your present use of it." Nor is it material whether the lessor has got in fact as good a rent for it in its altered condition as he would probably have got for it if restored. If this is so, it is his good fortune, and there is no reason why it should inure to the benefit of the former lessees. The ques-

tion simply is, how much is the building injured by the alterations? And on this issue I think the opinions of experts familiar with the market value of similar premises, and especially with the rental value of such property, are competent. The witness Naylor seems to have had sufficient experience to make him a competent witness on the question of the extent of the damage. Evidence also of the cost of restoring the building to its former condition would be competent. Although Mr. Naylor's experience was as a builder, and not as a repairer of buildings, yet he had such an experience as to the cost of materials and labor that I think he should have been allowed to testify on this point also. Report recommitted, with instructions to give the parties a further hearing.

JEWESS, The (LIVINGSTON v.). See Case No. 8,412.

## Case No. 7,303.

Ex parte JEWETT.

In re MORRIS.

[2 Lowell, 393;[1] 11 N. B. R. 443; 12 N. B. R. 170.]

District Court, D. Massachusetts. Feb., 1875.

BANKRUPTCY—PETITION — AMENDMENT — DEFECT IN VERIFICATION—WAIVER—RIGHTS OF CREDITORS — COMPOSITION MEETING — PURCHASE OF DEBTS—RIGHT TO VOTE THEREON.

1. The allegation in a creditors' petition for adjudication of bankruptcy, that the petitioners constitute the requisite amount and number of all his creditors, is not the allegation of a jurisdictional fact.

[Cited in Re Duncan, Case No. 4,131; Roche v. Fox, Id. 11,974; Re Donnelly, 5 Fed. 787.]

2. Such an allegation may be amended after a meeting for composition has been held, and when the question of the acceptance of the resolution is before the court.

3. A case is pending in bankruptcy, within sect. 43 of the bankrupt act [14 Stat. 538], as amended June 22, 1874 [18 Stat. 182], so that a composition may be proposed and made, though the verification of the petition is defective.

[Cited in Re Funkenstein, Case No. 5,158; Re Henderson, 9 Fed. 198.]

[Cited in Guild v. Butler, 122 Mass. 500.]

4. In the absence of fraud, a defect in the verification of the creditors' petition is waived by the debtor, when he calls a meeting for composition; and the dissenting creditors cannot take advantage of it.

[Cited in Re Weber Furniture Co., Case No. 17,331.]

5. Every creditor, authorized to vote at a meeting for composition, has a right to make suitable inquiries of the debtor.

[Cited in Re Mathers, Case No. 9,274.]

6. How this right is to be reconciled with that of the meeting to regulate its own proceedings, quaere?

7. Until these rights are found to be irreconcilable, it is the duty of the court to refuse to record a resolution passed at a meeting at which a creditor's right of inquiry was, by a vote of the meeting, postponed, against his will, until after the resolution had been voted on.

[Cited in Re Shafer, Case No. 12,695.]

8. Where a creditor, believing in good faith that a larger offer might be made by a compounding debtor, bought up enough of the debts to prevent the acceptance of the resolution, publicly offering to pay at the same rate for all other of the debts,—*Held*, he could vote upon the debts so bought.

[Cited in Re Sheffer, Case No. 12,742.]

In bankruptcy.

LOWELL, District Judge. The petition of creditors against the supposed bankrupt was made and filed, and before adjudication the respondent called a meeting of his creditors, at which a resolution for composition was passed; and the hearing has now been had upon the acceptance thereof. The original petition was defective in this, that by a clerical mistake it averred that the petitioners constituted the requisite number and amount of the creditors of the said A. B., naming one of the petitioners, instead of the respondent. This defect was overlooked until now, when it is objected that without a distinct and accurate allegation on this head there is no jurisdiction. A recent decision of an able and learned judge was cited in support of this position: In re Rosenfields [Case No. 12,061]. Notwithstanding my respect for that decision, and after careful consideration, I cannot admit that the number and amount of petitioners has any thing to do with the jurisdiction of the court. Congress has very carefully provided that such a want of parties shall be taken advantage of as a strictly dilatory plea, and be disposed of in a summary way, not for the purpose of ascertaining the jurisdiction of the court, but the sufficiency of the plaintiff's petition, which is a very different thing. If the court should decide wrongly on that point, its decision would bind all the world.

The district court has jurisdiction in bankruptcy of every person residing within the district, who owes three hundred dollars of provable debts; and when a paper which purports to be a petition in bankruptcy, and which alleges such residence and indebtedness, is filed, and an order of notice has been duly served, there is and can be no jurisdictional fact remaining, if the residence and indebtedness to the extent of three hundred dollars are admitted. The court may then proceed to allow or refuse amendments, or any thing else proper for a court to do that has undoubted jurisdiction of the subject-matter and the parties. Indeed, if due service has been made, it could properly allow those jurisdictional allegations to be amended. To put an extreme case, let us suppose that the petition distinctly averred that the petitioners were not the requisite number, &c.; the mistake of course would be clerical, but it might not be discovered, and there might be an

[1] [Reported by Hon. John Lowell, LL. D., District Judge, and here reprinted by permission.]

adjudication. The decree would be erroneous, but it would not be void; and no court could correct it, excepting the court in bankruptcy, either subordinate or appellate, upon a direct application for that purpose; and it would be such an error as might be amended after almost any lapse of time. The mistake here is of that sort, though not as palpable; and the motion to amend is granted, though, in my opinion, no amendment is necessary. The statute gives the debtor a right to propose a composition whenever a case in bankruptcy is pending by or against him; and the objection just considered, as well as the next in order, depend upon the proposition that a case is not pending when the court has no jurisdiction of it, which may be admitted. But when the court has jurisdiction of the subject-matter and the parties, it will not be easy to point out a defect in pleading which would prevent the case from being a case.

The second point relates to the verification of the creditor's petition. The petition was properly made by the several firms, and the signature was that of the firms; and the jurat also properly sets out the individuals who made oath. The jurat in this way comes to vary in form from the signatures. My impression is that the verification is sufficient; but I do not decide it, because, in my opinion, the case is pending whether the verification is regular or otherwise; and not only so, but the objection may be waived by the debtor, and has been waived, no question being made of the bona fides of the petition.

The next objection brings up an important practical question. The statute provides for a meeting of creditors, and requires the debtor to be present, and to answer any inquiries made of him. The debtor was present in this case, and ready to answer inquiries, but the meeting voted to proceed to the consideration of the resolution. After that had been voted, the objecting creditors declined to make any inquiries.

It was the opinion of the able and learned register, who acted as chairman of the meeting, that the statute means that the debtor shall answer any question put by the meeting, or with its consent; because otherwise it will always be in the power of a minority, however small, to work a dissolution of the meeting by protracting inquiries until the patience of the meeting is exhausted, and because a meeting imports a body entitled to govern its own proceedings. On the other hand, it is insisted by the objecting creditors that the statute is intended to protect the minority, and enable them to instruct themselves and the majority upon the expediency of the proposed composition, before it is voted on. At the argument I asked counsel to look up the English cases, and several have been furnished me; two of which had been printed, and had reached this country before our statute, which follows exactly the English law in this respect, was passed: In re Davis, 19 Wkly. Rep. 524; Ex parte Levy, Id. 586; Ex parte Mackenzie, 23 Wkly. Rep. 121. In these cases it is taken for granted that any creditor may make inquiries at the meeting. In one of them, the point was taken that a refusal to answer was no objection to the proceedings, unless the sense of the meeting was taken; and though the point was not overruled, (the court deciding in favor of the party taking that point), yet it was not noticed in the judgment, which it might well have been, if considered by the court to be sound, as it would have disposed of the matter without going, as the judgment did, into the materiality of the particular question put.

I have heretofore refused to order the examination of a debtor who had called a meeting for composition, on the ground that the statute gave a right of inquiry (though the answers would, perhaps, not be on oath) at the meeting. And it seems to be the obvious intent of the act that inquiry may be made by any person entitled to inquire. In one of the cases cited, the decision was that the debtor's solicitor might advise him whether to answer or not, and that he need not answer an immaterial question, but that a refusal to answer would be at his own risk. In another, the ruling was like that which I have referred to, that the true place for examination was at the meeting.

Upon the whole, I am of opinion that the courts ought not to take for granted that the law will be found impracticable unless by giving it a somewhat forced construction; and it is only on that assumption that there can be much ground of hesitation. There is no suggestion in the English cases that any difficulty has been found in conducting the inquiry. The matter may, perhaps, be regulated by the supreme court, by rule, and in the mean time by the district courts. I feel it my duty to overrule the opinion of the register; but if the debtor desires it, leave will be granted to call another meeting, as the point was nice and important.

[Congress has inserted in the statute a clause not found in the English act, putting upon the court the duty of ascertaining whether the composition will be beneficial to the parties concerned. After the very full discussion at the bar, and nearly two days spent in inquiring into the value of the debtor's assets, every one connected with the case conceded, I believe, that a burden has been cast upon the court that is not easily sustained of instructing parties concerning their own interests. In the absence of fraud and concealment, the question for the court seems to be, not whether the debtor might have offered more, but whether his estate would pay more in bankruptcy. There can be no other standards, because the court cannot require the debtor to make a second offer; and perhaps ought not to permit him to do so under any circumstances.

And as it is established by all experience that a man can make more out of his own assets than assignees of more general capacity than he, and entirely honest, can possibly realize, there is an undoubted margin in many cases which the debtor may save by offering less than he might offer, but more than his creditors can obtain by process of law. The English statute makes the determination of the creditors final on that point, in the absence of fraud, and I dare say it will be found that the practical application of our law must be very similar. I should certainly hesitate to decide that any small difference ought to oblige me to reverse the action of the creditors. In this case I see no objection to saying that it seems probable the debtor could have offered a little more, and yet that the creditors were wise in accepting what he did offer. There has now been a full investigation of the case, under oath, and I regret that it should be fruitless. I regret that our practice is not yet guided by the orders of the supreme court, though I intend no reflection on that overworked tribunal for not furnishing this guidance, which is likely to be more satisfactory for being made up after some experience has been obtained of the working of the law. Until they act, I shall be happy to receive the aid of the bar in making a rule or rules on this subject. If none should be made we must trust to the good sense of the registers and of the meetings, to find a way to reconcile the apparently conflicting rights of the meeting and its members. Leave to record resolution refused. The debtor may call a new meeting, if he applies within twelve days. I fix this time because he has ten days, I suppose, to apply to the circuit court to revise this decision.][2]

A new meeting was called in this case, in accordance with the foregoing intimation of the court, and the debtors were examined; and while this was going on, the objecting creditors bought some of the debts, under circumstances stated in the following opinion of the court, and thus defeated the resolution, if the debts thus procured were to be counted. The purchaser offered publicly at the meeting to pay twenty-five per cent for all the debts, the offer of the debtor being twenty per cent.

R. Stone, Jr., for the debtor, maintained that these debts could not be reckoned in ascertaining the amount required, and cited Ex parte Cobb, 29 Law T. (N. S.) 123; Ex parte Fore Street Warehouse Co., 30 Law T. (N. S.) 624.

H. R. Brigham, for opposing creditors.

LOWELL, District Judge. At the former hearing, I thought and said that the evidence tended to show that the debtor might have offered a little more than he did, but intimated that it might require a greater discrepancy, or some evidence of fraud, to make it my duty to refuse a resolution which the creditors had voted. Before or at the second meeting, and before the vote was put, the objecting creditors bought up enough of the debts to enable them to defeat the resolution.

It is insisted that the debts thus bought ought not to be reckoned, or permitted to be voted upon, at the meeting. The English cases cited show that, where debts have been purchased in order to carry a composition, the resolution will be held to be tainted with fraud. I do not think that the like rule can always be applied to the purchase by a dissenting creditor. In the one case, the evidence tends, almost conclusively, to prove that there must be some motive at work besides the interests of the creditors; for instance, where the composition offered was 2s. 6d., and the purchase was made at 10s., the court had a right to infer that there was some secret contract to reimburse the purchaser. Whether there were or not, the transaction amounted to a preference of the creditor whose debt was bought. The vote of assent was virtually his, and he had been paid more than the others. Such cases are common, and are held fraudulent in all courts, whether they relate to discharges in bankruptcy, to compositions at common law, or in any other way in which such a question can be brought up.

But I have never known a case in which a creditor has been bribed not to assent to a debtor's discharge, or not to sign a composition deed. There is no very apparent occasion or inducement to fraud on that side, though, possibly, there may be oppression.

I do not say that clear evidence of hostility or spite, for the indulgence of which an enemy may be willing to pay, would not authorize the rejection of his vote. But there is no such presumption of an improper notice, as exists in the cases cited, because its existence is very improbable.

Looking at the facts here, it seems probable that the purchaser of these debts may have supposed that the debtor's assets would fairly pay all that he has chosen to give for these debts. That agrees with the impression which the evidence left upon my own mind; and, if this is so, I see neither fraud nor oppression in the action of the creditor. I said in my former opinion that a debtor appears to have under the statute a margin between what he can realize from his assets and what an honest and skilful assignee in bankruptcy can obtain; and if the creditors can fairly manage to defeat the debtor's attempt to realize this margin, thinking, perhaps, that they shall thus secure it for themselves, I cannot hold that to be a reason for rejecting their votes. It is their property, after all, that he is saving for himself.

[2] From 11 N. B. R. 443.]

It was argued that, by section 22 of the bankrupt act (Rev. St. § 5077), no debt is provable which is procured for the purpose of influencing the proceedings in bankruptcy, because the creditor must swear that he has not procured it for that purpose; and that we ought to adopt the analogy in proceedings for composition, because those creditors only are to vote at the meeting whose debts are provable.

I have known very few cases, either under the bankrupt act or the law of Massachusetts, from which this form or oath was borrowed, which have touched this matter. I do not know what it means. I see nothing objectionable in itself in a person's buying a debt for the sake of influencing the proceedings, excepting it be in some such way as has been already referred to; that is, to vote for the bankrupt's interests, without regard to those of his creditors. I do not believe the oath has had the least effect upon the settlement of cases in bankruptcy, nor do I consider it to apply to resolutions for composition. That debts may be assigned pending the proceedings in bankruptcy, is settled; and it is taken for granted as applied to compositions in the English cases. This being so, I think some illegal motive should be shown, beyond the mere desire to defeat the composition upon the ground that it is not for the best interest of the creditors to accept it.

Motion to record resolution denied.

## Case No. 7,304.

In re JEWETT.

[1 N. B. R. 491 (Quarto, 130);[1] 7 Am. Law Reg. (N. S.) 291; 15 Pittsb. Leg. J. (O. S.) 354.]

District Court, N. D. Illinois. 1868.

BANKRUPTCY — INDIVIDUAL AND PARTNERSHIP CREDITORS—PAYMENT—NO JOINT FUND.

Where there are both individual and partnership creditors of a bankrupt, but the assets are individual only, though mainly consisting of goods purchased by the bankrupt from the partnership on its dissolution prior to the bankruptcy, and being principally the same goods, in the purchase of which the partnership debts had originated; the partnership creditors will be entitled to be paid pari passu with the individual creditors.

[Criticised in Re Byrne, Case No. 2,270. Cited in Re Knight, Id. 7,880; Re Rice, Id. 11,750; Re McEwen, Id. 8,783; Re Hamilton, 1 Fed. 812; Re West, 39 Fed. 203.]

[Cited in Curtis v. Woodward, 58 Wis. 506, 17 N. W. 328.]

By Hon. LINCOLN CLARK, Register: This being the day fixed for the second meeting of creditors, the assignee, Mark Kimball, Esq., made his report, by which it appeared that he had in his hands the sum of thirty-seven thousand six hundred and forty-six dollars and eighty-three cents ($37,646.83) cash, as assets subject to distribution, as the creditors or the assignee should determine according to section 27 of the act of bankruptcy [of 1867 (14 Stat. 529)]. Upon due consideration and in view of what might be necessary to meet future expenses and provide for claims not yet proved, &c., a majority of the creditors being present and declining to decide, the assignee, at their request, decided that twenty-five per cent. of the cash in his hands should be distributed among those creditors who had proved their claims and who were legally entitled to receive a dividend out of the assets of the bankrupt's estate, and that the surplus should remain in his hands subject to future distribution. The said [Frederick] Jewett was forced into bankruptcy under the involuntary provisions of the act at the instance of the Third National Bank of Chicago. At the time of the adjudication of bankruptcy the said Jewett was a hardware merchant in the city of Chicago, and previous to February 1st, 1867, was in copartnership with one Oliver R. Butler for the space of ten years, under the firm and style of Jewett & Butler. On said 1st of February the said Jewett purchased the entire interest of Butler. The entire indebtedness of the bankrupt was more than one hundred thousand dollars ($100,000). The whole amount of the assets, good and doubtful, were estimated at between fifty thousand dollars ($50,000) and sixty thousand dollars ($60,000). About eighty-five thousand dollars ($85,000) of claims were proved by the individual creditors of Jewett, and about sixteen thousand dollars ($16,000) were proved by the creditors of Jewett & Butler. The Third National Bank, who instituted the proceeding, were individual and joint creditors. Upon this state of the proofs Mr. Clarkson, attorney for some of the individual creditors, and also for some of the joint creditors, contended that the individual creditors and the joint creditors should be paid pari passu out of the assets. Mr. Waller, attorney in behalf of some of the individual creditors, contended that the joint creditors could receive no portion of the assets of the bankrupt until the claims of the individual creditors were fully satisfied. There was no evidence of the solvency of Oliver Butler, nor that there were any partnership assets; nor was there any evidence to the contrary, and thereupon the question arose whether the joint creditors were entitled to share equally with the individual creditors in the division of the assets. The register overruled the objection made by Mr. Waller, and decided that all the creditors were entitled to equal distribution, which question, by the agreement of the respective attorneys, is certified to the court for its decision. In this case the bankrupt is as much bound to pay the debts due and owing by Jewett & Butler, as he is to pay his own individual debts. In fact, the debts owing by the partnership are several as

[1] [Reprinted from 1 N. B. R. 491 (Quarto, 130), by permission.]

well as joint; and the creditors have a right to proceed against any property or interest therein which he has for the satisfaction of their claims; and if there is any principle in equity which qualifies this rule it is not because the obligation of the bankrupt is any less, nor because all his interests in his property are not subject to the payment of his debts, but equity will interfere only to protect the relative rights of others as those rights shall be made to appear. It appears to me, then, that prima facie all the creditors of the bankrupt have the right to proceed against his property for the satisfaction of their debts.

It is undoubtedly a rule in equity that where there are individual creditors and partnership creditors, and individual assets and partnership assets, the individual creditors must resort to the individual assets, and the partnership creditors to the partnership assets; and it is not denied that this rule is applicable in bankruptcy. But how stands the rule when there are separate and joint creditors, but no joint or partnership assets, all the assets being those of the bankrupt? There are exceptions upon this subject. Story, Partn. § 378, says: "These exceptions allow a joint creditor to share pari passu with the separate creditors in every case to which they are applicable. They are of three sorts: (1) When the joint creditor is the petitioner for a separate commission against the bankrupt partner. (2) Where there is no joint estate and no living solvent partner. (3) Where there are no separate debts." The rule, then, is that "where there is no joint estate and no living solvent partner," the joint creditors shall share equally with the separate creditors. How, then, is the exception to be manifested? Under what circumstances shall it be considered that there is no joint estate and no solvent living partner? If there was any joint estate, the bankrupt was interested in it, and he was bound to set it out in his schedule, but he has set forth none. No doubt it would have been competent for the individual creditors to have proved that there was a joint estate and a solvent living partner, but they did not seek to do it, but contended that the individual debts should be first paid, although there was no joint estate, and although the individual debts would consume the whole amount of the assets. Can it be that the joint creditors have no rights against the assets until they allege and prove negative propositions? In equity where two parties have a lien upon one fund, and one of the parties has a lien also upon a second fund, the party having a lien upon the first fund can compel the other party to exhaust his remedy upon the second fund, before he can resort to the first. But must he not allege and prove the existence of the second fund? I suppose it is clear that he must. How does the statement of the facts and the proof in the foregoing case differ? There is a view of the subject which would render it exceedingly unjust that the joint creditors should be postponed to the individual creditors. The testimony of Jewett was taken in his deposition. He proves, that after he bought out the interest of his partner, he purchased but few goods; of course the debts of the joint creditors were made in the sale to the firm of Jewett & Butler of the goods which constituted chiefly the assets of Jewett. Should these goods be turned away from the payment of the joint debts, which constituted the consideration for making them, to the payment of the individual debts? "Equity alone can restrain the joint creditors from receiving their full dividend until the joint effects are exhausted." See James, Bankr. Law, 91. I am of the opinion, in the present state of the proofs, that the joint creditors should be paid pari passu with the individual creditors.

DRUMMOND, District Judge. As there seems to be no joint fund or source of payment for the joint creditors, I think the decision of the register is right.

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## Case No. 7,305.

In re JEWETT et al.

[7 Biss. 242.] [1]

District Court, W. D. Wisconsin. Aug., 1876.

BANKRUPTCY—ATTACHING CREDITORS NOT COMPUTED.

Attaching creditors are not to be counted nor their claims computed in ascertaining whether the petition for involuntary bankruptcy is supported by the "number and amount prescribed by statute."

[In bankruptcy. In the matter of S. A. Jewett and others.]

Warner & Spooner, for attaching creditors.

Dewitt Davis and William F. Vilas, for petitioning creditors.

HOPKINS, District Judge. The alleged bankrupts filed denial of acts of bankruptcy, but raised no question as to the sufficiency of the number of creditors petitioning against them. Whereupon certain creditors who had attached within two months portions of the property of the alleged bankrupts, applied and obtained leave to intervene and deny that the petitioners constituted one-fourth in number or represented one-third in amount of the provable debts of the bankrupts. The bankrupts were thereupon ordered to file a list of their unsecured creditors, which they did, and one of them was examined in relation thereto before a register. From the list and examination it appears that the petitioners constitute the requisite number and amount unless the attaching creditors are to be counted among the list of unsecured credit-

[1] [Reported by Josiah H. Bissell, Esq., and here reprinted by permission.]

ors, so that the only question is as to whether the attaching creditors shall be included.

No direct authority in favor of such a proposition was cited on the argument. The case In re Hatje [Case No. 6,215], was referred to to show that they should be included in the computation, but as I understand in that case no objection was made to such course, as there were enough petitioners including them; but if that court intended to hold that they were to be included in the list, I must dissent from that conclusion.

Just after the argument I was referred to the case In re Scraffard [Id. 12,557], as a direct authority in favor of the claim of the attaching creditors to be counted. I have examined that case carefully, and am constrained to say that neither the cases cited nor the argument of the learned judge satisfies my mind that his interpretation of the act is correct. It is too restricted and does not give full effect to the spirit or purposes of the act. Such creditors have security, therefore their debt is not provable until that security is abandoned or surrendered. Their security is hostile to and declared void by the terms of the act. It was an attempt by them to secure an unlawful preference in defiance of and contrary to the spirit and letter of the law. The object of the law was to place a creditor, who knowing the insolvent condition of his debtor but who undertook to secure his own debt by an attachment, upon the same footing as a creditor who obtained a preference by the consent of the debtor. He occupies no better position than a preferred creditor by act of the debtor. The security of both is void if proceedings in bankruptcy are instituted within the time prescribed. Both undertake to prevent the equal distribution of the insolvent's estate, which the bankrupt law was intended to accomplish, and I am not able to discover any ground upon which a valid or even plausible distinction between these cases or their status in the bankrupt court can rest. If attaching creditors are to be included in the number or computation, I think preferred creditors and all other parties whose security is or may be avoided by the bankruptcy proceedings should have the same privilege, and it is because I cannot see any ground of distinction, that I hold they are not to be included in ascertaining whether the requisite number of creditors have joined in the petition. The construction contended for is placing the unsecured creditors wholly at the mercy of the secured creditors. In effect it is giving the control of the question whether a debtor may be proceeded against in bankrupt courts, to parties whose interests are in hostility to the bankrupt act, which would defeat completely the rights of the unsecured creditors to insist upon equal distribution of the estate which is their only remedy to obtain anything. No such unreasonable and unjust construction could have been within the intention of the legislature in adopting it.

The attachments are dissolved only on assignment to the assignee under section 5044, Rev. St. U. S. These creditors are now secured so that they have not now a provable debt, and are therefore by the very terms of the act excluded. Act 1874, § 12 (18 Stat. 181). The fact that their security may be avoided if the case proceeds to certain other stages is not now to be considered. It is sufficient that they have not now a debt unconditionally provable to defeat their present claim. In re Frost [Case No. 5,134].

They applied and were admitted to defend to maintain their security. Now they want to occupy the position of unsecured creditors. Parties cannot play "fast and loose" in that way. The law does not favor such changes. It is stable and conservative and confines parties to consistent positions. If they want the rights of unsecured creditors, let them discontinue the attachment suits and they can have them at once. The act prescribes the course for them to pursue.

The motion to dismiss on the ground that a sufficient number of creditors have not joined in the petition is therefore denied.

NOTE. Since the above was prepared, Judge Dillon has reversed the decision in Re Scraffard [Case No. 12,557], and held that attaching creditors were not to be counted. In re Scraffard [Id. 12,556].

## Case No. 7,306.

In re JEWETT et al.

[7 Biss. 328; [1] 15 N. B. R. 126.]

District Court, W. D. Wisconsin. Jan. 12, 1877.[2]

PARTNERSHIP—WHAT CONSTITUTES—ESTOPPEL—PRIOR ADJUDICATION.

1. Where a person holds himself out as a partner or permits another to hold him out as a partner, and thereby procures credit upon the strength of his supposed relation, he is on principles of natural justice held to be such partner. But knowledge or notice of his being so held out must be brought home to him, or there must be proof of circumstances which will authorize a court to presume notice, before he can be so charged.

[Cited in Crompton v. Conkling, Case No. 3,407.]

2. A party by neglect of an ordinary duty, as to look after his interest for an unreasonable length of time, is presumed to have approved of the management of the person having it in charge, and by such gross neglect is estopped from denying the existence of the authority exercised by the party claiming to represent him.

3. The adjudication of a firm in one district does not prevent a subsequent adjudication in another district of a firm which is partly composed of the same persons.

A petition was filed in this court against S. A. Jewett, E. D. Jewett and George K. Jewett, charging them with being partners, under the name and style of "S. A. Jewett

[1] [Reported by Josiah H. Bissell, Esq., and here reprinted by permission.]

[2] [Affirmed in Case No. 7,307.]

& Co." located and doing business at Jewett's Mills and Red Cedar Falls, in this state, under which name the debts of the petitioners were contracted. The bankrupts, when the debts were contracted, resided, S. A. Jewett in this state, E. D. Jewett in St. Johns, New Brunswick, and Geo. K. Jewett, in Bangor, Maine. E. D. Jewett and Geo. K. Jewett appeared and filed an answer, denying that they were members of the firm of S. A. Jewett & Co., and setting up that they had been adjudicated bankrupts in the district court of Massachusetts, before the filing of this petition, as a bar or defense to the adjudication here.

[3] [The evidence given on the hearing shows that, in 1855, E. D. Jewett and one Marsh, under the name of Jewett & Marsh, furnished means to S. A. Jewett & Chase, a firm then residing and doing business in Minneapolis, under the name of Jewett & Chase, to enter a large quantity of pine lands lying in this state, and that Jewett & Chase entered such lands, one undivided half of which was deeded to Jewett & Marsh, and a quarter each to Jewett & Chase individually. That in 1859 the firm of Jewett and Marsh had been dissolved, and George K. Jewett formed a partnership with E. D. Jewett to manufacture lumber at St. Johns, N. B., under the firm name of E. D. Jewett & Co. That about that time the firm of Jewett & Chase, of Minneapolis, became embarrassed, and the firm of E. D. Jewett & Co. bought and took a deed of their interest in the pine lands aforesaid. That about 1862 they furnished money to S. A. Jewett to build a saw-mill on the lands at a place now called Jewett's Mills, and not long afterwards furnished money to erect a grist-mill at the same place, the amount thus advanced being about eight thousand dollars. That S. A. Jewett went on and built the mills, and moved there with his family, and carried on the lumber business, cutting logs from the land, converting them into lumber, selling the lumber from time to time as he saw fit, and using the proceeds according to his discretion in payment of taxes on the lands, buying the necessary tools, teams, and implements for carrying on such business as was necessary to a successful management thereof, and in erecting houses for the accommodation of his employees and himself, as was also necessary. He also opened a store, and carried on the business of a merchant, in connection with such mill. All the business, however, was done in his name, and no separate accounts of the expenditures or receipts from the separate kinds of business were kept. This continued until 1869, during which time he rendered no account to E. D. Jewett & Co., who owned the property, either of expenses or receipts, or amount of lumber cut and sold, nor does the evidence show that they ever called for any accounts. It appears that G. K. Jewett was there in 1863, after the saw-mill was built. But no evidence was given to show that any special arrangement was made in reference to the management of the business.

[Mr. E. D. Jewett claims that the original understanding was that Samuel was to look after the lands, reblaze the lines where necessary, keep off trespassers, look after the taxes, and grant stumpage permits if any parties should desire to cut lumber thereon. But S. A. Jewett says, according to his understanding, he was not only to do those things, but after the mill was built he was to manufacture lumber himself, and manage the business incident to it for E. D. Jewett & Co., and that he regarded all the personal property used on and about the business, including tools, teams, etc., as well as the merchandise in the store, and lumber cut and manufactured, as belonging to E. D. Jewett & Co. In 1869 E. D. Jewett & Co. conveyed to S. A. Jewett one-third of their interest in the lands, including mills and improvements thereon; and S. A. Jewett testifies that he understood the bargain to cover not only the land, but also a third of all the personal property in and about the mills, and the merchandise in the store. The consideration to be paid by S. A. Jewett was about forty-three thousand dollars, being one-third of the original cost of the land, with six per cent. interest thereon, and one-third of all moneys advanced by them for improvements and taxes. S. A. Jewett continued to carry on business after that time the same as before, and all money advanced by E. D. Jewett & Co. thereafter was charged on their books one-third to S. A. Jewett and two-thirds to Wisconsin lands, and all money sent them by S. A. Jewett was credited in the same way. In the year 1870 E. D. Jewett came West on a visit to his brother S. A., and spent a short time at Jewett's Mills; but, according to his testimony, he made no investigation or examination into the affairs or condition of the business. In the fall of 1870 the parties made an additional purchase of lands and mills at Red Cedar Falls, for which they paid twenty-four thousand dollars, and went on and expended in improvements in addition thereto something over fifty thousand dollars. The title to the property was taken: one-third to S. A. Jewett, and two-thirds to the firm of E. D. Jewett & Co., the same as the other real estate. E. D. Jewett & Co. advanced for the purchase about twenty-four thousand dollars, and toward improvements about twelve thousand dollars. The balance of the amount used in improvements was paid by S. A. Jewett, as he testifies, out of the proceeds of the business of the parties carried on at said mills. In 1872, about the time the business at Red Cedar Falls commenced, S. A. Jewett commenced using the name of S. A. Jewett & Co., and soon thereafter all the business of manufacturing lumber, and buying and selling merchandise in connection therewith, at both Red Cedar Falls and Jew-

[3] [From 15 N. B. R. 126.]

ett's Mills, was transacted in that name. Notes were given by S. A. Jewett, in the name of S. A. Jewett & Co., for merchandise bought for the stores there. For about two years before they stopped business they had bills and letter-heads with such firm name printed thereon, which they used in their business. There is testimony also that S. A. Jewett represented to some of the petitioning creditors in this case that his brothers E. D. and George K. were his partners. The evidence also shows that the business here, in the fall of 1873, became embarrassed; that S. A. Jewett drew upon E. D. Jewett & Co. for ten thousand dollars, which they advanced to him, and charged one-third to him and two-thirds to Wisconsin land account; and that the payments thereafter made to them by S. A. Jewett were credited by them on their books in the same way. From the testimony of S. A. Jewett it appears that the amount of business transacted since 1872 exceeded one hundred thousand dollars annually, and that he managed the business and used the proceeds in making improvements and additions, and in paying the expenses and taxes upon the lands from time to time, as he thought the interest of the parties required; and whenever he required more money than was derived from the business, he called upon E. D. Jewett & Co. for it, and they advanced it. He never rendered any detailed statement of the business to E. D. Jewett & Co. during its continuance, nor does it appear that he was ever called upon by them for such a statement. But he testifies that about once a year he wrote them, giving a general statement of affairs. He says that during the time he was in possession he cut and manufactured about 40,000,000 feet of lumber from the lands. He also testifies that during that time he put into the business, of his own funds, seven thousand dollars. His books were produced, and they do not show that any account was kept in the name of S. A. Jewett & Co.; but he testifies that all the money received from the business was charged to him, so that a full account could be received therefrom.

[A record of a suit in a state court commenced in December, 1875, in favor of Samuel A. Jewett, and against E. D. & George K. Jewett, to dissolve and wind up the partnership of S. A. Jewett & Co., was produced in evidence, from which it appeared that an attorney residing in Hudson, in this state, appeared for the defendants, and waived service of process, and answered confessing the partnership, and consenting to the appointment of a receiver therein. The evidence of the attorney and E. D. and George K. Jewett satisfactorily shows that the attorney was never authorized by them to appear or make any answer for them; hence the proceedings in that case must be regarded as coram non judice, and as not furnishing any proof of the partnership against them. E. D. Jewett testifies that one object in buying the Red Cedar Falls Mills was to increase the value of their lumber, and that Samuel A. agreed, if they would buy it, to pay them three dollars a thousand stumpage for all lumber he might cut on the lands, and keep the mills in repair, and that that was the only agreement made between them on the subject of cutting and manufacturing the lumber. S. A. Jewett, on the contrary, denies the making of such agreement, and says that stumpage was only mentioned by way of argument to show that the purchase would be a profitable one, and further testifies that he never kept any account of stumpage, nor supposed that they understood anything of that kind, until 1875, when he went East, after their failure, to see how it affected the business being transacted here, when his brother E. D. called upon him for a statement of stumpage; that that was the first he heard of any such pretended agreement. Both E. D. and G. K. Jewett deny that they had any knowledge that their brother was doing business in the name of S. A. Jewett & Co., or was representing that they were partners. S. A. Jewett has never paid directly any portion of the purchase money agreed to be paid for his third, nor has any settlement of the account ever been had from the commencement of the business.

[It also appears from the evidence that E. D. Jewett & Co. were members of a firm doing business in Boston, Mass., composed of themselves, Edward L. Jewett, Nathaniel L. Jewett, and Franklin W. Pitcher, transacting business under the name of Jewett & Pitcher, and that a petition in bankruptcy was filed against that firm, some of whom resided in Massachusetts, in the district court of Massachusetts, on the 6th day of October, 1875, which was followed by an adjudication on the 28th of February, A. D. 1876, by an assignment to an assignee on the 14th of March following. At the time of filing the petition, however, neither E. D. nor G. K. Jewett resided in the state of Massachusetts.][4]

De Witt Davis, S. U. Pinney, and I. C. Sloan, for petitioners.

W. F. Vilas, for E. D. & G. K. Jewett.

HOPKINS, District Judge (after stating the facts as above). E. D. Jewett & Co. rely upon these points to defeat the adjudication in this case. 1st. That they were not partners of S. A. Jewett; and 2d. If held to be partners, that their adjudication in the district court of Massachusetts is a bar to their being adjudicated bankrupts in this court. The counsel on both sides occupied a very wide range in their argument of the case, but I shall notice but few of the points discussed, as, in my opinion, many of them are unnecessary in the determination of the question now involved.

There is no direct testimony to establish the existence of the partnership of the bankrupts: that is, there is no partnership agree-

[4] [From 15 N. B. R. 126.]

ment between them proved. If one can be made out, it must be from inference or implication. Taking the testimony of Samuel A. Jewett as true, there would be but little difficulty in solving that question, but as that is contradicted in some of its material parts by the other bankrupts, it becomes necessary to consider and carefully weigh it in connection with such contradictions. And in the first place I may say that the claim that he was to cut the lumber and pay three dollars stumpage, is not, I think, sustained by the evidence. The conduct of parties negatives any such agreement and confirms S. A. Jewett's denial. It is incredible that his brothers would have allowed him to work under such an agreement for over four years without ever calling upon him for any account, or ever investigating to see to what extent he was cutting their timber. The testimony shows also that three dollars is a much larger price than was being paid for stumpage in that region during that time. Again, if Samuel was doing business for them only under that stumpage agreement, they fail to show any excuse for not looking after their taxes during that period. For if Samuel did not represent them or their interest either as agent or partner, they would, it seems to me, have looked after their own interest and have seen that their taxes were paid. And as Samuel's conduct during that time accords with his testimony on that point, I think his evidence should prevail.

That pretense being disposed of, and that was the only ground upon which they relied to explain the manner in which the business was done and their indifference in relation to it, it becomes necessary to see whether a partnership can be established from the conduct of the parties, and the evidence of S. A. Jewett, and it must be said that S. A. Jewett's theory of the case is corroborated by all his acts and doings in the premises, and unless he was a partner, as he says, it is difficult to see in what character he acted, unless we hold that he was their agent, and to so hold, we should have to conclude he was clothed with the most general authority to manage their interest, that is, to charge them with such liabilities as might be necessary, proper and customary in carrying on that kind of business, which would be as extensive as the authority conferred upon one partner by another. That they had great confidence in S. A. Jewett is not denied. [Before 1869 he carried on their business without restriction, cut and used their lumber, ad libitum, erected buildings, and used the proceeds of the business at his discretion, without having any interest himself in it.] [5] And unless he had understood in some way that they were partners with him, he was guilty of gross fraud and dishonesty in representing them to be such, and getting credit upon their joint names in the manner he did, and I do not believe, from his evidence and the conduct of the parties, that he did so, without their consent and authority. The manner in which they kept their accounts confirms this conclusion. If they had charged the money advanced directly to the firm of S. A. Jewett & Co., that would have been an acknowledgement of the existence of such a firm. In legal effect, however, the charging one-third to S. A. Jewett and two-thirds to Wisconsin land was the same thing. That recognized their liability to contribute two-thirds and S. A. Jewett one-third, which was according to their respective interests in the real estate, and the timber converted and sold by S. A. Jewett. If S. A. Jewett had been carrying on that business for himself alone, or as their agent, they would have charged the whole to him and made him pay it all to them. They were not liable for the expenses of the business simply because they owned a portion of the land, nor were they liable for any expenses if he was their tenant, agreeing to keep the mill in repair and pay stumpage as they claim. The way they kept their accounts is entirely inconsistent with any theory save that of partners. They were jointly interested in the land, in the growing timber; they were jointly interested in the mills, buildings and improvements for carrying on that kind of business; they made no agreement as to terms upon which anybody else was to use their property and cut their timber. So in view of the manner of keeping their accounts in reference to this property, in connection with the conduct and testimony of S. A. Jewett, I can see no other solution of the matter than to hold that they were partners.

There is another remarkable circumstance that requires notice. They must have known that their brother was carrying on this large business of over $100,000 a year, and to suppose that they allowed him to carry on a business of that magnitude for over four years with property of which they were the owners of two-thirds, without knowing the manner he was doing it, is too unnatural to be credited. Such indifference in regard to one's interest cannot be accepted by courts without the most satisfactory proof. The law presumes that every man will look after his own interest, at least, must hold him to ordinary care and attention to it, and to believe that they totally neglected, for such a period, such an amount of property as they had in this case, being a two-thirds interest in over 23,000 acres of pine lands valued at from one hundred thousand to two hundred thousand dollars, requires an unreasonable amount of credulity on the part of the court. And as they fail to furnish any reasonable excuse for such neglect, I think a court may accept the testimony of S. A. Jewett as showing the true relation between them. In

[5] [From 15 N. B. R. 126.]

this case there is a community of interest, one of the essential elements of a partnership, and the other one, a sharing in the profits, may be inferred from the acts of the parties and the circumstances of the case where there is no express agreement to that effect. But in this case we are not left to inference on that subject, if the testimony of S. A. Jewett is true, for he says he used the profits for the joint benefit of the parties in making improvements and paying taxes; if his testimony is true in that respect, it is as binding upon them as if their share had been paid them in money, for as to the improvements, they enhanced the value of their interest, and as to the taxes, it was the discharge of a liability which they would have had to meet with their own money if he had not paid them out of such proceeds.

This seems to be the only reasonable conclusion to be drawn from the testimony. It was claimed that if they were not partners as between themselves, they were as to third persons who had given them credit on the strength of their being partners. This might be so, although to charge a person as partner in such cases, it is necessary to show that he was cognizant of the conduct of the party who represented him to be such partner. This is not shown here, but I think, as claimed by the petitioners, that a party by his neglect of an ordinary duty, as to look after his interest for an unreasonable length of time when he knows his property is in the hands of and being managed by a third person, may be presumed to have approved of the management of the person having it in charge, and, by such gross neglect, be estopped from denying the existence of the authority that the party claiming to represent him exercised.

In such cases neither community of interest nor participation in the profits is absolutely necessary. When a party holds himself out as a partner or permits another to hold him out as a partner and thereby procures credit upon the strength of his supposed relation, he is, on principles of natural justice, held to be such partner. But knowledge or notice of his being so held out must be brought home to him, or there must be proof of circumstances which will authorize a court to presume notice before he can be so charged.

The respondents' counsel claimed that the parties were only tenants in common. They were tenants in common of the real estate it is true, but S. A. Jewett must have been clothed with more power than a tenant in common possession over the common property to have transacted the business he did.

One tenant in common cannot sell the entire property; he can only sell his share, while a partner has authority to sell the whole. S. A. Jewett, the evidence shows, cut timber from the land, manufactured it into lumber, and disposed of it and the whole of it for a series of years, and that, too, with the knowledge of the other owners, and they must, in the absence of evidence to the contrary, be presumed to have acquiesced in and ratified his acts, which would be equivalent to an original authority, so that the claim of tenancy in common as to the business transacted by S. A. Jewett must fail.

He had more authority than is possessed by one tenant in common. He was clothed with an apparent right to manage and carry on the manufacture of lumber and buy and sell it, and such other things as are usually bought and sold in the conduct of that class of business, and by reason of such authority could bind his co-tenants by his acts and contracts in reference thereto, and having adopted the form and name of a partnership, I think, as to parties giving him credit under that name, he bound his co-tenants, and that their long silence may be construed into an acquiescence which would clearly as to third persons if not inter se create the relation of partners.

Both E. D. and G. K. Jewett professed too much ignorance in regard to the manner the business was transacted by their brother, more than seemed reasonable, and gave an air of improbability to their testimony, so that I must find that the defendants are, at least so far as third persons who have given credit, believing and relying upon their being members of that firm are concerned, partners, and liable to be proceeded against in bankruptcy, unless the second ground of defense relied upon is well taken.

This is a question of law, there being no dispute about the facts. E. D. Jewett, when the petition was filed in Massachusetts against the firm of Jewett & Pitcher, was a resident of St. Johns, New Brunswick, and George K. was a resident of Bangor, Maine, so that the district court of Massachusetts had no jurisdiction over them individually, nor over them as members of the firm of E. D. Jewett & Co., nor of the firm of S. A. Jewett & Co. Cameron v. Canieo [Case No. 2,340]. The court had jurisdiction of the firm of Jewett & Pitcher, a firm doing business in Boston, of which E. D. and G. K. Jewett were members, because that firm did business in Boston, and the proceedings were against it.

Now the question presented here is, does their adjudication as members of that firm prevent their being adjudicated here as members of the firm of S. A. Jewett & Co., a firm doing business in this state and including another party?

The discussion on this question took a very wide range, but it seems to me it is practically settled by the case of Amsinck v. Bean, 22 Wall. [89 U. S.] 395.

In that case one partner had gone into bankruptcy, and his assignee brought an action to recover back money previously paid to a creditor of the co-partnership, on the ground that it was paid in fraud of the pro-

visions of the bankrupt act against preferences.

The court say that in such a case the bankruptcy of one of the parties dissolves the partnership, but that "the solvent partners retain their full right, power and authority over the partnership property in the same manner and to the same extent as if no bankruptcy of a particular partner had occurred." Again, that although the decree in bankruptcy dissolved the co-partnership, "the joint property remains in the hands of the solvent partner or partners, clothed with a trust to be applied by him or them to the discharge of the partnership obligations, and to account to the bankrupt partner or his assignee for his share of the surplus."

This settles the status of the firm property of S. A. Jewett & Co., and shows that it could and should be retained by S. A. Jewett, after the decree of bankruptcy against his co-partners, with the same power over it as he had before, and the right to use it in the same manner, and that the assignee of Jewett & Pitcher had no right to interfere with it; that his interest was only in the residue, after the payment of the partnership debts of the firm of S. A. Jewett & Co., which overthrows the position of the respondents' counsel, that the assignee of Jewett & Pitcher took as tenant in common with S. A. Jewett, and it is therefore unnecessary to notice the list of authorities that were relied upon as establishing a different doctrine from that laid down in the above case, as that is binding upon this court.

The court in that case further say that "repeated decisions have settled the rule that an assignee of an estate of an individual partner has no such title as will enable him to call third parties to an account for partnership property. * * * That if money paid under such circumstances as a preference can be recovered back at all, it must be claimed by the partnership, in whose behalf it was paid, or by an assignee duly appointed to administer the joint estate as it is quite clear that neither an individual partner nor his assignee can call the party to whom such a payment has been made to account for such a payment any more than he could for any other debt due to the partnership."

This is a complete answer, it seems to me, to the objection of the respondents' counsel that a second adjudication could not be made. Unless such an adjudication can be had the firm of S. A. Jewett & Co. cannot be proceeded against in bankruptcy at all, and their assets cannot be administered by the bankrupt court, which would exempt a certain class of debtors from the operation of the bankrupt law. E. D. and G. K. Jewett were adjudicated in another interest and for the benefit of another class of creditors who have no standing in this case, neither had the creditors of S. A. Jewett & Co. any standing in the case where the first adjudication was made. The principle laid down by the supreme court in that case, carried to its logical results, authorizes an adjudication against all the parties here, for the reason that this is a different firm, composed of different parties whose creditors have wholly distinct rights which can only be protected and enforced by a separate proceeding.

The learned counsel for the respondents felt the force of these principles laid down in that case, and sought to avoid them by claiming that an adjudication of the other member of the firm would bring the case into this court, and that the assignees appointed in the separate cases could unite and recover all claims due this firm. I do not agree with him. Such assignees would not represent the firm. They could not marshal the assets under section 5121 United States Revised Statutes, that can only be done by the assignee in proceedings by or against the partners as such.

In cases against a firm, the firm creditors have the control of the proceedings, elect the assignee who primarily represents their interests, and where a party is a member of two firms, as in this case, I think he may be proceeded against and be adjudicated in both where both are insolvent and have estates to distribute.

In no other way can the provisions of the law be applied in both firms. The case of Hunt v. Pooke [Case No. 6,896] holds that a party who has been adjudged a bankrupt individually, may subsequently be adjudicated as a member of a firm, which is a direct authority on the question. It is true it is but an ipse dixit of the judge, his reasons not being given, but such is nevertheless his opinion.

In re Wallace [Case No. 17,095], Judge Lowell says he knows of no rule that authorizes proceedings in bankruptcy against parties who cannot be joined in a suit at law or in equity; that such proceedings are equitable, and the rule in relation to parties in that court should be consulted in bankruptcy cases. According to which decision the firm of S. A. Jewett & Co. could not have been joined in the proceedings against Jewett & Pitcher, nor could their estate have been administered there.

I am satisfied that, under the authorities, as well as upon principle, the respondents, E. D. and G. K. Jewett, may be adjudicated as members of the firm of S. A. Jewett & Co., notwithstanding their previous adjudications in Massachusetts as members of the firm of Jewett & Pitcher, and order a judgment of adjudication accordingly.

A good deal of discussion was had on the argument as to whether a partnership creditor could prove his debt against the estate of an individual partner, and if so, whether his discharge would relieve him from such debts. The authorities on that point seem to be somewhat in conflict. But I think the weight of authority is in favor of the view

that such debts can be proven, and that being provable, they are necessarily released by the discharge. Ex parte Crisp, 1 Atk. 134; Ex parte Elton, 3 Ves. 238; Ex parte Clay, 6 Ves. 813; Ex parte Chandler, 9 Ves. 35; Ex parte Bolton, 2 Rose, 389; Tucker v. Oxley, 5 Cranch [9 U. S.] 34 (opinion by Chief Justice Marshall under act of 1800 [2 Stat. 19], which was substantially like the present law); In re Frear [Case No. 5,074]; Hudgins v. Lane [Id. 6,827]; In re Milick [Id. 9,399]; Rev. St. U. S. §§ 5069, 5115, 5118.

A good deal of discussion was had also upon the question as to what property would pass to the assignee in this case if one was appointed. It is not necessary to consider that question at this time. That question will arise when an assignee is appointed and proceeds to take possession of property.

The question as to whether the assignee appointed in the proceedings against the firm of Jewett & Pitcher, took the interest of the firm of E. D. Jewett & Co. in this firm, is not now properly before the court, and is not considered on this hearing, but is left to be brought up and disposed of at the appropriate time.

[On petition of review in the circuit court (Case No. 7,307), the decree of this court was affirmed.]

## Case No. 7,307.

In re JEWETT et al.

[7 Biss. 473; 16 N. B. R. 48; 4 N. Y. Wkly. Dig. 494; 9 Chi. Leg. News, 345; 4 Law & Eq. Rep. 77; 23 Int. Rev. Rec. 232.] [1]

Circuit Court, W. D. Wisconsin. June, 1877.[2]

JURISDICTION OF COURT—PRIOR ADJUDICATION IN ANOTHER DISTRICT.

Proceedings in bankruptcy in one district court against a firm constitute no bar to similar proceedings in another district against another firm, some of whose members were also members of the former firm.

[Cited in Corey v. Perry, 67 Me. 144.]

[In review of the action of the district court of the United States for the Western district of Wisconsin.]

In bankruptcy.

S. U. Pinney, for assignee of S. A. Jewett & Co.

W. A. Vilas, for E. D. and G. K. Jewett.

DRUMMOND, Circuit Judge. These are the material facts in this case: There was a firm in Boston doing business under the name of Jewett & Pitcher, of which E. D. Jewett and George K. Jewett were members. We must assume, for the purposes of the decision, that there was also a firm transacting business in Wisconsin, of which S. A. Jewett, E. D. Jewett, and George K. Jewett were members, under the name of S. A. Jewett & Co.

In October, 1875, S. A. Jewett was a resident of Wisconsin, E. D. Jewett a resident of New Brunswick, Dominion of Canada, and George K. Jewett a resident of Maine. At that time a petition in bankruptcy was filed in the district court of Massachusetts, against the firm of Jewett & Pitcher. All the other members of the firm, except E. D. Jewett and G. K. Jewett, were residents of Massachusetts. A decree in bankruptcy was rendered against that firm on the 25th of February, 1876, in the district court of Massachusetts, and of course that decree proceeded against E. D. and G. K. Jewett, as members of the firm of Jewett & Pitcher; and it is alleged, in the petition of review, that although E. D. Jewett was a resident of New Brunswick at the time the petition in bankruptcy was filed in Massachusetts, he afterwards changed his residence to Massachusetts, and appeared in the case as a party; and it is also alleged that both E. D. Jewett and G. K. Jewett filed their schedules in the case in Massachusetts, setting forth their debts and their assets jointly and individually. This is all that appears in relation to the proceedings in Massachusetts.

It is not stated that the bankrupt case is disposed of, or that the debts of the firm of Jewett & Pitcher are settled, or that they were discharged as bankrupts. The inference from the statement is, that the suit, as such, is still pending in the district court of Massachusetts, or was at the time the facts, which are now to be mentioned, occurred.

In July, 1876, a petition in bankruptcy was filed in the district court for the Western district of Wisconsin, against the firm of S. A. Jewett & Co.—the Wisconsin firm—and of which E. D. Jewett and G. K. Jewett were members. E. D. Jewett and G. K. Jewett appeared to the petition and denied the acts of bankruptcy alleged, and among other things set forth the proceedings in the district court of Massachusetts, which have already been referred to, and alleged that a decree in bankruptcy had been rendered against them as members of the firm of Jewett & Pitcher; and they insisted that that constituted a bar in the district court of the Western district of Wisconsin, to a decree in bankruptcy against them.

There were various questions argued by the counsel of the bankrupts, as I infer, in the district court, and they have been again argued in the circuit court—most of which will have to remain, for the present, undecided. The district court found a partnership to exist between the three persons, S. A., E. D., and G. K. Jewett, and held that the fact of a decree in bankruptcy against E. D. and G. K. Jewett, as members of the firm of Jewett & Pitcher, in the district court of Massachusetts was not a bar, and did not defeat the petition in bankruptcy in the district court for

[1] [Reported by Josiah H. Bissell, Esq., and here reprinted by permission. 4 N. Y. Wkly. Dig. 494, and 4 Law & Eq. Rep. 77, contain only partial reports.]

[2] [Affirming Case No. 7,306.]

this district. [Case No. 7,306.] And the only question now before this court is, whether that does constitute a bar to or defeat the petition in bankruptcy here. I think that the decree of the district court was right.

The firm of S. A. Jewett & Co. were engaged in the lumber business in Wisconsin quite extensively, the business amounting, as is said, in the course of a year to about one hundred thousand dollars. They had become embarrassed, and a petition in bankruptcy was filed against them. Their creditors insisted that their property should be administered by the court under the bankrupt law for the payment of their debts. There was no way in which this could be done except by a decree of bankruptcy against the partners; and it seems to me clear, that the proper forum in which the decree should be rendered was that which existed in the district where they were transacting business, namely, in the Western district of Wisconsin. There was no other way by which these partnership assets could be reached and administered in the bankrupt court, unless S. A. Jewett, as a member of the firm of which E. D. and G. K. Jewett were also members, was called, in some form, into the district court of Massachusetts, and the assets of the firm of S. A. Jewett & Co., administered there, namely, the residuary interest which E. D. and G. K. Jewett had in them after the settlement of the claims against the firm of S. A. Jewett & Co., because I assume that the only interest which E. D. and George K. Jewett, or their assignee had, either as representing the firm of Jewett & Pitcher, or themselves individually, was the residuary interest which they or either might have in the assets of S. A. Jewett & Co., after the payment of the debts of that firm.

It is clear as a principle of law, it seems to me, that the firm assets of S. A. Jewett & Co., must be administered in the district court of this district, for the payment of the debts of that firm. It is also true that until all the debts are paid, neither E. D. Jewett nor George K. Jewett has any interest in these firm assets. It is equally true that the firm assets of Jewett & Pitcher must be administered in the district court of Massachusetts.

Now S. A. Jewett has no interest whatever, residuary or otherwise, in the assets of Jewett & Pitcher; he is not concerned in that firm; of course, therefore, he could only be brought into the bankruptcy litigation in Massachusetts as a member of the firm of which two persons, parties to the litigation in that court, were also members. This being so, the only difficulty that can arise is as to the individual property of E. D. and George K. Jewett. The fact that they were adjudged bankrupts here, as members of the firm of S. A. Jewett & Co., does not necessarily dispose of all the questions that may arise concerning that property. It may be that many delicate and difficult questions may arise as to the property. For example, it appears that E. D. and George K. Jewett owned two-thirds of a large tract of land in this district, of which S. A. Jewett owned one-third.

It is claimed that a decree in bankruptcy, with the deed to the assignee in Massachusetts, clothed him not only with the title to the joint property, but also with that of the individual property of each member of the firm of Jewett & Pitcher. Now, whether that individual property should go to pay debts of Jewett & Pitcher, if the joint property is not sufficient to accomplish that result, or to pay debts of S. A. Jewett & Co., the Wisconsin firm, may be a very serious question, which I do not feel inclined to decide, or even intimate an opinion upon at present. The most that can be said is, that E. D. and George K. Jewett have already been adjudged bankrupts in the district court of Massachusetts; they are again adjudged bankrupts in the district court of the Western district of Wisconsin. But in the one case they have been adjudged bankrupts as members of the firm of Jewett & Pitcher, and in the other of S. A. Jewett & Co.

Strictly, the district court of the Western district of Wisconsin had the right to adjudge them bankrupts as members of the firm of S. A. Jewett & Co., and this is all I care to decide at present. Therefore, as this petition was filed by E. D. and George K. Jewett for the purpose of reviewing the decision of the district court, and, as I hold that the decision was right, the order of the district court decreeing them bankrupts will be affirmed. When, hereafter, it is ascertained what is the exact situation of the joint property of S. A. Jewett & Co., and of the individual property of the members of the firm in this district, a question may arise as to what shall be done with the latter, and how and by what means it shall be administered, and for whose benefit.

[In 3 Fed. 503, the bankrupt secured his discharge.]

## Case No. 7,308.

In re JEWETT et al.

[1 McA. Pat. Cas. 259.]

Circuit Court, District of Columbia. June, 1853.

PATENT OFFICE APPEALS — REFUSAL TO GRANT PATENT—NEW REFERENCES ON APPEAL.

[The provision of the seventh section of the act of 1836 (5 Stat. 119), requiring the commissioner to notify an applicant of the existence of conditions barring his application, giving him briefly such information and references as may be useful in judging of the propriety of renewing his application, or altering his specifications, makes it improper, on an appeal to the judge, for the commissioner to rely upon references not before given to the applicant.]

[This was an appeal by S. S. Jewett and F. H. Root from the refusal of the commissioner of patents to grant them a patent for certain alleged improvements in stove doors.]

The application under consideration in this

case afterwards issued as patent No. 9,780, June 14th, 1852.

P. H. Watson, for appellant.

MORSELL, Circuit Judge. Appeal from the decision of the commissioner of patents refusing to grant a patent for alleged improvements in stoves, which consisted in attaching sliding-doors to stoves or grates instead of the more common stove-door opening on a hinge. The appellants claim that their improvement involves a combination of three things. The first is the fire-place or furnace; the second is a horizontally sliding-door to close the front of the fire-place; and the third is a recess in one or both of the door-jambs, completely separated from the fire-place, so as to prevent smoke and flame from circulating through it; which recess is adapted to the reception of the door, and the door is fitted to slide into it, and when in, will be concealed from view on the outside and protected from the smoke and flame on the inside, so that when within the recess the outside of the doors will not be liable to become smoked; consequently, when drawn out, no part of the surface exposed to view will be rendered offensive by smoke and soot. In stating the usefulness and advantages of their improvements, they say: "This construction and arrangement of the parts confines the soot to the inner side of the door and keeps that always concealed from view and out of the way, so as to avoid soiling the garments of those who approach the doors to open or shut them; while the sliding-doors and recesses possess these advantages, that they also avoid the rush of smoke and flame into the apartment that attends the sudden opening of hinged doors."

The commissioner in his report states that the invention was sufficiently described in the specification, illustrated in the drawings, and shown in the models. It does not appear to have been a case of interference or opposition, but to have been decided on the ground of want of novelty, and for that reason rejected. The report states that on the 7th of July, 1851, the application was examined and rejected on that ground, and a reference was given for an example of a sliding-door to the rejected application of C. Hitzelberger. On the 9th of the same month a reconsideration of this decision was requested, for the reason that the reference given was to a sliding-door for a dwelling-house or stone front, which ought not to bar the applicant from receiving a patent for a sliding-door as applied, because the results in the latter were widely different. On the 11th of the same month the application was again rejected, and a new reference was given to the rejected application of W. C. Hibbard. It was contended that the devices of the two are not analogous, because of the radical difference of function which they are appointed, respectively, to perform; from which decision this appeal was taken. The substance of the reasons of appeal are correctly stated in the report.

On the day and place appointed for hearing the appeal the appellants appeared by their counsel, and an examiner on the part of the office, who laid before the judge the grounds of the commissioner's decision in writing, with the original papers and the evidence in the cause, as already in part alluded to. The report further states "that in one of the early modifications of the stove which still bears his name Doctor Franklin introduced vertical sliding-doors for regulating the draft and for security against the falling of brands or coals out upon the floor of the room," &c. Again, "that on the 22d of April, 1835, a patent was granted to E. Ingall, in which he claims as his invention the application of horizontally sliding-doors to stoves and grates of all descriptions." These latter references having been made for the first time at the trial of the appeal before the judge, were objected to by the appellants upon the ground of surprise. And it has been urged in the argument that, if an opportunity had been afforded them, they could have shown a radical and substantial difference between their improvement and that contained in Ingall's patent, in which latter the open door is, and only can be, partially concealed, as the plate behind which it is pushed is only about half its own width. In the feature of concealing the door this stove, therefore, furnishes no answer to the appellants' claim. Further, the recess to receive the door and insulate it from the fire does not appear in Ingall's stove; consequently his stove only embraces two of the three elements of the appellants' combination —the sliding-door and the fire-place, but not the recess for concealing and protecting the door; this nowhere appears in connection with the sliding-door and fire-place prior to the invention of the appellants. They claim the right to have had an opportunity also afforded them of so amending or altering their specification as to embrace only that part of the invention or discovery not within the patent of Ingall.

The law under which the right is claimed is the seventh section of the act of 1836, which, after limiting and specifying the three instances to which the commissioner's examination is confined, says, in the event of the existence of either of the conditions, that he shall notify the applicant thereof, giving him briefly such information and references as may be useful in judging of the propriety of renewing his application, or of altering his specification to embrace only that part of the invention or discovery which is new. If these references are to be considered by the judge as grounds on which his opinion in this appeal is to be based, then the rule of law above stated and relied on by the appellants is certainly applicable, more especially as it appears that the ref-

erences originally referred to as the grounds of the commissioner's decision, and from which this appeal was taken, so far from now being confided in, are virtually abandoned.

I have therefore thought proper, and do hereby decide, that the said decision of the commissioner of patents be, and the same is hereby, reversed for the purposes aforesaid, and the commissioner is hereby directed to proceed in the said case accordingly.

## Case No. 7,309.

In re JEWETT.

[1 N. B. R. 495 (Quarto, 131); 7 Am. Law Reg. (N. S.) 294; 2 Am. Law T. Rep. Bankr. 7.] [1]

District Court, N. D. Illinois. Jan., 1869.

BANKRUPTCY—SALE OF INTEREST TO OTHER PARTNER—UNPAID NOTES—RIGHT OF PARTNER TO DIVIDEND.

Where A., one of two partners, sells his interest in the concern to his copartner, B., taking his notes therefor, and B. becomes bankrupt, leaving some of the notes unpaid, A. cannot receive a dividend from the assignee until all the partnership debts have been paid.

By Hon. LINCOLN CLARK, Register:

This being the day fixed for the second meeting of creditors at the office of the register, for the purpose of hearing the assignee's report, and for declaring a dividend of assets among those entitled thereto, Oliver R. Butler claimed a dividend as a creditor of the bankrupt, upon a proof of claims heretofore filed, in the sum of ten thousand two hundred and fifteen dollars and forty-three cents ($10,215.43). The proofs consist of twelve promissory notes, each for the sum of $750, made by the said [Frederick] Jewett to the said Butler, dated February 1st, 1867, payable 1st of May, 1868, and on the 1st of each and every month thereafter until the whole should be paid. The said Oliver R. Butler had been copartner with the bankrupt for ten years anterior to the 1st day of February, 1867, at which time he sold his entire interest in the firm to the said Frederick Jewett for about the sum of $25,000, and took from him his promissory notes in payment therefor. It appeared in evidence, by the deposition of the said Jewett, that the notes herein before described were a portion of those given in the purchase of the interest of the said Butler.

Clarkson, attorney for a portion of the creditors, and also for the assignee, objected, that the said Oliver R. Butler was not entitled to a dividend upon those notes. I sustained the objection, and decided that no dividend could be allowed upon the proof of them.

Waller, attorney for Butler, desired the matter to be certified to the court, the question being as to whether the said Butler was entitled to a dividend upon the basis of the said notes.

It appeared that the joint indebtedness of Jewett & Butler was some $16,000, no portion of which had been paid by Butler. That Jewett, after the purchase of Butler's interest, bought but very few goods, from which the inference is clear that, had Butler been allowed to receive a dividend, he would have taken the proceeds of assets liable to the payment of his own debts, at the same time that he had not, as partner, paid the partnership debts. That Butler could not have a dividend until all the partnership debts were paid, seems to me clear. Whether, after that, he would come in to share with the individual creditors, is a question not now calling for consideration.

DRUMMOND, District Judge. In this case, it appearing that the only fund for payment is the individual property of the bankrupt, I have no doubt that there can be no dividend allowed to Butler so long as there is anything due from him. The decision of the register is consequently correct.

[1] [Reprinted from 1 N. B. R. 495 (Quarto, 131), by permission. 2 Am. Law T. Rep. Bankr. 7, contains only a partial report.]

## Case No. 7,310.

JEWETT v. CUNARD et al.

[3 Woodb. & M. 277.] [1]

Circuit Court, D. Maine. Oct. Term, 1847.

BILL IN EQUITY—REAL ESTATE—NEGLECT IN MANAGING — FAILURE TO ACCOUNT FOR PROCEEDS—CONVEYANCE IN FEE TO SECURE A DEBT—DUTY OF GRANTEE—REFERENCE TO A MASTER TO TAKE AN ACCOUNT — ACTION FOR MONEY HAD AND RECEIVED.

1. Where the complainant alone owned parts of property conveyed to the respondents, and owned parts in common with another, and sued the grantees and his co-owner for neglect in managing the estate, as well as for not accounting for all the proceeds, the complainant can properly bring his bill in chancery alone.

2. But he can recover only the proportion which his interests bear to the whole property, or the balance left after paying the debt. The other co-owner might by proper pleading against the other respondents, obtain what balance is due to himself from them.

3. Where a conveyance is absolute on its face, yet if it was made to secure a debt, the grantee will be bound to account for the rents and profits and sales towards the debt. He is also liable, if not managing the property with due care, and must account for what the estate ought to have produced while in his custody, and use as mortgagee or trustee. See some of the items proper to be considered in such accounting.

4. A master will be appointed, truly to take an account of debts and credits, and where the court has means to do that satisfactorily, and is disposed to do it, the enquiry will not be referred to a master, unless both sides desire it, and acquiesce in the further delay and expense incident to it.

5. Where an agreement, not under seal, is to account with A, or reconvey to him certain prop-

[1] [Reported by Charles L. Woodbury, Esq., and George Minot, Esq.]

erty, and to do the same to B with other property, and to both with still different estate, as it came in those ways from A and B, and from both, a separate action lies for A for his separate proportion.

[Cited in Walsh v. U. S., Case No. 17,116; Veazie v. Williams, 8 How. (49 U. S.) 159.]

6. An action at law may not lie for money received under a special agreement, if it could not be sustained on the agreement itself. But where the whole facts showed that property had been received as security for a debt, and to be accounted for, if a balance of money remained from its due increase and sale, beyond the debt, an action at law lies to recover that balance, under a count, for money had and received.

This was a bill in equity [by Joshua Jewett] against Joseph Cunard & Co. and Bryce Jewett. The complainant alleged that in A. D. 1830, about the 1st of October, he separately was indebted to Joseph Cunard & Co. in certain sums, and also in another sum jointly with Bryce Jewett. That having before given lien on his estate, personal and real, to the Cunards for security, and being hard pressed by them for payment, or farther security, he joined said Bryce in a conveyance to them of all their estate, both real and personal, and took back an obligation in writing to account for the rents and advantages thereof, and if they should amount the first year to £550, they were to be applied to one of the debts, and if to a like sum the second year, to be applied to the same debt, and so on till extinguished, and then to another debt, specifying it, and so on, till all due were paid with interest. There was another written obligation given to them by the Cunards, agreeing to deduct certain amounts from their debts, if £1,000 were paid by November, A. D. 1830, and security for certain other sums at subsequent periods. It was further averred, that the real-estate so conveyed was very valuable, amounting to over $70,000, and the personal estate to $4,000. That the Cunards leased the estate, real and personal, at the halves the first year after the conveyance to Bryce Jewett and J. Beck, and received large sums therefor, and might have received much more, had the said Bryce and Beck managed them with care, and especially the reserve lot for timber and the mill. That great losses were sustained by their inattention to the property, and neglect of the Cunards to look after the estate, and that the receipts towards discharging the debt might have been much more than £550. Similar averments were made as to the subsequent neglect, by the Cunards, to obtain so much income from the personal and real-estate as they might easily have obtained, and also, that they in June, 1834, sold all the real-estate, and such part of the personal as had not been before sold, destroyed or lost by want of due care, and had refused to account for the same. The bill averred further, that the receipts might have been more than was provided for towards the discharge of the debts, and that they and the sales had far exceeded the aggregate amount of them and interest thereon, and the bill therefore prayed that Bryce Jewett, as well as the Cunards, answer certain interrogatories propounded as to the manner in which the estate had been conducted and the contracts about it, and income therefrom. It prayed, moreover, that the obligations for the debts might be cancelled, and the difference between them, on the one hand, and the true value of the estate, and what ought to have been received from it, on the other, paid to the plaintiffs, or such other relief in the premises as may be deemed proper. There was more in the bill, that need not be here set out.

The answers were by Joseph Cunard for himself and company, and a separate one by Bryce Jewett. The former admitted the conveyances and contracts in connection with them, as to the allowance of rents and advantages received, if they amounted to £550 the first year, and so onward. But it denied any receipts to that amount, or any net income whatever from the estate, and averred that, on the contrary, a loss was incurred the first year under the lease to Bryce and Beck, who, it is said were assented to as lessees, by the complainant, and averred further, that large losses happened in the subsequent years, when the farm was carried on by the Cunards themselves, without leasing it, from an alleged inability to procure suitable lessees, who would pay any rent. It further exhibited the account of sales of the property, in June, 1834, at a much less price in the aggregate than the amount of the debt and interest, and denied any neglect or mismanagement of the estate on their part, or any liability to account for anything whatever to the complainant under their contracts. It next objected that Bryce Jewett was not made a co-plaintiff with Joshua Jewett. The other material portions of the answer, on the part of Cunard & Co., will be stated in the opinion of the court, when necessary to a full understanding of the case. The answer of Bryce Jewett admitted the lease to him and Beck for the first year, but denied any lease to him, or any control by him, over the property afterwards, though he was at times employed as a hired man. It admitted incapacity and misbehavior by Beck during the first year, as well as afterwards, but not by himself; and averred that he was entitled to some indemnity from the Cunards for his interest in the estate, though he had signed a discharge to them in respect to his private dealings. He stated many other matters in reply to the interrogatories in the bill, which it is not important here to repeat.

The evidence in the case was very voluminous. Copies of all the conveyances and writings were introduced, but none of them need be given in detail, except the obligations executed by the Cunards to Joshua and Bryce Jewett—which are annexed.

(No. 1.) "This agreement made and entered into this first day of October, in the year of our Lord one thousand eight hundred and thirty, between Joseph Cunard, Samuel Cunard and Edward Cunard, of Meramichi, in the county of Northumberland, in the province of New Brunswick, merchants, carrying on business under the style and firm of Joseph Cunard & Co., of the one part, and Joshua Jewett and Bryce Jewett, both of Ludlow, in the county and province aforesaid, lumberers, of the other part. Whereas, the said Joshua Jewett separately, and jointly with the said Bryce Jewett, now stands justly indebted to the said Joseph Cunard and Company in the sum of two thousand seven hundred and sixty pounds, eight shillings and five pence, current money of New Brunswick. And whereas, the said Bryce Jewett is justly indebted to the said Joseph Cunard and Company, in the sum of one hundred and twenty-four pounds, eight shillings and six pence. And whereas, the said Joshua Jewett heretofore conveyed to the said Joseph Cunard, all his real-estate situate in the counties of Northumberland and York. And whereas, the said Joshua Jewett and Bryce Jewett have conveyed, and delivered to the said Joseph Cunard and Company, all their cattle, horses and other personal property in the said county of Northumberland. Now the said Joseph Cunard and Company do hereby agree to, and with the said Joshua Jewett and Bryce Jewett, that is, if they do well and truly pay to the said Joseph Cunard and Company, on or before the last day of November next, the full sum of one thousand pounds, and on or before the said day, give them satisfactory security for the payment of the sum of one thousand three hundred and eighty-four pounds, sixteen shillings and eleven pence, one-half payable with interest on the first day of June, in the year of our Lord one thousand eight hundred and thirty-one, and the other half with interest on the first day of June, in the year of our Lord one thousand eight hundred and thirty-two, that they, the said Joseph Cunard and Company, shall and will make a discount on the whole of the said debts of five hundred pounds, and shall also cause to be reconveyed or assigned to the said Joshua Jewett and Bryce Jewett, or to such other person or persons as they may direct, as well all the real-estate so conveyed by the said Joshua Jewett to the said Joseph Cunard, as also all the said cattle, horses and other personal property so conveyed and delivered by the said Joshua Jewett and Bryce Jewett to the said Joseph Cunard & Co. as aforesaid; but should the said sum of one thousand pounds not be paid, and the security for the said sum of one thousand three hundred and eighty-four pounds, sixteen shillings and eleven pence, not be given by the said 1st day of November next, then this agreement to be null and void. In witness whereof, the said parties hereunto have set their hands on the day and year first above written. Jo. Cunard & Co. Joshua Jewett. Bryce Jewett.

"Witness (the words 'last and November,' being first written on an erasure, in two places on the second page hereof before signing): Edward Baker. Robert Morrow."

"Articles of agreement made and entered into this first day of October in the year of our Lord one thousand eight hundred and thirty, between Joseph Cunard, Samuel Cunard and Edward Cunard, of Meramichi, in the county of Northumberland, in the province of New Brunswick, merchants, carrying on business under the style and firm of Joseph Cunard & Co., of the one part, and Joshua Jewett and Bryce Jewett, both of Ludlow, in the county and province aforesaid, lumberers, of the other part. Whereas, the said Joshua Jewett at present stands justly indebted to the said Joseph Cunard and Company in the sum of eight hundred and twenty-three pounds, eleven shillings and three pence, current money of New Brunswick, on an adjusted account. And whereas, the said Joshua Jewett and Bryce Jewett now stand justly indebted to the said Joseph Cunard and Company, in the sum of one thousand four hundred and seventy-five pounds, fourteen shillings and eight pence, of like current money, upon an adjusted account. And whereas, the said Bryce Jewett is justly indebted to the said Joseph Cunard and Company, in the further sum of one hundred and twenty-four pounds, eight shillings and six pence, of like current money, on an adjusted account. And whereas, the said Joshua Jewett is justly indebted to the said Joseph Cunard, in the further sum of four hundred and sixty-one pounds, two shillings and six pence, by virtue of a bond made by the said Joshua Jewett in favor of Francis Peabody, Esquire, (and secured by a mortgage from the said Joshua Jewett on the second tract, so called, in the parish of Ludlow, originally granted to John Porter, Junior,) and by the said Francis Peabody, assigned to the said Joseph Cunard. And whereas, the said Joshua Jewett heretofore conveyed all his real-estate in the counties of Northumberland and York, with all the houses, mills, barns and other improvements thereon, to the said Joseph Cunard. And whereas, the said Joshua Jewett and Bryce Jewett have also bargained, sold and delivered unto the said Joseph Cunard, all the cattle, horses, farming and mill utensils, and all other, their personal property at present situate, and being in the said county of Northumberland. And whereas, the said Joseph Cunard hath agreed that the whole of the lands, mills, houses and other premises, above mentioned, together with the said cattle, horses and other personal property so conveyed to him, by the said Joshua Jewett and Bryce Jewett, shall be forthwith let to farm, to such person or persons as will hire or manage the same on the best terms, and

if the full sum of five hundred and fifty pounds currency per annum, from the first day of October, instant, can be realized out of all the said real and personal property, until the said sum of one thousand four hundred and seventy-five pounds, fourteen shillings and eight pence, so due by the said Joshua Jewett and Bryce Jewett, and interest thereon from the sale; and the said sum of one hundred and twenty-four pounds, eight shillings and six pence, so due by the said Bryce Jewett; and the like sum of one hundred and twenty-four pounds, eight shillings and six pence, and interest thereon, in part payment of the said debt of eight hundred and twenty-four pounds, eleven shillings and three pence so due from the said Joshua Jewett, then, and so soon as the said several sums shall be so paid and realized out of the rents, profits and advantages of the said lands, mills and personal property at the rate of five hundred and fifty pounds per annum, from the time above mentioned, the said Joseph Cunard shall give and grant to the said Bryce Jewett as good a deed as he himself now hath, of all that part of the said lands and mills above mentioned, which were conveyed to the said Joseph Cunard, by Samuel Kendall, to include half the new mill on the said lands. And when, and so soon thereafter as the said Joseph Cunard and Company shall be paid the balance of the said sum of eight hundred and twenty-three pounds, eleven shillings and three pence, and interest, out of the rents and profits of the other half of the said mill property, and all other the real and personal property at the rate of three hundred and fifty pounds per annum, then, and so soon, the said Joseph Cunard will reconvey to the said Joshua Jewett, or to such other person as he may direct, the other half of the said land, on which the said mills stand, with all other privileges attached thereto, being the land and premises which were sold and conveyed to the said Joshua Jewett by the late James Young, deceased. And whereas, it is further agreed by and between the said Joseph Cunard, and the said Joshua Jewett that when, and so soon thereafter as the said Joshua Jewett shall pay, or so soon as the said Joseph Cunard can realize out of the said mortgaged premises above mentioned, and out of the said mill property, and the personal property above mentioned, the said sum of four hundred and sixty-one pounds, two shillings and six pence, with the interest thereon, at the rate of three hundred and fifty pounds per annum, then the said Joseph Cunard shall cancel the said mortgage and bond, or reconvey the said mortgaged premises to the said Joshua Jewett, or to such other person as he may direct. and shall also relinquish and give up all other, the real-estate he now holds from the said Joshua Jewett, either to the said Joshua Jewett, or such other person as he may direct. And it is further agreed by and between the said Joseph Cunard and Company, and the said Joshua Jewett, that they, the said Joseph Cunard and Company, shall and will, after payment of all the said several sums of money above mentioned, and interest thereon, in the way and manner, and on the respective days and times above mentioned, return and re-deliver to the said Joshua Jewett and Bryce Jewett, or to such other person or persons as they may direct, all the said cattle and other personal property above mentioned, or other cattle and personal property, of the like quality and description, or that the said Joseph Cunard and Company shall, well and faithfully account to the said Joshua Jewett for the same, or such part thereof, at a fair price, as they may dispose of, in part payment of the said several sums of money above mentioned or some, or one of them, but the said Joseph Cunard and Company shall not be liable to make good any loss that may accrue by accident, or by casualty, to any part of the said personal property. Now this agreement witnesseth, that the said Joseph Cunard, Samuel Cunard and Edward Cunard do hereby for themselves, their heirs, executors and administrators, covenant, promise and agree, to and with the said Joshua Jewett and Bryce Jewett, their executors and administrators, in manner following, that is to say; that they, the said Joseph Cunard, Samuel Cunard and Edward Cunard, or some, or one of them, their or some one of their heirs, executors and administrators, shall and will forthwith let, to hire, to the best possible advantage, all and singular, the said lands, mills and all other, the real-estate, and also the personal property above mentioned, to such person or persons as will take the same, and that they, the said Joseph Cunard, Samuel Cunard and Edward Cunard, shall, and will keep a just and true account of all the rents, profits, gains and advantages that may arise from the said real and personal estate, which account shall be open to the inspection of the said Joshua Jewett and Bryce Jewett, their executors and administrators, on the first day of October in each year, and that they, the said Joseph Cunard, Samuel Cunard and Edward Cunard, shall and will, so soon as the profits of the said real and personal estate shall fully pay off and discharge at the rate of five hundred and fifty pounds per annum, as aforesaid, the said debt, or sum of one thousand four hundred and seventy-five pounds, fourteen shillings and eight pence, so due to them by the said Joshua Jewett and Bryce Jewett; —and the said debt or sum of one hundred and twenty-four pounds, eight shillings and six pence, so due by the said Bryce Jewett;— and also the sum of one hundred and twenty-four pounds, eight shillings and six pence, in part payment of the said debt of eight hundred and twenty-three pounds, eleven shillings and three pence so due by the said Joshua Jewett, with legal interest on the said three several sums from the date hereof, they,

the said Joseph Cunard, Samuel Cunard and Edward Cunard, shall cause to be executed to the said Bryce Jewett, his heirs and assigns, as good a deed as the said Joseph Cunard himself now hath of all that part of the said lands and mills above mentioned, which were conveyed to the said Joseph Cunard by Samuel Kendall, to include one-half of the new mill now standing upon the said land, and also that they, the said Joseph Cunard, Samuel Cunard and Edward Cunard, their heirs, executors or administrators, after the payment of the said debts, last above mentioned, and so soon as the balance of the said debt of eight hundred and twenty-three pounds, eleven shillings and three pence, so due from the said Joshua Jewett, and the interest thereon, shall be fully paid and satisfied out of the profits and advantages of the other half of the said mill property, and of all other, the said real and personal estate, at the rate of three hundred and fifty pounds per annum, they, the said Joseph Cunard, Samuel Cunard and Edward Cunard, shall cause to be reconveyed and relinquished to the said Joshua Jewett, or to such other person as he may direct, all the right, title and interest which the said Joseph Cunard now hath, of, in and to the said other half of the said mill property, and all the privileges and appurtenances thereto belonging: And further, that so soon after the payment of all the sums of money above mentioned, and interest in the manner hereinbefore stated, as they can realize out of the profits of the said mortgaged lands, and out of the said personal property at the rate of three hundred and fifty pounds per annum, the said sum of four hundred and sixty-one pounds, two shillings and six pence, and interest thereon, or so soon as the said Joshua Jewett shall pay to them the said sum of four hundred and sixty-one pounds, two shillings and six pence, and interest at the rate of three hundred and fifty pounds per annum, they, the said Joseph Cunard, Samuel Cunard and Edward Cunard, their heirs, executors and administrators, shall and will cause the said mortgage to be cancelled, or the said mortgaged premises, and all other, the real estate conveyed by the said Joshua Jewett to the said Joseph Cunard, to be reconveyed to the said Joshua Jewett, or to such other person as he may direct. And the said Joseph Cunard, Samuel Cunard and Edward Cunard, so soon as all the said several and respective sums of money above mentioned, with the interest thereon, shall in the manner, and at the times above mentioned, be fully paid and satisfied, redeliver to the said Joshua Jewett and Bryce Jewett, or to such other person or persons as they may direct, all the cattle, other and personal property above mentioned, or other cattle and personal property of the like quality and description, or that they, the said Joseph Cunard, Samuel Cunard and Edward Cunard, shall and will, well and faithfully account to the said Joshua Jewett and Bryce Jewett, for the said cattle and personal property at a fair price; but the said Joseph Cunard, Samuel Cunard and Edward Cunard are not to be answerable for any part of the said property that may be lost, injured or destroyed by accident. And the said Joshua Jewett and Bryce Jewett do hereby covenant, promise and agree, to and with the said Joseph Cunard, Samuel Cunard and Edward Cunard, their heirs, executors and administrators, that, should the profits, gains and advantages of the said real and personal property above mentioned, not realize and satisfy to the said Joseph Cunard, Samuel Cunard and Edward Cunard, yearly, and every year, from the said first day of October instant, the full sum of five hundred and fifty pounds, until the said debt of one thousand four hundred and seventy-five pounds, fourteen shillings and eight pence; and the said two sums of one hundred and twenty-four pounds, eight shillings and six pence each, with the interest thereon, then, and from such time as the said profits, gains and advantages shall fall short of five hundred and fifty pounds per annum, the said Joseph Cunard, Samuel Cunard and Edward Cunard shall be freed, exonerated and discharged from all the articles, clauses, matters and things herein contained, anything herein contained to the contrary notwithstanding. And it is further agreed, by and between the said parties, that should the said Joseph Cunard, Samuel Cunard and Edward Cunard be unable to hire, or let the said real and personal property, that they, the said Joseph Cunard, Samuel Cunard and Edward Cunard, shall employ proper and fit persons to conduct the said mill, and all other, real and personal property, to the best advantage, and that the profits and gains arising therefrom shall be faithfully accounted for to the said Joshua Jewett and Bryce Jewett, in payment of the said debts above mentioned, but should the said profits of the said mill property not amount to the said sum of five hundred and fifty pounds per annum, and such deficiency shall not arise from the neglect of the said Joseph Cunard, Samuel Cunard and Edward Cunard, in not employing proper persons to work and manage the said mill, then the said articles, clauses, matters and things above mentioned, on the part of the said Joseph Cunard, Samuel Cunard and Edward Cunard, shall be null and void, anything herein contained to the contrary notwithstanding. In witness whereof, the said parties to this agreement have hereunto set their hands on the day and year first hereinbefore written. Jo. Cunard & Co. Joshua Jewett. Bryce Jewett. Witnesses: Edward Baker. Robert Morrow.

"It is agreed by the parties to the above agreement, that if, by any mismanagement by the said Joseph Cunard, Samuel Cunard and Edward Cunard, the profits arising from the said property, should fall short of the amount above mentioned for any one year, the actual gain to be credited, and an extension of time

given to the said Joshua Jewett and Bryce Jewett, in just proportion to make up such deficiency. Dated the day and year above written. Jo. Cunard & Co. Joshua Jewett. Bryce Jewett. Witnesses: Edward Baker. Robert Morrow."

The other testimony on both sides will be referred to, in the opinion, so far as pertinent and material.

Mr. Ellton and Gen. Fessenden, for complainant.

W. P. Fessenden and Mr. Kent, for respondents.

WOODBURY, Circuit Justice. The first question in this case, not connected with the merits, and which it seems important to settle before an examination of the merits, is in respect to the non-joinder of Bryce Jewett as plaintiff. He has, it is true, some interest in the contract between the Cunards and the plaintiff, having owed some of the debts separately, and others in conjunction with Joshua Jewett, and some interests in the property, having been a tenant in common in some of the estate named in the contract, both real and personal. But at the same time having been a lessee of the property afterwards from the Cunards, and alleged by Joshua Jewett to have been guilty of neglect and mismanagement of the estate, he is prosecuted for that, with the Cunards, as a respondent, and for misconduct as a lessee, and could not without an absurdity, prosecute himself for it as a co-plaintiff. The first answer then to this objection is this, that such conduct has since occurred as to the property and contract, by neglect and misbehavior, and which is one of the alleged grounds of recovery by this bill, that Bryce Jewett could not, as an agent charged with being guilty of that neglect, prosecute himself, but probably may well be made, as he is one of the respondents, alleged to have conducted unfaithfully towards the plaintiff. It is doubtful whether one tenant in common can ever join another in such a proceeding. Lothrop v. Arnold, 25 Me. 136. A second answer to the objection is, that Bryce Jewett had no interest whatever in some of the property sold by the Cunards, and no right, therefore, to damages for its misuse, and that portions of the contract were to Joshua alone, as if alone interested in them. 1 Story, Eq. Pl. §§ 75, 72, 276. The maxim thus well applies to such, "Reddenda singula singulis" ("Words may be transferred and distributed among several subjects, and have different meanings, as the matter differs, and as right requires"). 1 Spence, Eq. Jur. 540. So in 1 Spence, Eq. Jur. 545, it is laid down that "where the interest of the covenantees is several, they may maintain separate actions, though the language of the covenant be joint." See, also, 1 Saund. 153, 154, note; 4 Bing. (N. C.) 426. "Lord Coke mentions six several instances in which the joint words of the parties shall be taken respectively and severally," and one of them is if several interests of the grantors, as when tenants in common and another of the grantors exist. Windham's Case, 5 Coke, 8a. It is not only alleged here that the complainant owned some of the property alone, and some as tenant in common with Bryce, but that the value of his interest was seven-eighths of the whole. This is not denied, nor asked to be proved, and hence is virtually an admitted fact, and justifies a recovery by the complainant to that extent, if entitled to recover at all. Again, according to some of the allegations in the bill, and which are not denied in the answer, though some of the evidence might render it doubtful, Bryce Jewett in May, 1844, when the bill was filed, was a citizen of New Brunswick, and hence this court had jurisdiction over him as a defendant, but he could not have joined Joshua as a plaintiff, without defeating the jurisdiction over the Cunards, who are alleged to belong to the same province. Harrison v. Urann [Case No. 6,146]. By express statute, there is a provision as to the joinder of defendants, that you may not unite them in such cases. Act Feb. 28, 1839, § 1 [5 Stat. 321]; Herriot v. Davis [Case No. 6,404]; [U. S. v. Freeman] 3 How. [44 U. S.] 556. And it would not be a very forced construction of the concluding language of that statute, to extend it to the non-joinder of plaintiffs. There certainly would be nothing unreasonable in not joining them, if their interests were in part separate, and in part only that of tenants in common, as well as the contract being in part separate. Place v. Delegal, 4 Bing. (N. C.) 426. Again, the claims of Bryce Jewett may all have been settled or discharged, as seems probable by a writing, which he testifies in his deposition, as well as states in his answer, that he gave or intended to give to the Cunards. And for other reasons he might be unwilling, if he could, to risk the action so far as regards himself. Independent, however, of the consideration before named, I think he should join on strict legal principles. Hallett v. Hallett, 2 Paige, 18. In conclusion, then, on this point, as Bryce Jewett is now a defendant, and asks for such relief as the facts may justify, the parties are all on the record in form sufficient to justify such a decree as will not do injustice to any of them, on whichever side of the docket they may stand. 1 Story, Eq. Jur. 630; [Boone v. Chiles] 10 Pet. [35 U. S.] 177. In giving judgment for one plaintiff alone, we should, of course, go only to the extent of his interests, leaving the interests of the other, if not already adjusted out of court, to be settled equitably between him and the respondents in this or another action, on proper pleadings. 3 Johns. Ch. 555; Chamley v. Lord Dunsany, 2 Schoales & L. 718; Cross v. U. S. [Case No. 3,434]; West v. Randall [Id. 17,424]; 1 Smith, Ch. Prac. 90.

The next preliminary question is, whether the answer of the Cunards, not being expressly requested in the bill to be under oath, should be voluntarily sworn to and treated as evidence by the respondents, in their own favor. I do not deem it very material, whether the answer is to be weighed here as if duly sworn to, or not; considering that the leading facts in the case are made out satisfactorily by the testimony of more than one witness. But the course of practice is to have the answer sworn to, and to give it effect as such, when the plaintiff does not expressly state in his bill that he wishes to dispense with it, and when the court and the defendant accede to the proposition. The oath is the general rule, and the dispensing with it the exception. 2 Story, Eq. Pl. § 874; 1 Smith, Ch. Prac. 266. When the defendant cannot be present, the answer is taken under a commission, whose form requires it to be sworn to. 1 Spence, Eq. Jur. 372. What the form given to it should be, after taken, whether technically as evidence by the respondent, or as a bar to a recovery, till more than proof by one witness is adduced, is another question, and not very material, except as a matter of correct phraseology. Chief Justice Marshal and Judge Story have called it "evidence," and such is the ordinary term applied to it. Russel v. Clark, 7 Cranch [11 U. S.] 92; Cushman v. Ryan [Case No. 3,515]; Gould v. Gould [Id. 5,637]. But in strictness of phrase, perhaps, the answer is not evidence, but rather a portion of the pleadings,—rather a bar in the nature of a plea, and when sworn to, stands till overcome by more than one witness. 2 Daniel, Eq. Prac. 626; 6 Clark & F. 295. The oath to it is like the "decisory oath" in the Roman law, and stands as such, like a decision or bar, till disproved by stronger evidence. 1 Spence, Eq. Jur. 677. Yet it does not seem to violate much either good precedent or sound analogy, to call such an answer, when sworn to, in common parlance, "evidence."

We are now prepared to proceed to the consideration of the merits. In the threshold the respondents contend that their contract with the plaintiffs was a mere special contract which subjects them to pay nothing for the income of the property, unless it amounted to £550 in the first year from October 1st, 1830, to October 1st, 1831. They insist, also, on a strict construction of it, and if that sum was not then realized, that they are not bound in any other way, or on any other terms, to account for the estate itself, whether real or personal. That it must be considered as sold to them absolutely and irrevocably, looking to the conveyances themselves, and that the only modification of that view is by another subsequent and special contract, agreeing to reconvey or account, on terms, conditions or events, which last likewise have never been complied with, nor happened. Such cases may exist. See Bentley v. Phelps [Case No. 1,331]; 14 Pick. 467; [Conway v. Alexander] 7 Cranch [11 U. S.] 237. But it is proper to say that this view of the transaction is, in the opinion of the court, not the true one, and more especially is it not in equity. The conveyances now in dispute, had been preceded by several others, of both real and personal estate, from the Jewetts to the Cunards, some of them on their face expressing that they were made to secure debts due to the Cunards and others, though absolute in form, manifestly intended merely as security for what the Jewetts owed the Cunards. Where the possession had been changed nominally, and leases back given to only Bryce Jewett, as was the case under one of the first contracts, the actual possession seems to have remained unaltered in Joshua, and so far from any of those conveyances being then deemed in truth a sale and the debts actually paid by them, the consideration is at times nominal, no prices whatever are agreed on, and the evidences of the debt are never surrendered, or receipts or releases executed of it.

Matters stood in this situation in October, 1830, when the Cunards, still considering themselves creditors of the Jewetts, and anxious to obtain better security for their debts, requested them to execute the new conveyances, including property in the old ones, as well as all the new estate, and extending down to the smallest articles, even to a "hammer" and "log canoe." The conveyance of the personal property bears date the 11th of October, 1830, and that of the real-estate September 30th, 1830, while the agreements on the part of the Cunards are dated the 1st of October, 1830. In order to remove any doubt that this transaction was but one throughout, though bearing different dates, and was designed only for security for the debts due the Cunards, the managing partner in his answer adds, "The execution of all the papers was one transaction, and according to the agreement between the parties before any papers were drawn," and further, "It was one agreement and one transaction." Next as to its being an agreement for security for a debt, and not a sale or mere special contract, it will be seen that the firm in the answer of Joseph, who was the acting partner in it at Chatham, admits that the previous confession of judgment was "for the security of the amount due said company from said Jewett:" that before the conveyance in October, "justice to himself and firm required that some arrangements should be made for the security of said debts, etc.," and after ascertaining the amount due, it was agreed between the parties that the said complainant should execute a deed of certain real and other estate, viz.: "lands and right of pre-emption under minutes in council to this defendant, and said Joshua and Bryce should execute a bill of sale of their personal property to said company, and that said company should execute a written contract and

agreement with said Jewetts, agreeing to reconvey said property, real and personal, upon certain conditions, which said agreement between the parties was, on said first day of October, 1830, carried into effect and said deed, bill of sale and contract were accordingly executed and delivered, and copies thereof are hereunto annexed and marked 'A,' 'B' and 'C,' respectively, and this defendant prays that the same may be taken as part of his answer. And this defendant further says that the terms of said contract marked 'C,' were not only satisfactory to the complainant at the time, but were actually proposed by him in the first instance, and assented to by this defendant, on behalf of said company, and this defendant was not only willing that said Jewett should redeem all said property, by the payment of their debts to said company, according to said contract, but was so desirous that said Jewett should redeem said property, that he actually and voluntarily proposed to them the terms of another and additional agreement on the part of said company, by which said company agreed to remit five hundred pounds of their debt, on being paid the residue thereof within a certain time, and the said company, by this defendant, executed and delivered to said Jewett a written contract to that effect, a copy of which is hereunto annexed, and marked 'D,' and this defendant prays that the same may be taken as a part of his answer." As additional proof that the object of the parties, standing, as they did, in the relation of creditors and debtors, was in all these contracts, the last no less than the first, merely to secure the payment of the debts, the conveyance of the personal property says, ipsissimis verbis, it was as "security for the payment of the said sum of money above mentioned." And the contract as to the real as well as personal estate, recites, that, after payment, the Cunards will "return and redeliver it," and "faithfully account" for such parts of the personal estate as they shall "dispose of in part payment" of the debts, etc., but not be liable for any of it lost by "accident or casualty." And there is no evidence whatever, or even a pretence, that prices were affixed, or agreed on, for any of the property, real or personal, in the last conveyance, any more than the previous ones, or any debts whatever, cancelled, or any money paid, or receipts, or discharges of demands given when any of the writings were executed. The whole arrangement, then, in equity, however it might be in law, must be considered a mortgage rather than an absolute sale, and rather than a mere special contract strictly to be fulfilled, or else to be treated as a nullity. Bentley v. Phelps [Case No. 1,331]. See Shapley v. Rangeley [Id. 12,707]; Hunter v. Marlboro [Id. 6,908], and cases there cited; Flagg v. Mann [Id. 4,847]; 2 Story, Eq. Jur. § 1018; 4 Kent, Comm. 142. This conforms to the spirit of another stipulation, that the loss of any of the personal property by "accident" should fall on the Jewetts and not the Cunards. But unless it was a mortgage, such a stipulation would be either absurd or oppressive, as making a vender liable for losses after he had parted with the title entirely. Regarded as a mere security for the debts, these conveyances then show the amount due, and render it just that the grantee, on having his debts satisfied, either by income or sales of the property, should account for the rest by a reconveyance of the residue of the property, or if sold, by refunding its value. In this way it would operate like a mortgage, or pledge to secure a debt, with a power to sell and account. And the transaction, viewed as a whole, was meant to accomplish the payment in this way, though if paid in any other, there was another separate written arrangement to make a large deduction of money provided it was done within a given time. In both of these arrangements, if the parties looked further than security, and agreed for payment to be made by a particular day, as they do in cases of ordinary pledges and mortgages, equity will always step in, as it should, and prevent a forfeiture or penalty by non-payment at the day, if that payment be only made afterwards and interest, within such reasonable time as the laws allow to relieve debtors against accident or misfortune in not paying at the precise day, in case of pledges and mortgages. 1 Spence, Eq. Jur. 602, 604. This constructive relief is believed to have been the practice ever since the early portion of the seventeenth century in England, and became a settled part of the civil law as early as the fourth century. 1 Ch. R. 11.

It had been regarded as irreligious and contrary to good conscience, to take advantage of a forfeiture for non-payment at a particular day, ever since the council of Lateran, A. D. 1178. 1 Spence, Eq. Jur. 601. The courts of law resisted this construction, and this kind of relief, while it was gradually adopted in courts of equity. And though the common law judges in the sixteenth century refused, after a long conference, to acquiesce in the views of Lord Chancellor Moore, in favor of relief against penalties in bonds, he is said to have sworn "by the body of God"—that in chancery he would issue an injunction, if they continued to pursue the course of refusing to remit the penalty in such cases (Coop. Ch. Prac. 223), and now scarce a state in this Union, where no chancery court exists, has omitted to provide for such relief, in both bonds and mortgages, in cases at law. If the parties ever stipulate to prevent redemption, or prevent an account, as is done about the latter in one of these conveyances of personal estate, equity still relieves the party, if the transfer was clearly a security for a debt. Vernon v. Bethell, 2 Eden, 113; 2

Ball & B. 278; Gordon v. Lewis [Cases Nos. 5,613, 5,614]; 2 Story, Eq. Jur. § 1019; Co. Litt. 204, note; 4 Kent, Comm. 1426, 1424; 7 Watts, 261; Coote, Mortg. 21; 1 Spence, Eq. Jur. 604. Any other course would tend to usury to the borrower, so often a slave to the lender, or oppression on debtors generally, too often the victims of creditors. This view, being the correct one, it follows that the respondents are liable, not only for all their actual receipts, but for all which they might, by due diligence, have realized. This is well settled. See Upham v. Brooks [Case No. 16,797]; Jenkins v. Eldridge [Id. 7,268]; Taylor v. Benham, 5 How. [46 U. S.] 233. What a trustee loses by supine neglect, or gross inattention, he cannot justly refuse to account for. See cases in Taylor v. Benham [supra].

Here the plaintiff goes so far as to contend that in all the years, the income and sales of the estate have been such as to conform to the requisitions of the contract, even if regarded strictly and specially, and independent of the conveyances being mere securities for a debt. We shall, therefore, proceed to examine the case in that aspect, as well as the other, though if not proving to be rigidly complied with, the whole transaction, as a security for the debt, will also be considered at the same time, and if the debt and interest have been satisfied, or should have been upon equitable principles, under the stipulations of the contracts, any balance remaining ought, in our view, to be accounted for by the respondents. 4 Kent. Comm. 304; Humph. Prec. 16. Some objection is made to our doing this, on the score of jurisdiction. But this course is not taking jurisdiction over the subject, as one of fraud, and where as good a remedy exists at law, for mere damages, as in equity. 28 Me. 532. It is rather, in one view, taking jurisdiction over a case of the specific performance of a contract. That is, over a contract to pay certain balances back, or make reconveyances after paid, and in default of either, it is to enforce a specific performance, if practicable, and if not, to give damages as an indemnity. And in another view, it is exercising jurisdiction over a trust growing out of a mortgage, with power to sell, and making the trustee responsible only for receipts and gross neglect, as he should be, whenever they have happened. 4 Kent, Comm. 136; 1 Term R. 445; 5 Paige, 18; Taylor v. Benham, 5 How. [46 U. S.] 233; 12 Ves. 493. Among other things, it was here expressly provided, that if the income fell short of the amount agreed, either through "neglect" or mismanagement of the Cunards, it was to be deemed no breach by the Jewetts, and the time of payment was to be extended. The jurisdiction, in either of these views, is an ordinary one in equity, and entirely clear, as chancery powers extend peculiarly to specific performances, and to all trusts and mortgages. Watkins v. Holman, 16 Pet. [41 U. S.] 25; 4 Kent, Comm. 308. And the last need not be called, either, in the bill, if the facts, set out and proved, make them so. See 10 Johns. 395; 1 Ves. Sr. 491. It also may be proper for chancery, as a case of accounting between persons having a community of interest, and one acting as bailiff or receiver of the rest. A confidence is then reposed, which justifies a resort to chancery, and a discovery, whether under oath or not, of matters not equally in the knowledge of both. 1 Story, Eq. Jur. § 462, note; 6 Ves. 136; 5 Ves. 87; 12 Price, 502; Pierpont v. Fowle [Case No. 11,152]. These constitute the "stress," as Newbury calls it, upon which the case properly comes to the court on its equity side, and not a demand merely for damages, on account of any fraud or misfeasance which would be allowed at law. 1 Spence, Eq. Jur. 430; Harg. Law Tracts, 444; Warner v. Daniels [Case No. 17,181].

Proceeding then to the other material questions, the next one is, was the contract by Joshua Jewett to pay a certain sum yearly complied with, and the debt thus extinguished, and a balance left belonging to him, or regarding the transaction as a trust and mortgage, have the income and sales of the property been more than enough to discharge the debt and interest? This is a complicated enquiry, and after the lapse of so many years, difficult, tedious and surrounded by much conflicting evidence. But it is our duty to eviscerate from the mass of evidence and circumstances what is as near the truth as may be, though after all, the result will probably be only an approximation to it, rather than possessing much exactness and certainty. The best course will be to examine the first year by itself, because it is the test year, looking to the case as one of an independent special contract, and also as some guide for the other years, looking to the whole as a mortgage or trust. It was more a test also, because showing the real income, when there were persons, like the lessor and lessee, of antagonistic interest, to fix the prices and quantities of both what was bought and sold, and of united interests, likewise to make the income near what it should be, as both would thus realize more gain, and as one of the lessees was one of the cestui que trusts, and hence under double inducements so to manage and control as to increase the net proceeds. The accounts exhibited by the Cunards themselves, show a loss to the farm or estate for that year, of only £38, 4s, 1d, charging against it £390, 8s, 8d, a new debt due from the lessees personally. But the Cunards took the notes of the lessees for that debt, one of which was afterwards given up or paid, and the other in part satisfied, if not entirely, and no reason appears to exist for charging it to the estate, though not yet paid. Correcting that

error, then, the admitted balance on the account would stand in favor of the estate, £307, 4s, 7d, for the first year. The respondents concede, also, that there was on hand half the produce of the farm, for the season previous, which they afterwards credit at £111, 8s, 9d. This is, however, crediting the hay at only 60s per ton, when in other transactions hay is sold, and it is credited by themselves at 80s, which last price even, is rather lower than the average testimony on both sides, and allowing only that 20s more per ton for thirty tons, is £30, making the produce equal to £141, 8s, 9d. This added to the other £307, 4s, 7d, makes a balance of £448, 13s, 4d. Besides this, three oxen are credited for beef that year, and a new pair bought and charged. I think this charge allowable, as they may have been needed in the place of others. But the latter are put at the rate of one hundred per cent. higher than the others, when, for aught which appears, their value was alike, or nearly so. The first oxen, when killed for beef, should, therefore, be credited quite one hundred per cent. higher than they are, so as to be equal in price to that charged by the Cunards for other beef that year and the next. This requires £47 more, including, in a like ratio, a fat cow killed. To this should be added two oxen allowed to die that year from neglect and starvation, and several swine, at least £40, and one cow sold..... £ 4 10s

40

47

These make ..... £ 91 10s

To this add as before..... 448 13s 4d

All these amount to..... £540 3s 4d

Now, sanctioning the trade in horses, which may have been useful and competent, under the power to sell and buy, granting the repairs and the work on the shop, as the economy in managing the farm the ensuing years, as well as that year, were probably improved thereby, and the sales of it higher in 1834, and not deducting several questionable items, such as horseways, chain-traces, etc., etc., because in some views permissible, and these matters will continue to stand in the account, except that the commissions of £7 on the duties paid are not admissible, and the repairs of £15, 9s, 6d. are more properly chargeable to the year A. D. 1834. Add these to the £540, 3s, 4d, and the aggregate balance is £572, 12s. The pound in New Brunswick is about $4.00 of our currency. The net income from the estate in all ways, realized the first year, would be about $2,290. I do not think it necessary for the account in the first year, standing by itself, to discriminate exactly between what was mere rent, and what were receipts from sales of property, and the value of what should have been realized, and what was lost by neglect. The Cunards were to apply the first year all which could be "realized out of said real and personal estate," by due attention and care. If let, it was to be let to hire, "to the best possible advantage," and there is no discrimination, in the contract, between what was to be derived from actual rent or otherwise, but all realized is embraced under "rents and advantages," and the obligation "to faithfully account" for the personal property. Nor should the respondents complain of this, when they themselves, beside rent, have credited the cattle killed to the estate the first year, and when, if they pay such items then, as were then realized, or might have been, or were then lost by neglect, they will not be obliged to account for them again at the close of the transaction. Under the special contract, the amount to be realized the first year, was £550, or $2,200. It will be seen that there was, or should have been, actually realized, under our computations, $2,290.40, making an excess of $90.40. More might be added in some views, and some in other views subtracted. As, for instance, I do not add to this anything for the larger quantity of lumber that many witnesses testify might have been got in and sawed there that year; nor anything for the higher prices which ought to have been allowed for that actually sawed, as several others testify. Because there is evidence that the complainant assented to the employment of Bryce Jewett as one lessee, and also to Beck, who joined with Bryce, though he preferred Varrel, I think that after such an assent, it is not competent for him to complain of the general results under their joint lease, though he is still at liberty to show specific neglect and losses caused by their inattention, which the Cunards should have made them liable for, and which the complainant could resort to the Cunards for. Standing thus, then, the first year, regarded under the contract as a special one, accomplished all required of it. And J. Cunard, instead of declining to settle with the complainant, as he did, instead of refusing to credit to him anything, instead of allowing what was proper, amounting to a large sum, as then claimed by Jewett, and not fabricated since, should have made an exhibit of all the accounts that year such as is now annexed to his answers. He should have then examined the complainant's claims, as presented in January after, and attempted to come to an amicable arrangement for that year, and made some mutual agreement who should control the estate under the Cunards the second year. But Cunard, on the contrary, peremptorily refused to allow anything. He did not consult the complainant as to whom he should employ the second year. He failed to obtain a lessee the second year, who was agreeable to him, deprived Bryce Jewett, one of the former lessees and parties in interest, and nominee of the complainant, of all control over the es-

tate, though permitting him to work there some as a hired man, and gave the immediate superintendence and management to Beck, on monthly wages, though he had acquired the character with many, by his conduct the first year, of an incompetent and unfaithful manager. This last is dissented to by others, but the results of his superintendence afterwards, when alone controlling at Ludlow, though his brother-in-law supervised him from Chatham, served still more strongly to show his unfitness, when alone, for such a position. They do this, even if looking only to the exhibits made by the respondents themselves.

The whole estate is represented by them in the second year, as running itself in debt near $2,640, instead of yielding any net income, and this, though it is admitted to have produced such an income the first year, of $350, and did in truth produce one of near $2,000. Again, after this disastrous result the second year, Beck was still retained in control the third year, and no notice given to the plaintiffs of this great loss. Another loss is exhibited of near $2,000 more, and yet Beck retained through most of the fourth year, with like returns of indebtedness and loss, and like neglect to notify the plaintiffs. Again, the very idea of a large real-estate, estimated in value at near $20,000, and perhaps justly at over $10,000, and personal estate estimated at $4,000, being not able to be made to yield any rent whatever, but subjecting the owner to a necessary loss of $2,000 a year, is almost incredible, when the estate, as here, consisted of some nine hundred acres of land, besides a timber lot, near one hundred and sixty of it in mowing, tillage and pasture, cutting from fifty to eighty tons of hay yearly, having valuable mills, and a stock of thirteen oxen, seven cows, six horses, and over thirty sheep. So the idea is almost absurd, that when several witnesses were willing to run the mill at the halves, and others to give rent for the estate, and when it has been at times rented in both ways, the management could have been good or faithful, which not only failed to produce any rent, but run it in debt over $2,000 a year, in both the second and third years, and in like proportion for the fourth. Next, beside the use for nothing, of all the land, cattle and horses, and mill, it is remarkable that the lumber is made to cost per thousand over $18.00, when the usual cost is less than $8.00, and when it was all sold for less than $9.00, only about one-half its cost. Under the exhibits here, we have no means of computing any details as to the number of men employed, or their wages, or the actual price of their board. But the probability from the exhibit is, that quite double the usual quantities were either consumed or wasted, and it is certain that the result must early have admonished a prudent man, who closely supervised the matter as trustee, that he should employ Beck no longer, or if he believed the great deficiency to arise, not from Beck's incompetence or neglect, but the position and condition of the property, should stop carrying it on longer, and let it lie idle, as much the most profitable course to both the creditors and debtors. At least it would then run neither in debt till the two Jewetts could be and were further advised with, and their wishes consulted. But notwithstanding all this, it appears by the respondents' own exhibits, that while the gross charges increased yearly, and the gross receipts diminished yearly, and instead of any income, larger debts were accumulating, yet he pushed on, and no change of agent was made, nor any stop put to so ruinous a career.

| These gross charges— | | Receipts of lumber |
|---|---|---|
| in 1831 were..... | £1,031 | 327,227 feet |
| in 1832 ..... | 1 349 | 293,075 |
| in 1833 ..... | 1,388 | 265,673 |

As the case now stands, we have ascertained not only the income the first year, but the facts are entirely defective to exonerate the trustee from being chargeable with neglect and ruinous mismanagement by those employed under him in the subsequent years. It follows, therefore, necessarily, that we must enquire into, not merely the actual receipts and expenditures during the subsequent years, but what they should and would have been, under a careful and faithful supervision. One of two courses must be adopted in order to ascertain what the just amount is, to charge the trustee with, during those subsequent years. Either we must have each item of debt and credit scrutinized, and the proper amount fixed on special evidence, and then add to our sums against the trustee all lost by clear mismanagement and neglect in each particular, or we must endeavor to reach a like result, near as may be, by the general data and evidence now before us. Attempting this last, I see no course so obvious and apparently just under this view, and indeed under the general aspect of the whole case, as to take the year, which can be ascertained as to its true income, for the general guide in relation to the others, charging the trustee then with the amount already ascertained to be proper for the first year. I think the three subsequent years should correspond to that, after making suitable allowances and additions, required by the evidence and the nature of the case, in order to reach the true annual income. All charged the first year, is not income of that year, but in part sales, losses, crops on hand, etc. Such a course is likely to be as near what is just to the complainant, as a minute and expensive scrutiny and proof about every item, nor can it be oppressive to either side. It will give to the former no more than was actually realized the first year by the respondents, after correcting what was not annual income, keep-

ing the temporary distinct from the permanent, and will devolve on the respondents no greater charge than they actually credit to the farm the first year, making all appropriate amendments and additions. How much of this may be regarded as real rents, how much for advantages not improved from neglect, and how much for personal property sold, is not very material to the final result, but is properly discriminated in fixing what is technically annual income, but will be obvious enough on an analysis of the case, and the accounts rendered and printed with the record.

Let us then attempt to make the proper corrections in the aggregate charge for the first year, as a guide to the subsequent years, in respect to the true annual income. The complainant has been shown to be entitled to $2,290.40 for the first year, for every advantage enjoyed by Cunard in that year. But it is manifest, on a little enquiry, that though this was the entire sum which was then realized, or ought to have been, by the trustee under the lease, yet it was not the exact or net sum which the estate was likely to have yielded him as mere annual income, under good management, had he carried it on in person, nor what it was likely to yield in the three subsequent years. In that year £390 were lost by the lessees, to appearance on the accounts, but the real loss was less, as this was subject to a deduction for half the crops they had on hand, which belonged to them, being, as before seen, under the corrected prices, about £141, 8s, 9d. They also received other credits for work and services in that year, and lumber, some of which were not deducted at the settlement, but credited in the next year at about ..... £ 73

| | | | |
|---|---|---|---|
| | 141 | 8s | 9d |
| | £214 | 8s | 9d |
| From the apparent loss.... | £390 | | |
| Deduct ..... | 214 | 8s | 9d |
| And the balance lost is..... | £175 | 11s | 3d |
| Deduct from the whole receipts of 1830–1 credited.. | £572 | 12s | 0d |
| | 175 | 11s | 3d |
| And ..... | £397 | 0s | 9d |

is the balance as net gain to the farm for annual income the first year. But in this are still contained some items, not strictly annual income, though properly chargeable to Cunard in that year, such as cattle sold or killed over those bought at prices in the account ..... £ 15 0s 0d

| | | | |
|---|---|---|---|
| So crops on hand in October, 1830 ..... | 101 | 0s | 0d |
| So cattle and swine lost by neglect ..... | 40 | 0s | 0d |
| | £156 | 0s | 0d |
| Deduct this from the..... | £397 | 0s | 9d |
| | 156 | 0s | 0d |
| And it leaves..... | £241 | 0s | 9d |

as net annual income, without additions from other sources.

From this some other reductions might be made, in some views, and under others, some additions made to it. Thus it might be reduced more for a guide for coming years, as there was some less stock to be rented out to yield an income. But that seems quite overbalanced by the neglect to keep the remaining stock in good order for the production of young, and for which no separate charge will be made in the ensuing years.

Let us then take this corrected and reduced sum of £241, 0s, 9d, as the standard, and it seems to me a moderate standard, for the mere annual income during the ensuing years.

| | | | |
|---|---|---|---|
| Following it for the second year, it constitutes the first item for that year..... | £241 | 0s | 9d |
| Add for stock sold in that year to be accounted for.. | 102 | 15s | 0d |
| | £343 | 15s | 9d |

This last is the aggregate, properly chargeable to the trustee for the second year by analogy to the first one, after all due corrections for this purpose.

| | | | |
|---|---|---|---|
| For the third year, a like sum as annual income, without the stock sold.... | £241 | 0s | 9d |
| Add for stock sold and other items credited to that year ..... | 229 | 14s | 0d |
| They make united..... | £470 | 14s | 9d |
| For the fourth year, ending at the sale in June, and business nearly finished, charge as the second year, without stock, viz..... | £241 | 0s | 9d |

The four years would then stand at income from land and mill, and stock sold or lost, or killed, in each year:

| | | | |
|---|---|---|---|
| First year..... | £ 572 | 12s | 0d |
| Second year..... | 343 | 15s | 9d |
| Third year..... | 470 | 14s | 9d |
| Fourth year..... | 241 | 0s | 9d |
| Aggregate ..... | £1,628 | 3s | 3d |
| Add personal property sold in June, 1834, deducting lumber and work and seed then on the farm..... | 482 | 3s | 8d |
| Personal estate not then or before acounted for..... | 65 | 0s | 0d |
| Sale of real-estate..... | 2,150 | 0s | 0d |
| Total ..... | £4,325 | 6s | 11d |
| Interest on these from time due till 1st July, 1834.... | 165 | 0s | 0d |
| Whole ..... | £4,490 | 6s | 11d |

| | | | |
|---|---|---|---|
| On the contrary the original debts were | £2,884 | 16s | 11d |
| Paid by Cunard towards one lot swine | 33 | 0s | 6d |
| Work on the shop done in the 1st year | 15 | 9s | 6d |
| (There are other losses charged for various claims and operations, none of which accompanied by any evidence to render them allowable.) | | | |
| Aggregate debt | £2,933 | 6s | 11d |
| Interest on this, chiefly from 1st October, 1830, to July 1st, 1834 | 700 | 0s | 0d |
| In all | £3,633 | 6s | 11d |
| Deduct this from the receipts | £4,490 | 6s | 11d |
| | 3,633 | 6s | 11d |
| Balance | £ 857 | 0s | 0d |

This is near $3,428.12. The whole sum due from the respondents being $3,428.12, of this, seven-eighths, which is the share of the plaintiffs, would be $2,999.62. Interest on this for thirteen years and a third, is about $2,399.40. This makes now due, in all, about $5,399.

To show that some other considerations have not been overlooked in coming to these general conclusions, a few further explanations may be proper. Thus I should feel disposed to deduct from this quite ten per cent. for the increased expense and difficulty likely to exist yearly of obtaining logs. While, on the contrary, something seems chargeable on the evidence even the first, as well as subsequent years, for neglect and unfaithfulness in not getting so much lumber out and sawed yearly, as the business and mill, well managed, could have realized, and, in the next place, for not accounting for so high prices as might be proper, if the accounts of the sales by Cunard and Company were exhibited. It is the duty of the trustee to exhibit those sales, if he would discharge himself. He acted for others, as well as himself, and should not expect them to rely on prices put down at his pleasure, not giving to them any validity by an actual agreement or assent of either of the Jewetts, or any lessee, to this amount; or by any proof that he realized no more net value from the sale of that or similar lumber, in those subsequent years. As to the quantity of lumber, also, the evidence is in favor of the mill being able to cut six hundred thousand yearly, instead of less than three hundred thousand, the quantities accounted for. The quantities received in some previous years from the complainant, are no true guide here, as in those years he had but half the proceeds sometimes, and but a quarter at others, and worked more at square timber. But the year we have adopted as a guide was one devoted to this business exclusively, was under lessees interested to get higher prices and a large quantity, and though both were, perhaps, less, from Beck's inexperience and want of attention, yet, under all the circumstances, and under a general view, it is better to let the result in the first year govern, without adding to it either quantity or price, or deducting from it anything on account of any increased scarcity or distance of the timber. These can stand set off against each other, and must, unless a master goes into an expensive and protracted inquiry. Where precise data are not attainable in a complicated account by a trustee or mortgagee in possession, if any fixed and pretty certain general grounds can be obtained, they are the truest clue and guide amidst a labyrinth of contradictory evidence. The first year furnishes some such grounds here, as in that year parties in interest existed, who had the control, and were consulted on both sides, and were competent to fix the prices properly, both of what was bought, and what was sold, and paid high, even ten per cent. addition for what they bought of the Cunards. But in other years, the respondents charged what they pleased, both in price and amount, credited what they pleased, and forbade Bryce Jewett, one of the debtors, to be present at the surveys, in order to secure more of the lumber from being put down as refuse, and thus largely reducing its price. It is proved, likewise, that some persons did secure themselves against this result, by being present and remonstrating with the surveyors at Chatham. It is shown, also, that the Cunards required the lumber to be as much as possible in deals, which prevented a survey of so much clear stuff as there otherwise might have been with higher prices.

Considerations like these, in the absence of more precise testimony, show that no injustice is likely to be done to the respondents by taking the first year as a guide in respect to the lumber, without addition or subtraction, and allowing some apparently reasonable differences from it on both sides to stand counterbalanced by each other, nor can the complainant object to that, when his own son and co-debtor was one of the lessees in the first year, and acting as such, under his approbation. On the other hand, too, as a test for the subsequent years, it is to be considered that the Cunards have no ground to object to this, as they are in this way required to account for only what they received and ought to have realized, judging from an actual experiment made the first year, and in addition to that, are allowed their own profits on all the supplies furnished, and on all the lumber received and sold by them from this estate. These pay them well without, and instead of, other commissions, which are seldom to be charged by trustees in such situations. Another general test of the correctness of this general result, as between these

parties, is its conformity to what ought to be expected from the situation and value of this property. If the value of the whole was as large as estimated by Jewett, the net proceeds we have computed would not be two per cent., not one-quarter as much as might be anticipated from very productive estates of that value. While, if the value was only about $15,000, six per cent. on that would be $900, which is but little over the annual income fixed by us, deducting losses by stock sold and starved, and credits for some crops on hand at the beginning of the year. The whole real and personal estate may have been worth something less than $15,000. The estate sold in 1834 for somewhat less than that, but adding the portions of the personal estate, which had been disposed of and lost, not less, by a sum greater than might be expected, after the property had been in such a wasteful and ruinous management, and bad reputation as it acquired during the few previous years. On the other hand, it is hardly credible that an estate consisting of three or four thousand dollars of productive personal property, cattle, horses, sheep and swine, and of land that yielded sixty tons of hay per annum, and the potatoes, oats and wheat and pasturage this one did, with a new saw-mill and a privilege to cut logs from the reserve at so low a duty, could be supposed to yield much less than six per cent., or be much less in value in the aggregate in A. D. 1830, than from $12,000 to $15,000. At all events, nobody could believe it would yield nothing whatever, of net profits annually, and for a series of years must run a prudent possessor in debt some $2,000 annually.

It has been asked how the debtors in this case could be possessed of so valuable an estate, beginning in 1820 with small means, and cultivating it but ten years; and if it was so valuable, how Jewett became so much in debt to the Cunards. The answer is very obvious, and rather sustains than impugns this supposed value. The debts were incurred in getting means to help to pay for this very estate, and to improve it by erecting mills, houses, barns, etc., and stocking it, and these constituted a large portion of the $11,000 debt, and were incorporated into their value. Add to this the labor of Jewett and his two or three sons for ten years, allowing the rest of his family to maintain themselves, and ample means exist to make up our $15,000 or $20,000 and some losses which Jewett sustained in 1826. But take a different method of arranging these accounts and claims for damages by neglect. If all these data and guides to general results for the years subsequent to the first one were abandoned, and if we were to require any apparent neglect in not cutting sufficient lumber, or getting sufficient prices for it, to be atoned for, and a minute examination of details and contradictory evidence in other things was instituted, the result, as computed by the plaintiff, would be much more favorable to him, while the respondents insist it would exonerate them from paying over any balance. The truth, in this way, could not, therefore, be attained, probably, without much more delay, evidence and expense. More light on several particulars could undoubtedly be flung on the case by more evidence which exists, and is in the power of the parties, but has not been laid before us. But the conclusion could not probably be much varied by such a protracted inquiry before a master, as only a few of the special points involved could be submitted, and acted upon by a master, and no motion has been made on either side to submit further evidence to the court, whose duty it is to decide everything material. We must, as we have, decide what are the true constructions of the contracts and conveyances, the question of our jurisdiction over them, and the fact of negligence by the respondents, and their liability for what would have been made from the property yearly, by greater attention and economy, no less than for what was actually received by them. Nothing is proper, in a case like this, to be devolved on a master in any sound view, except mere matters of debt and credit. 1 Spence, Eq. Jur. 364. The twelve masters were originally designed as a sort of jury in chancery for that purpose, whenever the court finds occasion for it, and has not the means of stating the account before it, and a master is generally appointed, if desired and convenient. But here it is not necessary, when, as already shown, we have before us means, and have used them, for reaching what is probably just on the general data and general principles we have been considering. Yet if a master was desired here, by both parties, each thinking the result could, on more detailed evidence, be made more satisfactory, I would cheerfully appoint one, as neither could, in that event, complain of the additional delay and expense. But otherwise it can hardly be justified.

I have thus given some views of the merits, resting chiefly for the last years on general considerations connected with the first year. But we have not been inattentive to the details on the evidence as now standing, and if obliged to dispose of it on the present testimony, rather than the general data already suggested, the result would be a still larger balance against the respondents. It would arise on account of the neglect to improve all the advantages of the timber and mill, and of which the weight of evidence shows them to have been susceptible, and on account of the low prices allowed for the lumber, with no account of its sales produced, and the apparently extravagant and wasteful amount of supplies furnished to Beck. But the other mode of fixing the balance, we consider less liable to error, where the testimony is so contradictory, the lapse of time since so long, and the proof so defec-

tive, as to the necessity for such an extraordinary quantity of supplies, for such small results. Of this general balance, the complainant, as before suggested, is entitled only to seven-eighths, and till further evidence is laid before us, the other eighth must be left to be decided in another proceeding, if it be still unsettled between Bryce Jewett and the respondents, or in this case, if it may hereafter be presented, under proper pleadings and expositions made in behalf of Bryce against his co-defendants, the Cunards. Decree for Joshua Jewett for the amount before considered as proper.

At the subsequent term, in May, 1848, a question arose as to costs between these parties in an action at law, which had been instituted between them as early as October, 1839. It was entered in the state court, and afterwards transferred by the defendants to the circuit court. It contained counts for money had and received, for money paid, and one on the final agreement made October 1st, 1830, between these parties, which is the chief ground of recovery in the bill in chancery just reported. This last count sets out most of that agreement and the debts, and conveyance of property by Joshua Jewett separately, and Bryce separately in some cases, and in others by both together, and avers that, in consequence of them, a promise was made to carry on and use the farm, mills and others property to the best advantage, that the defendants took possession of the property, and it ought to have realized the sum stipulated, and was held long enough to yield it, if properly managed. In conclusion, there was an averment that it did yield enough, and that the plaintiff demanded a reconveyance, which the defendants refused, and sold the property for a large sum of money, viz. $100,000, which, though requested, they have never paid over to him. When the original case came on for trial here, October term, 1843, the presiding judge thought the parties had better agree to a continuance of the action at law till a bill in chancery could be instituted, and the merits of the claims and accounts between them be more fully and justly examined in that way than in an action at law. Accordingly, a written agreement was signed between them to carry into effect that recommendation, a copy of which is annexed.

(Copy.) "Jewett v. Cunard. It is agreed in the above suit that Edward Kent and W. P. Fessenden, counsel for the defendants, will appear and answer for said defendants to any bill in equity which may be brought by Joshua Jewett and Bryce Jewett, or either of them, in the circuit court of the United States for Maine district, against said defendants in relation to the subject matter of the aforesaid suit, within six months next ensuing, not waiving any exceptions that may be taken to said bill. It is also agreed on both sides that the aforesaid suit at law, between Joshua Jewett and said Cunards, shall be continued without costs after this term, until a final decree in said suit in equity, and if, by the decree therein, and in the opinion of the court, it shall appear that said suit at law could have been maintained against said Cunards, costs may be allowed said Jewett, if, in the opinion of the court, he would have been entitled thereto—otherwise, costs are to be allowed said defendants, if, in the opinion of the court, they would have been entitled to the same, either from defects in the form of said suit, or upon any other legal ground, properly to be considered in said question of costs. (Signed) E. Kent. W. P. Fessenden. F. Allen. F. D. L. Fessenden. Circuit Court, U. S., October Term, 1843, Maine District."

Under this agreement each party now moved for the costs in the action at law, which had accrued before the bill in equity was brought, and the motion was argued by

Samuel Fessenden, for plaintiffs.

Mr. Kent and W. P. Fessenden, for defendants.

WOODBURY, Circuit Justice, observed that the first objection was to the action at law being sustainable in the name of Joshua Jewett alone. But he felt satisfied that an action at law could be sustained on the special agreement by Joshua Jewett alone to the extent of his separate interests in the property. To that extent his own exclusive estate had been conveyed to the Cunards, and had been used and sold by them, so as to help with the rest to realize more than he was indebted to them, or which would have yielded more if properly managed. The correctness of this view is manifest, not only from the cases cited in the opinion on the bill in chancery, but in various other cases at law on contracts not sealed, and in which one of several promisees appears to have some separate interest, either on account of the consideration in part emanating from him separately, or the benefit in part being to him separately. Ham. Parties, 20, 21; 1 Saund. 154, note; Lilly v. Hodges, 8 Mod. 166; 13 East, 538; Farmer v. Stewart, 2 N. H. 97; 3 Caines, 53; [Hall v. Leigh] 8 Cranch [12 U. S.] 50; 2 Mass. 401. Though a promise in such cases is technically made to two, if it appears to be for the benefit of one, or is to be performed to one, he alone may sue. Place v. Delegal, 4 Bing. (N. C.) 427. From some cases this seems to be the rule, even in sealed instruments, such as covenants. James v. Emery, 8 Taunt. 245; Browne, Act. 118, and cases there cited. The proportion of the whole balance which Joshua Jewett ought to have recovered at law in this case might not be the same allowed in equity, as that sum was founded on an admission as to the true amount of all his interest, several and joint, and on the fact, not existing here, that his son, the other party in interest, was there-

one of the defendants. But the proportion out of the balance, which at law would belong to Joshua Jewett alone, might perhaps be in the ratio of his separate debt and separate property to the whole debt and whole property conveyed. There is no objection to the institution of as many suits on this one contract as there are distinct interests; and these would cause no more cost or litigation, than if there had been as many different papers, and a contract to each claimant or class on each of them, instead of all being on one paper, and in one contract. The test is the separate consideration and separate interest appearing on the face of the contract.

Another objection is, that Joshua Jewett, alone or with Bryce Jewett, could not, at law, have recovered on the special agreement, because the amount stipulated to be paid yearly on the interest in the property to be forfeited, was not received by the Cunards, nor able to be obtained by prudent and skillful management of the estate each year, till the sale. But we have already decided in the bill in equity, that enough to answer the stipulation was actually received the first year; and it is manifest from that case that more than enough was realized from the income and sales the last year. The other two years fell short, though partly from mismanagement, in which case of mismanagement it was expressly agreed that longer time should be given for payment. As this mismanagement was not the sole cause of the deficiency, I do not feel entirely satisfied that a recovery could be had at law on the special contract, as the declaration now stands, without an averment that the deficiency in the second and third years arose from mismanagement. Nor am I convinced that a recovery can be had at law on the general money counts predicated wholly on the special agreement, if it cannot be had on the agreement itself, or could not be had on it after an amendment of the count on it. But as no motion has yet been made for an amendment of the special count, it is not necessary to say more on that view of the question, and especially as the money counts apply to another view of the transaction more free from difficulty. That other view is this. The opinion on the bill in equity holds the transaction as a whole to have been a mortgage with a power to sell the property and account for the proceeds. It considers that view clear in equity, and states facts enough to render it a mortgage at law, or at least to render the grantees liable in law to account for all moneys received, or able to be received by proper care in income and sales of the estate, beyond their debts. This liability is shown from all the writings in the case, including others than the special contract of October, 1830, and from the admission in the answers. If, therefore, on all the facts a balance of money thus remained in their hands, they were liable in law to refund it on the count for money had and received. This is the drift of the opinion and decree, though not there required to be gone into in detail, as in equity no question existed, that the conveyances were mortgages, with a power to sell, and a liability to account.

We are sometimes misled as to jurisdiction at law by the words "trust" and "trustees," over which equity has full jurisdiction. But still jurisdiction over them exists, likewise, at law for many purposes, and especially to close them up when all the objects of the trust are accomplished, and a balance in money remains. Assumpsit ex aequo et bono lies for that balance, as here, so far as Joshua Jewett is separately interested. Because, by charging the respondents, first with the actual income, then with the deficiencies by mismanagement, and lastly with the proceeds of all the sales, the balance found in the bill remains to be accounted for and paid over, and would be recoverable at law. And though the second item is not money itself, it is an account chargeable by law, and if so charged with the income, as is proper, leaves a balance in money from the sales, which is appropriately subject to an action at law. Let judgment be entered for the plaintiffs, for costs up to the date of the agreement.

## Case No. 7,311.

JEWETT v. HONE.

[1 Woods, 530; [1] 2 Am. Law T. Rep. (N. S.) 97.]

Circuit Court, S. D. Georgia. Nov. Term, 1873.

COMMERCIAL LAW—FEDERAL COURTS — DECISIONS OF STATE COURT — WHETHER BINDING—ACCOMMODATION ACCEPTOR — SECURITY FOR DEBT — HOLDER FOR VALUE.

1. In passing upon questions of general commercial law the federal courts are not bound by the decisions of the courts of the state where the contract in question was made or is sought to be enforced.

2. An accommodation acceptor of a bill of exchange transferred before maturity, by the drawers in liquidation of their own preexisting debt, cannot defend an action against him on the bill by alleging that he was an accommodation acceptor only, and that the fact was known to the holders of the bill when they took it.

This case was tried by WOODS, Circuit Judge, and a jury. It went off on the motion of plaintiff to exclude from the jury the evidence offered by defendant to sustain his defense.

Thomas M. Norwood, for plaintiff.

Yates Levy and Geo. A. Mercer, for defendant.

WOODS, Circuit Judge. This action is brought by plaintiffs as holders, against the defendant as acceptor of a bill of exchange, of which the following is a copy: "$2,587.90. New York, June 25, 1870. Thirty days after date, pay to the order of ourselves, twenty-five hundred and eighty-seven 90/100 dol-

[1] [Reported by Hon. William B. Woods, Circuit Judge, and here reprinted by permission.]

lars, with exchange on New York, and charge the same to account of Christol & Struthers. To Mr. Wm. Hone, Savannah, Ga." The bill was indorsed by Christol & Struthers, and accepted by defendant. To the declaration upon this bill the defendant has pleaded the general issue, and a special plea to the effect that the acceptance was without consideration and for the accommodation of the drawers, and that the bill was given to the plaintiffs in liquidation of an antecedent debt due from the drawers to the plaintiffs, and that no injury or detriment has accrued to the plaintiffs, or benefit to the drawers or defendant by reason of said acceptance.

The facts about which there is no dispute are in substance these: On the 25th of June, 1870, Christol & Struthers were a firm doing business in the city of New York. They were indebted to the plaintiffs, John Jewett & Sons, who were pressing them for payment. Christol & Struthers, being unable to pay their indebtedness to plaintiffs, applied to the defendant, William Hone, of Savannah, for assistance, which he assented to give. To this end Christol & Struthers drew the bill in question, which was indorsed by Christol & Struthers and accepted by Hone, who was purely an accommodation acceptor, and received no consideration for his acceptance, and Christol & Struthers agreed with him to pay the bill at maturity. The bill so indorsed and accepted was before maturity transferred by Christol & Struthers, who were "hard pressed," to the plaintiffs, who were their creditors, "in liquidation of a debt due them, and the plaintiffs "received it for the amount expressed on its face." Jewett & Sons knew when they received the draft that Hone was an accommodation acceptor.

The question presented by the case should have been raised on demurrer to the sufficiency of the plea. Such demurrer was not filed, and the point in controversy is submitted to the court upon the motion of plaintiff to exclude the evidence of the defendant tending to establish his special plea. The point for our determination is this: Can an accommodation acceptor of a bill of exchange, transferred before maturity by the drawees in liquidation of an antecedent debt, set up as a defense to an action against him upon the bill the fact that he was an accommodation acceptor, that fact being known to the holders when they received the bill?

It is claimed by the defendant that the contract sued on is a New York contract, made and to be performed in that state, and that it must be governed by the law of that state. It is further insisted that by the law of New York, as set forth in the decisions of the courts, the facts set up in the special plea would be a good defense to this action, and we are cited to the following cases: Wardell v. Howell, 9 Wend. 170; Rosa v. Brotherson, 10 Wend. 86; Hart v. Palmer, 12 Wend. 523; Root v. French, 13 Wend. 570. Is this court bound by these decisions, admitting that they set forth the settled doctrine in New York? This question was raised, and decided in the negative by the supreme court of the United States in Swift v. Tyson, 16 Pet. [41 U. S.] 1, in which the court says, in referring to the same decisions cited in this case: "It is observable that the courts of New York do not found their decisions upon this point upon any local statute or positive, fixed or ancient local usage, but they deduce the doctrine from the general principles of commercial law. It is however contended, that the thirty-fourth section of the judiciary act of 1789, c. 20 [1 Stat. 92], furnishes a rule obligatory upon this court to follow the decisions of the state tribunals in all cases to which they apply. That section provides that "the laws of the several states except when the constitution, treaties or statutes of the United States shall otherwise require or provide, shall be regarded as rules of decision in trials at common law in cases where they apply. In order to maintain the argument it is essential therefore to hold that the word 'laws' in this section includes within the scope of its meaning the decisions of the local tribunals. In the ordinary use of language it will hardly be contended that the decisions of courts constitute laws. They are at most only evidence of what the laws are, and are not of themselves laws. They are often reexamined, reversed and qualified by the courts themselves whenever they are found to be either defective, or ill founded, or otherwise incorrect. The laws of a state are more usually understood to mean the rules and enactments promulgated by the legislative authority thereof, or long established local customs having the force of laws. In all the various cases which have hitherto come before us for decision, this court have uniformly supposed that the true interpretation of the thirty-fourth section limited its application to state laws strictly local; that is to say, to the positive statutes of the state and the construction thereof adopted by the local tribunals and to the rights and titles to things having a permanent locality such as the rights and titles to real estate and other matters immovable and intraterritorial in their nature and character. It has never been supposed by us that the section did apply or was designed to apply to questions of a more general nature, not at all dependent upon local statutes or local usages of a fixed and permanent operation, as for example to the construction of ordinary contracts or other written instruments, and especially to questions of general commercial law when the state tribunals are called upon to perform the like functions as ourselves, that is, to ascertain upon general reasoning and legal

analogies what is the true exposition of the contract or instrument, or what is the just rule furnished by the principles of commercial law to govern the case. * * * The law respecting negotiable instruments may be truly declared, in the language of Cicero, adopted by Lord Mansfield, in Luke v. Lyde, 2 Burrows, 883, 887, to be in a great measure not the law of a single country, but of the commercial world: 'Non erit alia lex Romae, alia Athenis, alia nunc, alia posthac, sed et apud omnes gentes et omni tempore una eademque lex obtinebat.'" This extract from the decision of the supreme court of the United States shows conclusively that we are not to be controlled by the decisions of the local tribunals of New York, in passing upon the rights of the parties in this action, even if these decisions were uniform; but they are not. Thus, in Warren v. Lynch, 5 Johns. 239, the supreme court of New York held that a preexisting debt was a sufficient consideration to entitle a bona fide holder, without notice, to recover the amount of a note indorsed to him, which might not, as between the original parties, have been valid; and the same doctrine was held by Mr. Chancellor Kent, in Bay v. Coddington, 5 Johns. Ch. 54. And the cases in 10, 12 and 13 Wendell, supra, have, by subsequent decisions of the supreme court of judicature of the state, been overruled. Bank v. Babcock, 21 Wend. 499; Bank v. Scoville, 24 Wend. 115. We think it clear, therefore, that in determining the liability of the defendant, we are to be guided by the rule of the general law merchant, and not by the shifting and conflicting decisions of any local tribunals.

Do the facts, then, as they appear in this case, constitute a defense to the action? We think the current and weight of authority sustain the doctrine that a bona fide holder, taking a negotiable note in payment of, or as security for a preexisting debt, is a holder for a valuable consideration, entitled to protection against all the equities between the antecedent parties. Swift v. Tyson, 16 Pet. [41 U. S.] 1; Cooledge v. Payson, 2 Wheat. [15 U. S.] 66; Townsley v. Sumrall, 2 Pet. [27 U. S.] 170; Atkinson v. Brooks, 26 Vt. 574; Poirier v. Morris, 20 Eng. Law & Eq. 103; Petrie v. Clark, 11 Serg. & R. 377; Gibson v. Conner, 3 Kelly, 47. In Swift v. Tyson [supra], the supreme court of the United States says: "It becomes necessary for us, upon the present occasion, to express our own opinion of the true result of the commercial law upon the question now before us. And we have no hesitation in saying that a preexisting debt does constitute a valuable consideration in the sense of the general rule as applicable to negotiable instruments. Assuming it to be true that the holder of a negotiable instrument is unaffected with the equities between the antecedent parties, of which he has no notice, only where he receives it in the usual course of trade and business, for a valuable consideration, before it becomes due, we are prepared to say that, receiving it in payment of, or as security for a preexisting debt is according to the known usual course of trade. * * * This question has several times been before this court, and it has been uniformly held that it makes no difference whatsoever as to the rights of the holder, whether the debt for which the negotiable instrument is transferred to him is a preexisting debt, or is contracted at the time of the transfer. In each case he equally gives credit to the instrument." In Atkinson v. Brooks, 26 Vt. 574, the court says: "But it has often been claimed that there is an essential difference in principle between taking a current note or bill in payment and as security for a prior debt then due. The transactions are certainly different in form at least. But it seems to me the ordinary case of taking such a security as payment, or as collateral to the prior debt, is the same in principle. One whose debt is due, in the commercial world, must pay it instantly, or he becomes bankrupt. If instead of money he gives a bill or note, either on time or at sight, whether this is in form payment or collateral to his debt, he gains time and saves the disgrace and ruin consequent upon stopping payment. And in either case there is an implied undertaking that he shall wait upon his debtor till the result of the new security can be known, and in both cases where that proves unproductive, the creditor may pursue his original debt, or he may sue the prior parties on the new security. * * * According to the general commercial usage there is no essential difference in principle, whether a current note or bill is taken in payment of it as collateral security for a prior debt, provided the note is in both cases truly and unqualifiedly negotiated, so as to impose upon the holder the obligation to conform to the general law merchant in enforcing payment." In Percival v. Frampton, 2 Cromp., M. & R. 180, Parke, Baron says: "If the note was given to the plaintiff as a security for a previous debt, and they held it as such, they might be properly stated to be holders for a valuable consideration." In Palmer v. Richard, 1 Eng. Law & Eq. 529, it was held that it was not material whether the note or bill be deposited as security for an advance or in payment. In Poirier v. Morris, 20 Eng. Law & Eq. 112, Lord Campbell, C. J., in giving judgment says: "There is nothing to make a difference between this and a common case where a bill is taken as security for a debt, and in that case an antecedent debt is a sufficient consideration." In the same case, Crompton, J., says: "Whether the bill was a collateral security or whether it had the effect of suspending the judgment of the antecedent debt is quite immaterial." Such is regarded as the settled law in Eng-

land at the present day, and most of the states of the Union have virtually adopted the rule as laid down in Swift v. Tyson, In Georgia, Gibson v. Connor, 3 Kelly, 47, expressly decides that taking such paper as collateral security for a prior debt, is sufficient to shut out equitable defenses. See, also, Reddick v. Jones, 6 Ired. 107; Allaire v. Hartshorne, 1 Zab. [21 N. J. Law] 665; Chicopee Bank v. Chapin, 8 Metc. [Mass.] 40; 3 Kent. Comm. 96; Allen v. King [Case No. 226].

We think that we are justified by the authorities cited, in holding that whether or not Jewett & Sons received the bill in question in absolute discharge of their debt, or as a security merely, they are holders for value. Were they bona fide holders without notice? On this point there can be no doubt. It is true that they knew that Hone was an accommodation acceptor, but the paper was transferred to them to accomplish the very purpose Hone had in view in making the acceptance. They are now only calling upon Hone to do what he agreed to do when he put his name upon the bill. To say that because Hone received no consideration from Christol & Struthers for the acceptance, and that plaintiffs knew the fact, does not release Hone, for as we have seen, the plaintiffs took the bill for value. To hold that because Hone was an accommodation acceptor, and the plaintiffs knew it, therefore the bill is not good, would be to strike a fatal blow at all discounts of negotiable securities for preexisting debts. upon such a doctrine, what would become of that large class of cases where new notes are given by the same or other parties by way of renewal or security to banks, in lieu of old securities discounted by them, which have arrived at maturity?

We are of opinion, therefore, upon the whole case, that the evidence offered to sustain the defense can be of no avail, and we therefore sustain the motion to exclude it from the jury.

JEWETT (HOSMER v.). See Case No. 6,713.

JEWETT (INGERSOLL v.). See Case No. 7,039.

## Case No. 7,312.

JEWETT v. LEAVENWORTH COUNTY.

[Cited in Adams v. Douglas Co., Case No. 52. Nowhere reported; opinion not now accessible.]

JEWETT, The JACK. See Cases Nos. 7,121 and 7,122.

JEWETT (LEAVITT v.). See Case No. 8,172.

JEWETT (ROGERS v.). See Case No. 12,012.

JEWETT (THOMPSON v.). See Case No. 13,931.

## Case No. 7,313.

The J. F. FARLAN.

[3 Ben. 206.] [1]

District Court, S. D. New York. April, 1869.[2]

SALVAGE BY CORPORATION—PULLING VESSEL OFF THE ROMER SHOAL—REASONABLE COMPENSATION—COSTS.

1. Where a schooner was ashore on the Romer Shoal, and was pulled off in less than two hours' time, by a steam-tug owned by a corporation incorporated for wrecking purposes, which had heard of the situation of the schooner and sent the tug down to her, and which claimed $3,000 salvage for the service, the schooner and her cargo being worth $23,000, *held*, that the libellants were entitled to reasonable compensation for the services rendered.

[Cited in The Stratton Audley, Case No. 13,529; Baker v. Hemenway, Id. 770; The Plymouth Rock, 9 Fed. 417.]

2. The fact that the vessels of the corporation were maintained for wrecking and salvage purposes, at heavy expense, and were often unemployed, was inadmissible as a basis of fixing that compensation.

3. Four hundred dollars should be allowed to the libellants, and, as it had been offered to them and refused, the decree must be without costs.

The libellants in this case were the New York Submarine Company, a corporation created by the laws of the state of New York, for the business of assisting and saving vessels wrecked and vessels in distress. The claim set up in the libel was for services rendered by the steamer Rescue, owned by the libellants, and by persons on board of that vessel, in the employ of the libellants, in towing the schooner J. F. Farlan, by means of a hawser, from off the Romer Shoal, in the lower bay of the port of New York, on the 4th of October, 1867. The libel propounded the claim as one of salvage, and demanded the sum of $3,000 for the service. The only service set up in the libel was, that the libellants, by means of the Rescue, put a wrecking crew on board of the schooner, and, at the request of her master, attached a line to her and hauled her off from the shoal, where she was aground. The circumstances relied on in the libel, as furnishing ground for demanding so large a compensation were, that the libellants maintained the Rescue and other vessels, and a large quantity of wrecking apparatus and material, and a large staff of skilled men, for the purpose of rendering assistance to vessels needing such assistance; that, if the schooner had not been pulled off when she was, she would have gone to pieces during the following night; that ineffectual attempts had been made, by two other steamers, to get her off, before the Rescue took hold of her; that the Rescue, a valuable vessel, and the valuable property on board of her, and her crew, were exposed to great hazard and peril in rendering the service in question; and that the schooner was of the

[1] [Reported by Robert D. Benedict, Esq., and here reprinted by permission.]

[2] [Affirmed in Case No. 7,314.]

value of over $23,000. The answer set up, that the schooner was in no danger, and was making no water; that the service did not occupy over twenty minutes; that the libellants were not entitled to salvage, or to anything more than a reasonable compensation, which the claimants had offered to pay; and that the demand for $3,000 was exorbitant, unreasonable and unjust.

J. E. Parsons, for libellants.
E. H. Owen, for claimants.

BLATCHFORD, District Judge. I regard it as determined, by the decision of the circuit court for this district, in the case of The Morning Star [Case No. 9,818], that the rule applicable to claims for services rendered to vessels by incorporated companies, such as the libellants are, is to award a reasonable and liberal compensation for the use, in the particular service, of the apparatus employed, and for the skill with which it is handled—in other words, a reasonable and liberal compensation for the work and labor and the materials used—but that nothing can be awarded as a salvage compensation, on the principles which govern the admiralty in awarding compensation for admitted salvage services, it being necessary to exclude all considerations of personal sacrifice or gallantry in encountering peril in rendering the service, and it being the fact, that the persons engaged in the service, and representing the corporation, are employed to render the service, at fixed wages, depending in no manner on the success of the service, and do not share in the compensation, as such, received for the service.

In this case, the libellants were not employed to send a vessel to take off the schooner, but learning, through a telegraphic despatch from their agent at Sandy Hook, that the schooner was ashore on the Romer Shoal, they sent down the Rescue to see if assistance was needed. The Rescue reached the schooner between 11 a. m. and noon. The schooner was pulled off from the shoal by a quarter before 1 o'clock p. m. The whole service, therefore, so far as the schooner was concerned, occupied less than two hours of time. It was effective, and rendered with skill and judgment, but it was not attended with any extraordinary hazard or peril.

The sum of $3,000, as a proper compensation for this service, is sought to be maintained by the testimony of four witnesses for the libellants. One of them, Pierce, is the master of one of the wrecking schooners of the libellants. Another, Low, is a divers' attendant, in the employ of the libellants. Another, Samuels, was formerly president of the libellants, and is now president of the Atlantic Submarine Company, a corporation of a kindred character with the libellants. The fourth, Perry, is the general agent of the libellants. Pierce says that, under the circumstances, as the schooner was situated, he does not think $3,000 is out of the way; but, when asked how he makes up that sum, he says he does so because they might have been four or five days getting the schooner off, and that, if they got her off sooner, so much the better. Low fixes the sum of $3,000, in view of the number of vessels and force of men which the libellants keep up. Samuels fixes that sum, in view of the fact that the vessels and men of the libellants are often unemployed for a time, that their force of sixty men have high wages and constant pay, and that they keep on hand for their business a large amount of material. Perry fixes that sum on the idea that the libellants keep up their stock and men, which may have to lie for a month doing nothing. It is hardly necessary to say, that the basis of compensation assumed by the witnesses Low, Samuels and Perry, is wholly inadmissible in law. It amounts to this, that this schooner is to pay, not for the service rendered to her, not for the work and labor and materials used in such service, not for the skill with which the apparatus used in pulling her off from the shoal was employed, but for the fact that other vessels do not ground on the Romer Shoal, and, therefore, do not require to be hauled off from it by the libellants, and that the weather is not always stormy, and that wrecks are an exception and not a rule. The universal rule of trade is, that the price or value of an article is enhanced when the supply is not equal to the demand. But this rule is sought to be reversed in this case, and the price is sought to be enhanced, because the supply is greater than the demand. The proposition need only be stated to carry with it its own refutation. As the basis on which these witnesses for the libellants fix this sum of $3,000 wholly fails, their evidence must be wholly disregarded. So, too, the idea of the witness, Pierce, that the schooner must pay the $3,000, because the libellants might have been four or five days in earning the $3,000, is equally inadmissible.

It is shown that the master of the schooner offered to the libellants $400 for the service, and that they refused it. Two witnesses for the claimants, who have been in the tow-boating business, with steam-tugs, for many years, and are familiar with cases similar to the case of this schooner, testify that $300 would be a reasonable price for this service. Under the circumstances, I award to the libellants $400, without costs.

The decree in this case was affirmed by the circuit court, on appeal, in February, 1871, on the facts [Case No. 7,314], although the principle of the case of The Morning Star [Id. 9,818] was overruled by the supreme court in the case of The Camanche, 8 Wall. [75 U. S.] 484.

## Case No. 7,314.

The J. F. FARLAN.

[8 Blatchf. 207.] [1]

Circuit Court, S. D. New York. Feb. 6, 1871.[2]

SALVAGE—TOWAGE—COMPENSATION.

1. Tests applied to determine whether a service was a salvage service.

2. Considerations affecting the question of the amount of salvage compensation.

3. Compensation allowed for a towage service. [Cited in Baker v. Hemenway, Case No. 770.]

4. Under the circumstances, although the decree below was affirmed, the appellants were not charged with the costs of the appeal.

[Appeal from the district court of the United States for the Southern district of New York.]

In admiralty.

John E. Parsons, for libellants.

Edward H. Owen, for claimants.

WOODRUFF, Circuit Judge. I think the clear preponderance of the evidence in this case is, that the service was neither rendered nor received as a salvage service. Plainly, the captain of the schooner was acting in the belief that his vessel was in no danger, and that, without any assistance, she would soon be off the shoal. His conversation with the agent of the libellants indicated this, and the service was rendered with knowledge that such were the views under which it was accepted. The captain of the schooner is corroborated, and the declaration of the agent of the libellants, testified to by two witnesses, and not expressly denied, enjoining his men to make haste or the schooner would be off without aid, is in strong confirmation of the claimants' proofs.

The standards by which the libellants' witnesses measure the compensation tends in the same direction. One thinks the amount should be three thousand dollars, because it might have required four or five days to get the vessel off—a very good reason for asking a high price if the libellants were asked to agree to take her off at all events, however much time and service were required, but no reason for giving it for a service of two hours, rendered without fixing the price. This estimate manifestly proceeded upon an estimate of a suitable contract price, and not all upon the idea of compensation as salvors, sharing in the property saved. Others rest their estimates upon the fact that, with large outlay of expense, the libellants are much of the time without employment. This circumstance cannot properly affect the question. If, by this means, the libellants are able to render more efficient aid, that is to be considered in estimating the value of the service rendered, when that is the test of compensation: and, whenever salvage service is rendered, its usefulness and efficiency are always to be considered, by whomsoever it is rendered.

Upon the whole evidence, I do not think that here the requisite elements exist to warrant an allowance to the libellants as sharers in the property saved. Their service was not accepted upon any such footing, and I greatly doubt that it was rendered upon any such expectation. The service was not attended with any especial danger to person or property. Nothing was put at hazard; and it is, at least, doubtful, whether the service was needed. Certainly, it was not a service involving much time or serious labor to the libellants, or their agents, servants or property.

The compensation allowed below [Case No. 7,313] was moderate; and, upon consideration of the fact that the decision below was placed, in part, at least, upon the idea that a corporation should not in any case be treated as salvors, I will direct, as to the libellants, what the claimants insisted I ought to do as to them, if I increased such compensation, namely, excuse them from paying costs on the appeal. The decree must be for the libellants for the sum awarded below, four hundred dollars.

[1] [Reported by Hon. Samuel Blatchford, District Judge, and here reprinted by permission.]

[2] [Affirming Case No. 7,313.]

## Case No. 7,315.

The J. F. SPENCER.

[3 Ben. 337.] [1]

District Court, E. D. New York. June, 1869.

MARITIME LIEN—CONDEMNATION AND SALE OF VESSEL—EVIDENCE.

1. Where a foreign vessel was libelled, to recover for supplies furnished her in New York, and the defence was set up, that the lien had been discharged by a subsequent condemnation and sale of the vessel, as unseaworthy, at St. Thomas; and where the only witness called to prove that she was unseaworthy was the claimant, who bought the vessel, and who had taken part in the proceedings as surveyor, and was connected in business with the parties to whom the master consigned the vessel, one of the surveyors on the first survey having signed his report in blank, and refused to be on the subsequent surveys, because he "did not like the looks of things:" *Held*, that the sale had not been sustained, and that the vessel was still liable for whatever supplies constituted a lien.

2. Courts of admiralty are not bound by the rules of evidence which are applied in the courts of common law, and they may, where justice requires it, take notice of matters not strictly proved.

[Cited in The Boskenna Bay, 22 Fed. 667.]

3. Where copies of papers pertaining to the condemnation and sale of the vessel, certified by the British consul to be copies of official documents on file in his office, had been proved by deposition a considerable time before the trial, so that the parties were not taken by surprise: *Held*, that they were admissible in evidence in the admiralty.

In admiralty.

[1] [Reported by Robert D. Benedict, Esq., and here reprinted by permission.]

F. A. Wilcox, for libellants.
Benedict & Benedict, for claimant.

BENEDICT, District Judge. These are two actions against a foreign vessel, to enforce alleged liens for supplies furnished to her in this port.

The circumstances under which the advances were made are not in dispute, and they are such as, according to the maritime law, create a lien upon the vessel.

The defence, in both cases, is, that the vessel has been discharged of the lien, by reason of her subsequent condemnation and sale as unseaworthy, and the lien thereby transferred to the proceeds of that sale.

It appears, from the evidence, that, in point of fact, the vessel was condemned and sold at St. Thomas, subsequent to the furnishing of the supplies.

The proceedings and sale at St. Thomas are, however, challenged by the libellant, and it is insisted that the evidence shows a state of facts which require the court to declare those proceedings void and of no effect, for the reason that the vessel was not in such distress as to warrant her condemnation and sale.

I propose to notice first a question of evidence, which arose upon the trial, in regard to the admissibility in evidence of certain documents, certified by the British consul at St. Thomas to be true copies of the official documents on file in his office, pertaining to the condemnation and sale of the vessel, such as the demand for a survey, the reports of the surveyors, the estimates for repairs, and the report of the sale of the vessel at auction.

Were this a proceeding at common law, those copies could not be received in evidence for any purpose. If they were copies of documents on file in the office of the American consul, they would be admissible under the act of January 8th, 1869 [15 Stat. 266]. Being from the office of the British consul, they are not made evidence by any statute. Nevertheless, I am of the opinion that they are admissible in a court of admiralty. Courts of admiralty are not bound by all the rules of evidence which are applied in the courts of common law, and they may, where justice requires it, take notice of matters not strictly proved. Thus, Dr. Lushington says, in the case of The Peerless, 1 Lush., 41: "This court has, both in prize matters and in civil suits, been accustomed to receive evidence which would not have been admitted in other courts. For instance, affidavits sworn almost in every way, before justices of the peace, commissioners in chancery, &c., even evidence not on oath, as where, according to the custom of some of the states in the north of Europe, the original evidence was not taken on oath, but the person giving it undertook to make oath afterwards, if required. So, from the necessity of the case, all parties interested were, contrary to the laws of other courts at the time, admitted to give evidence in cases of collision, salvage, and others."

The present case seems to be a proper one in which to relax somewhat the strict rules of evidence in favor of these documents, for it is to be noticed that many of the material facts which they tend to prove are shown by other evidence to have taken place; that is to say, it appears by other evidence that the vessel was examined, and was reported on, and was condemned, and was sold at public auction at the time and place mentioned.

The copies have been proved by deposition, for a considerable period of time, and the opposite party is not, therefore, taken by surprise, but has had abundant opportunity of examination, and no suggestion is made that the papers have been falsified. The papers themselves, when examined, have all the appearances of being true copies. There is nothing unusual or suspicious in their contents, and they are certified by the consul to be copies of his records. There seems to me, therefore, no necessity to compel the parties to go to the expense of a commission to prove the papers, in order to make them admissible in evidence. How much weight should be given to the various portions of these papers is another question.

Passing then to the main issue of the case, namely, whether the claimant has made it appear that the necessities of the vessel were such as to justify her sale by the master at St. Thomas; I am constrained to say that the proofs adduced do not satisfy me that there was any such necessity as to justify the condemnation of the vessel. The fact that the only witness produced to prove the necessity is the party who bought the vessel, and is the claimant here, and that he took part as a surveyor in the proceedings which resulted in the condemnation; that he was also connected in business with the parties to whom the master consigned the vessel in St. Thomas, and that one of these parties made the bids for him at the auction, are sufficient to raise a serious doubt as to the good faith of the proceedings, which is reduced almost to a certainty by the evidence in the case in regard to the condition of the vessel when sold, and the further fact, that one of the ship-masters, who was upon the first survey, says that he signed his report in blank, and refused to be on the subsequent surveys, "because he didn't like the looks of things."

In such a state of the proofs, it must be held that the sale has not been sustained. The result, therefore, is, that the libellant, in one case, is entitled to a decree, with an order of reference to ascertain the amount.

An examination of the account sued for in the other case, however, discloses certain items which cannot be recovered, no lien arising therefor by the maritime law. It may be referred to the commissioner to ascer-

tain and report for so much of the account unpaid as shall appear to be entitled to a lien by the maritime law.

[See Case No. 7,316.]

## Case No. 7,316.

The J. F. SPENCER.

[5 Ben. 151.] [1]

District Court, E. D. New York. May, 1871.

LIEN—ADVANCES—APPLICATION OF FREIGHT MONEYS.

1. A person who advances money upon the credit of a foreign ship for the purpose of repairing her, or for furnishing her with necessary supplies, and which is actually employed for that purpose, has a lien on the ship for such advances.

2. In the absence of any express application by the ship owner, freight money received by a consignee of a ship, is to be deemed to be applied to the discharge of the liens on the ship.

[Cited in The Suliote, 23 Fed. 923; Nippert v. The Williams, 39 Fed. 826; The Mary K. Campbell, 40 Fed. 906.]

3. The case of Minturn v. Maynard, 17 How. [58 U. S.] 477, discriminated.

In admiralty.

F. H. Wilcox, for libellants.

E. C. Benedict, for claimants.

BENEDICT, District Judge. This is a proceeding in rem to enforce a lien upon the bark J. F. Spencer for the amount of certain advances made by the libellants on the request of the master, to supply the necessities of that vessel. [Case No. 7,315.]

The case now comes up in the form of exceptions to the commissioner's report; but it must be considered to be on hearing upon the questions of law and of fact, which were not disposed of at the first hearing, and is to be decided upon the evidence reported by the commissioner in addition to that taken in court.

It appears, then, from the evidence, that the vessel in question was a foreign vessel, owned in Nova Scotia, and engaged in the general freighting business. On several occasions when she arrived in New York, she was, by her master, consigned to the libellants, who accordingly acted as shipping agents for her, doing her business at the custom house, collecting her freights, paying such of her bills as the master might direct, and procuring business for her. When first employed, the master informed the libellants that he should need advances for the vessel, and, accordingly, certain advances were made upon the credit of the vessel, and charged to her at the time. A bill of the sums, which constitute the demand now sought to be recovered, was put in evidence upon the first hearing, the gross amount of which is $5,460 25, on which a credit of $4,310 76 is given, leaving a balance of $1,149 49, and it is for this balance that a decree is asked.

The evidence taken before the commissioner supports his conclusion that the amount of the bills of necessaries used by the vessel and paid by the libellants, is $4,507 46, the items of which consist of necessaries for the vessel, which the vessel actually needed and received, and this sum the libellants advanced upon the credit of the ship.

According to the general maritime law, a person who advances money upon the credit of the ship, in a case like this, for the purpose of repairing her or for furnishing her with necessary supplies, and which is actually employed for that purpose, has a lien upon the ship for such advances. The maritime codes seem to be harmonious in regard to this rule, and they have been followed by the admiralty courts of this country. Davis v. Child [Case No. 3,628]; The Joseph Cunard [Id. 7,535]; The Crescent [Id. 3,386]; 1 Pars. Mar. Law, 489.

The rule has also been applied by the English admiralty. In the case of The Sophie, 1 W. Rob. Adm. 369, Dr. Lushington, speaking of money advanced to the master for the service of the ship, says: "I consider myself at liberty to enlarge the term necessaries so as to include money expended for necessaries." See, also, The Wm. F. Safford, 1 Lush. 69. And such I understand to be the rule of the maritime law as administered in France.

There is a decision of the supreme court of the United States in the case of Minturn v. Maynard, 17 How. [58 U. S.] 477, which might be supposed to look towards the establishment of a different rule. But that case, probably, cannot affect the question here, as in that case the libellant was the general agent or broker of the owners of the ship, who acted, as I gather from the report, in the place of the owners' residence, and never dealt on the credit, pledge or security of the ship. I do not understand that decision to be applicable to a case like the present, and it has not been relied on by the claimants here.

However this may be, there is here another question upon which the case must turn, and that whether the libellants should not be held to have been repaid these advances by the freight which they have received. It appears by the proofs taken before the commissioner that the libellants have received freight moneys of the vessel more than sufficient to discharge the present demands, but they claim the right to apply these credits first to the discharge of certain other demands for insurance, commissions, &c., which they claim the vessel owed them, and accordingly they give credit for the balance only upon the bill in suit. I do not find in the evidence any proof that any such application of these freights was made at the time of their payment, and am of the opinion that, in the absence of any express application by the ship owner, freight money received by a con-

[1] [Reported by Robert D. Benedict, Esq., and here reprinted by permission.]

signee of a ship is to be deemed to be applied to the discharge of the liens upon the ship. Such an application is to be presumed, because, while liens are implied in the interest of commerce and for the advantage of the ship, it is equally important that they be extinguished as soon as possible; and further, because the freight, which the ship earns, is the true fund from which necessaries of the ship are to be supplied. Many, if not all such items carry with them liens upon the freight as well as upon the vessel, which are discharged by the receipt of the freight, and to the extent of the freights are deemed thereby paid. The Antarctic [Case No. 479]; The St. Jago de Cuba, 9 Wheat. [22 U. S.] 409.

Applying this rule to the present case, it is apparent that the demand of the libellants has been discharged by the freight moneys acknowledged to have been received. The libel must, accordingly, be dismissed, with costs.

## Case No. 7,317.

The J. G. McNEIL.

[Blatchf. Pr. Cas. 162.] [1]

District Court, S. D. New York. May, 1862.

PRIZE—CONDEMNATION.

Vessel and cargo condemned as enemy property.

In admiralty.

BETTS, District Judge. This vessel and cargo were captured off Matagorda, in the Gulf of Mexico, half a mile from the shore, January 25, 1862. Her registry and ship's papers were given to her by the government of the Confederate States at Indianola, Texas, where her owner and master reside. She sailed under the license and flag of the Confederate States, and had no other colors. She was captured by the United States man-of-war Arthur. The vessel was from Vera Cruz, destined to Indianola, with a cargo of coffee and tobacco, owned by residents of the latter place. The master knew of the proclamation of the president placing the southern ports under blockade, but had no other direct notice of the blockade. The cargo was laden on board at Vera Cruz about the 8th of January, last. The prize was taken to Ship island, was pronounced unseaworthy for navigation north by Flag-Officer McKean, and was appropriated to the use of the United States government, her value having been appraised.

The evidence being clear and satisfactory that the vessel and cargo were the property of owners domiciled at Indianola, and the marshal having returned to the warrant of attachment due notice of the arrest of the property and of the proceedings in court against it as prize, its condemnation and forfeiture is ordered, the appraised value of the vessel to be accounted for in court to the credit of the captors.

[1] [Reported by Samuel Blatchford, Esq.]

## Case No. 7,318.

The J. G. PAINT.

[1 Ben. 545.] [1]

District Court, S. D. New York. Nov., 1867.

SALVAGE AGREEMENT—REASONABLENESS.

1. Courts of admiralty will not allow a salvor to take advantage of his situation and to avail himself of the calamities of others to drive a bargain; but they will enforce a contract made for salvage service and salvage compensation, where the salvor has not taken advantage of his power to make an unreasonable bargain.

2. Under the circumstances of this case, an agreement to pay to a steamboat $3,000 for towing a vessel worth $8,000, with a cargo of sugar, for twenty-seven hours, was sustained by the court.

In admiralty.

Beebe & Donohue, for libellant.
E. H. Owen, for bark.
D. D. Lord, for cargo.

BLATCHFORD, District Judge. This is a libel for salvage, filed by Charles Loveland, master and part owner of the steamer Eureka, on behalf of himself and all others interested, against the bark J. G. Paint and her cargo. The bark is a British vessel, and was on a voyage from St. Jago de Cuba to New York, with a cargo consisting of 640 hogsheads, 205 barrels, 38 boxes, and 10 tierces, of sugar. She is 340 tons burthen, new measurement, and is two years old, and was worth about $8,000 in United States currency at the time of the salvage service. It does not appear what was the value of her cargo. On the 30th of March, 1867, about 6 o'clock a. m., the bark was at anchor in six fathoms of water, about four miles east north-east from Absecom light on the New Jersey coast. She had been blown off from pilotage ground, while looking for a pilot to bring her into the port of New York, eight days before, and had lost her rudder in a gale at that time. For two days afterwards she continued to lie to, and then she fell in with a brig, to which she made a signal by setting her colors union down. The brig took off from her the women and children, and a sick sailor, and sailed in company with her for some time. The bark sailed on the wind and steered by her sails, but she could not steer by them when off the wind. After a time the brig took the bark in tow, as the wind was light, the bark being then about 15 miles to the southward and westward of Cape May, and intending to go in to Hampton Roads as the nearest port. It then became calm and both vessels came to anchor, land being visible. Subsequently

[1] [Reported by Robert D. Benedict, Esq., and here reprinted by permission.]

the wind came out from west north-west, blowing off shore, and the vessels sailed in company along the shore out of sight of land, on a course north or north north-east, close to the wind, with their port tacks aboard. No opportunity was afforded to try and steer the bark before the wind, or to wear ship. She was steered by her sails. The brig afterwards got astray, but the bark kept on her course, and got out a spar to assist in steering. The brig found the bark again and the two sailed in company, the wind being steady and blowing favorably. The bark was obliged to sail in such direction as she could, when on the wind. The wind getting light again, the brig took the bark in tow again, and land was made, which the brig took to be Cape Henlopen, and the bark thought was Absecom. The latter idea proved to be the correct one. The bark came to anchor there, although the weather was fine and the wind favorable for continuing her course to Sandy Hook, for the reason that the brig insisted, even after the light on shore was set on the evening of the 29th of March, that the light was Cape Henlopen light, and not Absecom light. The brig let go of the bark and stood off, and at sunrise the next morning was 9 miles east south-east from the bark, hull down.

At 6 o'clock on the morning of the 30th, the steamer, being on a voyage from New York to Little Egg Harbor, (between which place and New York she was a regular trader,) and being at the time about 2 miles off from the bar at the entrance of the inlet, and 30 miles from her dock at Little Egg Harbor, saw the bark lying at anchor, about 7 or 8 miles south of the bar, and believing her to be in distress, ran down to her. When the steamer came within 2 miles of the bark, she saw on the bark a signal of distress, being a flag set union down half way up the peak. The steamer reached the bark about 8 o'clock a. m. The bark, on being hailed from the steamer, said that she wanted assistance, and her master asked the captain of the steamer what he would charge to tow the bark to the Delaware breakwater. The captain said, that he would not tow her to the breakwater, but would tow her to New York. The master then asked, what he would charge, and, at the request of the captain, went on board of the steamer. The captain there told the master, that he would tow him to New York for $4,000. The master said that he would not give it, but would let the bark go ashore first, and offered $2,000. The captain refused that, and the master started to return to the bark. Either before the master left the steamer, or after he got into the small boat, the captain said he would take $3,000. The captain's version is, that the $3,000 offer was made before the master left, that the master refused it and started to return to the bark, and the steamer started her screw ahead to leave, and that the master, when he got a short distance off, said he would give the $3,000. The master's version is, that, after his offer of $2,000 was refused, he got into his boat to leave, that then the $3,000 offer was made, that he returned to the bark without making a bargain and consulted his mates, and that all concluded to give the $3,000. The clerk of the steamer drew a written agreement, which the master signed on board of the steamer, whereby the master promised to pay to the steamer or her owners, in one month, $3,000 for towing the bark from Absecom to New York. This agreement, so signed, was delivered to the captain. The steamer took the bark in tow at first by a hawser behind, but, after about an hour, took her alongside, and thus towed her to New York, and anchored her off the Battery. She was towed for twenty-seven hours. The steamer had from a quarter to a half of a ton of coal left when she arrived at New York. Little Egg Harbor bar is 90 miles from New York. The usual time of the trip of the steamer, from New York to where she was when she turned aside to go to the bark, was about 10 hours. Her consumption of coal was 7 or 8 tons for 14 or 15 hours running. The steamer was worth $22,000, and had on board at the time 20 tons of cargo, destined for Little Egg Harbor, which she subsequently delivered there and collected freight for.

The captain of the steamer says, that the wind was west south-west, and blowing hard when he reached the bark; that it was misty when he took her in tow; that he thought she would go on the beach in an east wind if she did not take his offer; that it was 50 or 60 miles nearer to the breakwater than to New York, but he could not have gone to the breakwater and back sooner than to New York and back, because of the head sea; and that he could not, for want of coal, have got the bark to the breakwater.

The master of the bark says that, when the steamer reached him, the wind was light off shore, but it looked as if they were going to have a storm; that, if the wind had blown on shore, there would have been danger; that there was not any time after the bark lost her rudder when she was perfectly unmanageable; that he does not consider a vessel without a rudder safe; that, if he had been on a lee shore, he would have had to trust entirely to his anchors, and, if his ground tackle had given way, he would have gone ashore; that, with the wind right on shore, there would not have been much salvation; and that the place where the bark was anchored was a dangerous place. The mate of the bark testifies that if, at the place where the steamer found the bark at anchor, the wind had changed to blow on shore, there would have been danger of going ashore, if the anchors had failed to hold. The bark did not leak, and was not otherwise disabled than by the

loss of the rudder. When the steamer arrived at New York with her, the wind was south-east, and it was storming, and had been so for three or four hours.

The answer of the bark does not set up that any unfair advantage was taken of the circumstances in which the bark was found, to exact from her an unreasonable contract, or that the price agreed to be paid for the service was more than the salvage service was worth. It sets up, that the master asked the captain of the steamer what he would ask to tow the bark to the breakwater; that the captain refused to tow her to the breakwater, but said he would tow her to New York for $4,000; that, after some negotiation on the subject, the master agreed to give $3,000 to be towed to New York, which was accepted; that, while the claimants of the bark do not admit that such service was worth $3,000, yet, as the master agreed to pay that sum, they, so far as respects the bark and freight, are willing to abide by the contract; that, nevertheless, if the court shall not consider such sum just and reasonable, as respects the owners of the cargo, then the claimants of the bark desire to have the benefit of any reduction thereof; and that such contract was made for the benefit of the cargo as well as of the vessel, and the cargo is bound to contribute and pay its just proportion of such salvage service.

The answers of the claimants of the cargo deny that the service was worth $3,000, and allege that the agreement to pay the same was improperly exacted out of the master of the bark, by taking advantage of the peculiar circumstances in which he was placed, and that it should not be enforced against the cargo, although they say they are willing to pay a reasonable and liberal compensation for the trouble, labor and services of the libellant, and for the assistance of the steamer, and they claim that a proper proportion should be paid by the owners of the bark and her freight.

It is well settled that courts of admiralty will not allow a salvor to take advantage of his situation, and to avail himself of the calamities of others to drive a bargain; but yet they will enforce a contract made for salvage service and salvage compensation, where the salvor has not taken advantage of his power to make an unreasonable bargain. Post v. Jones, 19 How. [60 U. S.] 160; The Emulous [Case No. 4,480]; The A. D. Patchin [Id. 87].

After a careful consideration of all the facts in this case, I am unable to come to the conclusion that the sum agreed upon, $3,000, is an unreasonable compensation for the service rendered, or that the agreement to pay it was made under such circumstances that the sum fixed by the agreement ought not to be taken as the measure of the salvage compensation. I therefore award to the libellant the sum of $3,000 as such compensation, with interest from April 30th, 1867, the amount to be apportioned between the vessel and the cargo by a commissioner, on a reference for that purpose, if such apportionment is not otherwise fixed by the parties.

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J. H. GAUTIER, The. See Case No. 6,399.

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## Case No. 7,319.

The J. H. GAUTIER.

The HERBERT MANTON.

[5 Ben. 469;[1] 11 Am. Law Reg. (N. S.) 769; 5 Am. Law T. Rep. 87; 15 Int. Rev. Rec. 39.]

District Court, S. D. New York. Jan., 1872.[2]

COLLISION IN EAST RIVER — STEAMTUG AND SCHOONER—TOWBOAT AND TOW.

1. A canal-boat loaded with coal was towed on the port side of a tug, bound to Astoria. The tug went up the channel between Blackwell's Island and New York, and, when above the island, headed across for the dock at Astoria. A schooner coming down from Hell Gate, after passing Hallett's Point, took a course to go down the channel between Blackwell's Island and Long Island, which course brought her continually nearer the shore as she approached the dock at Astoria. The tug, as she approached the dock, headed more nearly parallel with the end of the dock, on a port helm, and, seeing that there was danger of a collision with the schooner, blew one whistle, and stopped and backed. The schooner did not change her course, and struck the canal-boat a glancing blow on the port side, and sunk her, the canal-boat being so near the dock that the schooner came against the end of the dock. The owners of the canal-boat and her cargo filed a libel against both the tug and her schooner: *Held*, that the tug and the canal-boat must be considered as one steam vessel, as against the schooner.

[Cited in The L. P. Dayton, 120 U. S. 351, 7 Sup. Ct. 574; The Fred. W. Chase, 31 Fed. 96.]

2. Therefore, the case was brought within the 15th and 18th rules for avoiding collisions.

3. The schooner was, therefore, not in fault in keeping her course, and the tug was in fault for not avoiding her, and was liable for all the damages.

In admiralty.

T. Scudder and R. D. Benedict, for libellants.

W. R. Beebe and C. Donohue, for the tug.

E. H. Owen and E. L. Owen, for the schooner.

BLATCHFORD, District Judge. These two suits are tried together. The libellants in the first suit, as owners of the canal-boat Gettysburg, and the libellants in the second suit, as owners of the cargo of coal laden on board of said canal-boat, bring these suits, each of them against the steamtug J. H. Gautier and the schooner Herbert Manton, to recover damages for the total

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[1] [Reported by Robert D. Benedict, Esq., and here reprinted by permission.]

[2] [Affirmed in Case No. 6,399.]

loss of the canal-boat and her cargo, through a collision which occurred between the canal-boat and the schooner, on the 28th of November, 1871, between nine and ten o'clock a. m., off the steamboat wharf at Astoria, Long Island, a short distance above the upper end of Blackwell's Island. The canal-boat was at the time in tow of the steamtug, being lashed to the port side of the steamtug. The tug and canal-boat had come from Twenty-Third street, New York, and were bound for the steamboat dock at Astoria, where the cargo of coal was to be discharged. They had gone up the channel between Blackwell's Island and Manhattan Island. This required the tug, after reaching a point sufficiently far above the upper end of Blackwell's Island for safety, to swing around to starboard by porting, so as to head across the channel she had come up, and across the upper end of Blackwell's Island, and across the channel between Blackwell's Island and Long Island, to reach the dock at Astoria, and so as to present the port side of the canal-boat to vessels proceeding through Hell Gate around Hallett's Point to New York. The tide was the last of the flood. The schooner went through Hell Gate from the eastward, rounded Hallett's Point, and was proceeding on, with a view to enter the channel between Blackwell's Island and Long Island, when she came into collision, stem on, with the port side of the canal-boat, and the canal-boat and her cargo were totally lost.

The libels allege, that the collision was caused by the carelessness and negligence of those in charge of the tug and schooner; that the tug was negligent in turning in to the dock ahead of the schooner, instead of allowing the schooner to pass clear between the tug and the dock, "as she would otherwise have done;" and that the schooner was negligent, in not keeping a proper lookout, in not sheering out to avoid the canal-boat, as she could have done, "and in changing her course back again after she had undertaken to pass outside."

The answers of the tug allege, that the wind was free for the schooner; that, upon nearing Astoria, the tug and her tow headed in towards the dock to which she was bound, heading nearly or quite across the river, and, as she neared the dock, gradually turning her head towards New York, so as to bring the canal-boat next to the dock, and the head of all to the tide; that, while the tug and her tow were thus approaching the dock, and when they were a very short distance from it, and heading on it, the schooner was coming down through Hell Gate, bound to New York, having the wind free and a full-sail breeze, with the whole river to the New York shore side free for her navigation; that, as the schooner came on towards the tow, she ported, so as to throw her head off shore, and her course outside of the tug and canal-boat, and then suddenly kept away, as if to endeavor to force herself between the tow and the dock, from which the tow was then but a few feet distant, the tow being then turning its course towards New York, and at a time when it was impossible for the tug to avoid the schooner; that a warning signal was given, but the schooner kept on, and struck the canal-boat on the port side a glancing blow, both vessels at the time heading the same way substantially; and that, at the time of the collision, both the tow and the schooner were so near the dock that the schooner came up along the end of the dock, the canal-boat, at the time of the blow, being about the width of the schooner from the dock.

The answers of the schooner allege, that the collision was caused solely by the fault of the tug and the canal-boat, in turning in to the dock, and in crossing the bows of the schooner in order to reach the same, in not stopping and allowing the schooner to pass along, and in not sheering off and passing under the stern of the schooner, either of which movements could have been made without difficulty; that the schooner had a competent lookout, properly stationed; that she was lawfully prosecuting her voyage when the tug and the tow approached; that she kept steadily on her course, as she was by law entitled to do, and did not change the same; and that the tug and the tow attempted improperly to cross her bows, and so threw themselves under her, and thereby received the injuries complained of.

There is no good reason why the court should not apply to this case the rule prescribed by article 15 of the steering and sailing rules in the act of April 29, 1864 (13 U. S. Stat. 60), which is, that "if two ships, one of which is a sailing ship and the other a steamship, are proceeding in such directions as to involve risk of collision, the steamship shall keep out of the way of the sailing ship," and the further rule prescribed by article 18, that where, by article 15, "one of two ships is to keep out of the way, the other shall keep her course, subject to the qualifications contained" in article 19. It is manifest that negligence caused this collision, that the canal-boat was without fault, and that either the tug or the schooner or both of them, were in fault. As respects the schooner and her duty towards the tug and her tow, lashed as the tow was to the side of the tug, and not towed behind by a hawser, the tug and the tow must be regarded as one vessel, and that a steam vessel. It was the duty of the tug to avoid the schooner, and it was the duty of the schooner to keep her course. The schooner had a right to select, after passing Hallett's Point, a course, in the then state of the tide and the wind, which would be most favorable for the prosecution of her voyage to New York. It is in evidence that such course

was a course, after rounding Hallett's Point, approaching towards the Long Island shore, at an angle, so as to go down through the channel between Blackwell's Island and Long Island. She adopted that course and kept it. Such course would naturally carry her comparatively near to the dock at Astoria, and would cause her, after rounding Hallett's Point, to approach nearer all the time to the Long Island shore. There is no warrant in the evidence for the conclusion that the schooner, at any time after rounding Hallett's Point, ported or turned her head to starboard. The schooner had a right to rely on the rule of navigation, and to suppose that the tug would stop in time, and not attempt to cross the bows of the schooner. But the tug kept on until, seeing there was danger, she blew one whistle and stopped and backed, but at too late a time. The schooner, in the jaws of peril, and to ease her blow against the canal-boat, starboarded, when a collision was inevitable, and but a moment before it occurred, and fell off a little, so that the concurring forward motion of the three vessels and the action of the tide brought them all near to the dock. It is impossible not to see that there was no fault in the schooner, and that the collision was caused by the fault of the tug in not stopping sooner and going under the stern of the schooner. There was abundant room for her to do this, and no excuse for not doing so.

There must be a decree for the libellants in each suit against the tug, with costs, with a reference to a commissioner to ascertain the damages, and the libel must be dismissed in each suit as to the schooner, with costs.

[Subsequently, on appeal to the circuit court, this decree was affirmed, with costs. Case No. 6,399.]

## Case No. 7,320.

The J. H. STARIN.

[15 Blatchf. 473; 45 Conn. 585; 8 Reporter, 293.][1]

Circuit Court, D. Connecticut. Jan. 24, 1879.

WHARFAGE.

1. A vessel, in January, February and March, 1877, received and discharged cargo, in New Haven, at a wharf called the Derby Railroad wharf, which was within 416 feet of the wharf belonging to the libellant, "The contractors to rebuild and support Union wharf and pier in New Haven," but more than three rods distant to the east of it, and abutted on a wharf called the Basin wharf, and ran outwardly from it in a southeasterly direction, and about in a line parallel with the libellant's wharf. A great part of the cargo so received and discharged was carted upon and over the libellant's wharf and that part of the Basin wharf lying between the Derby Railroad wharf and the libellant's wharf. The Basin wharf abutted on the libellant's wharf on the east side thereof. The Basin wharf and the libellant's wharf were each of them used as a free public highway, to pass and repass upon. The libellant brought a suit in rem, in admiralty, against said vessel, to recover, in respect of said goods so carted over the libellant's wharf, to and from said vessel, the same wharfage as if said goods had been originally laden upon, or unladen from, said vessel, while lying immediately along side of the libellant's wharf: *Held*, that the libellant was entitled to recover.

[The Gilbert Knapp, 37 Fed. 213.]

2. The case of Union Wharf Co. v. Hemingway, 12 Conn. 293, examined.

3. The libellant's rights are not varied by the fact that the Basin wharf was connected with the main land by the filling in of the canal basin, or by a route passing eastward.

[Appeal from the district court of the United States for the district of Connecticut.]

This was an appeal by the claimant, in a suit in rem, in admiralty, from a decree of the district court in favor of the libellant. The decision of the district court (SHIPMAN, J.) was as follows:

This is a libel in rem against the steamboat J. H. Starin, to enforce a lien upon said steamer for the amount of wharfage alleged to be due the libellant, for or on account of said steamer and its cargo. In December, 1731, the proprietors of common and undivided lands in the town of New Haven, at a legal meeting, granted to such of their members as should undertake to meet the expense thereof, liberty to erect and forever maintain a wharf, on the flats, thirty feet wide, of such course as the said grantees might select. At a meeting of said proprietors, in December, 1732, it was voted, that they would not allow any wharf to be erected within three rods on the eastern side of such wharf as might be erected pursuant to the grant of the year preceding. An association was afterwards formed, which built a wharf such as was authorized by the first vote, and thereafter demanded and received wharfage from all parties using the same, from the year 1746 down to its incorporation in 1760. In 1760, an act of incorporation was obtained, by the name of "The Union Wharf Company in New Haven." In 1801, the wharf extended southerly from near the foot of Fleet street towards a certain pier which had been built in the harbor of said town, about a third of a mile beyond the end of said wharf. In 1801, the owners of said wharf and pier obtained another and further charter from this state, by the same name, and was thereby empowered to contract for the rebuilding and extending of said wharf and pier, in such manner as it should direct, and to assign to any parties contracting for the same the right to collect wharfage upon or by reason of said wharf and pier. In 1802, a contract was made by this Union Wharf Company with certain individuals to rebuild and extend the wharf, and, in 1810, the general assembly incorporated said individuals under their present name of "The

[1] [Reported by Hon. Samuel Blatchford, Circuit Judge, and here reprinted by permission. 8 Reporter, 293, contains only a partial report.]

Contractors to Rebuild and Support Union Wharf and Pier in New Haven," giving to them the rights and privileges of the Union Wharf Company. The last-named corporation, which is this libellant, soon thereafter rebuilt and extended said wharf and pier, according to the said contract; and, in consideration thereof, prior to the first Tuesday of October, 1815, received from the first-named corporation, pursuant to the charter of the latter, an assignment of the income thereafter to accrue from the said wharf and pier, and the right to collect all the wharfage thereafter to accrue, by reason of the use of the same, in any manner, by any parties, from time to time. In 1815, the general assembly, by an amendment of the charter of the libellant, granted to it the right of collecting wharfage, at certain rates, in said amendment specified, and the libellant has ever since demanded and collected wharfage, according to the rates so established. By the charter of the libellant, as thus amended, it is provided, that the wharfage due for or on account of any ship or vessel, or the cargo thereof, shall be and remain a lien on such ship or vessel until the same shall be discharged; and that all goods landed from or put on board coasting vessels shall pay certain rates of wharfage, in said amendment specified, as aforesaid, as respects most commodities of ordinary use, and, as to all other articles not enumerated, in the same proportion as those so enumerated; and that vessels, owners, masters, and goods are liable for wharfage for the use of said wharf or pier. In the year 1826, the said Union Wharf Company and the libellant entered into an agreement with the Farmington Canal Company, a corporation chartered by said state, whereby said canal company was authorized to construct a canal basin on the east side of said wharf, and to enclose the seaward side thereof by an embankment, or wharf, running from the main land near the foot of Brewery street to the east side of said Union wharf; and it was further agreed, that said canal company should forever keep in repair said part of the east side of said Union wharf to be thus included in their said basin, and that the canal-boats and their lading, transported up and down the canal within said basin, should be free from wharfage from said Union wharf; but that all powers and rights not therein especially granted should be retained by the libellant. The committee of the proprietors of common and undivided lands in said town also then granted to said canal company the right to construct said basin and embankment, on condition of the execution of said agreement, and with reference thereto. Said canal company soon thereafter constructed said basin and embankment, in manner aforesaid, but afterwards, to wit, in the year 1836, ceased to do business; and, prior to the first day of January, 1848, all the rights of said canal company, in and to said canal basin, passed, by due conveyance, to the New Haven and Northampton Company, a corporation incorporated by said state.

Said New Haven and Northampton Company, by their deed dated the twenty-fourth day of March, 1848, conveyed to the New York and New Haven Railroad Company, a corporation incorporated by said state, all their rights in and to all of a described part of said former canal basin, comprising that portion of said former canal basin opposite to which the Derby Railroad wharf, hereinafter described, has been recently built, which said basin was then disused; which said deed is recorded in the land records of said town of New Haven, volume 120, page 575. Afterwards, by deed dated the seventh day of September, 1848, the libellant and said Union Wharf Company, party of the first part, granted and conveyed to said New York and New Haven Railroad Company, party of the second part, the liberty and right to cross said wharf with its railroad, and to fill up a certain part of the flats adjoining the east side of said wharf, within the limits of said canal basin, down to a point seven hundred and thirty-one feet southerly from the libellant's well at the head of said wharf, subject, nevertheless, to certain reservations, terms, and conditions, a part of which conditions being as follows: "Provided, however, and the foregoing grants and consent are upon the express conditions following, namely, that the said party of the first part shall, at all times, have and enjoy, and they do hereby reserve to themselves, the right, liberty, and power to collect and receive, on all goods, merchandise, and articles, landed by water or taken off by water on and from all the wharf or wharves, or embankments, piers or bridges, belonging to, or constructed or occupied by, said party of the second part, and connected with said Union wharf on either side thereof, the same rate of wharfage as is now collected and received, by said party of the first part, on goods landed or taken off by water on and from the wharves attached to and connected with said Union wharf on the west side thereof: except on such goods, merchandise, and articles as are carried up or brought down in the cars of said party of the second part, without otherwise coming on to the said Union wharf, and except, also, on such goods and articles as are to be used for railroad purposes on the said railroad." And the said New York and New Haven Railroad Company did, in the same deed, covenant and agree as follows, to wit: "And the said party of the second part, in consideration of the premises, do hereby promise, covenant, and agree, to and with the said party of the first part, that the said party of the first part shall, at all times, have and enjoy the said right, liberty, and power of collecting and receiving wharfage,

so as aforesaid reserved by said party of the first part; and that they, said party of the second part, will faithfully observe, perform, and comply with, all and singular the conditions hereinbefore expressed, as the conditions upon which said grants and consent are given and made, according to the true intent and meaning of the same;" which said deed is recorded in the New Haven land records, volume 127, page 260. Afterwards, to wit, by deed dated July 19th, 1852, by them well executed, the libellant and said Union Wharf Company further granted to said railroad company permission to fill in the residue of said flats within said basin, on certain terms and conditions. The portion of said deed which is material to this case is as follows: "That the said party of the first part, in consideration of the covenants and agreements hereinafter contained, and which, on the part of the said party of the second part, are to be done and performed, doth hereby give and grant unto the said party of the second part liberty and permission to fill up their railroad embankment, on the east side of the said Union wharf, to extend southerly to the south side of Basin wharf (so called) from the termination of their former grant; which termination of their former grant was distant seven hundred and thirty-one feet southerly from the well belonging to said party of the first part at the head of said Union wharf, and to adjoin their said railroad embankment to the east side of said Union wharf, along the whole length thereof, from said termination of their former grant to the south side of said Basin wharf: provided, however, and the foregoing grant and permission is upon the express condition and with the reservations following, namely, that the said party of the first part shall, at all times, have and enjoy, and they do hereby reserve to themselves, the right and liberty to collect and receive the same rates of wharfage on all the said railroad embankments or wharf which may be built within the above mentioned limits, for which permission is given as aforesaid, and also on and from that part of the said Basin wharf which extends for a distance of four hundred and sixteen feet of the length of said Basin wharf from its junction with said Union wharf, and also on all wharf or wharves which may be constructed or attached to said Basin wharf, within this distance of four hundred and sixteen feet, as is collected and received by said party of the first part on said Union wharf; (except on such goods, merchandise, and articles as are carried up or brought down in the cars of said party of second part, or in cars of other railroads running in connection with said railroad, without otherwise coming on to said Union wharf, and except, also, on such goods and articles as are to be used for railroad purposes on the said railroad.") "And the said party of the second part, in consideration of the premises, do hereby promise, covenant, and agree, to and with the said party of the first part, that the said party of the second part will now, at the time of the execution of this contract, pay to said party of the first part the sum of twenty-five hundred dollars; and, further, that the said party of the first part shall, at all times, have and enjoy the said right and liberty of collecting and receiving wharfage, in the manner and upon the several wharves as hereinbefore reserved and specified; and, further, that they, the said party of the second part, will faithfully observe, perform, and comply with, all and singular the conditions hereinbefore expressed, as the conditions upon which said grant and permission is given and made, according to the true intent and meaning of the same."

Under the permission granted in said deeds to said railroad company, the part of said canal basin contiguous to the easterly side of said wharf was, prior to January 1st, 1874, by said company filled up solid with the main land, down to the line of said Basin wharf, so that all immediate access by water to the easterly side of Union wharf, north of Basin wharf, a distance of about 1,500 feet in length, was barred. Union wharf is about 3,500 feet long. The greater part of the old canal basin was thus filled up, and became a railroad-yard, intersected with tracks for the use of a railroad. Teams can not pass and repass to the town over said railroad-yard, but gain access to and depart from Basin wharf, as previously, either over Union wharf on the west or by way of Brewery street on the east. There is a strip of water within the eastern end of Basin wharf, not yet filled in, of 300 feet in width in some places. Lighters enter this part of the old basin, under a bridge at the eastern end of Basin wharf. Formerly, vessels entered the basin through gates in Basin wharf. The gates at the western end were walled up about the year 1848. Afterwards, and before 1874, all rights, franchises, property, and obligations of the New York and New Haven Railroad Company became legally vested in the New York, New Haven and Hartford Railroad Company, a corporation incorporated by this state. This company perpetually leased to the New Haven and Derby Railroad Company a right to use, and occupy with tracks, a strip of the land mentioned in the first described deed, opposite and adjoining the wharf hereinafter mentioned, and afterwards there was erected, in 1874, by said Derby Railroad Company, claiming under said New York, New Haven and Hartford Railroad Company, or by some person claiming under said Derby Railroad Company, a wharf, attached to the south side of Basin wharf, and extending southerly toward the channel, and running parallel to said Union wharf, and within four hundred and sixteen feet thereof and more than three rods therefrom, access to which is to be had only

by going over said Basin wharf. The land end of this wharf abuts upon Basin wharf at a point where the canal basin has been filled up solid with the main land. Access by teams to this wharf is gained solely by means of Union wharf or Brewery street, which are at the two ends of Basin wharf, and thence over Basin wharf. At all times since the original construction of Basin wharf, the libellant has claimed the right to wharfage on all goods landed by water on any wharf within the limits aforesaid, and transported over said Basin wharf to or from said Union wharf; and has, from time to time, collected large sums as wharfage on goods so transported; and has vindicated its right to the same by the judgment of the supreme court of errors of said state, in a suit brought by this libellant against one Hemingway, reported in the twelfth volume of Connecticut Reports, page 293. Heretofore, to wit, on the last day of January, the first three days of February, and the twenty-first and twenty-second days of March, 1877, the said steamer, the J. H. Starin, being a packet-boat plying daily between the port of New Haven and the port of New York, lay, during such parts of such days as she was in this port, at said Derby Railroad wharf, and within four hundred and sixteen feet of said Union wharf, receiving and discharging freight and passengers. On said days, she discharged and received on board a large quantity of goods, as freight, a great part of which were carted upon and over said Union wharf and said part of said Basin wharf lying between said Derby Railroad wharf and said Union wharf. If said goods, so carted on said days upon and down said Union wharf, and thence over said Basin wharf, to, upon and up said Union wharf, had been originally laden upon or unladen from said steamer while lying immediately alongside of said Union wharf, the libellant would have been entitled to charge, demand, and collect wharfage thereon. The Union wharf is partly occupied by stores, and is a highway which is freely used by the public as it has need to do business at the stores or at the vessels lying upon the wharf, or to pass and repass for any purpose whatever, but is kept in repair solely at the expense of the libellant. Basin wharf is a public highway. The claimant, John H. Starin, is the owner of the steamboat J. H. Starin, and has been, for some years past, regularly, a common carrier between New Haven and New York, by means of said vessel, and has latterly occupied, with said vessel, the wharf known as the Derby Railroad wharf, or Starin's wharf. All the allegations of fact contained in the various paragraphs of the libel are true. There are no substantial facts in dispute between the parties. All the important facts were proved by documentary evidence.

The question in dispute is one of law, and is, whether, under and by virtue of the charter of the libellant, and the various contracts and agreements which were made between it and the parties under whom the claimant occupies his wharf, the libellant is entitled to wharfage upon goods landed by water or taken off by water at said Derby Railroad wharf, and transported across Union wharf, for purposes of import or export. About the year 1837, and before the canal basin was filled up, one Hemingway owned, with others, a line of packets, running to and from New Haven and New York, and also occupied a warehouse on the west side of Union wharf. These packets discharged their cargoes at the Basin wharf, (which was the seaward rim of the canal basin), more than three rods from the libellant's wharf; "and the goods thus landed upon Basin wharf were transported across the plaintiff's (libellant's) wharf to the defendant's (Hemingway's) store, or upon the plaintiff's wharf to the main land, and were, in like manner, transported and shipped, by means of the Basin wharf, into said packets." Suit was brought, before the superior court of this state, by the libellant, against Hemingway, to test its right to wharfage upon cargoes thus transported across Union wharf. The case went to the supreme court of errors of this state (Union Wharf Co. v. Hemingway, 12 Conn. 293), and was decided in favor of the libellant. The decision was placed upon two grounds: First. The users of Union wharf, for the purpose of importing or exporting goods, were under obligation to pay a compensation therefor, called wharfage, whether such goods were directly landed upon the wharf, or were removed thither for the purpose of reaching their place of destination. The court say: "It has not been denied, but that, if goods imported were landed at a pier, and then transported in a boat or on the ice, to this wharf, and landed there, or transported over it, they would have been subject to wharfage; and, if another wharf had been built four rods distant, and goods imported were landed thereon, and then brought on to this wharf, upon the same principle, they must have been subject to wharfage. If such a wharf had been extended to the main land, the owners of this wharf could not complain, although it deprived them of much of their profits; because they must have known originally, that they were liable to this competition, and they were willing to risk it. But, as this wharf was erected for the accommodation of the importers and shippers of goods, it is but reasonable that those who used it for that purpose should make compensation therefor; and, although the goods imported or shipped might first rest upon a pier, or upon the ice, or even another wharf, yet, if they were placed upon this wharf for the purpose of reaching their place of destination, we think there is nothing in the fact that they were first placed upon another wharf, more than upon a pier or the ice, which would exempt them from

wharfage. They obtained the very accommodation which this wharf was designed to give—a landing upon a structure connected with the main land." Second. Such right to demand wharfage upon goods transported over the Union wharf was expressly reserved by the libellant in its grant to the canal company of the right to connect the seaward rim of the canal basin with Union wharf. After this decision, wharfage was collected upon all goods landed upon Basin wharf and transported across Union wharf. This judicial construction of the libellant's charter, and of its contract with the canal company, has been the acknowledged law since 1837. This court has no disposition to attempt to vary the construction which the supreme court of this state has given to a charter granted by the legislature of the state, or to vary rights to property, having a permanent locality, which have been sustained by the highest state court, and which have been acquiesced in for many years. Swift v. Tyson, 16 Pet. [41 U. S.] 1; Townsend v. Todd, 91 U. S. 452.

The claimant occupies his wharf by virtue of grants from the libellant, which expressly, and as a part of the conditions of the grants, reserve to said corporation the wharfage rights which were declared by the supreme court of the state to belong to the libellant, and which reservation was expressly admitted by the grantees, in their contracts with the libellant, to be a part of the terms upon which the grants were made. In 1848, the New York and New Haven Railroad Company succeeded to the rights of the canal company in and to that part of the canal basin opposite to which the Derby wharf is built, and obtained from the libellant the liberty to fill up a portion of the canal basin, upon the condition that the libellant should collect, on all goods landed by water or taken off by water on and from the wharves of the railroad company which were connected with Union wharf, the same rate of wharfage as was then collected on goods landed or taken off by water on and from the wharves on the west side of Union wharf and attached thereto, subject to specified exceptions. The railroad company covenanted that such reserved right of wharfage should at all times be had and enjoyed by the libellant. In 1852, a further grant was made to the same railroad company by the libellant, upon substantially the same condition, so far forth as relates to wharves to be constructed and attached to Basin wharf, within a distance of four hundred and sixteen feet east of Union wharf, and the same covenant was entered into by the railroad company. The Derby Railroad Company are the lessees of the successors of the New York and New Haven Railroad Company. The wharfage rights which were declared by the supreme court of errors to belong to the libellant have thus been the subject of contracts between the grantors or licensors of the claimant and the libellant; and, for a valuable consideration, those under whom the claimant has title have covenanted that such rights shall be, at all times, enjoyed by the libellant. It is not, perhaps, now important to inquire whether, because the claimant's wharf is attached to the main land, he should, in the absence of an agreement, have the right of transporting goods over Union wharf free of wharfage, inasmuch as his wharf was attached to the main land upon the express condition and agreement that wharfage should be paid upon all goods transported from or to it over Union wharf. His wharf became connected with the land only by the permission of the libellant, upon the condition that the rights which existed before the basin was filled up should be reserved. But it may be remarked, that the claimant is a necessary user of Union wharf for the purpose of landing and receiving cargoes. Unless goods are transported through Brewery street, Union wharf must be used; and, for such use, it is held, in the Hemingway Case, that the libellant is entitled to wharfage. "Goods brought by water, and landed on or transported over the plaintiff's wharf, for the place of their destination, can not free themselves from wharfage, by resting upon a pier, or the ice, or even another wharf. They can not be said to be landed, in the one case, more than in the other." 12 Conn. 302. Under the decision in the Hemingway Case, and the contracts, I do not think that the libellant has a right to collect wharfage upon the vessels which may lie at the Derby wharf. Let a decree be entered for the libellant, and a reference to a commissioner to ascertain the amount of wharfage due upon the goods specified in the twenty-first and twenty-second paragraphs of the libel, which were transported over Union wharf.

Simeon E. Baldwin, for libellant.
George H. Watrous, William B. Wooster, and Morris F. Tyler, for claimant.

BLATCHFORD, Circuit Judge. The facts of this case are largely set forth in the judgment rendered by the district court. The question is one of law, as to what rights were conferred on the libellant by the statute law of the state of Connecticut, in respect to wharfage, so called, on goods in the situation of those involved in the present case. The decision of the highest court of the state of Connecticut on the very question must be accepted as the proper interpretation of such statute law. In 1837, the case of Union Wharf Co. v. Hemingway, 12 Conn. 293, an action of assumpsit for the wharfage of goods, brought by the same corporation which is the libellant in this case, was decided by the supreme court of errors of Connecticut. The defendants in that case owned vessels which ran from New Haven to New York and back, and also owned stores or warehouses on the west side of the plaintiff's wharf. These vessels discharged their car-

goes at the Basin wharf, on the outer side thereof, at a point more than three rods distant from the plaintiff's wharf; and the goods thus landed upon the Basin wharf were transported across the plaintiff's wharf to the defendant's said stores, or were transported upon the plaintiff's wharf to the main land. Then, as now, the Basin wharf abutted on the libellant's wharf on the east side of the libellant's wharf. Then, as now, the libellant's wharf and the Basin wharf were each of them used as a free public highway to pass and repass upon. The proprietors of the libellant's wharf demanded and received wharfage from all parties using it, continuously, from the year 1746. In 1760, the colonial legislature granted to the proprietors of the libellant's wharf a charter, incorporating them as "The Union Wharf Company in New Haven," and recognized their ownership of such wharf, and gave them power to repair and manage said wharf for the future, and to keep accounts, and to take care of the wharfage of the wharf, through a committee, which committee should account for the receipts of the company, and to agree with any member to keep the wharf in repair, and take the profits till they should satisfy his disbursements. In October, 1801, the legislature of Connecticut (1 Priv. Laws Conn. p. 523), incorporated the owners and proprietors of the libellant's wharf, by the name of "The Union Wharf Company in New Haven." The resolve of incorporation authorized the company, "at all times hereafter, to make all necessary contracts for the rebuilding, repairing or extending said wharf and pier, in such manner as they shall direct, and for keeping the same in repair," and to assign to the contractors the income of the wharf, and the right to collect the wharfage established by the company, from time to time, until the income should reimburse the expenditure, with interest, after which the income should revert to the company, subject to such reasonable restrictions or extensions with respect to repairs and wharfage as the legislature might then think proper to adopt. In May, 1810, the legislature of Connecticut (Id. p. 497), incorporated the libellant by the name of "The Contractors to Rebuild and Support Union Wharf and Pier in New Haven," and gave the corporation power to make such ordinances as it might find necessary to regulate the mode of receiving, collecting and enforcing the payment of wharfage. The corporators were authorized to appoint five directors to manage the concerns of the company. The resolve proceeds: "And the directors so chosen may appoint, from time to time, a suitable person as a wharfinger, who shall have power to collect and receive the wharfage when due, and, upon neglect or refusal to pay the same after notice and demand, it shall be lawful for such wharfinger either to sue for the same at common law, or to distrain for such wharfage, on any goods or chattels found on board the ship or vessel from which the same shall have accrued, and the goods or chattels so distrained to sell and dispose of in the same manner as if taken on execution, and the wharfage due for or on account of any ship or vessel, or the cargo thereof, shall be, and remain, a lien on such ship or vessel until the same shall be discharged." Prior to the resolve of 1810, the wharf company had contracted with the parties who became so incorporated in 1810 as the libellant, for the rebuilding, extension and maintenance, by the latter, of such wharf and pier. Soon after the libellant was so incorporated, it rebuilt and extended the wharf and pier, according to such contract, and received from the wharf company an assignment of the income thereafter to accrue from said wharf and pier, and the right to collect all the wharfage thereafter to accrue by reason of the use of the same, in any manner, by any parties, from time to time. Afterwards, and in October, 1815, the legislature of Connecticut passed a resolve declaring that the libellant has the right of collecting wharfage to reimburse it for its expenses, according to its contract with the Union Wharf Company, at a rate not exceeding a tariff annexed to said resolve, and thereby establishing said tariff accordingly, and further declaring, "that neither the claims of any individual or individuals to be exempted from wharfage, nor the claims of said company to demand wharfage of such individual or individuals, shall be in any way affected by this resolve." This tariff fixes, as wharfage, so much per ton per year for vessels belonging to New Haven, employed in foreign trade, and so much per ton per year, for coasting vessels belonging to New Haven, the above to be payable semi-annually, July 1st and January 1st, and so much per ton per day for coasting vessels not belonging to New Haven, and so much per ton per day for sea vessels not belonging to New Haven, with the privilege to vessels not belonging to New Haven to enter at any time for one year, by paying in advance the same wharfage as vessels belonging to New Haven. "All goods landed from or put on board coasting vessels" were required "to pay the following rates of wharfage," different articles of merchandise being specified, and the rate of wharfage being fixed at so much each, or so much per ton, or bale, or cubic foot, or bag, or thousand, or box, or fifty feet, or hundred weight, or dozen bottles, or dozen, or cask, or hogshead, etc. The resolve proceeds: "All other articles not enumerated, in same proportion. Goods or merchandise taken by water from, or by water put on board, coasting vessels lying at, or attached to vessels made fast to, the wharf, to pay half wharfage, unless the said goods or merchandise be conveyed to or from the wharf to any store adjoining the same, in which case full wharfage shall be charged. All vessels belonging to this port, which either lie at the wharf, or use it by taking on board or landing any part of their cargo or

passengers, shall pay six months' wharfage on the vessel, which vessel shall be entitled to the use of the wharf (if after January) until the next following July; (if after July) until the next following January. Vessels coming into this port, which enter by the year, shall pay wharfage at the rates above established, from the time they arrive till the next following January or July. Vessels, owners, masters and goods are liable for wharfage. * * * All articles landed on the wharf, and remaining more than four days, shall pay, in addition, for each day after, one-fourth of the established rates of wharfage. All articles brought by land and left on the wharf, shall, after the expiration of four days, be liable to the same rate of wharfage as if imported by water, and, if left in such a situation as will incommode the free use of the wharf, and the owner, or person having charge thereof, shall neglect to remove the same, on notice from the wharfinger, the same shall be deemed a nuisance, and may be removed by the wharfinger at the expense of the owner. Ballast deposited on the wharf shall be liable to wharfage, if suffered to remain more than four days without special license from the wharfinger, and, if left on the wharf after the vessel which discharged it shall have departed from the port, shall be forfeited to the use of the company. 'Provided, however, that this resolve shall at all times be liable to be altered or repealed by the general assembly." The resolve also provided, that sea vessels not belonging to New Haven should be liable to "the same wharfage, for goods landed or taken off, as coasting vessels." The following resolve was passed in May, 1819 (1 Priv. Laws Conn. p. 502): "Upon petition of the contractors, praying for an alteration in their tariff of wharfage and proviso contained in their former grant. Resolved by this assembly, that, in lieu of said proviso, and the exemptions heretofore claimed, the following alterations of, and additions to, the rates of wharfage heretofore established, be made and become permanent, and not subject to be altered, without the sanction of this assembly, viz: First. That lumber landed by water, in any of the yards adjoining the wharf, shall pay only one-half the rate of wharfage heretofore established, provided the lumber is owned by the proprietors or occupants of the yard. Second. Goods or merchandise, other than lumber, landed from a coasting vessel, into any of the back doors of the stores, or back yards, if to be exported in a sea vessel, without coming on to the wharf in front of said stores or yards, and all articles landed in the same manner from any vessel employed in foreign trade, and exported coastwise, without coming on to the wharf in front, shall pay only one-half the rates of wharfage heretofore established. Third. All articles landed from a coasting vessel into any of the stores or yards aforesaid, if to be exported coastwise, and not coming on to the wharf in front, shall pay half the established rate of wharfage when landed, and half when taken off. Fourth. No goods or merchandise landed into, or shipped from, any of the back doors of stores, or yards adjoining the wharf, shall be exempted from the payment of wharfage on both landing and shipping, unless owned by the owners or occupiers of said stores or yards. Fifth. All articles landed on any part of the wharf, from a coasting vessel, if reshipped within two days, coastwise, shall not pay only one wharfage, provided the said articles have not been carted up or down the wharf, and have not been sold. Sixth. Goods shipped, and immediately relanded, shall pay only one wharfage. And the petitioners shall have the same power and authority to collect the wharfage hereby established, and to enforce the collection thereof, in the same manner as is provided for the collection of the wharfage heretofore established, any law or provision in said former resolve to the contrary notwithstanding." In 1826, the Union Wharf Company and the libellant entered into an agreement with the Farmington Canal Company, a Connecticut corporation, whereby the canal company was authorized to construct a canal basin on the east side of the libellant's wharf, and to enclose the seaward side thereof by an embankment or wharf running from the main land near the foot of Brewery street, to the east side of libellant's wharf, and whereby the canal company was to forever keep in repair the part of the east side of the libellant's wharf which would be thus included in such basin, and the canal boats and their lading which should be transported up and down the canal within such basin, were to be free from wharfage, from the libellant's wharf; and by which it was provided, that all powers and rights not therein especially granted should be retained by the libellant. The canal company obtained the authority and constructed the basin and the embankment, such embankment being what is before referred to as the Basin wharf.

Such was the condition of things when the case of Union Wharf Co. v. Hemingway [supra], was decided. In the report of that case it is said: "The plaintiffs had, for thirty years, claimed and exercised the right of collecting wharfage on all goods brought upon their wharf, by land, from any adjoining wharves and yards, or landed at said wharves and yards and carried up the plaintiffs' wharf." The defendants in that suit had paid wharfage to the canal company on the goods landed from their vessels at the Basin wharf, and were indemnified by that company, and claimed that they used the plaintiffs' wharf in no other manner than as a public highway, and were not responsible to the plaintiffs for wharfage. The counsel for the defendants in that suit contended (1) that the plaintiffs had no title to the Basin wharf at the place where the goods were landed, which was a point more than three

rods east from the east side of the plaintiffs' wharf; (2) that, when the goods were put upon the Basin wharf from the vessel, they were landed, or removed from the water on to the land; that, therefore, they were not landed on the plaintiffs' wharf; and that their transportation over the plaintiffs' wharf, after they were landed, was transportation by land; (3) that no other use was made of the plaintiffs' wharf, for the goods, than to transport them thereon, as a public highway; (4) that the plaintiffs had no right, under any of their grants, of 1760, 1801, 1810, 1815 or 1819, to demand payment for the mere use of their wharf as a public highway; (5) that the plaintiffs could not rely on any usage proved, to charge for the use of their wharf as a public highway, because, first, the grant to them was not doubtful or equivocal in its provisions, and, second, the usage proved was a usage in regard to wharves and yards on the west side of the plaintiffs' wharf, erected under grants from them and on their flats. In giving judgment, the court said: "That the Union wharf is a free, open public highway, is not denied. But the plaintiffs claim, that they have the right to demand compensation for all goods brought by water, which are landed upon or pass over their wharf, and upon all goods transported or shipped from their wharf; and this seems not to be denied on the part of the defendants, but they claim that, as these goods were first landed upon or shipped from the Basin wharf, and transported up or across the plaintiffs' wharf only as a public highway, therefore, no wharfage can be demanded." The court then allude to the fact, that, in 1732, the proprietors of undivided lands in New Haven voted not to allow any wharf to be erected within three rods of the east side of the plaintiffs' wharf, nor within four rods of the west side, "thus holding out to those who would embark in this enterprise, that, if this wharf should become a public highway, those who, by means of it, imported or exported their goods, should not be allowed the facilities of another wharf, by which they could avoid a reasonable compensation for the expenses incurred in this then novel but important undertaking." The court further said: "Soon after, and, as we may fairly presume, in consequence of this vote, the original wharf was erected. Under this grant, though the wharf became a public highway, yet those who used it, to import or export goods, always paid a compensation therefor, under the denomination of wharfage; and it has not been denied but that, if goods imported were landed at a pier, and then transported in a boat or on the ice, to this wharf, and landed there, or transported over it, they would have been subject to wharfage; and, if another wharf had been built four rods distant, and goods imported were landed thereon, and then brought on to this wharf, upon the same principle, they must have been subject to wharfage. If such a wharf had been extended to the main land, the owners of this wharf could not complain, although it deprived them of much of their profits, because they must have known originally, that they were liable to this competition, and they were willing to risk it. But, as this wharf was erected for the accommodation of the importers and shippers of goods, it is but reasonable that those who used it for that purpose, should make compensation therefor; and, although the goods imported or shipped might first rest upon a pier or upon the ice, or even another wharf, yet, if they were placed upon this wharf for the purpose of reaching their place of destination, we think there is nothing in the fact that they were first placed upon another wharf, more than upon a pier or the ice, which would exempt them from wharfage. They obtained the very accommodation which this wharf was designed to give—a landing upon a structure connected with the main land. And when we consider, that, by the grant, no wharf was to be erected within four rods of this, we think that goods brought from such a wharf to this, to be transported to their place of destination, may be fairly said to be landed upon this wharf, and so, in the strictest sense, subject to wharfage. Had there been no connection between this wharf and the Canal wharf, these goods must have been brought in boats to the wharf of the plaintiffs, in which case they would have been literally landed on their wharf, and would certainly have been subject to wharfage. How, then, is the case altered by the arrangement made between the corporations? The canal company had no right to unite their wharf to the Union Wharf, or to build within three rods of it, without the consent of the plaintiffs. An arrangement, however, was made, and it is immaterial at whose request, and that consent was given, but upon certain terms and conditions. One of these conditions was, that the side of the Union wharf enclosed within the basin, should be free from wharfage for canal boats, and all articles transported either up or down in them; and the Union Wharf Company retained to themselves all powers and rights not especially granted to the canal company. The first mentioned provision clearly shows what was intended to be granted, as it regards wharfage—an exemption from wharfage on goods brought down or carried up the canal, and canal boats; not, however, upon all, but such only as should come or send their goods within the basin. How frivolous would this arrangement have been, if the claim of the defendants is admitted! How idle to provide, that goods coming down the canal might be free from wharfage, if all goods from any place were to be free from wharfage! If it should be said, that this exemption applies only to goods first landed upon Union wharf from the canal boats, it would deduct very little from the weight of the argument; for,

as these wharves were to be connected, whether the goods were first landed upon one or the other, would be a matter of trifling consequence, in such an arrangement. But, further, the Union Wharf Company, after the exemption, which is the only thing said about wharfage, expressly reserve all rights and privileges not expressly granted; and as they had granted no exemption but the one before stated, all other rights to wharfage, which they before had, remain with that corporation. Had not this junction of the two wharves been made, we have seen, that the plaintiffs would have been entitled to wharfage upon all goods landed, directly or indirectly, from a vessel, upon their wharf, for the purpose of arriving at their final destination, by means thereof, or upon goods shipped therefrom, in a similar manner. If goods imported have once been transported from a pier or wharf to the main land, then they may be no more liable to wharfage than any other goods brought from the country to the stores on the wharf; but goods brought by water, and landed on or transported over the plaintiffs' wharf, for the place of their destination, cannot free themselves from wharfage, by resting upon a pier, or the ice, or even another wharf. They cannot be said to be landed, in the one case, more than in the other. The canal company, when they took this grant from the Union Wharf Company, must have understood, that nothing was intended to be granted, but what was expressly granted; and they then received a grant of the flats upon which their wharf and basin is founded, from the proprietors of the town, upon the express stipulation, that this agreement between the Union Wharf Company and the canal company be ratified. They, therefore, agreed to build their wharf under these conditions and stipulations. But, by the claim now made, the Union Wharf Company are not to retain the power and enjoy the privileges they before did. The canal company are to take from them all the business which the space their wharf occupies will permit, and, at the same time, subject the wharf of the plaintiffs to a great share of the damage incident to such business. Such a construction of this contract the court cannot accede to. We consider it contrary to good faith, and contrary to the spirit of the contract and the intent of the parties, who, at the time, seemed desirous to guard the rights of the plaintiffs with great care. As between these corporations, therefore, every principle of law, as well as of justice, is in favor of the plaintiffs; and this suit is in fact, though not in form, a suit between these companies, for, the defendants are indemnified by the canal company. It is true, however, that the defendants' indemnification may fail; and they must have a right to be heard in their own defence. How, then, do they stand? The plaintiffs would have had a right to exact wharfage of them upon these goods so placed upon their wharf, before the erection of the Canal wharf. The defendants must, then, show how that right has been lost or varied, and, for this purpose, they must rely upon the rights of the canal company; and, if this company have no rights, as against the Union Wharf Company, to intercept their claim of wharfage, we do not see how the defendants can resist the claim. That they have paid their wharfage to the canal company, may evince what has been found by the jury, that there was no design to avoid wharfage; but it will not show that the plaintiffs were not entitled to it. And, if the plaintiffs would have been entitled to wharfage, aside from the intervention of the Canal wharf, the defendants must show, that, by means of that wharf, this right was lost. And, when the very instrument under which the wharf was erected, shows that the plaintiffs' right of wharfage was retained, it is not easy to see how the defendants can shelter themselves under it, more than the canal company. To a majority of the court, then, it appears that the plaintiffs, upon the facts admitted and proved in this case, are entitled to wharfage; and, of course, there must be a new trial." This judgment was delivered by Chief Justice Williams, with the concurrence of Judges Bissell, Huntington and Waite. Judge Church dissented.

It is entirely clear that the state court, in construing the legislative grants to the Union Wharf Company and to the libellant, and the contract with the canal company, asserted the truth of the following propositions: (1.) That goods arriving by water, by a coasting vessel, and transported over the libellant's wharf, to reach their place of destination on the main land, are liable to pay wharfage to the proprietors of such wharf, if they are discharged from such vessel upon the Canal wharf or Basin wharf, even at a point distant more than three rods easterly from the libellant's wharf, and then pass upon carts over the Basin wharf on to the libellant's wharf and up the latter wharf to points in the city beyond it; (2.) that, under such circumstances, such goods may be fairly said to be landed on the libellant's wharf; (3.) that the term "wharfage" includes the compensation for such use of the libellant's wharf; (4.) that the proprietors of the libellant's wharf, before the construction of the Basin wharf, had the right to demand wharfage as compensation for the use of their wharf, in transporting over it goods arriving by water in a coasting vessel, though first discharged from such vessel on a wharf four rods distant from the libellant's wharf, if they were afterwards transported over the libellant's wharf to reach their destination on the main land, beyond the libellant's wharf, and that the right to such wharfage was not abridged by anything in the agreement with the canal company, or by anything done thereunder, in the construction of the

basin or of the Basin wharf; and (5.) that the owner of the goods liable to such wharfage has no rights, as against the claim of the proprietors of the libellant's wharf, to such wharfage on such goods, which the canal company did not have.

Aside from the binding character of these adjudications of the highest state court on the questions in issue, reference may be made, in support of the correctness of the conclusions arrived at, to provisions, before cited, from the resolves of the legislature, to show that the scheme of the legislature was to permit the proprietors of the libellant's wharf to receive wharfage, in some cases, for the use of the wharf, in respect of goods, even when there was no landing on the wharf, or deposit on or transit over the wharf, of goods which had arrived by water. Thus, by the resolve of 1815, goods taken by water from, or by water put on board of, coasting vessels lying at the wharf, or attached to vessels made fast to the wharf, were required to pay half wharfage, even though the goods were not conveyed to or from the wharf, or any store adjoining the wharf. By the same resolve, all articles brought by land and left on the wharf, even though not imported by water, were required, after the expiration of four days, to pay the same rate of wharfage as if imported by water. In another direction, compensation was given directly for the use, by goods, of the wharf in front of a store or yard, irrespective of the landing of the goods in the store or yard, and for the use of the wharf to cart goods up and down the wharf, which had been landed on the wharf. Thus, by the resolve of 1819, goods other than lumber, landed from a coasting vessel into any of the back doors of the stores or back yards, if to be exported in a sea vessel without coming on to the wharf in front of said stores or yards, and all articles landed in the same manner from any vessel employed in foreign trade, and exported coastwise, without coming on to the wharf in front, were made subject to only one-half of the established rates of wharfage; and all articles landed from a coasting vessel into any of said stores or yards, if to be exported coastwise, and not coming on to the wharf in front, were required to pay only one-half of the landing wharfage, when landed, and one-half of the wharfage for putting on board, when taken off. By the same resolve, all articles landed on any part of the wharf, from a coasting vessel, ir reshipped within two days coastwise, were required to pay but one wharfage, that is, not wharfage for landing and wharfage for putting on board, but only one of the two, in case such articles had not been carted up or down the wharf and had not been sold.

The present suit is a libel in rem against the steamer J. H. Starin, a packet boat plying daily between New Haven and New York. On each one of six days in January, February and March, 1877, she laid for a time, in the port of New Haven, at a wharf called the Derby Railroad wharf, which was within 416 feet of the libellant's wharf, and east of it, receiving and discharging freight and passengers. The Derby Railroad wharf is a wharf abutting on the Basin wharf and running outwardly from it in a southeasterly direction, and about in a line parallel with the libellant's wharf. On the days before named the steamer discharged and received on board a large quantity of goods, as freight, a great part of which were carted upon and over the libellant's wharf and that part of the Basin wharf which lies between the Derby Railroad wharf and the libellant's wharf. If the goods so carted upon and down the libellant's wharf and thence over the Basin wharf and the Derby Railroad wharf to the steamer, and those so unladen from the steamer and carted over the Basin wharf to, upon and up the libellant's wharf, had been originally laden upon, or unladen from, the steamer, while lying immediately alongside of the libellant's wharf, the wharfage on the same, which the libellant would have been entitled to charge and collect, would have been $76 10.

The canal company, before mentioned, in 1836, after it had constructed the basin and the Basin wharf, ceased to do business, and, prior to January 1st, 1848, it conveyed to the New Haven and Northampton Company all the rights which it had to the canal basin.

In 1845, the legislature of Connecticut, by a resolve (3 & 4 Priv. Laws Conn. p. 1380), gave to the New Haven and Northampton Company the right of collecting wharfage "at their Basin wharf," between the libellant's wharf and Tomlinson's wharf, at a rate not exceeding a tariff thereunto annexed, and established said tariff, with the proviso, "that neither the claims of any individual or individuals to be exempted from wharfage, nor the claims of said company to demand wharfage of such individual or individuals, shall be in any way affected by this resolve." At the same session of the general assembly a resolve was passed in these words: "Whereas a resolution has passed this assembly, at its present session, relating to the rate of wharfage on the Basin wharf in the city of New Haven: Resolved by this assembly, that nothing therein contained shall be construed to affect the rights of the Union Wharf Company or the contractors to rebuild and support Union wharf and pier in New Haven, to collect wharfage in any case whatever, or any other existing rights of said company."

The New Haven and Northampton Company, on the 24th of March, 1848, conveyed to the New York and New Haven Railroad Company all its rights to a part of said canal basin, comprising that part of it opposite to which the said Derby Railroad wharf is built, said basin being then disused. On the 7th of September, 1848, the libellant and the Union Wharf Company conveyed to the New York and New Haven Railroad Company the

right to cross the libellant's wharf with its railroad, and to fill up a certain part of the flats adjoining the east side of said wharf, within the limits of the canal basin, down to a point 731 feet southerly from the libellant's well at the head of said wharf. But the grants and consent were made upon the express conditions, that the grantors reserved the right to collect, on all goods landed by water, or taken off by water, on and from the wharves, or embankments, piers or bridges belonging to, or constructed or occupied by, the railroad company, and connected with the libellant's wharf on either side thereof, the same rate of wharfage as was then collected and received by said grantors on goods landed or taken off by water on and from the wharves attached to and connected with the libellant's wharf on the west side thereof, except on goods carried up or brought in the cars of the railroad company without otherwise coming on to the libellant's wharf, and except on goods to be used for railroad purposes on said railroad; and on the express further conditions, that no buildings should be erected or placed on the east side of the libellant's wharf, within 80 feet of the front line of stores then standing on the libellant's wharf, and that any railroad tracks which might be thereafter placed on the east side of the libellant's wharf, running northerly, should be placed between said wharf and any buildings which might be erected or placed on the east side thereof, on said adjoining wharves. The grantee, in the same deed, agreed that the grantors should have the said power of collecting so reserved by them, and that the grantee would observe all the conditions so expressed as those on which said grants and consent were given and made, according to the true intent and meaning of the same.

On the 19th of July, 1832, the libellant and the Union Wharf Company conveyed to the New York and New Haven Railroad Company permission to fill up its railroad embankment on the east side of the libellant's wharf, to extend southerly to the south side of the Basin wharf, from the said point distant 731 feet southerly from the said well, and to adjoin said embankment to the east side of the libellant's wharf, along the whole length thereof, from the termination of said former grant to the south side of the Basin wharf, on the express conditions and reservations, that the grantors should have the right to collect the same rates of wharfage on the embankments or wharf which might be built within said limits, and also on and from that part of the Basin wharf which extends for a distance of 416 feet of its length from its junction with the libellant's wharf, and also on all wharves which might be constructed or attached to the Basin wharf, within such distance of 416 feet, as were then collected by the grantors on the libellant's wharf, except on goods carried up or brought down in the cars of the railroad company, without otherwise coming on to the libellant's wharf, and except also on goods to be used for railroad purposes on said railroad, with express further conditions as to the erection of buildings to the eastward of the libellant's wharf, and as to constructing a drain, and as to the location of wood yards and coal yards, and as to some other minor matters. The grantee agreed that the grantors should enjoy the right of collecting wharfage in the manner and on the wharves before reserved and specified, and that the grantee would observe all the conditions so expressed as those on which such grant and permission was given and made, according to the true intent and meaning of the same.

Under the said grants to the New York and New Haven Railroad Company, the part of the canal basin contiguous to the east side of the libellant's wharf was, prior to the 1st of January, 1874, filled up solid by said company down to the line of the Basin wharf, thus barring all immediate access by water to the easterly side of the libellant's wharf, north of the Basin wharf. Prior to 1874, all rights, franchises, property and obligations of the New York and New Haven Railroad Company became legally vested in the New York, New Haven and Hartford Railroad Company. The latter company, on the 9th of October, 1873, by a lease in perpetuity made by it to the New Haven and Derby Railroad Company, gave to that company certain rights, under which the Derby Railroad wharf, before mentioned, was constructed, in 1874.

The evidence shows, that, ever since the decision in the Hemingway suit, the proprietors of the libellant's wharf have claimed to collect, and have collected, wharfage for the use of such wharf to transport thereon goods coming on to it from the Basin wharf, and goods going from it on to the Basin wharf, which arrived by water in coasting vessels, or were shipped by water in coasting vessels, and were discharged upon the Basin wharf, or laden from the Basin wharf, except so far as the right to collect such wharfage was expressly parted with by the instruments before recited. It also appears, that the libellant exclusively keeps in repair the part of its wharf which lies northerly of its junction with the Basin wharf.

The affirmative defence set up in the answer is, that the Basin wharf is a part of the main land and a public highway; that the part of the libellant's wharf which is north of its junction with the Basin wharf is a part of the main land and a public highway; and that the wharf at which the steamer discharged and received said goods is more than three rods distant, to the eastward, from the libellant's wharf.

The question does not seem to be varied at all from what it was when the Hemingway Case was decided, so far as regards

goods in the situation of those involved in the present case, except so far as it may be varied by the fact, that, since then the canal basin has been filled up, so that what was then water has become land, continuous with the main land inside, and continuous with the Basin wharf on the outside. But, the Basin wharf was built and connected with the libellant's wharf by the permission of the libellant, and the libellant necessarily reserved all rights to wharfage which it did not expressly then part with. By the decision of the state court it had the right which is claimed in the present suit. That right was not parted with, in the grants to the canal company, or in the grants to the New York and New Haven Railroad Company, and the claimant can have no better position, as against the libellant, in respect of such right, than that company had or than the canal company had. The locus in quo of the discharge and shipment of the goods in this case is to the westward of a line crossing the Basin wharf at a distance of 416 feet east from the libellant's wharf. The libellant does not make, in the present case, a claim, by virtue of any of the instruments before recited, to any greater right than has been conferred upon it by statute, but only claims, that, while the right insisted on in this case was granted to it by statute, it has not parted with such right by any of such instruments.

The fact that the Basin wharf is connected with the main land by the filling in of the canal basin, or by the route through Brewery street, cannot vary the libellant's rights in the present case. The wharfage here claimed is for the use of the libellant's wharf by transporting the goods over it. If they had not been transported over it, but had been taken to or from the Derby Railroad wharf by the way of Brewery street, they would not have been subject to wharfage for being transported over the libellant's wharf.

On the evidence, the libellant's wharf must still be regarded as a wharf, on the part of it used by the goods in this case, so that the statutory rights given in respect to it remain, quoad such goods and their use of it, however much it may be a public highway in respect to goods not liable to wharfage for the use of it. If the libellant is usurping a franchise which does not belong to it, its title to such franchise can undoubtedly be tried by a proper judicial proceeding in the tribunals of the state. But, so long as the libellant's wharf is used for the transportation over it of goods coming from the Basin wharf on to it, or of goods going from it on to the Basin wharf, which goods have been discharged from, or are afterwards laden, on a coasting vessel, at the point on the Basin wharf where the goods in this case were discharged and laden, and so long as the decision in the Hemingway Case stands as the interpretation by the highest state court of the resolves of the legislature, so long must this court maintain the claim made by the libellant in this case.

By the resolve of 1810, it is provided, that, upon neglect or refusal to pay wharfage after notice and demand, it shall be lawful either to sue for the same at common law, or to distrain therefor, to the extent specified; and that the wharfage due for or on account of any vessel or the cargo thereof, shall be and remain a lien on such vessel until the same shall be discharged. It is clear, that the resolve means, that wharfage on cargo is to be a lien on the vessel until such wharfage is paid. It is left to the vessel to see that it is made secure for its liability, which it can well do, having possession of the goods, and being able to take care either that they do not pass over the libellant's wharf, or, if they do, that the proper wharfage therefor is paid.

The claim to a lien for wharfage in this case is such a claim as is cognizable in admiralty. The use of the libellant's wharf facilitated the operation of the steamer in loading and discharging, to such an extent that the legislature thought fit to give a lien on the steamer for the wharfage dues prescribed for the cargo. The use of the libellant's wharf, as it was used in this case, pertained to navigation by water, to such an extent that the implied contract for wharfage, in respect of the goods, may properly be regarded as a maritime contract, of benefit to the steamer, and, therefore, one the lien given for which by the resolve is cognizable and enforceable in the admiralty. The Lottawanna, 21 Wall. [88 U. S.] 558; Ex parte Easton, 95 U. S. 68; The Virginia Rulon [Case No. 16,974]. There was a sufficient notice and demand in this case prior to the bringing of the suit.

The libellant is entitled to a decree for $76 10, with interest thereon from July 1st, 1878, and for $80 73, its costs in the district court, and for its costs in this court.

I do not understand the libel in this case as making any claim for wharfage founded on any thing except the use of the libellant's wharf by the goods. It does not claim, in addition, that the steamer is liable for any wharfage prescribed for vessels, aside from the liability of the steamer for the wharfage prescribed for the goods. I, therefore, express no opinion on that question, nor on any question except the one distinctly involved in this case.

## Case No. 7,321.

JILLSON v. WINSOR.

[1 MacA. Pat. Cas. 136.]

Circuit Court, District of Columbia. July, 1850.

PATENT OFFICE APPEALS—INTERFERENCE—EVIDENCE.

[On the evidence, *held*, that Arnold Jillson was the first inventor of the improvement in weavers'

temples, which constitutes the subject of this interference.]

[Appeal from the decision of the commissioner of patents.

[This was an appeal by Arnold Jillson from a decision of the commissioner of patents, in an interference proceeding, awarding to Olney Winsor priority of invention, in respect to an improvement in weavers' temples.]

W. P. Elliot, for appellant.

J. Dennis, Jr., for appellee.

CRANCH, Chief Judge. This is an appeal from the decision of the commissioner of patents rejecting the application of Arnold Jillson for a patent for an improvement in weavers' temples, because it would interfere with the claim of Olney Winsor for a patent for the same invention. The decision of the commissioner was in these words: "Upon the hearing of this case, it appears by the testimony of two witnesses that the said Winsor invented the temple in question at least as early as the winter or spring of 1847, and it does not appear by the testimony adduced the said Jillson made the same invention earlier than the winter of 1848. Priority of invention is therefore decided in favor of the said Olney Winsor." After the amendment of the specification, the only point involved by the reasons of appeal is the question of priority of invention.

The appellant contends that certain certificates of manufacturers should be received as evidence in the cause, but the refusal of the commissioner to receive them is not alleged as a reason of appeal filed in the patent office, and cannot now be received as such; and if they had been so alleged, they were properly rejected, because not on oath in due form of law. The question of priority, therefore, is the only point in the reasons of appeal, and it is the only question decided by the commissioner. Mr. Winsor, in support of his claim to priority of invention, produces his ledger—a book of accounts—upon a blank leaf of which is found a drawing of an instrument called a "weavers' temple," exactly like that which Mr. Jillson claims to have invented in June, 1848. On the preceding page, viz., page 257 on the same sheet, is an account against Seth Scott—the only entry in which, on the debit side, is dated "1842, March 10th," written with blue ink, and on the creditors' side, "March 28th." At the top of the page containing the drawing are the words "Providence, August 10th, 1845," in black ink. The page is quite blank, but ruled with red ink, as all the other pages in the book are. On the next page is an account against Whipple & Willmarch, commencing 1846, August 24th, and running on to December 25th, 1846. There are no entries in the book (except the words "Providence, August 10th, 1845," on the top of page 258) between March 28th, 1842, and August 24th, 1846. This is accounted for by the fact, as testified by B. F. Kendall, that Mr. Winsor failed in business in 1842, and did not get into business again till 1846, when he went into the machine business with Albert G. Coffin, and continued to work with him until 1848, when the connection was dissolved.

1. Mr. Albert G. Coffin testified that in 1846 he saw the draft on Mr. Winsor's book; and the plan now shown is that which Mr. Winsor showed him in 1846. He believes it was in 1846, second month, that Mr. Winsor came to work with this witness; that the charges made in the book were made at or about the time they bear date, commencing August 24th, 1846; the last charge was made January 25th, 1848. Being required to state the exact time when Mr. Winsor showed him this draft of a temple, he said, "I cannot be positive of the day when he showed it to me; I think it was in the second month of 1846; I cannot be positive of the day—not to certify to it." Being asked when Mr. Winsor first showed him the model in the book, and where was it, he says: "First at the house; I think in the second month of 1846: I won't be positive as to the date of the month; afterwards at the shop." He does not know when Winsor first manufactured any temples from this model. He dissolved business with Winsor in 1848, "somewhere along in July or August"—can't tell the date. Between the time when he showed the witness the draft and the dissolution of their connection Winsor did not manufacture any of these temples—witness never saw one in operation. After dissolving business with Coffin, Winsor worked some, making temples, at a small shop in Providence. Can't tell what kind of temples he made. He made temples of various kinds, some of this kind. Witness first saw one of this kind manufactured by him about the 1st of April, 1849. He said he was selling temples, but not of this kind. There are many different kinds. He had some of this kind in his shop. Does not know that he sold any. Mr. Winsor usually kept the book at his house. The slate was taken to his house, where the entries were made from the slate. He saw the book about the time the partnership was dissolved—about July or August, 1848; does not know that Winsor made any before April, 1849.

2. Benjamin F. Kendall testifies that he has not sold any of these temples. It was the last of February or first of March, 1849, that witness first heard that Jillson had a temple like that claimed by Winsor. On his return from Providence he told Mr. Winsor what he had heard about the Woonsocket temple, and explained it to him. He (Mr. Winsor) said it was not a new principle, and claimed it as his own invention, and exhibited to this witness a drawing in a book,

&c. Winsor was making temples, but not of this kind; witness had seen none of them; witness had never seen the drawing before. He was interested conjointly with Winsor in two temples—Priest's temple and Harris' temple. Witness had been concerned with Winsor about six months, but Winsor had never communicated to him any knowledge of the temple in controversy. He manufactured some of these temples about the 1st of April, 1849. That was the first the witness knew of it. He paid no attention to the manufacture of temples; he has no interest in this matter. The temples were put on the looms first at Lowell in April or May, 1849.

3. Oliver Hunt worked for Olney Winsor and A. G. Coffin in 1847, and during that time saw a drawing to the effect of that shown to him, on the same principle; could not say he saw it in the book shown to him. The drawing he saw was made by Olney Winsor. The book he saw it in looked like the one shown him, and the drawing was similar to this; apparently it is the same book. The principle of it was explained to those in the shop at the time. The plan was then chalked out on the floor and explained. A day or two afterwards he showed this drawing to the witness in the book at his house. Never saw a model of this made at that time or about that time. The time he saw this was the latter part of April or first of May, 1847. He fixes the time in May, 1847, by the time he went there to work. He worked for Winsor and Coffin over a year. Winsor showed him this drawing about two months, he should think, after he went there; it was the latter part of April or first of May; he cannot fix the day. He knows it was then, because he was talking with Mr. Joseph Winsor, the man he is now working for, about going to work on some harness machines, but he did not go to work for him until July last (1849). The drawing was shown to witness in 1847. He knows that this took place at the time he had talked with Joseph Winsor, because he had seen him in town a day or two before the drawing was shown to him; it was shown to him in Coffin and Winsor's shop in "Central Falls." The witness does not know of Mr. Winsor's making any temples of this kind, but knows that he had two or three pairs in his shop, and there might have been more.

This is the substance of the evidence adduced by Mr. Winsor in support of his priority of invention of the temple in question. Mr. Jillson does not claim to have invented it before June, 1848. The only evidence that Mr. Winsor ever invented this temple is the fact that an exact drawing of it is found upon page 258 of a book of accounts belonging to Mr. Winsor, which does not appear to have been in use by him from March 28th, 1842, (the last preceding entry,) and the 24th of August, 1846, (the next succeeding entry,) on page 260, and the fact that that drawing in the book was shown by Mr. Winsor to Albert G. Coffin in the year 1846, and to Oliver Hunt about the 1st of May, 1847. It is true that the witness Hunt, in speaking of the time when he saw the drawing in the book, says the drawing he saw was made by Mr. Winsor; but it is evident that his attention was not drawn to the question who made the drawing, but to the question when it was made. He seems to have taken it for granted that it was made by Mr. Winsor because it was in his book; and his assertion that the drawing was made by Mr. Winsor seems to be only an inference drawn by him from the fact that it is found in his book. There is, therefore, no direct and positive evidence that Mr. Winsor ever invented the temple in question; certainly not before the year 1849. There is no evidence that he made any such temple before that time. If he had made and perfected such an invention in 1846, it is not to be believed that he should have kept it secret until 1849, and made no use of it. The witnesses Coffin and Hunt, who say they saw the drawing in the book in 1846 and 1847, may have been mistaken as to the year, and they do not speak with certainty of the date. Upon a close examination of the drawing in the book, and comparing it with the temple which Winsor borrowed of Jillson in the name of Harris, I am quite satisfied that the greater part of the drawing was made from that temple by placing it upon the leaf and drawing the outline from the temple itself with a pen; and as that temple was not made until the year 1849, the drawing could not have been seen in 1846 and 1847.

There is no evidence that Mr. Winsor made any such temple until 1849. On the contrary, Mr. Tourtellot, superintendent of the Albion Company Mills, testifies that in April, 1849, Mr. Winsor offered to sell him a temple—not one like those invented by Jillson. He asked the witness if he knew a better; witness described to him one of Jillson's, and told him he could see one at the Clinton Mills, Woonsocket, but he (Winsor) seemed to doubt whether it was better than his. This evidence shows that at that time he was ignorant of the temple invented by Jillson. Ira Lee testifies that in April, 1849, Mr. Winsor came into the Clinton Machine Shop, at Woonsocket. Mr. Jillson, who was employed as master mechanic at the Clinton Mills, was in the shop. Mr. Winsor inquired if there was a new kind of temple, and if it was a good kind. The witness and Mr. Jillson explained it to him. He wanted to get a pair that night, but concluded to wait till the morning. They took him to be a manufacturer. He did not say it was new, but rather seemed to think he had never seen such a kind before, thus again showing his ignorance of Jillson's invention. Cyrus Harris, superintendent of Doctor Harris' Mills, testifies that in April, 1849, Winsor came to the mills and said he had a temple he want-

ed him to try. It was a new temple he had found at Woolsocket, got up by one Jillson. He wanted the witness to take the temples and try them, if he would, and send them home to Woonsocket. As he had obtained them in the name of the witness, he wished him to take them and send them home in his name to Mr. Jillson or to Lippet & Jillson. That the temple now shown to the witness is the same, or of the same kind, as the one he showed to him, and which he said he obtained from Jilson; that Winsor stated to the witness that the reason why he used the name of Mr. Harris was that he thought the temple was the best he had seen, and that he could not get it in any other way. This witness further testified that Winsor told him that he had taken a model from the temple which he had borrowed of Jillson in the name of this witness. Charles T. Martin, in a deposition taken on the part of Mr. Winsor, testifies that in April, 1849, at the request of Mr. Winsor, he tried to get a pair of the temples made by Mr. Jillson, and went with him part way to Clinton Mills; that Mr. Winsor went in, and witness waited under the railroad bridge. When Mr. Winsor came out he had what witness supposed was a pair of temples, and asked witness to be with him as a witness of the time and the kind of temple he obtained of Mr. Jillson.

That Mr. Jillson invented the temple in question is abundantly proved by the testimony of the following witnesses: (1) Dudley Reach, who testifies that he first knew of Mr. Jillson's claim of an improvement in weavers' temples in May or June, 1848; that he used to go into the shop about that time, and saw him frequently at work on those temples. (2) Lorenzo B. Jillson, who testifies that he knows of Arnold Jillson's having invented an improvement in weavers' temples, and having applied for a patent thereon; thinks he first knew of this improvement in June, 1848, and first saw them in use the last of June, 1848, in Clinton Mill, in Woonsocket; that he saw Jillson making one. Being asked what is the improvement invented by Jillson in weavers' temples, and in what does it differ from other temples, he says: "All other jaw-temples which I ever saw have a device for opening and closing the jaw; these do not, but work by the action of the cloth." (3) Gardner Smith says he was present when Jillson was making improvements in weavers' temples, and did the blacksmithing for them in June, 1848; that he saw the improved temple made by Jillson in operation on trial, by way of experiment, in June, 1848, in the machine-shop of the Clinton Mill; that this improvement obviates the necessity of any spring whatever; the gravitation of the jaw is its motive power, and is unlike all others to his knowledge. (4) Robert Hilton worked in the weave-shop in the Clinton Mill, in Woonsocket, from 1843 to 1849, except twelve or thirteen months; had charge of the weave-shop and tried the temples, and made all the experiments with them, and they were the first he had ever heard or seen of the kind. It was about two years ago (February, 1848) since they were first applied to looms in Woonsocket. He never saw them applied in any other place. (5) Mr. Tourtellot first heard of the invention late in the fall or winter of 1848. (6) Ira Lee, in April, 1849, was at work in the machine-shop at Woonsocket upon temples invented by Mr. Jillson. (7) Cyrus Harris says that Winsor came to the mills in April, 1849, and said he had a new temple he wanted him to try; he found it at Woonsocket; it was got up by one Jillson.

Upon consideration of the whole evidence, I am satisfied that the applicant, Olney Winsor, was not, and that the said Arnold Jillson was, the first inventor of the improvement in weavers' temples, which is now the subject of controversy in this case, and that the decision of the commissioner of patents rejecting the application of the said Arnold Jillson and awarding the priority of invention in favor of the said Olney Winsor ought to be, and the same is hereby, reversed.

JIM WATSON, The (BRAWLEY v.). See Case No. 1,817.

## Case No. 7,322.

The J. L. BOWEN.

[5 Ben. 296;[1] 4 Am. Law T. Rep. U. S. Cts. 214.]

District Court, S. D. New York. Aug., 1871.

SALVAGE—SERVICES OF NAVIGATOR—DISTRIBUTION.

1. A brig left New York, bound on a voyage to Gibraltar. Four days afterwards an affray took place on board, in which the master was killed, the second mate so hurt as to be incapable of doing duty, and the first mate seriously hurt. He, however, took command, and headed the vessel back to New York, remaining on deck and in charge, without sleep, for two days. On the morning of the second day the ship E., attracted by a signal of distress, came to her, and H., the mate of the E., went on board the brig, and navigated her back to New York, the services lasting sixty hours. The brig and her cargo were worth $50,000. *Held*, that the service was a salvage service.

2. $3,000 was a proper compensation, to be divided as follows: $1,600 to the owners of the E.; $450 to her master; $650 to H.; and $300 to the rest of her crew, according to their wages.

[Cited in The Marie Anne, 48 Fed. 748.]

In admiralty.

Beebe, Donohue & Cooke, for libellant.

Scudder & Carter, for claimant.

BLATCHFORD, District Judge. On Sunday, the 28th of May, 1871, the brig J. L. Bowen left New York, bound to Gibraltar. Her ship's company consisted of a master, two mates, a cook and six men before the

[1] [Reported by Robert D. Benedict, Esq., and here reprinted by permission.]

mast. She had one passenger. The vessel and her cargo were worth $50,000. On Thursday, the 1st of June, an affray occurred between four of the seamen and the officers, in which the master was killed, the second mate was so injured that he was incapable of doing duty, and the first mate was very much hurt. The seamen were all of them colored men, and the officers were white men. Two of the seamen and the cook took no part in the affray. The men who were engaged in the affray were at work at the time, using the capstan. The difficulty arose in reference to the manner of putting a turn on the capstan, and the blows which killed the master and injured the mates were inflicted by capstan bars. The outburst was a momentary one, but a very violent one. The first mate, though hurt, remained on deck at his duty, and headed the vessel back for New York. His orders were obeyed by all the men who were fit for duty, two of the four who were concerned in the disturbance having been disabled. The cook exhibited fidelity, but he was a colored man. The passenger rendered what assistance he could. But the first mate was the only officer left for duty, and the only person left alive, except the second mate, who was acquainted with navigation. From the time of the affray until Saturday morning, the 3d of June, the first mate remained on deck all the time, and obtained no sleep. He had been wounded twice in the head, his shoulder had been knocked out of joint, and one of his arms was in a sling. On Friday a signal of distress was set. On Saturday morning the ship Europa, bound from Bremen to New York, with a general cargo and 130 passengers, came in sight of the brig, and noticed the signal of distress, and made for her. The Europa had a master and only one mate, the libellant Hilmer. The mate was the only person on the Europa, besides her master, who could navigate the ship. As the Europa neared the brig, the brig sent a boat off with the cook and one man. The cook reported to the master of the Europa the condition of things on board of the brig. The master of the Europa sent the libellant in the boat to go on board of the brig, and ascertain the facts of the case, with instructions to return and report them. He went on board of the brig, and had an interview with the first mate of the brig, and saw and learned what had happened. The first mate of the brig requested assistance, and the result was, that the libellant, after he had returned to the Europa and reported, went, by the permission of the master of the Europa, on board of the brig, in order to assist in her navigation. He went alone. On board of the brig he discharged the duties of his position as mate, the first mate of the brig also assisting. The brig reached an anchorage in the lower bay of New York late on Monday night. The services of the libellant covered a period of a little over sixty hours. The weather was fine all the time, though, soon after the libellant went for service on board of the brig, a fog came on, and the brig and the Europa lost sight of each other, and neither again saw the other, the Europa having reached New York twenty-four hours before the brig did.

The libel is filed on behalf of the libellant and all others who are salvors, and claims salvage compensation for the libellant, and for the Europa and her crew. The answer denies that the service was one of great peril or danger, and denies that the brig and her cargo were rescued from any considerable peril, or were in any peril beyond the power of her mariners to control.

There can be no doubt that the service in this case was a salvage service, in respect of which the owners of the Europa and her master and crew, as well as the libellant, are entitled to a salvage compensation. Williamson v. The Alphonso [Case No. 17,749]; The Czarina [Id. 3,531]; The Roe, Swab. 84; The Janet Mitchell, Id. 111; The Golondrina, L. R. 1 Adm. & Ecc. 334; Jones, Salv. 14.

The only contest in the case is as to the amount to be awarded. The answer avers that the owners of the brig and cargo are willing to make ample compensation for the services rendered, but that the sum demanded has been so unreasonable and inequitable that no settlement could be made. What that sum is, is not stated in the answer, nor shown by the evidence. The libel specifies no amount, but claims reasonable compensation.

In the case of Williamson v. The Alphonso [supra], the two mates of the Alphonso were disabled, the master was ill with the yellow fever, a signal of distress was flying, the mate of the salving vessel took command of the Alphonso, and ran her a distance of 23 miles to a port of safety, and the Alphonso and her cargo were worth $15,000. The court allowed $750 salvage in all, giving $300 of it to the mate.

In the case of The Czarina [supra], the master and two mates of the Czarina had been killed, no one was left to navigate her, she and her cargo were worth about $95,000, and the first mate of the salving vessel was put on board of the Czarina, and navigated her for twenty days. The owners, master, mate and sailors of the salving vessel brought suit, and the court awarded to them $5,485, of which the owners received $3,500, the master $800, the first mate $1,000, the second mate $25, and sixteen sailors $10 each.

In the case of The Roe, Swab. 84, some of the crew of the Roe were dead and some were ill with the scurvy, a signal of distress was flying, the value of the property saved was £9,350, two of the crew of the saving vessel volunteered to serve on the Roe and

they were paid £20 each for their services, which continued for a period of seventeen days. The rest of the crew of the salving vessel, with her master and owners, sued for salvage. The court awarded £150, of which the owners received £60, the master £25, and the remainder was divided among 27 seamen in proportion to their wages.

In the case of The Janet Mitchell, Swab. 111, the master of the Janet Mitchell had been drowned, and some one was required to navigate her. The mate of the salving vessel volunteered to do so, and the owners of the Janet Mitchell gave him £200 for his services. The owners, the master, and the rest of the crew of the salving vessel sued for salvage, and, the value of the property saved being £29,700, the court awarded to them £1,000.

In the case of The Golondrina, L. R. 1 Adm. & Ecc. 334, the two mates of the Golondrina had deserted her, and her master had jumped overboard, and the second mate of the salving vessel was, at the request of the crew of the Golondrina, put on board of her, by the master of the salving vessel, to navigate her. The value of the property saved was £26,000, and the court awarded £1,800, of which the owners received £1,000, the second mate £300, the master £200, and the crew £300, according to their ratings.

In the present case, I think the sum of $3,000 is a proper allowance. Of this I award to the owners of the Europa $1,600, to her master $450, to the libellant Hilmer $650, and to the rest of her crew $300, according to their wages. Let a decree be entered accordingly, with costs.

## Case No. 7,323.

### The J. L. HASBROUCK.

[4 Ben. 359.] [1]

District Court, E. D. New York. Nov., 1870.[2]

COLLISION ON THE HUDSON RIVER OPPOSITE WEST POINT—STEAMER AND SLOOP—HOLDING COURSE—EVIDENCE.

1. A steamer and a sloop came in collision in the night, on the Hudson river off West Point. The steamer was going up on the east side of the river, and saw the sloop as she came round West Point, about in the middle of the river, exhibiting her starboard light. Her port light then became visible, but it was shut off again, when the pilot of the propeller sheered a little to east, and finding that the sloop was heading to east, he stopped the propeller, and while she was still in the water, the sloop came into her, striking her at nearly right angles, about forty feet abaft the stem. The tide was ebb. The usual course of navigation for steamers, bound up in that part of the river with that tide, is to keep well to eastward until they are able to see above West Point, and then to haul over, passing near the point when above it so as to give a wide berth to Magazine Point above. The testimony in the case as to the wind, was contradictory. On behalf of the sloop, it was claimed that she did not have a working breeze, while for the steamer it was testified that she had a good breeze from the northwest. *Held*, that it was the duty of the sloop, if she had a working breeze, which would enable her to do it, to haul around West Point and allow the steamer to pass her to east. A sailing vessel coming down the river in this locality does not hold her course within the meaning of the law, when without cause she changes from the west to the east side of the river in rounding West Point.

2. On the evidence, the sloop had a good working breeze.

3. The sloop was not bound to change her course to avoid the propeller, but she was bound in passing that point, to keep her place in the river, if possible, and not to allow herself to be carried over to the east side in the track of a steamboat which was pursuing the ordinary and only safe course to pass that point; and whether her action arose from ignorance or carelessness, or from some defect in her rigging, which made her refuse to obey her helm, was immaterial, as far as the liability of the steamer was concerned.

[See note at end of case.]

4. On the evidence, there was not time for the steamer to have avoided the sloop after it appeared that she was sheering to east.

[Cited in The Iron Chief, 53 Fed. 511.]

5. In a conflict of evidence, mere numbers of witnesses must sometimes be considered.

In admiralty.

C. Donohue and E. M. Cullen, for libellant.

R. D. Benedict and W. J. Haskett, for claimants.

BENEDICT, District Judge. This action is brought to recover the value of the sloop Venus and her cargo, which vessel was sunk by a collision in the Hudson river, on the night of the 27th of November, 1869. The locality of the collision was off West Point, where the river makes two sharp turns in quick succession, one at Magazine Point above, and the other at West Point below. The time of the collision was about midnight, but lights could be seen at a distance of one-half to three-quarters of a mile. The tide was running strong ebb. The Hasbrouck was a propeller bound up the river, at a speed of from seven to eight knots, the Venus was a sloop, bound down the river with a cargo of stone. The vessels came in contact a little below the light at West Point, the bowsprit of the sloop striking the port side of the propeller, about forty feet abaft the stem, nearly at right angles; whereby the sloop was so injured, that she sunk almost immediately. No other vessels were passing at the time, to interfere with the movements of either vessel. Both vessels were displaying the required lights, which were seen as soon as possible, when the lights of the sloop opened around West Point. The sloop was then about in the middle of the river, and not quite down to the point, while the propeller was about one-half a mile below the point, coming up on the east side of the river.

[1] [Reported by Robert D. Benedict, Esq., and here reprinted by permission.]

[2] [Affirmed by the circuit court; case unreported. Decree of the circuit court affirmed in 93 U. S. 405.]

The allegation of the libellants is, that the sloop was sailing on the starboard tack, east-south-east, with the wind south-west very light; that the propeller approached to within fifty feet of the sloop, heading for the sloop's fore-rigging, when, on being hailed to go under the sloop's stern, she sheered off to east across her bow, and in passing caught the sloop's bowsprit, which was taken out by the force of the blow, and the sloop thus caused to sink.

The allegation of the respondent is, that the wind was north-west, blowing a good stiff breeze; that the sloop, when seen a little above West Point, was exhibiting her starboard light; that as she got around the point, she exhibited a glimpse of her port light, and immediately shut it off again, when a slight sheer to east was given to the propeller, and finding the sloop to be hauling more to east, and across the river, the propeller was stopped, and while motionless was struck by the sloop. And it is charged, that the sails of the sloop were not properly and fully hoisted, and her jib was furled, and therefore she was unable to luff, and so ran across into the propeller.

In order to a correct determination of the points of difference between these parties, it is necessary to bear in mind, the locality of the accident, and the proper course of navigation in passing West Point, as to which there is no room for dispute.

For a steamer, bound up the river in an ebb tide, the true course is, as she approaches West Point, to keep well to eastward, until able to see above the point, then to haul over, passing near the point when above it, so as to give a wide berth in passing Magazine Point above, by which course vessels coming down are seen at the earliest moment, and easily pass in safety, if they keep to the westward side, or middle of the river, as they round West Point.

Such being the well known course of navigation at this point, it was the duty of the sloop in the present instance, if she had a working breeze to enable her to do it, to haul around the point, and allow the steamer to pass her to east. This she did not do, on the contrary, at the time the vessels came in contact, the sloop was well over to the east side of the channel. The sloop was therefore in fault, for being out of her proper course, provided she had a good working breeze from the north-west, to enable her to keep her place, as the claimants allege that she had. A sailing vessel in this locality, does not hold her course, within the meaning of the law, when without cause she changes from the west to the east side of the river rounding West Point.

The question of the wind is therefore a material question in the case, and it has been so treated. Some twenty witnesses have been called to testify in regard to it, and their evidence discloses the ordinary conflict so characteristic of this class of cases. The weight of the evidence is however clearly with the respondents. Some seventeen witnesses support the view of the respondents upon this point, to five or six upon the other side, and mere numbers must sometimes be considered. But the libellant's own evidence contains facts strongly corroborative of the respondent's statement, in respect to the wind. For instance, the record of the wind, kept at the barracks at West Point, while it shows that at 9 p. m. of the evening before the collision, the wind was light from the south-west, also shows that before morning it changed to the westward. When it changed is shown, by the testimony of the first hand of the sloop, that when the sloop entered the Highlands, the wind blew hard enough to compel them to take in their sails. Furthermore, this same witness says, that they again made sail after they passed Magazine Point, but with a reef in the mainsail. Hoisting a reefed mainsail within a short distance from the place of collision, clearly shows that there was plenty of wind at the time of the collision. So also the master of the sloop is proved to have stated, in accounting for the collision, that his sloop would not luff, and he himself admits the repeated use of that expression, which implies the presence of wind. A sailor would not have used such an expression to excuse the action of his vessel, unless there had been a wind.

In addition to these facts, derived from the evidence of the libellants, there is the testimony of the pilot of the ferry-boat at Garrison's, a witness wholly unconnected with the controversy, who was at his house at Garrison's, and was awakened in the night by his wife because his window had broken loose, and, getting up to make it fast, found the wind blowing heavily; likewise the testimony of the pilot of the Thos. Powell, a witness equally free from connection with these parties, who landed at Cold Spring about 11 p. m., and recollects having to stop for a small boat under sail, and who says the wind at that time blew heavily. In view of such a mass of testimony it is impossible to believe the statements of the crew of the sloop, when they say there was no wind. On the contrary, it must be held that the sloop had a good working breeze. This fact in regard to the wind, being found against the libellant, is conclusive of the case. With a wind which would enable the sloop to keep her proper course, she is found at the time of the collision well over to the east side of the river, and presenting her starboard side broadly to a vessel bound up. Such a course on the part of a sailing vessel at West Point, in a fresh breeze from the north-west, cannot be justified. Not that the sloop was bound to change her course to avoid the propeller, but because she was bound in passing that point to keep her

place in the river, if possible, and not to permit herself to be carried over to the east side, in the track of a steamboat which was pursuing the ordinary and only safe course to pass that point. Whether this action of the sloop arose from ignorance, or from carelessness, or from some defect in her rigging, which made her refuse to obey her helm, is immaterial, so far as the liability of the propeller is concerned. The propeller is not responsible for the improper position of the sloop.

There remains to consider whether the propeller was guilty of negligence in omitting any effort within her power to avoid the sloop; for, notwithstanding she had the right to suppose that in such a breeze the sloop would not attempt to go over to the east side, and to take her course accordingly, still, when she saw that the sloop was going over to east, it was her duty to avoid her if she could do so. It has accordingly been most earnestly contended that the propeller must be held in fault, upon her own answer, for sheering to the east instead of to the west, after she saw that the sloop was going over to east.

The zeal with which this feature of the case has been pressed, by an advocate of such large experience in matters of this kind, has led me to weigh with all possible care the evidence in the case bearing upon this point in connection with the answer; but I am constrained to say that I cannot agree to the conclusion which the libellant seeks to draw. The answer, indeed, says that after the sloop got around the point, she exhibited her port light and immediately shut it in again, and the pilot of the Hasbrouck then gave a slight sheer to east, then blew one blast of his whistle, and then stopped his boat. But if it be true that this sloop, with a working breeze, approached the point showing her starboard light, and, when below the point, showed her port light to the propeller, then coming up to east of her, and then shut out the port light, all which is proved, it would not follow that the propeller was bound to sheer to west, unless it also appear that there was room to do it after the red light shut off. Up to that time, the propeller was well justified in supposing, and indeed bound to suppose, that the sloop was intending to pass down to west. The statement of the pilot of the propeller is that there was not room to sheer to west after the port light shut off, and this statement is entirely consistent with the answer, and it is also supported by other evidence, which appears to me to be entirely controlling. Doubtless, some of the estimates of distance given by the pilot would indicate that he had more room; but estimates of distance can never be relied on in this class of cases, and they should not control his positive declaration that when the sloop, by shutting in her port light, indicated that she was going to the east, there was neither time nor room to enable him to avoid her by sheering to west. This statement of the pilot derives confirmation from the evidence of the first hand of the sloop, who says that when the propeller sheered to east she was very close to the sloop. To the same effect is the testimony of Dolahan, also a witness of the libellant, who says the propeller was pretty nigh on the sloop when she sheered to east. The proximity of the vessels is clearly and indisputably shown by the testimony of Decker, the watch on the barge Ulster County, which was being towed up alongside of the Hasbrouck, a witness wholly unconnected with the navigation of the propeller. This witness was standing midships on the barge when he heard the whistle of the propeller, which was blown when the red light shut off. He at once started forward, and when he reached the slide, some twenty feet from where he stood, and looked out, the sloop was close at hand, within a length or a length and a half of the propeller. The testimony of Bullis, who was below on the Ulster County, also indicates the short space of time between the whistle and the blow; and, finally, the libel gives the distance of the vessels apart at this time as about 50 feet. It is, therefore, impossible to hold the propeller in fault for omitting to sheer to port or for omitting to stop and back in time. So long as the sloop was to west of her and showing a red light the propeller was not called on to do either. When the red light was shut off she was too near the sloop to do anything more than she did. My conclusion, therefore, is that the collision in question was not caused by any fault on the part of the propeller, and, accordingly, the libel must be dismissed with costs to be taxed.

[NOTE. This decree was affirmed by the circuit court (case unreported). The libellant then appealed to the supreme court, where the decree of the circuit court was affirmed in an opinion by Mr. Justice Clifford, who said that, although it was necessary, for the sloop to change her course sufficiently to round the point at West Point, yet when that was safely accomplished she had no right to keep on that course which was not the accustomed one for sailing vessels descending the river, and so oblige the steamer to abandon the accustomed pathway and seek another one, usually navigated by sailing vessels. By so doing she had made the collision possible. 93 U. S. 405.]

## Case No. 7,324.

The J. L. HASBROUCK.

[5 Ben. 244;[1] 14 Int. Rev. Rec. 47.]

District Court, S. D. New York. June, 1871.

TUG-BOAT AND TOW—OWNERS OF CARGO—NEGLIGENCE—APPORTIONMENT OF DAMAGES.

1. Where a canal-boat loaded with grain was taken in tow, at New York, by a steamboat, to be towed up the Hudson river, but began to leak on the voyage up, and, on arriving off Fort Mont-

[1] [Reported by Robert D. Benedict, Esq., and here reprinted by permission.]

gomery, was cast off from the steamboat in order to go to a dock, which, however, she failed to reach, and drifted off into the river and sank: *Held*, that, for any damage accruing to the canal-boat or her cargo before she was cast off, the owners of the canal-boat and of the cargo must, as respects the steamboat, bear their own losses, as that resulted from the unseaworthy condition of the canal-boat.

2. The steamboat was in fault in leaving the canal-boat, as she did, after she was cast off.

3. The canal-boat was in fault in not being provided with an anchor, and in not using all her lines to get her into the dock.

4 The damages resulting to the canal-boat from the actual sinking of the canal-boat, over and above the damage it had sustained at the time it was cast off from the steamboat, must be apportioned between the owners of the canal-boat and the owners of the steamboat, and the damage resulting to the cargo from such sinking, must be apportioned between the owners of the cargo and the owners of the steamboat.

[Cited in The M. J. Cummings, 18 Fed. 182.]

These were two actions, brought by Taylor and others, owners of the canal-boat Frank Curran, and Hicks and others, owners of a cargo of wheat on board, to recover for the loss of the boat and cargo. The boat was taken in tow at New York City, to be towed up the Hudson river to a place above Poughkeepsie, in the evening. She soon after began to leak, and in the morning the captain of the canal-boat requested to be cast off. The canal-boat was being towed astern of a barge, which was also towed astern of the propeller on a hawser. When off Fort Montgomery the propeller ran in near a dock, and the order was given to the canal-boat to cast off, which was done, and the propeller went on up the river. The canal-boat did not reach the dock, she had no anchor on board, her master attempted to get a line to the dock, but failed, and she was carried by the tide out into the middle of the river, where she sank, and was totally lost, with her cargo.

C. Donohue and J. K. Hill, for libellants.

R. D. Benedict and W. J. Haskett, for claimants.

BLATCHFORD, District Judge. For any damage to the canal-boat or her cargo up to the time of the arrival of the propeller and her tows off Fort Montgomery dock, the owners of the canal-boat and the owners of her cargo must, as respects the propeller, bear their own losses. Such damage, on the evidence, was not caused by any negligence or fault on the part of the propeller, by towing at an undue rate of speed, or otherwise, but was caused by the leaky and unseaworthy condition of the canal-boat. The owners of the cargo, if they have a claim against anybody for such damage, must look for it to the owners of the canal-boat. For the actual sinking of the canal-boat off Fort Montgomery dock, and for the damage caused by such sinking to her cargo, over and beyond the damage it had sustained by water at the time the canal-boat was cast loose from the propeller, I think the propeller is shown to be responsible in part. The damage to the canal-boat, for which the propeller is so responsible in part, is the loss of such value as there was in the boat in the condition in which she was when she was cast off. But such damage to the canal-boat must be shared by her owners, and such damage to the cargo must be shared by its owners. There was fault on the part of the canal-boat in not having an anchor for use, and in not using, off Fort Montgomery dock, all the lines there were on board. These faults, on the evidence, contributed to the sinking of the canal-boat and her cargo, although there was great negligence on the part of those in charge of the propeller in leaving the canal-boat as they did, after having stopped their vessel for the purpose of casting off the canal-boat, knowing, as they did, that she was being cast off because of some difficulty, her destination not having been reached. The faults of the canal-boat enure, as respects her cargo, to the benefit of the propeller, as against the owners of the cargo, in like manner as they enure, as respects the canal-boat herself, to the benefit of the propeller, as against the owners of the canal-boat. Hay v. Le Neve, 2 Shaw, App. 395; The Milan, 1 Lush. 388, 403; The Atlas [Case No. 633]. There must be an interlocutory decree in each suit, and an order of reference to compute the damages, in accordance with these views. The question of costs is reserved until the coming in of the reports.

[See Cases Nos. 7,325 and 7,326.]

## Case No. 7,325.

### The J. L. HASBROUCK.

[6 Ben. 272.] [1]

District Court, S. D. New York. Dec., 1872.[2]

TUG-BOAT AND TOW—DAMAGES.

1. A propeller having a canal-boat in tow, which had sprung a leak while being towed, cast her off in such a way that she failed to reach a dock, and drifted off into deep water, and sank. She had a cargo of wheat, part of which had been wet by the leak before the boat was cast off. How much was wet was in dispute. *Held*, that, as it appeared that the canal-boat could have been put into shoal water near the dock at the time she was cast off, the total loss of so much of the cargo as was then uninjured was occasioned by the negligence of the propeller.

2. On the evidence, 800 bushels of the wheat was then wet and worthless, and the loss was the value of the cargo, less 800 bushels.

This was a libel by the owners of a cargo of wheat on board of a canal-boat, against a steamboat, which had taken the canal-boat in tow to tow her from New York to Poughkeepsie, to recover for the loss of the grain, the canal-boat having been cast off from the steamboat in a leaky condition,

[1] [Reported by Robert D. Benedict, Esq., and here reprinted by permission.]

[2] [Affirmed in Case No. 7,326.]

at Fort Montgomery, and afterwards having sunk in deep water. The court held that, for all damages received by the cargo up to the time the canal-boat was cast off, the steamboat was not liable, but was liable for the damages to the cargo occasioned by the sinking of the boat after she was cast off. [Case No. 7,324.] To show such damages, the libellants proved the number of bushels of sound wheat shipped at New York, and the master of the canal-boat testified, that, at the time the boat was cast off, there was three feet of water in her hold forward, and only three inches aft, and that a space three feet deep at the bow and three inches deep at the stern would be occupied by 800 bushels of wheat; and the libellants claimed, on this evidence, that only 800 bushels of wheat were wet when the boat was cast off. It had appeared, by the master's evidence on the trial, that, when the boat was cast off, she was about a foot deeper in the water at the bow than at the stern, and had been leaking more or less for several hours. The claimants insisted, on this evidence, that, if the water was three feet deep in the hold at the bow, it must necessarily have been two feet deep at the stern; and that, on such a calculation, nearly half the cargo must have been wet. The commissioner reported that only 800 bushels were wet, and fixed the damages at the value of the whole cargo of sound wheat, less 800 bushels, and $200 for the value of the 800 bushels of wet wheat. The claimants excepted to the allowance of each item.

C. Donohue, for libellants.
R. D. Benedict, for claimants.

BLATCHFORD, District Judge. It was proved on the trial, that the dock at Fort Montgomery is about 300 feet long in the line of the river, and runs out about 70 feet into the river; that, at low water, there is, at the dock, seven or eight feet depth of water; that, at its north end, the dock is out even with the edge of the flats, thus leaving 70 feet of flats between the outer edge of the flats and the land; and that, at the south end of the dock, the flats are sometimes bare. From this evidence, taken in connection with the other evidence given at the trial, it is quite apparent, that the bestowment by the propeller on the canal-boat of proper attention, when the latter was cast off, would have enabled the boat and her cargo to be put on the flats, so as to have prevented her sinking, as she did, out in deep water. The sinking of the cargo in deep water, and its consequent total loss, occasioned, therefore, such damages as there were to the cargo beyond the damage it had sustained, when the fault of the propeller was committed in casting the boat off, and leaving her without care or attention.

As to the damage which the cargo had sustained at that time, the commissioner reports all of it as undamaged, except 800 bushels of wheat, and that he reports as damaged to the extent of $1 37 per bushel; its undamaged value having been $1 62 per bushel. As to the quantity of wheat damaged at the time, the only testimony on either side, which specifies any number of bushels as damaged, is that of Atkins, master and part owner of the canal-boat, and who was on her at the time of the disaster. He gives the data from which he makes out that 800 bushels only were damaged, and no witness testifies that, from his data, his calculation was incorrect. No error in his data is pointed out, to my satisfaction, and his calculation therefrom is not so manifestly incorrect that the court can, without evidence, set it aside. I do not mean, by saying this, to suggest that it appears to be incorrect at all. I am not satisfied, however, that the 800 bushels of wheat are shown to have been worth anything at the time the boat was cast off. The weight of the evidence is that they were worth nothing. The sum of $200 must, therefore, be deducted from the report, and the damages must stand at $12,867 01, and the exceptions on both sides must, in all other respects, be overruled.

[From this decree both parties appealed to the circuit court, where the decision of the district court was affirmed. Case No. 7,326.]

## Case No. 7,326.

The J. L. HASBROUCK.

[14 Blatchf. 30.] [1]

Circuit Court, S. D. New York. Nov. 11, 1876.[2]

TOW—INJURY—MUTUAL FAULT—DAMAGES.

1. A steam-tug, having a canal-boat in tow astern, going up the Hudson river, was hailed by the canal-boat to land her, and that she was leaking. The tug ran in towards a dock, and stopped and hailed the canal-boat to cast off. She was cast off by her hands, but one of the lines jammed. She had made no preparation of lines by which to reach the shore, and she had no anchor. She drifted up the river, and sank an hour or more after she was cast off. The tug went on and gave no aid to the canal-boat. *Held*, that both vessels were in fault, and that the tug was liable for one-half of the damages.

2. The value of the canal-boat is to be estimated as she was just before she was cast adrift by the tug.

[Appeal from the district court of the United States for the Southern district of New York.]

In admiralty.

James K. Hill, for libellants.
Robert D. Benedict, for claimants.

JOHNSON, Circuit Judge. The libel in this case was filed to recover for the loss of the

[1] [Reported by Hon. Samuel Blatchford, Circuit Judge, and here reprinted by permission.]
[2] [Affirming Case No. 7,325.]

canal-boat Frank Curran, which, as was alleged, was sunk by the fault of the claimants, while she was being towed from New York to Low Point on the Hudson river. The district court decided [Case No. 7,324] that the claimants were not in fault in respect to any injury sustained by the canal-boat during the voyage from New York to Fort Montgomery, where she was detached from the propeller, but that those injuries were owing to her unseaworthiness and her being in a leaky condition. It further decided, that, in the casting off of the canal-boat from the propeller at Fort Montgomery, under the circumstances proved, both vessels were in fault —the canal-boat in having made no proper preparation of her lines for landing, and in having no anchor; the propeller in leaving the canal-boat unassisted, knowing that she was being cast off in consequence of some difficulty, before reaching her destination. It, therefore, decreed, that the propeller was bound to answer to the owners of the canal-boat for one-half the damages thus incurred, and declared those damages to be equal to the value of the canal-boat in the condition she was in when she was cast off. The cause was thereupon referred to a commissioner to ascertain these damages and report the same to the court. He subsequently reported the damages at $3,500, with interest to the date of the report, amounting in all to $4,200. To this report the claimants excepted on various grounds. Upon the hearing they were all overruled, and the court pronounced its decree, awarding to the libellants one-half of the damages so assessed, with interest from the date of the report. See [Case No. 7,325]. From this decree the libellants appealed to this court, and they claim that all the damages sustained by the canal-boat ought to have been recovered by the libellants. The claimants also appealed, claiming that the propeller was not in fault, and ought not to be charged with any part of the damages sustained by the loss of the canal-boat. They likewise contend that the exceptions to the commissioner's report, or some of them, ought to have been allowed, and that the decree should, in any case, have been for a smaller sum.

After a careful examination of the evidence, it is established to my satisfaction, that the agreement for towing this canal-boat was not made at Poughkeepsie, but at New York, with the captain of the propeller, and that the allegations of the answer in that respect are substantially sustained. In the execution of the contract the persons in charge of the propeller exhibited, in respect to the speed at which they moved, much consideration for the condition of the canal-boat. In the ten hours preceding the time of the final start, they made only 45 miles, which, in itself, is a substantial overthrow of the claim on the part of the libellants, that the propeller made ten miles an hour. It affirmatively appears, that, early in the voyage, upon the statement of the captain of the canal-boat, that she was loaded by the head too much, and that her seams that had been above the water were open and let in a little water, the captain of the propeller proposed to land her at or near Weehawken, but that Captain Atkins declined, alleging that he was moving the flour, which was part of his cargo, to the after part of the boat, and that there would be no danger after that change was made. The captain of the propeller then ordered the engineer to run at half speed all night. The engineer testified, that he reduced the steam pressure and throttled the engine, so as to reduce the speed fully one-half; that, while in motion, they averaged but five miles an hour, until they got out of the ice; and that they afterwards ran at not over six miles, till the canal-boat was cast off at Fort Montgomery. Against this evidence there are only vague statements of great speed on the part of the claimants, which are not, in my judgment, sufficient to establish any fault on the part of the propeller in this respect.

In respect to the allegation of want of care in taking the boat in tow, it may be properly answered, that, if there was any original want of care on first starting from the city of New York, no damage appears to have resulted. If the allegation includes the manner of towing during the residue of the voyage, various ways of fastening the barge and canal-boat in different positions seem to have been tried, as one after another seemed to present difficulties, but the fair result of the evidence is, I think, that the propeller was not in fault.

In respect to the ice, it was made that night, and was a mere skim at first. Upon the complaint of the captain of the canal-boat, her place was changed, so that she was astern of the barge, and that astern of the propeller. It was to make this change that the propeller was stopped, and not because she could not make her way through the ice. But the clear proof that the boat was not harmed by the ice is, that, although she made some water from the early part of the voyage, in consequence of the open seams near her bow, it was not until an hour after the ice was passed that Captain Atkins regarded the leak as of any moment. Albertson says the boat began to leak near Haverstraw or Grassy Point, and that up to that time there had been no difficulty from any leak. At this point of time Atkins and Albertson became alarmed, and insisted that the canal-boat should be landed. The people in charge of the propeller, (the canal-boat, as Albertson says, not leaking much then,) made motions indicating that they would land the canal-boat at a dock below Haverstraw; but Albertson declined to land there, he having ascertained that he could not get across the river from that point, and made motions for the propeller to go on, and told them to land the boat at Grassy Point. The propeller

sheered in to land the canal-boat at that point, and stopped or slowed, but Atkins then declined to cast his boat off. As they came near Fort Montgomery, Atkins hailed the propeller to land the boat, and that it was leaking. Albertson also hailed the propeller to land the boat there. The propeller ran in towards the dock at Fort Montgomery, the engine was stopped, and the canal-boat was hailed to cast off. She was cast off by the hands on board, but one of the lines jammed, and was not unfastened till it was broken by the starting of the propeller. No preparation of lines had been made aboard the canal-boat, her way had been checked by the line which had not been cast off, she was left about 400 feet from the dock, and the tide and wind carried her upward and away from the dock. A boat came to her from the shore, time was lost in getting out her lines, those which were in readiness were not long enough to reach the shore, and the boat from shore had not power enough to tow her. She had lines sufficient to reach the shore, if they had been in readiness. She had no anchor, so that no attempt could be made to hold her. The result was, that she drifted north of the dock, and out into the river, and finally, an hour or more after she was cast off, she sank, having drifted about a mile from the place where the propeller left her.

To the final catastrophe, I think it plain that the fault of the canal-boat contributed, and that to this, as well as to her unseaworthy condition, her loss is due; but I cannot exonerate the propeller from fault, under all the circumstances. It is true, that the usual way of landing boats from a tow, is to sheer in towards the dock and cast off their lines; but, in this case, the persons in command of the propeller knew, at least, that it was owing to something out of the usual course, that the canal-boat desired to land before arriving at her destination, and that she was leaking. This imposed upon the propeller the obligation not to leave her except in safety, or, at least, without some effort to secure her safety. So far from making any such effort, entire indifference seems to have been manifested in respect to her condition, and this contributed to the loss. It is quite true that a tug-boat is not an insurer or common carrier, in respect to the boats she takes in tow, but she still remains bound to employ that degree of caution and skill which prudent navigators usually employ in similar cases. The Webb, 14 Wall. [81 U. S.] 406, 414. The special contract made by third parties, did not exempt the propeller from that degree of care. I am, therefore, of opinion, that the decree of the district court was correct in charging the loss of the canal-boat equally to the propeller and to the canal-boat, and making its decree against the propeller for one-half the amount.

The value of the boat was, I think, to be estimated, not as she was after she had been cast adrift by the propeller, but as she was just before that time, while she might still have been saved from sinking by aid from the propeller, and brought to land. In this view, which I understand to be, in substance, that taken by the commissioner and the district court, in the judgment actually pronounced, I concur in the estimate of value and damage made in the district court. Judgment must be rendered accordingly.

## Case No. 7,327.

The J. M. WELSH.

[8 Ben. 211.] [1]

District Court, E. D. New York. July, 1875.

TOWAGE CONTRACT—LIEN.

The libellant A., proprietor of a line of towboats, filed libels to recover for towage services against each of 23 canal boats owned by E. & McM. One suit was tried as a test case. The evidence showed that an agreement was made by A. to tow all the boats of E. & McM. between Troy and New York during the season of navigation in a certain year, for a fixed sum per trip; and it appeared that the boats were not towed singly, but in fleets, sometimes with the boats of other parties, and sometimes by themselves, and that the contract was broken before the end of the season agreed for, and suit on the contract was begun by A. in a state court. *Held*, that under the terms of the contract there was no lien in rem upon the boat, the service being rendered in reliance upon the personal credit of E. & McM., and the libel must be dismissed.

[Cited in The Advance, 60 Fed. 768.]

In admiralty.

J. J. Allen, for libellant.

E. D. McCarthy, for claimants.

BENEDICT, District Judge. The terms of the contract under which the libellant Austin claims to have towed the vessel proceeded against show beyond dispute that the libellant relied solely upon the personal credit of Easton & McMahon, and not upon the credit of the boats towed.

The contract is inconsistent with the idea of a lien, and shows that a lien upon the boats was not within the contemplation of the parties. For services rendered under such a contract, and upon an exclusively personal credit, no lien exists. The libel is accordingly dismissed with costs.

J. L. WICKWIRE, The (HAYES v.). See Case No. 6,262.

## Case No. 7,328.

The JOANNA WARD.

[Blatchf. Pr. Cas. 164.] [2]

District Court, S. D. New York. May, 1862.

PRIZE—VIOLATION OF BLOCKADE—PROPERTY OF ENEMY.

Vessel and cargo condemned as enemy property, and for a violation of the blockade.

[1] [Reported by Robert D. Benedict, Esq., and Benj. Lincoln Benedict, Esq., and here reprinted by permission.]

[2] [Reported by Samuel Blatchford, Esq.]

In admiralty.

BETTS, District Judge. This vessel and cargo were captured on the 24th of February, 1862, off the port of St. Augustine, Fla., by the United States steamer Harriet Lane, and were sent into this port as prize. The vessel was documented January 6, 1862, as then owned, in Charleston, by Finlay & Patterson, citizens of that state, and had on board a bill of sale, purporting to have been executed by the said Finlay & Patterson to F. P. Salas, for said vessel, on the 11th of January, 1862, without any consideration being named or being proved to have been paid. Salas hired part of the crew in Charleston, and went himself, as supercargo, in the vessel. All on board of the vessel knew that Charleston and the Southern ports were blockaded; and she evaded the blockade of that port in going out, bound on a voyage to the West Indies, with a cargo, from Charleston. Her crew list was certified at Charleston, January 20, 1862, and it was therein stated that the vessel was bound "from the port of Charleston to one or more ports in the West Indies, and back to a port of discharge in the Confederate States," which, as explained in the proofs in preparatorio, meant "anywhere we could get in, at St. John's, Fernandina, or St. Andrews." She sailed under the Confederate flag, with a cargo from Charleston, converted its proceeds into another cargo at Matanzas, and was destined, on her return, for any point or place in the Southern States, wherever she could get in. The vessel was built and owned in Charleston, until the sale to Salas in that place, where the bill of sale was executed to him. It is not proved that he had any other residence, nor are papers or proofs put in showing that the cargo was not owned where it was shipped.

Upon these facts the vessel and cargo were, at the time and place of arrest, owned, in my judgment, by persons domiciled and carrying on the trade and commerce in Charleston, and were thus enemy property, and lawful prize; or, if that cause of seizure might admit of doubt, it is clear, upon the evidence, that the whole voyage from Charleston to the West Indies, and back to a Confederate port of the United States, was intentionally planned and put in prosecution to evade the blockade of Charleston; that such blockade was in fact evaded; and that an attempt was made, by the vessel and cargo, to violate the blockade of the coast of Florida. When the capturing vessel approached the prize, the master and supercargo threw overboard from the vessel a bundle of papers, tied up in a canvas bag. They were taken from the cabin, with two stones fastened to the bundle to sink them, and were thus thrown overboard. Judgment of condemnation and forfeiture of vessel and cargo is rendered.

## Case No. 7,329.

JOBBINS v. MONTAGUE et al.

[5 Ben. 422;[1] 6 N. B. R. 117.]

District Court, S. D. New York. Dec. 27, 1871.

BANKRUPTCY ACT—JURISDICTION—ORIGINAL PROCESS—SERVICE OUTSIDE OF THE DISTRICT.

1. A subpoena to appear and answer, in a suit in equity brought by an assignee in bankruptcy to restrain the foreclosure of a mortgage, is original process in a civil suit, within the 11th section of the judiciary act of 1789 [1 Stat. 79].

2. No authority is to be found in the bankruptcy act [of 1867 (14 Stat. 517)] for the service of such a subpoena on a defendant in the cause, outside of the limits of the district within which such suit is brought.

[Cited in Von Roy v. Blackman, Case No. 16,997; Re Litchfield, 13 Fed. 868; Romaine v. Union Ins. Co., 28 Fed. 636.]

[This was a bill in equity by William F. Jobbins, assignee, etc., against Ebenezer Montague, Townsend Jackson, Benjamin Albertson and wife, and Andrew Mount, sheriff of Hudson county, New Jersey.]

[2][The defendant Jackson and his copartner, Joseph P. Brouner, were on the twenty-second of January, eighteen hundred and seventy, adjudged bankrupts by this court on the petition of a creditor of theirs. The plaintiff was appointed to be their assignee on the eighteenth of February, eighteen hundred and seventy, and received the usual assignment, under which his title relates back to the thirteenth of January, eighteen hundred and seventy, the date of the filing of the petition. The assignment was recorded in the office of the clerk of Hudson county, New Jersey, on the twenty-fourth of June, eighteen hundred and seventy. On and prior to June fifteenth, eighteen hundred and sixty-nine, Jackson was seized in fee simple of certain real estate in Hudson county, New Jersey. On that day Jackson and his wife executed a mortgage to the defendant Montague, on such real estate to secure the payment of a bond for ten thousand dollars and interest, executed by Jackson to Montague. The bill alleges that the bond was given with the knowledge of Montague, to shield the property from the just claims of the creditors of Jackson, and that the ten thousand dollars was never due on the bond. On the twenty-fourth of November, eighteen hundred and sixty-nine, Jackson and his wife conveyed the said real estate, with other property, by deed, to the defendant Albertson, in fee simple, professedly for the consideration of fifteen thousand dollars. The deed was recorded in Hudson county on the fourth of December, eighteen hundred and sixty-nine. The bill alleges that the deed was made in contemplation of bankruptcy, and for the purpose of delaying, hindering and defrauding the creditors of Jackson,

[1] [Reported by Robert D. Benedict, Esq., and here reprinted by permission.]

[2] [From 6 N. B. R. 117.]

with the knowledge of Albertson. On or about the twenty-sixth of February, eighteen hundred and seventy, the plaintiff filed a bill in equity in this court, to set aside the said deed to Albertson and other conveyances made by Jackson, and to have a receiver appointed of the said property, and other property similarly conveyed, and to enjoin Jackson and Albertson and others, grantees of Jackson, who were made defendants to that bill, from disposing of said properties. On that bill this court granted an injunction to the foregoing effect on the twenty-eighth of February, eighteen hundred and seventy, which was duly served on Jackson and Albertson. On the twenty-third of September, eighteen hundred and seventy, the plaintiff was appointed receiver in that cause of the said real estate in Hudson county, and of other property. In opposition to the motion for the appointment of such receiver an affidavit made by said Montague was read. On the eleventh of October, eighteen hundred and seventy, a copy of the order appointing the plaintiff such receiver was served on the said Montague in person. On the seventeenth of October, eighteen hundred and seventy, Montague filed his bill of complaint in the court of chancery of New Jersey against Jackson and his wife and Albertson and his wife, for the foreclosure of the said mortgage. On such bill a decree was taken by default for ten thousand seven hundred and ninety-five dollars and twenty-six cents, principal and interest on said mortgage, on the seventh of February, eighteen hundred and seventy-one, and thereupon an execution was issued out of the said court of chancery, directed to the sheriff of Hudson county, New Jersey, commanding him to sell said real estate in Hudson county to satisfy said mortgage. The said sheriff advertised the property for sale at public auction on the fourth of May, eighteen hundred and seventy-one, but the sale was adjourned from time to time until the twenty-first of September, eighteen hundred and seventy-one.

[The bill in this suit was filed on the nineteenth day of September, eighteen hundred and seventy-one. It sets forth the foregoing facts, and avers that the plaintiff was not made a party to the said proceedings in foreclosure, and had no notice thereof, and did not know that they were in progress until after the final decree for foreclosure had been made, and a few days before the day first fixed for the sale; that the foreclosure proceedings were instituted and carried on by collusion between Montague and Jackson and Albertson for the purpose of delaying, hindering and defrauding the plaintiff, as such assignee and receiver, in his pursuit of his rights and remedies against the property mentioned in the mortgage, and with the intent that, by a sale under the foreclosure proceedings, Montague, Jackson and Albertson, or some of them, might either acquire a title to the property, or realize more money than is justly due on the mortgage, in fraud of the plaintiff's rights; that, in the foreclosure proceedings, no proofs appear to have been taken as to the amount due on the bond and mortgage, other than their production; that the plaintiff, from the fullest examination of the circumstances of Jackson and the giving of the mortgage, believes that the bond and mortgage do not truly show the real amount due; and that Jackson and Albertson and his wife reside in the state of New York, and Montague and the sheriff of Hudson county reside in New Jersey. The bill prays for a discovery from all the defendants except the sheriff of Hudson county; and that the conveyance from Jackson and his wife to Albertson may be decreed to be void and of no effect as against the plaintiff and the creditors of Jackson and of him and Brouner as copartners; and that an account may be taken of the amount due on the bond and mortgage to Montague; and that the plaintiff may be decreed to be entitled to redeem the mortgaged premises upon paying or tendering to Montague or his legal representatives the amount which may be so found to be due; and that Montague may be decreed to deliver up the mortgage to the plaintiff to be cancelled, upon payment or tender of said amount; and that Jackson and Albertson and his wife may be enjoined from selling, leasing, encumbering or otherwise disposing of or interfering with the mortgaged property, or its rents, issues or profits; and that Montague may be restrained from proceeding further in his suit for the foreclosure of said mortgage, and from instituting any other suit for its foreclosure, or for the sale or possession of the mortgaged property, and from taking any other proceedings for procuring the sale or possession of said property; and that the sheriff of Hudson county may be restrained from proceeding further in the execution of the writ for the sale of the property, and from executing any other writ at the suit of Montague for the sale of the property, until the further order of this court. Montague, Jackson, Albertson and his wife, and the sheriff of Hudson county, are made defendants to the bill.

[On this bill, and affidavits accompanying it, an ex parte injunction was issued by this court, restraining the defendants as prayed in the bill. On the same day a subpoena to appear and answer was issued, directed to the defendants and returnable on the first Tuesday of November, eighteen hundred and seventy-one. The subpoena and the injunction were served on Montague personally, at Hackensack, New Jersey, on the twenty-fifth of October, eighteen hundred and seventy-one, by a deputy of the marshal of the United States for this district. Montague now moves this court, by solicitors who appear for him only for the purpose of the motion, to set aside the service of the injunction and the service of the subpoena on

him, and to declare such service void and of no effect, on the ground that such service was irregular and unlawful.

[The plaintiff, on the nineteenth of May, eighteen hundred and seventy-one, filed a bill in equity in the district court of the United States for the district of New Jersey, against the persons who are defendants in this suit, making the same allegations made, and praying the same relief prayed for, in the bill in this court, and in such suit procured an injunction staying the sale under the foreclosure decree. Montague answered the bill and then moved for a dissolution of the injunction. On that motion the counsel for Montague raised the question of the jurisdiction of the district court for New Jersey to entertain the suit, inasmuch as the proceedings in bankruptcy against Jackson and Brouner were proceedings instituted and pending in this court and not in the district court for New Jersey. The court dissolved the injunction and dismissed the bill for want of jurisdiction, on the ground that the bankruptcy proceedings were not proceedings instituted and pending in the district court for New Jersey. After that decision was announced the bill in this case was filed.][3]

W. B. Putney, for the motion.

D. McMahon, opposed.

BLATCHFORD, District Judge. The service of the subpoena in this case on the defendant Montague, in New Jersey, is claimed to be irregular and without force to compel his appearance in the suit on pain of having the bill taken as confessed against him, on the ground that such service was in violation of the provision of the 11th section of the act of September 24, 1789 (1 Stat. 79). That provision is as follows: "No person shall be arrested in one district for trial in another, in any civil action before a circuit or district court; and no civil suit shall be brought before either of said courts against an inhabitant of the United States, by any original process, in any other district than that whereof he is an inhabitant, or in which he shall be found at the time of serving the writ." It is contended, on the part of the plaintiff, that this court has power, under the provisions of the 1st and 2d sections of the bankruptcy act of March 2, 1867 (14 Stat. 517), to bring the defendant Montague into this court to answer this bill, by process served upon him in New Jersey.

It is not contended that this court has not jurisdiction of the subject-matter of this suit. It has such jurisdiction by virtue of the 2d section of the bankruptcy act, which declares that this court, being the district court of the district where the proceedings in bankruptcy against Jackson and Brouner are pending, shall have jurisdiction of all suits in equity brought by the assignee in bankruptcy of the bankrupts, against any person claiming an adverse interest touching any property or rights of property of the bankrupts, or either of them, transferable to, or vested in, the assignee. The sole question is as to the jurisdiction of this court over the person of Montague, by means of such service of subpoena as has been made.

That this is a civil suit, and that Montague is an inhabitant of the United States and of the district of New Jersey, and was not an inhabitant of this district, or found in it at the time of serving the subpoena, are facts not disputed. Nor can there, I think, be any doubt, that the subpoena by which this suit is brought is "original process." So far as Montague is concerned, the bill prays for an account of the amount due on the bond and mortgage to him, and for a decree that the plaintiff is entitled to redeem the mortgaged premises on paying to Montague the amount so to be found due, and that Montague shall then deliver up the mortgage to be cancelled, and that all suits and proceedings by Montague, now or hereafter, to foreclose the mortgage, or to sell or obtain possession of the mortgaged property, may be enjoined. This is not a cross-bill, in any sense. Montague has no suit pending in this court. It is an original bill, praying for original relief, and the subpoena issued on it is original process.

That this court, independently of any provision in the bankruptcy act, could not acquire jurisdiction of the person of Montague in this suit, by such service of the subpoena as has been made in this case, is not doubtful. Independently of that act, this court could make effective no service beyond the limits of this district, of process of subpoena, in equity, to appear and answer, issued by it. Toland v. Sprague, 12 Pet. [37 U. S.] 300, 330; Herndon v. Ridgway, 17 How. [58 U. S.] 424, 425; Atkins v. Fibre Disintegrating Co. [Case No. 602].

Does, then, the bankruptcy act make lawful such service of the subpoena to appear and answer as was made in this case? In Toland v. Sprague (before cited) it is said, in reference to circuit courts: "Whatever may be the extent of their jurisdiction over the subject-matter of suits, in respect to persons and property, it can only be exercised within the limits of the district. Congress might have authorized civil process from any circuit court to have run into any state of the Union. It has not done so. It has not, in terms, authorized any original civil process to run into any other district, with the single exception of subpoenas for witnesses, within a limited distance. In regard to final process, there are two cases, and two only, in which writs of execution can now by law be served in any other district than that in which the judgment was rendered; one in favor of private persons, in another district of the same state; and the other in favor of the United States, in any part of the United

[3] [From 6 N. B. R. 117.]

States. We think that the opinion of the legislature is thus manifested to be, that the process of a circuit court cannot be served without the district in which it is established, without the special authority of law therefor." These views being founded on the language of the 11th section of the act of 1789, are equally applicable to the service of original process issued by a district court.

The jurisdiction conferred by the second section of the bankruptcy act, on this court, is one over "all suits at law or in equity which may or shall be brought by the assignee in bankruptcy, against any person claiming an adverse interest * * * * touching any property or rights of property of said bankrupt, transferable to, or vested in, such assignee." But, notwithstanding this grant of jurisdiction as to subject-matter, when the suit is brought against a defendant making a particular claim of interest touching certain specified property, it by no means follows that such jurisdiction must not be exercised in subordination to the provisions of the eleventh section of the act of 1789. There is nothing in the second section of the bankruptcy act dispensing with or repealing the provisions of the said eleventh section, and nothing repugnant to or inconsistent with them.

The only other section of the bankruptcy act, which it is supposed authorizes the service of subpoena made in this case, is the first section. But, that section only relates to the powers which this court is to exercise as a court of bankruptcy, in matters and proceedings in bankruptcy. It is now determined by the supreme court (Smith v. Mason, 14 Wall. [81 U. S.] 419), that the general clause in the first section, conferring jurisdiction on the district courts, must be considered in connection with all the other provisions of the act; that the clause, in such first section, specifically enumerating the cases and controversies to which the jurisdiction of said courts shall extend, does not enumerate the "suits at law or in equity" enumerated in the second section; that a cause involving a controversy such as that exhibited by the bill in this suit cannot be commenced by a petition, followed by an order to show cause why the prayer of the petition should not be granted, or be determined in a summary way by the district court sitting in bankruptcy, without due process of law; and that such a controversy falls within the provisions of the second section, and must be determined in a suit in equity or an action at law, as the case may be. In Morgan v. Thornhill, 11 Wall. [78 U. S.] 65, 80, it is said by the supreme court, that the jurisdiction conferred on the district courts by the second section of the bankruptcy act, is of the same character as that conferred on the circuit courts by the eleventh section of the act of 1789; and that the jurisdiction intended to be conferred on the circuit courts, by such second section, is the regular jurisdiction between party and party, as described in the act of 1789 and the third article of the constitution. The jurisdiction conferred by the second section on the circuit court for the district where the proceedings in bankruptcy are pending, over the suits therein mentioned, is conferred in the same terms in which it is conferred on the district court of the same district. In respect to each court it is an enlargement of its jurisdiction. But for such provision, the circuit court would have no jurisdiction of a suit wherein one of the parties named in the second section is not a citizen of the state where the suit is brought while the adverse party is a citizen of another state; and, but for such provision, the district court would have no jurisdiction of such a suit as is mentioned in the second section. The conferring of the jurisdiction on the two courts concurrently, by the second section, in the same terms, indicates, plainly, that one of them cannot, under authority derived from the provision, exercise such jurisdiction to an extent, or in a manner, different from the other. If, therefore, it can be claimed that this court can make effective such service of process as has been made in this case, it follows that the circuit court for this district, if this bill were pending in that court, could make effective a like service of process. But, it is entirely clear, I think, that the jurisdiction conferred on both courts by the second section of the bankruptcy act, is a regular jurisdiction between party and party, of the same character as that conferred on the circuit courts by the eleventh section of the act of 1789, and is to be pursued, as to forms and modes of process, under the same rules which obtain as to suits brought in the circuit courts in pursuance of such eleventh section. There is nothing in the bankruptcy act indicating an intention on the part of congress that process in the suits specified in the second section of the bankruptcy act shall be served or made effective in any different manner from that required in suits brought in a circuit court under the jurisdiction in "suits of a civil nature at common law or in equity," conferred on such court by the eleventh section of the act of 1789.

It by no means follows, because, in bankruptcy proceedings proper, pending in a district court, a summons or order or notice issued by such court may, in some cases provided for by the act, effectually bind a person on whom it is served, although such service is not made personally at a place within the territorial limits of the district, that original process in the plenary suits mentioned in the second section of the act can be effectively served out of the territorial limits of the court issuing such process. Indeed, the act, in my judgment, clearly indicates, in numerous places, an intention on the part of congress, that service other than

personal intra-territorial service shall be allowed in bankruptcy proceedings proper, while there is not, in the act, any indication of any intention that extra-territorial service shall be allowed in the suits mentioned in the second section of the act.

The views thus suggested are confirmed by the language of general order No. 32, in bankruptcy, prescribed by the supreme court, which provides, that, "in proceedings in equity instituted for the purpose or carrying into effect the provisions of the act, or of enforcing the rights and remedies given by it, the rules of equity practice prescribed by the supreme court of the United States shall be followed, as nearly as may be." One of those rules, (rule 15) requires, that the service of all process shall be by the marshal of the district or his deputy, or by some other person specially appointed by the court for that purpose, and not otherwise, while rule 13 requires that the service of a subpoena shall be made by delivery of a copy thereof by the officer serving the same to the defendant personally, or by leaving a copy thereof at the dwelling-house or usual place of abode of the defendant, with a member of or a resident in the family. By the 27th section of the judiciary act of 1789, it is made the duty of the marshal of the district to execute "throughout the district" in and for which he is appointed, all lawful precepts directed to him and issued under the authority of the United States. There is nothing in the general orders in bankruptcy, or in the rules in equity prescribed by the supreme court, which authorizes a marshal to serve a subpoena to appear and answer, in an equity suit, at a place outside of the territorial limits of the district for which he is appointed. The service of the subpoena in this case having been irregular, it must be set aside, and so, also, must the service of the injunction.

[An injunction obtained against the defendant in the district court of New Jersey was dissolved on the ground of want of jurisdiction in the matter. Case No. 7,330.]

## Case No. 7,330.

JOBBINS v. MONTAGUE et al.

[6 N. B. R. 509.] [1]

District Court, D. New Jersey. 1872.

BANKRUPTCY—JURISDICTION—ACTION BY ASSIGNEE IN OTHER DISTRICT.

1. The provisions of the bankrupt act [of 1867 (14 Stat. 517)] confer upon the United States district courts a general superintendence and jurisdiction of all cases and questions arising under the bankrupt act, but this jurisdiction is confined to the court within and for the districts where the proceedings in bankruptcy shall be pending.

[Disapproved in Goodall v. Tuttle, Case No. 5,533. Cited in Lamb v. Damron, Id. 8,014.]

2. An action brought by an assignee in bankruptcy in a district court other than the one in which the proceedings in bankruptcy were pending was dismissed.

3. An appearance and answer by a defendant does not preclude him from raising the question of jurisdiction.

4. Courts of bankruptcy are the special creatures of statutory law, and all their jurisdiction is derived from the act which creates them.

[Disapproved in Goodall v. Tuttle, Case No. 5,533.]

This is a bill in equity filed in the district court of the United States, for the district of New Jersey, praying for an injunction and relief. The complainant is the assignee in bankruptcy of Joseph B. Brauner and Townsend Jackson, of the city of New York, lately composing the firm of J. B. Brauner & Co., and the bill sets out that the said firm were duly adjudicated bankrupts on the twenty-second day of January, eighteen hundred and seventy, upon a creditors' petition, filed by one Edwin Saunders, in the district court of the United States, for the Southern district of New York; that the complainant was duly elected and appointed assignee in bankruptcy of said bankrupts; was duly qualified; has received from the register the proper assignments of the bankrupts' estate, pursuant to the act, and has been ever since acting as such assignee. [The service of a subpoena upon defendant in the same matter was set aside because made outside of the district in which the suit was brought. Case No. 7,329.]

The bill further alleges that on and prior to June fifteen, eighteen hundred and sixty-nine, Townsend Jackson, one of the said bankrupts was seized in fee simple of certain lands and real estate, situate in Jersey City, and state of New Jersey, therein particularly described; that on or about that date, he, and Martha, his wife, executed and delivered to one Ebenezer Montague, of the last mentioned state, a mortgage upon the said premises, to secure the payment of a bond of the said Townsend to the said Montague, for the sum of ten thousand dollars and interest; that the said sum was not due upon the bond at the date of the execution of the said mortgage; that the same was given by Jackson to Montague, as the said Montague then well knew, in view and contemplation of the pecuniary embarrassment in which the affairs of the said Jackson were then already involved, and for the purpose of shielding the said property from the just claims of the creditors of the said Jackson. That on or about the twenty-fourth day of November, eighteen hundred and sixty-nine, the said Townsend Jackson, being insolvent and bankrupt, and utterly unable to meet the payment of his debts, with Martha, his wife, conveyed the said premises, with other property in said deed specified, to one Benjamin Albertson, in fee simple, professedly for the consideration of fifteen thousand dollars; that said deed was made in contemplation of bankruptcy, and for the purpose of delaying, hindering and de-

[1] [Reprinted by permission.]

frauding the creditors of the said Jackson; that no consideration was in fact paid by the said Albertson, or if any, the same was grossly inadequate and designed merely as a cover to the real character of the transaction; and that Albertson then well knew the circumstances of the said Jackson, and his purpose aforesaid in making the conveyance. That on or about the twenty-sixth day of February, eighteen hundred and seventy, the complainant, as assignee as aforesaid, filed his bill of complaint in the United States district court for the Southern district of New York, for the purpose of setting aside the deed hereinbefore mentioned, and other deeds and conveyances of said Jackson; and of having a receiver appointed for the said property and other property similarly conveyed, and of enjoining the said Jackson, Albertson and others, the grantees of Jackson, who were made parties defendants to said bill, from disposing of the said property and the proceeds thereof; that thereupon an injunction was granted by the court to the foregoing effect, on the twenty-eighth day of February, eighteen hundred and seventy, and duly served upon the said Jackson and Albertson. That on the twenty-third day of September, eighteen hundred and seventy, the complainant was appointed receiver in said cause for the real estate described in said bill, and other property; that on the motion for the appointment of receiver, an affidavit of the said Montague was read in opposition thereto; and that on the eleventh day of October, eighteen hundred and seventy, a copy of the order appointing the complainant receiver was served personally upon the said Montague. That a few days afterwards, to wit: on the seventeenth of October, eighteen hundred and seventy, Montague filed his bill of complaint in the court of chancery of New Jersey against the said Townsend Jackson, and Martha, his wife, and Benjamin Albertson, and Martha B., his wife, for the foreclosure of the mortgage thereinbefore set forth; that on the seventh day of February, eighteen hundred and seventy-one, a decree by default was taken against the defendants for ten thousand seven hundred and ninety-five dollars and twenty-six cents, principal and interest thereon to that date; that an execution was issued directed to the sheriff of the county of Hudson, commanding him to make sale of the mortgaged premises; that the sheriff had advertised the same in obedience to the said writ, and threatened to sell on the eleventh day of May, then next ensuing; that the complainant was not made a party to said proceedings in foreclosure, and had no notice thereof, and did not know they were in progress until after the final decree and a few days previous to the time fixed for the sale of the mortgaged premises; that the said proceedings were instituted and carried on by collusion between Montague and Jackson and Albertson, for the purpose of delaying, hindering and defrauding the complainant as assignee and receiver, in the pursuit of his rights in, and remedies against the property mentioned in the said mortgage, and with the intent that, by a sale under the said foreclosure proceedings the said Montague, Jackson, Albertson or some of them might acquire a defensible title to said property, or realize more money than was justly due on said mortgage, in fraud of the complainant's rights and remedies.

The prayer is, that the said conveyance to Albertson may be decreed void and of no effect, as against the complainant and the creditors of the said Jackson; that an account may be taken of the amount, if anything, actually due to Montague upon the said mortgage, and that the complainant may be decreed to be entitled to redeem the mortgaged premises, upon paying or tendering to said Montague the amount so found to be due; that Jackson and Albertson and wife may be restrained from selling, leasing or otherwise disposing of or interfering with the said premises, and Montague from further proceeding in his suit for the foreclosure of his mortgage, or for the sale or possession of the property, and the said sheriff, his deputies and agents, from all proceedings in the execution of the said writ. The bill was filed on the nineteenth of May, eighteen hundred and seventy-one, with a number of affidavits and exhibits in support of its material allegations; and on the same day, upon application of the complainant's solicitor, an injunction was allowed against the defendants according to the prayer of the bill of complaint. The defendant, Montague, filed his answer June nineteenth, eighteen hundred and seventy-one, substantially denying all the charges of fraud contained in the bill and averring that the mortgage was given to him to secure the payment of ten thousand dollars lent to Jackson in good faith; that the whole sum was advanced by him to Jackson; that only six months' interest had been paid to him thereon, and none of the principal; and that in his proceedings in the court of chancery of New Jersey, for the foreclosure of the said mortgaged premises, he was only pursuing such remedies as the law gave to him for the enforcement of his rights under the mortgage.

NIXON, District Judge (after stating the facts as above). The case is now before me on the application of the defendant to dissolve the injunction, and his counsel has raised the question of jurisdiction, denying to this court the power in a suit brought by an assignee in bankruptcy, of restraining the defendant from prosecuting his suit in a state court when the bankruptcy proceedings are pending in another district court. If it were a question only affecting the forms of proceeding, I might be inclined to hold that the defendant, by appearance and answer, had waived it, but as it is one of jurisdiction, no voluntary act of the

defendant can give such jurisdiction, and it is never too late at any stage of the cause to consider it. It is a question of great practical importance in the administration of bankrupts' estates, and can only be decided by ascertaining and interpreting the powers vested in the district courts as courts of bankruptcy under the bankrupt act. The first section constitutes the several district courts of the United States, courts of bankruptcy, and original jurisdiction is given to them in their respective districts in all matters and proceedings in bankruptcy, and they are authorised to hear and adjudicate upon the same according to the provisions of the bankrupt act. This general grant of jurisdiction is followed by a special grant in the subsequent part of the section, extending such jurisdiction to all cases and controversies arising between the bankrupt and any creditor claiming a debt or demand under the bankruptcy; to the collection of the assets of the bankrupt; to the ascertainment and liquidation of liens and other specific claims; to the adjustment of priorities; to the marshaling and disposition of the different funds; and to all acts, matters and things to be done under and in virtue of the bankruptcy, until the final disposition and settlement of the estate and the close of the proceedings in bankruptcy. The second section grants to the several circuit courts of the United States, "within and for the districts where the proceedings in bankruptcy shall be pending," a general superintendence and jurisdiction of all cases and questions arising under the act; and also concurrent jurisdiction with the district courts of "the same district" of all suits at law or in equity, which may be brought by the assignee in bankruptcy against any person claiming an adverse interest, or by such person against such assignee, touching any property or rights of property of said bankrupt, transferable to or vested in such assignee. These powers were deemed necessary, in order to a harmonious and efficient administration of the law, and to a satisfactory settlement of the various questions constantly arising in bankruptcy proceedings; but in defining their limits and extent we must not forget that the bankruptcy court is the special creature of statutory law, and that all of its jurisdiction is derived from the act which creates it.

In considering the powers vested in the courts of bankruptcy by the act, two inquiries at once arise. 1. Whether the jurisdiction of the district courts, as courts of bankruptcy, extends territorially beyond their respective districts? 2. Whether the powers conferred may be exercised by any other court than the one in which the bankruptcy proceeding shall be pending?

It is not necessary or proper to answer the first question here and in this case. If the assignee had brought the suit in the district court of the United States, for the Southern district of New York, where the proceedings in bankruptcy are pending, it would have arisen there, and probably that court would have been obliged to examine and settle it. See Jobbins v. Montague [Case No. 7,329]. But I am concerned with the answer to the second inquiry, and that I shall proceed to consider.

Bearing in mind that courts of bankruptcy are mere creatures of the statute, and derive all their life and vigor from it; let it be observed that the original jurisdiction conferred upon them, in the first section of the act, in all matters and proceedings in bankruptcy is expressly subject to two limitations. In the first place such jurisdiction is only given "in their respective districts"; and secondly, they are authorised to hear and adjudicate only upon such matters and proceedings "according to the provisions of the act." What do these limitations mean? When the jurisdiction over bankruptcy matters and proceedings is conferred upon them "in their respective districts," is it not a fair legal inference that it was meant to be withheld outside of these districts? Why was such phrase inserted if such was not the intention of the law making power? And when they are authorised to hear and adjudicate upon all matters and proceedings in bankruptcy, "according to the provisions of the act," are we not, by such a clause, directed to the eleventh section, which requires every petition in bankruptcy to be filed in the district in which the debtor has resided or carried on business for the six months next immediately preceding the time of filing such petition, or for the longest period during such six months? Is not the question of residence a jurisdictional fact? If, therefore, authority is given in the first section to hear and adjudicate upon all matters and proceedings in bankruptcy, "according to the provisions of the act," and if the eleventh section limits the adjudication to the district of the debtor's residence, whence does another bankrupt court in another district derive its authority to hear and adjudicate upon such matters and proceedings? This interpretation of the first section I think is illustrated and confirmed by the phraseology of the second section. The primary design of the second section is to give jurisdiction over bankruptcy matters and proceedings to the circuit court. It confers upon that court a general superintendence and jurisdiction of all cases and questions arising under the bankrupt act, "within and for the districts where the proceedings in bankruptcy shall be pending;" but nowhere else. It also vests in the circuit courts a concurrent jurisdiction with the district courts of the same district of all suits at law or in equity, between the assignee in bankruptcy and any person claiming an adverse interest. It is clear from the language used that the circuit courts

have no general superintendence and jurisdiction over cases and questions arising under the bankrupt act, outside of the district where the proceedings in bankruptcy are pending. If it was the design of the law to authorise suits in such other districts between the assignee in bankruptcy and persons claiming an adverse interest in the estate, why were such cases, and only such, excluded from the general superintendence and jurisdiction of the circuit courts?

This is not a case of first impression, and I am sustained by respectable authority for such a limitation of the powers of the bankrupt courts.

Mr. Bump, in his valuable treatise on the Law and Practice of Bankruptcy (chapter 12), speaking of the jurisdiction of the court, says, "Their jurisdiction over the subject matter only attaches when the cause of action arises from a proceeding in bankruptcy pending before them, and each court only has jurisdiction of those matters that spring out of a case in bankruptcy pending before it. If such case is pending in another court, they have no jurisdiction over such matters by virtue of the bankrupt act. The only powers that can be exercised by district courts in such cases, are those which are conferred upon them by other statutes. These principles have been steadily conformed to in practice. Nothing is more common than to find an assignee bringing a suit in a court of bankruptcy against a party who lives in the same district with himself. No case, however, has yet been reported where he has brought a suit beyond the limits of his own judicial district." Page 177.

Blatchford, J., in Re Richardson [Case No. 11,774], held, that the act conferred no power upon the district court of the United States for the Southern district of New York, as a court of bankruptcy, to grant an injunction to stay proceedings upon suits in the New York state courts against the bankrupts, upon their petition, it appearing that the petitioners had been adjudged bankrupts by the district court of the United States, for the district of Louisiana. If the law gave them any remedy in such a case, it was either upon application to the court where the proceedings in bankruptcy were pending, or possibly by a proper form of suit in the circuit court, under the general equity powers which that court exercises independently of the bankrupt act. The reasoning of Dillon, J., in the case of Markson v. Heaney [Id. 9,098], leads to the same result. There a bill was filed in the circuit court of the United States for the district of Minnesota, by an assignee in bankruptcy, against a person claiming an adverse interest, to set aside a mortgage as fraudulent in fact and under the bankrupt law, the mortgaged premises being in the state of Indiana, the mortgagee residing in Minnesota, and the proceedings in bankruptcy pending in the district court of Kansas. The court refused the injunction asked for, holding that in such a case the circuit court of Minnesota had no bankruptcy jurisdiction, because the bankruptcy proceedings were pending in another district.

The precise question now before me arose in the district court of the United States for the district of Massachusetts, in the case of Shearman v. Bingham [Case No. 12,733]. That was an action of assumpsit, brought by assignees to recover money alleged to have been paid by the bankrupts to the defendants by way of preference. The proceedings in bankruptcy were pending in the district court of Rhode Island, and suit was commenced by the assignees in the district court of Massachusetts. Upon a plea to the jurisdiction, and after argument and consideration, Lowell, J., held that the district court of Massachusetts, as a bankruptcy court, had no jurisdiction in that case, or in any case where the proceedings in bankruptcy had begun and were pending in another district.

Thus, the construction of the bankrupt act and the authority of adjudged cases, constrain me in the present case to dissolve the injunction and dismiss the bill for want of jurisdiction. I should be glad to have reached a different result, for I can readily see that the denial to the bankruptcy courts of the jurisdiction here claimed impairs their efficiency, and may lead to difficulty and embarrassment in the administration of bankrupt's estates. This argument, however, is rather to be addressed to the congress on an application to enlarge their jurisdiction, than to the courts to induce the exercise of doubtful powers. If my view of the extent and scope of the authority conferred upon the courts is too narrow, the complainant has his remedy by appeal, and I shall not regret, but rather rejoice, if the superior courts can see their way clear to give a wider and less literal construction to the provisions of the act.

JOE (UNITED STATES v.). See Case No. 15,478.

## Case No. 7,331.

In re JOHANN.

[The case reported under above title in 2 Biss. 139, is the same as Case No. 675.]

JOHANN (AVERY v.). See Case No. 675.

## Case No. 7,332.

The JOHANNES.

[10 Blatchf. 478.] [1]

Circuit Court, E. D. New York. Feb. 25, 1873.

COLLISION—INEVITABLE ACCIDENT—NEGLIGENCE.

A barque, lying at a pier, fastened by chains which had held her there securely for three

[1] [Reported by Hon. Samuel Blatchford, District Judge, and here reprinted by permission.]

months, drew out a pile to which one of the chains was fastened, during a late period in a storm which had lasted two or three days, so that she swung around and against a tug lying near and injured the tug. *Held*, that the case was not one of inevitable accident, in a legal sense.

[Cited in The Energy, Case No. 4,485; The Chickasaw, 38 Fed. 363; The Mary L. Cushing, 60 Fed. 111; The Public Bath No. 13, 61 Fed. 693.]

[Appeal from the district court of the United States for the Eastern district of New York.]

In admiralty.

Franklin A. Wilcox, for libellant.

James K. Hill, for claimants.

WOODRUFF, Circuit Judge. The steamtug E. Palmer, belonging to the libellant, in the night of the 22d day of November, 1870, was lying in the slip between piers 50 and 51, East river, in the harbor of New York, fastened to other vessels, which lay between her and the bulkhead. The barque Johannes was lying along the southwesterly side of pier No. 51, the upper pier, with her bow near the bulkhead. She was fastened by a chain from her bow hawser hole to a pile on the dock, several feet within the bulkhead, a chain from about midships running aft twenty or thirty feet to a pile on the pier, and two other chains from near her stern to a pile on the pier a little aft her stern. In that position, and with those fastenings, she had lain from the previous August. Her chains, running obliquely lengthwise the vessel, permitted her to swing off and on three or four feet, according to the direction of the wind and the state of the tide. A northeasterly storm commenced a day or two prior to the 22d of November. It became more violent, blowing all the forenoon and afternoon of that day, and rising, at evening, to a heavy gale, at the same time bringing in an unusually high tide, which, the barque being light, lifted her high relatively to the pier, the vessel being "eighteen feet out of the water." At about nine or ten o'clock in the evening, the pile to which the forward chain was fastened, was, by the violence and force of the wind on the side of the vessel, and the direction of the strain on the pile, drawn out; and the bow of the vessel was swung around twenty or thirty feet from the pier. She was thereby driven against the tug-boat, which was, by the pressure, broken from her fastenings and driven against another vessel. To recover indemnity for the damage done thereby to the tug-boat, the libel herein was filed, and the libellant had a decree therefor in the district court. [Case unreported.]

Such indemnity was properly awarded: and, although the testimony shows more than one offer by the libellant to accept a very much less sum in satisfaction, shortly after the injury, it is not claimed that the proofs laid before the commissioner by whom the amount of indemnity was ascertained, did not justify his report of the sum awarded and decreed, namely, $620.20. Although the swinging of the barque upon the steamtug was caused by the violence of the wind and the height of the tide, it cannot, with truth, be said that it was inevitable, in the legal sense of the term. Doubtless, the proof shows that the fastenings of the ship were sufficient to hold her in ordinary circumstances. The fact that she had lain there in safety, for three months, with just those fastenings and no others, shows this. But, the proofs go far to show, that a prudent judgment forbids that such longitudinal moorings, permitting her to swing out and in from the pier, with no breast line running crosswise to the pier, to hold her, should be relied upon. However this may be in ordinary weather, it is clear, that extraordinary exposure to violence demands increased care and precaution; and occasional storms and gales should be anticipated and guarded against; and, in that view, I think the balance of the testimony shows, that it was not proper to rely upon the fastenings which she had, and that a crosswise line, to hold her to the pier, was called for.

It is urged, as an excuse, that a chain could not be passed crosswise to the pier, and made fast to any pile thereon, so as to be of any avail, unless it was carried across the pier, to the side thereof most remote from the vessel, which, it is claimed, would interfere with the proper use of the pier itself; and that the vessel was so high out of the water, that a chain to the pile on the side of the pier opposite and next to the vessel would have drawn nearly perpendicularly thereon. It cannot, surely, be claimed, that any defect in the pier, or its facilities for making fast, furnishes an excuse to the vessel lying there, if insufficiently secured; and the addition of two chains or lines since the accident, one of them secured crosswise, as above suggested, while it does not show, or even amount to an admission, that the fastening was insufficient before, does show that additional fastenings were practicable. As forcibly suggested in the opinion of the court below, those in the care of the vessel had abundant warning—such warning as should have awakened them to the highest vigilance, and even to the use of unusual precautions. If no other means were at hand, the running of a breast line across the pier, temporarily, or a line to the nearer pile, which, though nearly perpendicular when the vessel was against the pier, would furnish protection when and if the other lines permitted her to fall off a few feet therefrom, or both of these precautions, might have been adopted without difficulty or objection.

The claim of the appellant, that the steamtug was in the slip without lawful permission, or that her position was improper, if

it be not wholly overcome by the evidence, will not avail. She in no wise interfered with the barque, or any opportunity or privilege to which she was entitled. She violated no duty which she owed the barque, in being where she was, and she was, therefore, entitled to all the protection which proper precaution against the breaking loose of the barque would afford her.

It was upon these grounds that a decree in favor of the libellant was awarded in the district court. Upon the authority of The Louisiana, 3 Wall. [70 U. S.] 164; Union Steamship Co. v. New York & V. Steamship Co., 24 How. [65 U. S.] 307; Buzzard v. The Petrel [Case No. 2,261]; Lucas v. The Thomas Swann [Id. 8,588],—and the principles there stated, the libellant is entitled to a decree, in affirmance of the decree below, for his damages and costs, with costs of the appeal.

JOHN (UNITED STATES v.). See Case No. 15,479.

JOHN ADAMS, The (AMOSKEAG MANUF'G CO. v.). See Case No. 338.

JOHN ADAMS, The (BEERS v.). See Case No. 1,231.

## Cas No. 7,333.

The JOHN & ALBERT.

BETHEL et al. v. The JOHN & ALBERT.

[4 Adm. Rec. 534.]

District Court. S. D. Florida. Nov., 1851.

SALVAGE—WHEN ALLOWED—DISCRETION.

[1. A claim for salvage is of much merit when it appears that the salvors have acted with energy and skill, exposed themselves and their vessels to danger, and rescued the libeled vessel from a position of imminent peril of total loss.]

[2. The discretion of a court of admiralty as to the amount of award for salvage services should be used with a view to the circumstances of each case, previous decisions, and commercial policy.]

[This was a libel for salvage by Joseph Bethel and others against the ship John and Albert and cargo.]

T. R. Mallory, for libelants.

Wm. R. Nackley, for respondent.

MARVIN, District Judge. This is a libel for salvage. The principal facts of the case may be briefly stated as follows: The ship, while on a voyage from New York to Appalachicola, in ballast and with about two hundred bales of hay, on the night of the 1st of November, 1851, ran ashore upon a reef of coral rocks, known as "Pellican Shoals," situated on the edge of the Gulf Stream, about fifteen miles distant from Key West. The ship laboring considerably, and the masses of coral breaking away underneath, she became imbedded in them. She lay in seven and nine feet of water, she drawing ten feet forward and ten feet three inches aft. The libellants, being the crews of four wrecking vessels, arrived at the ship on the morning of the 2d of November, and, being employed by the master of the ship to assist him in getting the ship off, they proceeded to carry out an anchor, and plant it astern, and to throw overboard ballast, to lighten the ship. Continuing to throw overboard ballast, at 5 o'clock p. m., it being high water and finding they could not heave the ship off, they carried out a second heavy anchor. During the night they hove overboard more ballast, and hoisted the hay out of the lower hold, placing it between decks, and moving it forward to lighten the ship aft. In the morning they carried out and planted a third anchor, belonging to the schooner Victor, and they threw overboard more ballast, passing it out through the ballast portholes by hand, which method of removing the ballast they were obliged to adopt in consequence of the careening of the ship. On the morning of the 4th they sent down the ship's topgallant and royal yards and topgallant masts, fearing that, in consequence of the removal of so much ballast, the ship would not stand upright, when she came off, with these yards and masts aloft. They then hove overboard more ballast, and continued at this labour until about 5 o'clock in the afternoon, when having thrown overboard about one hundred and twenty tons of ballast, and it being high water, the ship began to move. The wind blowing a heavy norther, they set all sail, and manned the windlass, and by the means of the sails, and heavy strains upon the anchors, they succeeded, at about 7 o'clock, in getting the ship afloat, and bringing her into this port the next day. It appears, from an examination of the ship in this port, that her keel and bottom planks are very chafed and worn off by the rocks; and on an appraisement it appears that, although considerably injured, she is still worth the sum of $20,000. I think no reasonable doubt can be entertained that the ship would have been totally lost but for the efforts and labours of the libellants, thirty-four in all, with four wrecking vessels. It appears, too, that there were not more men employed in this service than were fairly necessary. The service was performed, too, with energy and skill, and involved considerable labour and some peril and exposure on the part of the salvors and their vessels.

Under these circumstances, the claim of the salvors is one of much merit. The law not having laid down any rule by which to determine the amount of salvage in any case, such amount is left to be fixed by the tribunals of justice, not arbitrarily, but upon a full consideration of all the facts, and with a due reference to previous decisions and sound commercial policy.

To enable me to form a satisfactory opin-

ion as to the amount of salvage I ought to decree in the present case, I have examined a considerable number of cases heretofore decided in this and in other courts, some of which it may be well to refer to. The first case I shall notice is that of The Tennessee [unreported], decided by Judge Webb in 1832. This ship, bound from New York to New Orleans, laden with a cargo estimated to be worth between seventy and one hundred thousand dollars, ran ashore off Long Key. She was assisted by two wrecking vessels and their crews, and lightened about twelve inches, and forced off at high water by means of the sails. The court decreed about three thousand dollars as a reasonable compensation for the services rendered. The judge considered the ship and cargo in danger, but not in imminent peril. The case of The Emporium [unreported] was decided in 1833. This ship was from Boston, bound to New Orleans, laden principally with ice. She ran ashore on Collins' Patches, and lay in a foot and a half less water than her actual draught. She was lightened by the crew of the sloop Isabella, Appleby, master, and heaved off the reef by her anchors. Immediately after the ship was relieved the wind commenced to blow hard, and increased in violence for two days. The ship and cargo were valued at $32,000, and sixteen per cent. thereof, or $5,120, were decreed for salvage. The case of The Ella Hand [Case No. 4,369] was decided in 1837. This ship ran ashore on Bird Key Shoal at the Tortugas. She lay in ten feet water, drawing twelve feet. The weather was squally, and the sea rolled in heavily, pressing her further on shore. Four of the large wrecking vessels and crews were concerned in lightening and relieving the vessel. They carried out two anchors, and hove her off. The ship and cargo were appraised at $33,200. The court decreed $7,500 salvage, or near twenty-two and a half per cent. The shares of the men amounted to $68.50. The case of the Mexican Naval Brig Independence [unreported], Kelly, master, was decided in 1836. This brig got ashore on the Sombrero Reef. She lay in eleven feet, drawing fourteen feet, with her rudder pintles broken and rudder unhung. Three of the large wrecking vessels were concerned in relieving her. They lightened the vessel by loading the schooner United States, of seventy tons burthen, with beef, pork, cordage, and other heavy articles, and forced her off the reef by means of her sails. They then hung her rudder, and brought her to this port. The vessel and cargo were valued at $23.000. The salvage decreed was $5,000. The men's shares amounted to $64. The next case I shall mention is that of The American & Cargo [unreported]. This ship got ashore off Sugar-Loaf Key, and was got off by the officers and crew of the revenue cutter Dexter and the crews of the regular wrecking vessels. The ship was lightened by loading the two wrecking vessels, and hove off by her anchors. The ship and cargo were valued at $45,000. The judge said: "Had the service been rendered solely by the regular wreckers, sixteen per cent., or $7,200, would be allowed as salvage; but, the principal services being performed by men belonging to a vessel of the United States, he decreed $6,000 for salvage." The case just mentioned is not unlike, in many particulars, the case of The Russell Glover [unreported], decided in this court in 1846. This ship, laden with ice, got on shore on Sombrero reef, and was lightened and hauled off by the crews of two pilot boats, engaged also in wrecking, and the crew of the revenue cutter Legan. She was badly ashore, sustained much injury, and was in great danger of total loss. The ship was valued at $16,500. The court said, had all the salvors been regular wreckers, $5,000 would be a reasonable salvage; but, acting on the principle decided in the case of The American, of allowing less salvage to men attached to national vessels, the court decreed $3,750. The case of The Suviah [unreported] was decided in 1840. This ship was ashore on Pickle's Reef, and was in great danger of total loss. She was relieved by four wrecking vessels, with their crews, lightened, and hove off. The ship and cargo were valued at $34,977. The one quarter thereof, or $8,744, were decreed for salvage. The men's shares amounted to $58. The case of The Abellino [unreported] was decided in 1850. This ship, laden with ice, got ashore on the Alabamian Shoal, and was relieved by six wrecking vessels and crews. They carried out an anchor, lightened the vessel of 75 or 100 tons of ice, and hove the ship off. The weather was bad and sea rough. The ship was in great danger, and the court said "there could be no reasonable doubt that the vessel would have been lost, but for the services of the wreckers." The ship was valued at $26,200. The salvage decreed was $6,550, being the one-quarter of the value. The shares of the men amounted to $34 each.

It may be learned, from the cases I have cited, and from many others decided in this court in awarding salvages, and to which I refer in the records and rolls, that the court, in awarding salvage, has steadily had in view, at all the different periods of its history, the idea of a fair and reasonable compensation, under all the circumstances, for the service done, rather than the idea of any particular pro rata amount; that the proportional rate has been diminished with the increased value; and e converso, other things being equal, that, acting upon this general idea, it has resulted, as a matter of fact, that there have been but few cases decided, even where the property was in much peril and of considerable value, in which the vessel's share has exceeded $1,400, or the men's shares $70 each. There are cases when the shares of the vessels and men exceed these amounts, as in The Ajax [Case No. 117]; The Amer-

ica [Id. 279]; The Euphrasia [Id. 4,545]; The Brewster [Id. 1,852]; and others; but it will be found, on examination, that even where the value of the property is large, and the danger great, the shares oftener fall short of the sums than they exceed them. When the value of the property has been small or the danger not great, the shares have fallen much below these sums; and as a general rule, admitting as exceptions, the shares rarely come up to these sums I have mentioned. In administering the law of salvage in this court, there is great danger of departing, little by little, and imperceptibly, from the principles, proportions, and amounts of salvage settled and given in years past in this court, without a frequent reference to, and examination of, the older decisions. Every such departure is to be deprecated on many accounts. The general rates and amounts of salvages allowed in this court should neither be increased or diminished. Any increase in the rates would unreasonably stimulate and encourage the business of wrecking, and enlist more men in the business than it can fairly support, or than the interests of commerce and humanity require; and such stimulation would inevitably, in the end, prove disastrous and ruinous in its consequences to all persons engaged in the business. On the other hand, any considerable diminution of the rates would be unjust to the persons already engaged in the business, and injurious to the interests of commerce. An even and steady course should be pursued.

To return to the case immediately under consideration. It will be seen, from the statement of facts I have made, that the present case is one of much merit, calling for a compensation to the salvors fully equal in amount to the salvages heretofore decreed in the most meritorious cases. In many particulars it will compare with the cases above mentioned. In its important feature it does not differ from the cases of The Ella Hand, The Independence, and The Abellino [supra]; and, comparing the case with those, I think that the sum of $6,000 will be a reasonable compensation in the present case. This amount will make the shares of the men $65.21 each. It is therefore ordered, adjudged, and decreed that the libellants have, recover, and receive the sum of $6,000 in money of account in the United States, in full compensation for their services rendered the said ship John and Albert, as alleged in their libel; and that upon the payment thereof, and the costs and expenses of this suit, the marshal restore said ship to the master for and on account of whom it may concern.

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JOHN & ALICE, The (HURRY v.). See Case No. 6,923.

JOHN A. WARNER, The (WOOLSTON v.). See Case No. 18,033.

JOHN B. COLE, The (VAN SANTWOOD v.). See Case No. 16,875.

## Case No. 7,334.

### The JOHN BRAMALL.

[10 Ben. 495.] [1]

District Court, E. D. New York. June 21, 1879.

LIMITATION OF LIABILITY UNDER STATUTE AND UNDER GENERAL MARITIME LAW — LIMITATION IN ADVANCE OF LIBELS—JURISDICTION—PLEADING—DEFECT OF LIBEL—PRACTICE—MONITION—APPOINTMENT OF TRUSTEE—REFERENCE.

1. An English steamship, the J. B., loaded with guns and munitions of war for the Turkish government, and bound from New Haven to Constantinople, went ashore on Little Gull Island, at the mouth of Long Island Sound, and became a total loss. Some wreckage was saved from the vessel, and most part of the cargo, which went back damaged to the consignors. The owners of the vessel, no action for damages having been begun within six months, made petition for limitation of their liability to the value of the vessel and freight, offering tender of the vessel and her wreckage in their hands. An order was thereupon issued by the court, directing all parties interested to appear, and show cause why an appraisement of the vessel should not be ordered and why the petitioners should not have the relief which they asked. Notice of the order to show cause was published, and on the return-day some of the consignors and the insurers appeared specially to oppose the petition, and objecting to jurisdiction. *Held*, that the ship-owners were not entitled to the benefit of the rule of the general maritime law limiting the liability of the ship-owners to value of the vessel and freight, but were entitled to the benefit of the statute of the United States (Rev. St. §§ 4283, 4284), though no action was in this case yet instituted against the ship in rem or the owners in personam to recover for the losses caused by the stranding; and that the court had jurisdiction of the proceeding.

2. The stranding having occurred within the territorial limits of this district, within which also the wreckage is, and no suit having been instituted in any other district, this proceeding was properly instituted in this court.

3. The libel should be amended so as to show the residence of the libellants, whether this be considered a proceeding in rem or in personam, under the 23d admiralty rule, but could not be held defective because it asked alternative relief, in a case like this.

4. The tender, made in the libel of the vessel and wreckage to be disposed of by the court, was an abandonment such as the law requires.

5. The court had power under the statute and the rules of the supreme court, to direct the marshal to take property into his custody; whether it had power to order a sale by the court, quere.

In admiralty.

Butler, Stillman & Hubbard, for libellants.

Robinson & Scribner and R. D. Benedict, for Winchester Arms Co. and others.

Scudder & Carter, for Atlantic Mutual Ins. Co. and others.

BENEDICT, District Judge. This is a proceeding to obtain at the hands of this court a limitation of the liability of the owners of the steamer John Bramall, for losses caused by the stranding of that steamer at Little Gull Island, on the 18th day of October, 1878,

[1] [Reported by Robert D. Benedict, Esq., and Benj. Lincoln Benedict, Esq., and here reprinted by permission.]

to the value of said vessel and her freight.

The libel avers, among other things:

That at the time of the said stranding the steamer was bound on a voyage to Constantinople, Turkey, with the following cargo, to wit: 15,790 cases of shells, 10,500 cases of bullets, and 3 boilers with 35 pieces of fixtures, all shipped by the Winchester Repeating Arms Company, of New Haven, Connecticut, to be delivered to order at the said port of Constantinople; and 1,604 cases of guns and 840 cases of sabre bayonets, all shipped by the Providence Tool Company of Providence, Rhode Island, to be delivered to order at the said port of Constantinople. That there were no passengers on board the said steamer, and she carried no cargo except that hereinbefore mentioned.

That at the time of stranding as aforesaid, and in consequence thereof, the steamer immediately filled with water. That the master secured the assistance of experienced wreckers to save the said cargo and steamer, and caused the greater portion of the cargo shipped by the Winchester Repeating Arms Company to be transported from the steamer to New London and to be there stored, and delivered the cargo shipped by the Providence Tool Company to the owners thereof.

That afterwards, on the 4th day of February, 1879, that portion of the cargo shipped by the Winchester Repeating Arms Company was claimed by the owners thereof, and was delivered to them. That no freight has been paid or demanded for the carriage or transportation of any of the goods before mentioned. That the means adopted by the master for the preservation of the cargo were prompt and efficient, but that, nevertheless, the said cargo was, as your libellants believe, greatly damaged. That all endeavors to save the said steamer were unavailing, and she never finished her voyage, but remained where she stranded, and finally broke to pieces and became a total wreck, though some of her tackle and furniture was, by the exertion of the master and crew, assisted by the said wreckers, saved and safely landed in this district, where it now is.

That no claim has been made against the said steamer or against the libellants for damages occasioned by the said stranding, and the libellants do not admit that any just claim for damages from the shippers or owners of the said cargo, or from any one, exists against them or the said steamer by reason thereof, but allege that the said damages, if any there were, were occasioned solely by the dangers and perils of the seas and navigation, and not by the fault or negligence of those in charge of and navigating the said steamer; and they further allege that whatever loss, damage or destruction of any of the said property, goods or merchandise shipped or put on board of said vessel, or whatever loss or damage has been done, occasioned or incurred by reason of the stranding and wreck aforesaid, has been done, occasioned and incurred without the privity or knowledge of the libellants and petitioners, or any of them.

That as the libellants are informed and believe, by the general maritime law and by sections 4283 and 4284 of the Revised Statutes of the United States, their liability, if any, for loss, damage or injury by reason of said stranding is limited to their interest in the said steamship and her freight, and that upon their surrendering the said vessel, as she lies, and the freight earned, or giving stipulation for the value thereof in this court, they are entitled to the benefit of the law limiting their liability as aforesaid, and to this end the libellants offer and tender such stipulation as to this court shall seem fit.

Wherefore the libellants pray that in case it should be hereafter found that there is any liability upon the part of said steamship or upon the libellants as owners thereof for damages occasioned by the stranding and wreck aforesaid, which liability they do not in any manner admit but expressly and wholly deny, that they may have the benefit of the aforesaid limitation of liability under the general maritime law, and also of the limitation of liability provided for in and by sections 4283 and 4284 of the Revised Statutes of the United States, and that the total amount of such liability, if any, and of any recovery which can be had thereon, shall not exceed the amount or value of the interest of the libellants as owners in said steamship at the time of said loss and in her pending freight:

And that this court would make an order for the sale of said steamship or for the appraisement of the amount or value of the interest of the said libellants in said steamship at the time of the loss and damage aforesaid, and in her pending freight, and for the payment of such amount into court, or for the giving of a stipulation with sureties for the payment thereof into court whenever the same shall be ordered, and will otherwise order and direct what shall be done by the libellants in this suit in order to secure and have the benefit of the law limiting their liability as in this libel alleged, according to the maritime law and the course of proceedings of courts of admiralty; and upon compliance by the libellants with such order, that a monition may be issued against all persons claiming any damages or any recovery against said steamship or her owners, citing them to appear before this court and make due proof of their respective claims and the amount thereof, if any such claims they have, at or before a certain time by this court to be named in said writ, and that such further notice be given as this court may direct, and if any liability be found to exist, the court would apportion the sum for which the libellants may be liable among the parties entitled thereto, and that an order may be made to restrain the prosecution of all and any suit or suits against said libellants or against said steamship in respect of any such claim, as is provided by the rules and practice in admiralty; and that

the libellants may have such other and further relief as to this court shall seem meet, with costs to be taxed.

Upon the filing of the libel an order was made as follows:

"On reading and filing the libel and petition of the Royal Exchange Shipping Company (Limited), Samuel Lucas, George Bassett, James Marsden, J. Nicholson, Edward Lucas, W. Mercer, Tobias Smith, M. H. Nicholson, David Ward, I. Howard and Samuel Cocker against the British steamer John Bramall, her engines, boilers, tackle, apparel, furniture and freight, and against all persons intervening for their interest, in a cause of limitation of liability, civil and maritime, setting forth among other things, that by reason of the facts and circumstances stated in said libel and petition, and by the general maritime law, and by the statutes of the United States, they are entitled to and claim the benefit of limitation of liability for the loss, damage or injury arising from the stranding of the said steamer John Bramall, on Little Gull Island, on the 18th day of October, 1878, and sustained by the shippers or owners of the cargo laden on said steamship, or by any one else, and praying this court to cause an appraisement to be had of the amount or value of the interest of the said libellants respectively in said steamship at the time of the said loss and damage referred to in said libel, and in her pending freight; and for the payment of such amount into court, or for the giving of a stipulation with sureties for the payment thereof into court whenever the same be ordered: and to otherwise order and direct what shall be done by the libellants in this suit in order to secure and have the benefit of the law limiting their liability, and upon compliance by the libellants with said order to cause a monition to be issued against all persons claiming any damages or any recovery against the said steamship or her owners, by reason of the stranding of the said steamship as aforesaid, citing them to appear before this honorable court and make due proof of their respective claims and the amount thereof, if any such claims they have, at or before a certain time by this court to be named in said writ; and that such further notice be given as this court might direct, and if any liability be found to exist, that the court would apportion the sum for which the libellants may be liable among the parties entitled thereto; and to make an order restraining the prosecution of all and any suit or suits against the libellants or against the steamship in respect of any such claim, as is provided by the rules and practice in admiralty, and for such other and further relief as to the court shall seem meet, it is now, on motion of Butler, Stillman and Hubbard, proctors for the libellants and petitioners,

"Ordered, that all persons and parties interested, sustaining damage or injury by reason of the stranding aforesaid, show cause before this court, at the court rooms thereof, in the United States court house, in the city of Brooklyn and state of New York, on the twelfth day of March, 1879, at eleven o'clock in the morning of that day, or as soon thereafter as counsel can be heard, why an appraisement should not be made of the said steamship, and of the interest of the libellants respectively in said steamship, and in her pending freight for the voyage upon which she was bound, and why the libellants and petitioners should not have such other, further or different relief, or order, in the premises as may be meet and proper, and in the meantime and until otherwise ordered by this court, let the commencement or prosecution of all or any suits against the said libellants and petitioners, as owners of said steamship, for or on account of any of the damages arising from the stranding mentioned and referred to, be hereby enjoined and restrained; and, on like motion, it is further

"Ordered, that notice of this order be given to all persons interested, by publishing a notice thereof in the Brooklyn Daily Union-Argus and in the New Haven Journal and Courier, for fourteen days prior to the return-day of this order, and by mailing copies thereof to the Winchester Repeating Arms Company of New Haven, Connecticut, and to the Providence Tool Company of Providence, Rhode Island, and to such other persons as the libellants' proctors may be advised."

Under this order special appearances have been entered by various parties in interest, for the purpose of objecting to the jurisdiction of the court; and on behalf of the Winchester Repeating Arms Company special exceptions to the libel have been filed.

One important question thus raised is, whether, upon the facts stated in the libel, the libellants are entitled to have applied for their benefit that rule of the general maritime law which limits the liability of a shipowner to the value of his ship and freight?

In regard to this question there seems to be no difficulty. It appears by the libel that the stranding out of which the libellants' liability arose, occurred at a place within the territorial limits of the United States. The libellants having seen fit to navigate their vessel within the territorial limits of the United States, have subjected themselves in the matter of the extent of their liability for acts there done to the laws of the United States there in force; and as the statutes of the United States "are to be given full operation in all cases occurring within the limits of the binding obligation of these statutes" (Story, Confl. Laws, § 373g)—that is to say, in all cases arising within the limits of the United States—the extent of the libellants' liability, caused by the stranding set forth in the libel, is to be determined according to the statute law of the United States upon the subject of the limit of the liability of owners of ships, now to be found in sections

4283 and 4284 of the Revised Statutes of the United States. And as the libellants are to be judged in respect to the extent of their liability by those statutory provisions, they are entitled to claim any benefit afforded by those same provisions.

In the case of Thomassen v. Whitwell [Cases Nos. 13,929, 13,930], before this court, the application of these provisions of the statutes of the United States was denied to certain foreigners, and the rule of the general maritime law was applied in their behalf; but in that case the liability arose out of a collision on the high seas beyond the territorial limits of the United States, where, as this court held, the statutes of the United States had no effect, and where the only law of the place was the general maritime law, which by comity courts of admiralty are permitted in a proper case to administer. That decision is supported by the decisions of the English courts upon a similar question. Cope v. Doherty, 2 De Gex & J. 614; The Wild Ranger, 1 Lush. 553; General Iron Screw Collier Co. v. Schurmanns, 29 L. J. Ch. 877.

The principle upon which this court proceeded in the case referred to was acted upon by the supreme court of the United States in Smith v. Condry, 1 How. [42 U. S.] 28, where it said: "The collision having taken place in the port of Liverpool, the rights of the parties depend upon the provisions of the British statutes there in force."

The question presented in England by the English act of 1862, is a different question from that which arose in the cases above referred to, and different also from that which arises under our statute.

For these reasons, I am of the opinion that the present libel, in so far as it seeks at the hands of this court an application of the rule of the general maritime law, is bad.

I next proceed to inquire whether, upon the facts stated in the libel, any benefit is afforded the libellants by the provisions of the statutes of the United States above referred to. Here the contention on the part of the objectors is, that inasmuch as it appears on the face of the libel that no action has been instituted either against the libellants in personam or against their ship in rem to recover for the losses caused by the stranding in question, this court has no jurisdiction under the statute to entertain an action instituted by these ship-owners for the purpose of effecting a distribution of the value of their ship among those having valid claims for such losses, and of obtaining protection against future proceedings to recover for such losses.

The argument is, that the supreme court of the United States, by the language used when deciding the case of Norwich & N. Y. Transp. Co. v. Wright, 13 Wall. [80 U. S.] 104, and in framing rules of 1872 (Admiralty Rules 54–57), for the purpose of regulating the method for obtaining the benefit of the statute, have in effect construed the statute as applicable only in cases where suits have been instituted either against the ship-owner or his ship.

It is evident that the supreme court, when deciding the case of Norwich & N. Y. Transp. Co. v. Wright [supra], as well as in framing the rules of 1872, had in mind no cases save those where suits have been instituted against the ship-owner or his ship. But it cannot, I think, be supposed that it was intended by the court to declare that the operation of the statute was to be limited to cases of that description. The case then before the court was one where suits had been instituted. No question was made in regard to cases where no suits have been begun, and neither the decision referred to nor the rules can properly be held by implication to furnish authority adverse to such a case.

In the absence of any previous authoritative construction of the statute, the language of the act, as understood by this court, must, therefore, on this occasion, control the determination. Looking to the statute itself, I am unable to find in it any words of limitation by which to determine that its operation is to be confined to cases where actions have been instituted to recover for losses, and against which relief is sought. No such words of limitation have been pointed out by the advocates of the objectors. The language is as follows: "The liability of the owner of any vessel for any embezzlement, loss, etc., * * * done, occasioned or incurred without the privity or knowledge of such owner or owners, shall in no case exceed the amount or value of the interest of such owner, in such vessel and her freight then pending." Rev. St. § 4283. These words appear to me to be intended to give to the provision effect under all circumstances, and such an intention is in harmony with the object of the statute.

But it is further said there is no provision in section 4283 which authorizes an action on the part of the shipowner to obtain the benefit of the provision, and the section must therefore necessarily be considered to confer simply a right of defence against actions brought.

I know not on what ground so to hold. Clearly section 4283 confers upon the shipowner a right to a limitation of his liability in any case where losses such as the statute describes occur. How, then, can he be denied access to a court of admiralty,—being a court of equity, and, as now settled, having full jurisdiction of the subject-matter,—for the purpose of asserting that right?

The language of the supreme court in Norwich & N. Y. Transp. Co. v. Wright [supra], where it is said, "Congress might have invested the circuit courts of the United States with the jurisdiction of such cases by bill in equity," indicates an opinion by that court that any right under this statute that could be enforced by a bill in equity before the chancellor, can be enforced by libel in a court of admiralty. A proceeding like the present

is quite analogous, in respect to the principle which permits the action to be brought, to bills of peace, bills to set aside contracts tainted with fraud or entered into by mistake, which are common in courts of chancery.

Here the vessel lies sunk on Little Gull Island, but, as the libel shows, these ship-owners have in their possession wreckage saved from the vessel which they desire to abandon for distribution among those claiming losses. This property they cannot sell without danger of affecting their right to a limitation of their liability. No creditor has pursued them or this property, although they have had the wreckage for some six months. There are parties who claim to hold them responsible for the consequences of the stranding of the vessel, who delay the institution of their actions. Under these circumstances there seems to be a plain equity in the application of these ship-owners to be permitted now to abandon their vessel and have an adjudication as to the extent of their liability arising out of the stranding in question. Nor is it seen how the rights of any one can be prejudiced by such a course.

For these reasons I am of the opinion that the right conferred by section 4283 of the Revised Statutes of the United States affords a legal foundation for the present proceeding.

But if not, then I am of the opinion that this proceeding is an appropriate proceeding within the meaning of section 4284. Here the contention of the objectors is, that the proceeding of the libellants is not such a proceeding as is authorized by section 4284, because the libellants do not admit any liability at all. It is said the only proceeding authorized by section 4284, is a proceeding for the single purpose of apportioning a sum of money for which a ship-owner is liable, and upon the face of this libel there is no such sum, because the libellants deny all liability.

A similar objection was overruled by Judge Blatchford in the case of In re Providence & N. Y. Steamship Co. [Case No. 11,451]. Since the promulgation by the supreme court of the United States of the rules of 1872, wherein is contained an express provision permitting a denial of the ship-owner's liability, it cannot be considerd open to the district courts to reject a proceeding as not authorized by section 4284, because a denial of all liability is one feature of the proceeding.

I have thus reached the conclusion that this proceeding can be maintained as a proceeding duly authorized by law, in which it is competent for a court of admiralty to grant to these libellants the relief prayed for, by virtue of the statutory laws of the United States, to which reference has been made.

It is next to be considered whether the proceeding has been instituted in a proper district. It appears from the libel that the stranding in question occurred within the territorial limits of this district; and, also, that the property which the ship-owner seeks to abandon, is within this district, and that no suit has been instituted in any other district. These facts make this a proper district, at least, in which to institute a proceeding looking to the distribution of this property.

There remains to consider several questions of less importance raised by the special exceptions filed to this libel. One objection so raised, is that the libel does not conform to the twenty-third admiralty rule, which provides, that if the action be in personam, the places of residence of the parties must be stated. This proceeding, it is said, is an action in personam, and the libel is defective in omitting to state the residence of the libellants. I have on a former occasion expressed the opinion that a proceeding under these sections of the statutes of the United States, is in its nature an action in personam. The opinion that it is a proceeding in rem has been expressed by Judge Blatchford, in the case of In re Providence & N. Y. Steamship Co. [supra]. But whether the proceeding be in personam or in rem, or whether it partakes of the character of a proceeding both in personam and in rem, is not an important question here, for aside from the twenty-third admiralty rule, there is a good reason why the residence of the libellant should be stated in all cases where it is sought to invoke the rule of the maritime law in regard to the limitation of a ship-owner's liability. That reason is, that the action of the court may depend upon the residence of the parties making the application. In this case, for instance, the libellants are conceded to be British subjects, residents of Great Britain; and inasmuch as by the present statute law of England, British courts are forbidden to administer the general rule of the maritime law even in cases arising on the high seas, and between foreigners, it may be that American courts will not feel bound to entertain the prayer of British subjects for the benefit of the rule of the maritime law to the detriment of citizens of the United States. The libel should therefore state the nationality and residence of the libellants, in order to enable that question to be presented to the court at the commencement of proceedings, and by exception to the libel.

The next objection to the libel is, that it mingles together two distinct rights having different sources, viz., a right arising under the general maritime law, and a right arising under the statute of the United States. The libel describes a certain state of facts, and upon those facts claims alternative relief. The principle upon which the practice of the admiralty court rests, namely, to give despatch, avoid circuity or multiplication of actions, and to afford any relief that the facts may justify, and that is in accordance with equity, will surely permit the demanding alternative relief in a case like this. The libel is not therefore defective, because it is a libel with a double aspect.

Lastly, it has been said that the libel does

not make an absolute tender of the vessel and wreckage, to be distributed by this court; but while it tenders with one hand, withdraws the tender with the other. I do not so read the libel. As understood by me, and also as understood by the libelants, according to their contention here, the libel tenders an absolute surrender of the vessel and the wreckage in the hands of the libellants, to the custody of this court, to be disposed of according to the order of this court, and in case the proceedings be entertained, it will be impossible afterwards to withdraw the fund from the control of the court. Of course, if upon the final determination of the cause, it be held that there is no valid claim upon this property for losses occasioned by the stranding in question, it will then be open to the libellants to ask at the hands of the court a re-payment of the fund to them—but none the less is there the absolute abandonment which the law requires.

I have now considered all the questions upon which my opinion has been sought, and the result is, that with an amendment showing the residence of the libellants, as to which there is no dispute, the libel will be entertained and an order made for the ascertainment of the interest of the libellants in the said vessel at the time of the loss and damage mentioned, and for the payment of such sum into the registry of the court, and that a monition thereupon issue according to the prayer of the libel.

Subsequently, on the 16th of July, the following decision was made:

BENEDICT, District Judge. Upon settlement of the order to be made in pursuance of the decision of this court in this cause upon the exceptions, rendered June 21st, 1879, the point has been made, that no authority in law exists by which the court can direct the marshal to take into his custody the property which the libellants desire to surrender to the court for distribution among those who may be found entitled to share therein.

The statute, it is said, confers no authority save only to apportion a sum of money or to appoint a trustee, to whom the ship-owner may transfer his interest in the vessel, and the only authority conferred by the admiralty rules is to authorize payment into court of the value of the ship-owner's interest in the ship and freight, or to accept a stipulation for the payment of such value, or for the transfer of the interest to a trustee to be appointed by the court.

Upon examining the libel it will be noticed that it contains no prayer to be allowed to make a transfer to a trustee, nor for the appointment of a trustee to accept such a transfer. The only prayer is that the court would order the sale of the vessel, or for the appraisement of the value of the vessel and her pending freight, and for the payment thereof into court, or for the giving a stipulation for the payment thereof into court.

While the libel thus appears to ask this court to sell the vessel, and may be considered as asking that all things be done necessary to accomplish such a sale and realize the proceeds which would involve taking the vessel into custody, there are no facts averred in the libel or presented by affidavit showing any necessity for a sale by the court. Therefore, while not intending to decide for or against the existence of the power to sell in a proper case, I have no hesitation in saying that circumstances will be required to warrant the adoption of any methods of procedure other than those which have been formally approved by the supreme court in the admiralty rules. No such circumstances are here shown and the order must therefore be for the appointment of appraisers and a payment into court of the appraised value.

NOTE. A statement of the practice followed in this case may be of value to those investigating the subject. Upon the rendition of the above opinion as to the appraisal of the property, the libel was amended by leave of court on notice, so as to pray for the appointment of a trustee by the court to whom the petitioners might transfer their interest in the vessel and freight pending, for the benefit of those persons sustaining loss or damage by reason of the stranding of the steamer who should thereafter prove any claim. A trustee was thereupon appointed, to whom the libellants transferred and assigned in due form all of their several and joint interests in the stranded steamer and her freight pending. A monition was issued to the marshal of the district to summon all persons claiming to have sustained damage or loss by reason of the stranding of the steamer, to appear before a commissioner appointed for the purpose, to prove their claims within three months. Meantime the trustee obtained leave of court, on notice to all parties who had appeared in the matter, to sell the wreck of the steamer as perishable; the sale realized $2,100. Upon the return-day of the monition, no claimants having appeared before the commissioner, default was noted, and thereafter a final decree was entered, granting the prayer of the petition for limitation of liability. The trustee sold the wreckage, consisting of chains, hawsers, rigging, sails, etc., and also the interest of the libellants in the freight pending, at public auction, realizing $308.90; and thereafter petitioned the court for leave to pay the whole amount received by him into court, and to be allowed his reasonable compensation for services. A reference was ordered to determine the amount of services and the proper compensation therefor, the report of the referee was confirmed on notice to proctors of all parties who had appeared in the matter; and the balance found to be in the trustee's hands, being by him paid into the registry of the court to await the claims of any persons who might have suffered damage as aforesaid, the trustee was discharged, and proceedings under this petition ended.

## Case No. 7,335.

### The JOHN BROOKS.

[1 Hask. 439.] [1]

District Court, D. Maine. Sept., 1872.

COMMON CARRIERS — PASSENGER — CONTRIBUTORY NEGLIGENCE—ROBBERY OF STATEROOM—LIABILITY OF CARRIER.

1. A passenger upon a steamboat in failing to secure his stateroom door by both lock and bolt, when both are provided, is guilty of negligence.

2. Such passenger, having his money stolen from his stateroom by reason of his neglect to both lock and bolt his door and without fault of the officers of the boat, cannot recover the same from the owners of the steamer.

3. Reasonable precautions only are required of the owners of a steamboat to preserve the property of passengers from loss.

4. A watch, to observe all persons that enter a stateroom door, is not required.

In admiralty. Libel in rem by a passenger upon a steamboat for money stolen from him while asleep in his stateroom. The owners appeared and made claim, and answered that the property was stolen by reason of the libellant's own carelessness in not properly securing his stateroom door, and not from their fault.

Charles P. Mattocks and Edward W. Fox, for libellant.

Almon A. Strout, for claimants.

FOX, District Judge. This steamer is one of the regular lines between this city and Boston, owned by the Portland Steam Packet Company, daily employed as a common carrier of freight and passengers. The libellant is a shipmaster, resident at Boothbay in this district, in command of a ship in the South American trade owned by R. Lewis & Co. of this city. He has testified as a witness, and the court is not aware of any reason, either from his appearance or the testimony in the cause, why his statements as to his loss should not be credited.

On the night of August 15, at Boston, he took passage on this boat for Portland, paying at the captain's office $1.50 for his passage and $2.00 for a stateroom, the key of which he received. No other person occupied the stateroom with him. Soon after the steamer left Boston, he went to his stateroom and deposited in the upper berth his overcoat and then returned to the saloon, which extends nearly the whole length of the upper deck, and from which entrance is had to the staterooms; the upper panel of the stateroom doors are of ground glass, through which light from the saloon is obtained for the staterooms. About nine the libellant returned to his stateroom, and he swears positively that he locked the door, the lock being on the inside of the door, but he admits that he did not bolt the door, as he did not notice the bolt upon it. He counted his money in the stateroom and found he had $306 in American currency, and $2 or $3 in South American scrip. All the money was placed in his wallet in the pocket of his pantaloons, which before retiring he hung upon the clothes-hooks fastened for that purpose to the partition; he secured the window, which was found in that condition the next morning. He occupied the lower berth and fell asleep in about half an hour, but was awoke in the course of the night, as he states, by a noise in the adjoining room, and being afraid of robbers he removed his pantaloons from the hooks and threw them into the upper berth; after this he slept until the boat arrived at Portland. On examining his pantaloons, his wallet was gone and the door of the room was unlocked, the key was in the lock and although careful search was made, no trace of money or wallet could be found, and as the company declined to make him any restitution, he has instituted this proceeding in rem for the recovery of the money thus lost. The libellant states that the morning after the loss the end of the key of the stateroom showed signs of abrasion, as by forceps, but in the trial the key was produced and nothing of the kind could be detected upon it by an experienced locksmith.

The answer denies all liability for money retained by a passenger about his person, although he occupies a stateroom provided for him by the boat as a sleeping apartment, and secondly alleges that the negligence of the libellant was the cause of the loss, by his not bolting the door of his stateroom on retiring to rest.

It is shown that there was a suitable brass bolt on the inside of the stateroom door, in plain sight, on the white casing about five inches above the lock, which would have afforded protection against access to the room if the libellant had made use of it, which it is admitted by him he did not do, as he did not notice it. Two watchmen were on duty in the saloon until ten o'clock, at which time all but one of the gas burners to each chandelier in the saloon were extinguished, leaving it light enough however to read in the saloon, and at that hour most of the passengers retired to their berths or staterooms, and but one watchman was then kept on duty in the saloon for the remainder of the trip. The watchmen both testify that their orders were to move around the saloon, keeping strict watch, and that on this night they did their duty, and no one, to their knowledge, entered the stateroom of the libellant, and that during a portion of their beat they were not in sight of the door.

The doctrine of the common law, as formerly stated was, that the common carrier is responsible for all losses, except those occasioned by the act of God, or the king's enemies; but this rule, in practice, has always been understood not to cover any losses which arise from the personal neglect, wrong, or misconduct of the owner or shipper of the prop-

[1] [Reported by Thomas Hawes Haskell, Esq., and here reprinted by permission.]

erty, nor from damages arising from any inherent defect in the article delivered to be carried. Story, Bailm. 431.

In Pennsylvania Ry. Co. v. Aspell, 23 Pa. St. 149, Black, C. J., says, "It has been a rule of law from time immemorial, and it is not likely to be changed in all time to come, that there can be no recovery from an injury caused by the mutual default of both parties. When it can be shown that it would not have happened, except from the culpable negligence of the party injured, concurring with that of the other party, no action can be maintained. * * * A party who violates a contract is not liable any more than one who commits a tort for damages which do not necessarily or immediately result from his own act or omission; in neither case is he answerable for the evil consequences which may be superadded by the default or negligence or indiscretion of the injured party. There is no form of action known to the law (and the wit of man cannot invent one) in which the plaintiff will be allowed to recover for an act not done or caused by the defendant, but by himself."

These remarks were made in a case where damages were sought to be recovered by a passenger for a personal injury sustained by him whilst traveling on the railroad, and are understood to be a correct exposition of the rule of law relative to contributory negligence in all cases where damages are claimed from a carrier, either for personal injuries by the passenger, or for the loss of his property in charge of the carrier.

In Purvis v. Coleman, 21 N. Y. 117, it is laid down that it is the well settled law of New York, "that if the plaintiff's negligence has caused or contributed to the loss or injury, an action against the carrier cannot be maintained."

The tendency of the modern decisions is to place the responsibility of inn-keepers upon the same grounds and to the same extent as that of common carriers; for it has been decided in England, as well as by many of the state courts in this country, that an inn-keeper, although guilty of no negligence, is liable for the loss or injury of the goods of his guests, not arising from the negligence of the guest, the act of God or the public enemies. Richmond v. Smith, 8 Barn. & C. 9.

The rule as declared by Erle, J., in Cashill v. Wright, 6 El. & Bl. 899, which was an action against an inn-keeper is, that an inn-keeper "is liable as for a breach of duty, unless the negligence of the guest occasions the loss in such a way as that the loss would not have happened if the guest had used the ordinary care that a prudent man may be reasonably expected to have taken under the circumstances."

In Fowler v. Dorlon, 24 Barb. 388, the court say, the inn-keeper can repel the presumption of liability, in case of loss, "by showing that the loss is attributable to the personal negligence of the guest himself. Gross negligence need not be shown. It is enough to exonerate the inn-keeper, if the guest has, by his own neglect or imprudence, exposed his goods to peril."

In Profilet v. Hall, 14 La. Ann. 527, the language is, "If the keeper of a hotel provide with a lock the room where his guest lodges, which opens inside and does not open from the outside, it would be in the power of the guest to protect himself, and the hotel keeper would not be responsible unless it were shown he was guilty of gross negligence in other respects."

In the case of Shaw v. Berry, 31 Me. 482, Mr. Justice Tenney delivered a very full and learned opinion on the question of the liability of inn-keepers, in which he held the law to be well settled, "that the inn-keeper is bound to keep the goods and chattels so that they shall be actually safe, inevitable accidents, the acts of public enemies and the owner of the goods and their servants excepted." On page 483, he says, "The inn-keeper is not chargeable, when the loss happens through the negligence of the guest or those for whom he is responsible." And the same principle is stated as the law in Mason v. Thompson, 9 Pick. 280.

It has not escaped the attention of the court that in Calye's Case, 8 Coke, 32, it is stated "that it is no excuse for the inn-holder to say that he delivered the key of the chamber to his guest in which he is lodged, and that he left the door open;" and that this dictum has been many times since cited with the approval of courts of high authority. Burgess v. Clements, 4 Maule & S., 306, and Morgan v. Ravey, 6 Hurl. & N. 265. In the latter case it appeared that the guest did not use a night bolt on the door of his chamber, although his especial attention was called to it by a printed notice in the chamber, and he obtained a verdict against the inn-keeper for the value of certain articles stolen from the chamber while he was asleep, the jury having been instructed that it was for them to say whether he was guilty of negligence in not reading the notice or in not locking the door.

I agree with the judge at nisi prius, that it was a question for the jury whether the plaintiff was guilty of negligence; but I cannot approve of the finding of the jury that the plaintiff was not guilty of negligence.

The language taken from Coke, as it seems to me, must mean that by receiving the key of his chamber the guest did not thereby assume the entire charge and custody of his goods, and exonerate the inn-keeper from all liability therefor, but that there was still a duty remaining upon the inn-keeper to bestow proper care and attention to the safety of the goods of his guest and provide honest servants, etc., and that if he failed in this respect, and thereby the goods were stolen by his servants or others who should not have been admitted to the inn, the inn-keeper still remained chargeable.

I cannot conclude that when the negligence of the guest was the principal cause of the loss that the inn-keeper was to be considered

as an insurer against such negligence. If such is to be deemed the effect of Coke's language, it has so often since his day been overruled, that it cannot now be regarded as law.

In the case now before the court, the libellant admits he did not notice the bolt on his door and therefore made no use of it; it was in plain sight, of brass on a white ground, and to a person whose attention was given to the matter of properly securing his door against intruders, it could not well escape his notice, the room being well lighted.

A passenger, who should on retiring leave the key of his stateroom on the outside of the door when not protected with a bolt, thereby indicating to any depradator that the room was not secured against him, certainly would have no great claim for redress if a thief should accept his invitation and enter and help himself to the property of such passenger. So, too, if a passenger, when proper appliances were provided, should neglect to make use of any of them, or in any way to secure his door in case of loss, such neglect ought to exonerate the carrier from liability if he has taken reasonable precautions outside of the stateroom by watchmen to prevent the loss of property; and when both bolt and lock are placed on the inside of a door, in the opinion of the court, it is a plain manifest warning to the passenger that the lock alone will not afford him adequate security, but that additional precautions are requisite, and that for this purpose a bolt is provided as a security against intruders. Certainly a bolt is much more sure and effectual than an ordinary lock, as it can not be reached from the outside without violence and noise and breaking of the door which must attract the attention of the watch on duty in any portion of the saloon. Having thus cautioned and warned passengers by placing the bolt on the inside of the door where with ordinary care it must be seen, I hold that a carrier has a right to expect a passenger to use the same for his security and protection, and that he is guilty of negligence in not doing so, and if by such negligence a thief enters his stateroom and carries away his property and he thereby sustains a loss which would not have been incurred by him if he had bolted his door, he has no just cause of complaint against the carrier, if the latter had done all that could be reasonably demanded of him to prevent such losses. The passenger has no right to expect that a guard will be placed in front of every stateroom door; and in the present instance, if this door had been bolted, in case of any attempt to enter from the saloon, it must have been detected by the watch on duty.

The carrier being thus released from accountability by reason of the negligence of the passenger, it is not necessary for me to determine whether he is or not accountable under other circumstances to a passenger for money stolen from his stateroom while asleep.

In 1866, this question was very thoroughly examined by the supreme court of Michigan in McKee v. Owen, 15 Mich. 115, Mr. Justice Christiancy holding that the carrier was accountable, Cooley, J., concurring. Mr. Justice Campbell delivered an opinion adverse to the plaintiff, in which the chief justice concurred, and as the court was equally divided the plaintiff did not prevail. All of the authorities bearing upon this question are referred to in these learned opinions, with the exception of Walsh v. The H. M. Wright [Case No. 17,115]. In that case McCaleb, J., in the district court of Louisiana, held that the carrier was liable for the contents of a valise stolen from a passenger's stateroom while she was asleep, and this decree was affirmed by Campbell, J., on appeal to the circuit court.

In Abbott v. Bradstreet (1864) 55 Me. 530, the supreme court of this state decided that the owners of a steamboat are not liable for money stolen from the pockets of a passenger thereon, when it does not appear that the robbery was perpetrated by one of the employees of the boat. An examination of the record in that case discloses that at the time of the robbery the passenger was in his berth in the common cabin and not in a private stateroom.

In this diversity and uncertainty, this court may well refrain from expressing any opinion upon this point, as the other objection is decisive of the cause. Libel dismissed with costs.

## Case No. 7,336.

The JOHN C. BROOKS.

[3 Ware, 273.] [1]

District Court, D. Maine. May, 1861.

CUSTOMS DUTIES—LANDING WITHOUT PERMIT—SMUGGLING.

A vessel, arriving from a foreign port, is forfeited by landing goods without a permit from the collector after her arrival in the port of discharge.

This case involved a question of law only.

Mr. Shepley, Dist. Atty., for the United States.

Mr. Butler, for respondent.

WARE, District Judge. This is a libel in rem for a forfeiture under the 50th section of the collection act of 1799 [1 Stat. 665]. The schooner John C. Brooks, of about 200 tons burthen, from Cardenas, in the island of Cuba, arrived at Portland on the thirtieth of March last, and, on that day, without a permit from the collector, landed 21,000 cigars at Simonton's Cove, in Cape Elizabeth. The smuggling is proved and is not denied on the part of the claimant, the master, having been indicted, pleaded nolo contendere to the facts alleged in this libel. And for the same act the United States

[1] [Reported by George F. Emery, Esq.]

claim a forfeiture of the vessel. To this, as working a forfeiture of the vessel, the claimant objects, and supports his objections, both on principle, that is the true construction of this act, and on authority. The forfeiture is alleged to have occurred under the 50th section of the collection act of 1799. By this it is provided, that if any goods shall be unladen within the United States, from a vessel arriving from a foreign port, without a permit from the collectors of the port, that there shall be a personal penalty on the master, and if the value of the goods thus landed shall amount to $400 or over, there shall be in addition, a forfeiture of the vessel in which they are brought. The act in this case is within the words of the statute. To extract this case from the express language of the statute, it must be shown that while the legislature said one thing they meant another. This, though not gratuitously to be supposed, may be shown; but it is incumbent on him who alleges an exception to prove it. To this the claimant says that the forfeiture in this section ought, in reason and justice, to be confined to unlading within a port, and that this unlading was before the vessel arrived in a port. This fact is asserted on one side and denied on the other, but whether it was within or without the port, and what are the particular boundaries of a port I shall not at present inquire. In support of this limitation, and that it may be fairly inferred from the whole act, the claimant quotes the 27th section. This provides for a landing before the vessel arrives at her port of discharge, and while she is, if I may so say, havening on the coast for that purpose, and enacts a different penalty on the master and with no forfeiture of the vessel into which such goods are unladen. The consequences will be, if this section is to be literally enforced, that two penalties of different sums are to be inflicted on the master, and in one case, for the same identical act, there will be a forfeiture of the vessel and in the other not. The legislature, it is argued, must have made a distinction in their minds though it is not noticed in their language, between an unlading before and after her arrival in her port of discharge. It must be admitted that there is not merely ingenuity in this argument. Should there be two penalties for the same act, or should there be a forfeiture of the vessel in one case and no forfeiture in another? Admitting the power of the legislature, this is not to be presumed unless indicated by the clearest terms. It seems to me that the objection presents a real difficulty, especially in a statute drawn with so much care, that after more than sixty year's experience, it remains on the statute book as the principal collection law. Penalties and forfeitures may be limited by construction on good and sufficient reasons, but never by such means are to be multiplied. But where the legislature has clearly expressed their will, courts have no other duty but to obey. If this question were to be now settled on principle, what is the true construction of the law, there would be good reason to hesitate before coming to a conclusion one way or the other. But the very case presented by this libel has, on two different occasions, been before the circuit court of the United States of different districts. The first was in 1806 before Judge Washington, in New Jersey, in the case of United States v. The Hunter [Case No. 15,428]. In this the learned judge decided, that a vessel was not forfeited by unlading without a permit before she arrives at her port of destination, and that the words of the 50th section, though comprehensive enough to include such a case, ought to be confined by construction to an unlading after her arrival within a port, as that of unlading out of her port of destination was specially provided for in the 27th section. And to this conclusion he was brought after a careful review of the whole act. Six years after, a case involving the same question came before Judge Story of this circuit, in The Industry [Case No. 7,028], and he decided after a like careful examination of the statute, that a landing in any port of the United States, after a vessel's arriving in her port of destination, did draw after it a forfeiture of the vessel. Both these cases were fully argued, and the same considerations which have been pressed in the present case were urged there, and the eminent judges came to precisely opposite conclusions. These conflicting decisions on the same question and on the same arguments are sufficient to show that it is not without intrinsic difficulties. The one admits the power of the legislature, but holds the statute, from its apparent uncertainty, subject to interpretation, the other is in obedience to the words of the law. While it is conceded that the argument has weight, it is not admitted that it can exempt the case from the direct language of the law. This is not only the latest decision, but one in this circuit, and this, in ordinary cases, makes the law of the circuit, until it is reversed by the highest court of appeal. In the present case there must be declared a forfeiture.

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JOHN COOK, The (MILNE v.). See Case No. 9,617a.

## Case No. 7,337.

The JOHN COOKER.

The JAMES W. EATON.

[10 Ben. 488.] [1]

District Court, E. D. New York. June, 1879.

COLLISION IN EAST RIVER — TUG AND TOW AND FERRY-BOAT — COURSE IN MIDDLE OF RIVER— PRACTICE — STIPULATION FOR VALUE — MOTION FOR RE-HEARING—EVIDENCE.

1. A boat of the Brooklyn Annex Line running from Jersey City to Fulton street, Brooklyn, came in collision with a barge in tow of a tug coming down the East river just outside of the piers. As a consequence of the collision the ferry-boat sank, and suit was brought for damages; the same person appeared as claimant for both tug and tow when they were both libelled, and gave a single stipulation for value to stand for both vessels, by consent: *Held*, that the tug and tow were in fault, and, under the practice adopted in giving a single stipulation for both, it was not necessary to decide which of them was in fault, if only one.

2. It was negligence in the tug and tow to pass so close to the piers and contrary to the statute of the state in regard thereto.

3. It was negligence for the tug to take her tow between the ferry-boat and a boat of the Fulton Ferry as she did, when any swing of her tow in passing would have rendered a collision with one or other almost certain.

[Cited in The John S. Darcy, 29 Fed. 647.]

4. No fault of the Annex boat contributed to the collision.

5. She was not in fault in coming out from her slip after the collision, in an attempt not to sink in a crowded slip, but to reach Jersey City, which failed because her pumps would not keep her free, those in charge having examined the injuries and being of the opinion at the time that she could be kept up; the effort was under the circumstanes laudable and cannot be held to have increased the damage.

6. On motion for re-hearing, on the ground that since the trial libellant's witnesses testified differently in another action growing out of the same collision: Motion denied.

See The C. F. Starin [Case No. 2,565.]

In admiralty.

W. W. Goodrich, for libellant.

Scudder & Carter, for claimant.

BENEDICT, District Judge. This action is brought to recover the damages caused to the steamboat J. A. Stevens by a blow from the barge James W. Eaton, delivered on the 15th day of June, 1878, off the Fulton Ferry slip, on the Brooklyn side of the East river. The barge was at the time being towed on a hawser by the propeller John Cooker. The action is against both the barge and the tug, and it appears from the answer that the same claimant has claimed both the vessels, and by consent has given a single stipulation for value to stand in place of both vessels. Under such circumstances, the tug and the tow must be treated as a single vessel, and any decree that may be rendered for the libellant will take effect upon the stipulation for value, whether the collision in question arose from the fault of those on the tug or those on the tow. The practice adopted renders it unnecessary, therefore, to determine which of the two vessels proceeded against, if either, was guilty of fault.

Upon the evidence it is clear that the collision was caused by fault on the part of the tow, and not by any fault on the part of those in charge of the Stevens. In the first place, it was a fault in the tow to attempt to pass down the river close to the Brooklyn shore as she did, instead of keeping near the centre of the river as she might have done and as the statute of the state requires. I am aware of the temptation that impels to a violation of this statute at this locality, and that such violations constantly occur, but a disregard of this statute has never been sanctioned by the courts. There are few places in the whole East river where a departure from the statute is attended with so much risk of loss, not only of property, but of life, and where obedience to the statute is more necessary.

But aside from her violation of the statute, the tow was in fault for attempting as she did to pass between the Stevens and the ferry-boat Hamilton. The space was narrow and a collision almost certain if any drift or swing of the barge should occur during the passage. The tow took the risk of effecting the passage without drift or swing, and failed. Having attempted to accomplish a hazardous manoeuvre, she must bear the consequences of her want of success.

No fault conducing to the collision is proved against the Stevens. The fault charged against her is that she started up her engine while the tow was passing and so ran into the barge then seen to be crossing ahead of her. The weight of the evidence, however, disproves the charge. No movement on the part of the Stevens conduced to the accident.

There remains to be determined another question relating to the action taken by those in charge of the Stevens after the collision with the John Cooker and her tow. The Stevens was at this time running as an "Annex boat," and was bound to the Annex dock next to the Fulton Ferry slip, on the Brooklyn side. After the collision in question, she proceeded to the Annex dock and landed her passengers, then, after an examination of the injury, she put out into the river, under the supposition that with her engine working, her pumps would keep her afloat until she could reach a place of repair, or, if not, that she could be beached upon the Jersey shore or upon Governor's Island. Soon after she got into the stream it was found that the pumps would not keep her afloat, and she was in danger of sinking at once; therefore she then turned to reach the shore and succeeded in reaching Martin's dock, where she shortly sank in 30 feet of water.

An effort was made to show that under the circumstances it was negligence for the Ste-

[1] [Reported by Robert D. Benedict, Esq., and Benj. Lincoln Benedict, Esq., and here reprinted by permission.]

vens to leave the Annex dock and that her bow could have been run upon the shore at the bulkhead next the Annex dock, in either of which cases it is supposed the loss would have been much less than it was. But manifestly it was incumbent upon the owner of this boat if possible not to allow her to sink at the ferry dock or in the slip. The crowded condition of the dock and piers and the obstruction caused by a sunken steamboat, justified taking some risk in order to get the boat to a place where she could properly be beached. Whether her pumps would keep her free when her engine began to move could not be certainly known until the effort was made. Those on board thought the condition of the boat warranted taking the risk, and they took the risk themselves with the boat. The result proved that the pumps could not keep her free, and when that was ascertained, she was taken to the nearest place available, where she sank. There is no reason to suppose that the loss was greater by reason of her sinking where she did than it would have been if she had been allowed to sink at the Annex dock, and I cannot believe that it would have been justifiable to permit this boat to sink at the Annex dock and so stop the ferry, or to sink at the adjoining bulkhead, and so obstruct the slip, without any effort to get her to some place where she could properly be beached. The effort made was, in my opinion, laudable, and it cannot be found to have increased the loss. There must, accordingly, be a decree in favor of the libellant, for the amount of the libellant's loss, with a reference to ascertain the amount.

On a motion for re-hearing, the following decision was made:

BENEDICT, District Judge. This case comes before the court upon a motion for a re-hearing. The affidavit upon which the motion is founded, states two grounds. One ground is that upon the trial it was ruled that one of the questions passed on in the opinion already delivered, viz.: the question whether it was negligence on the part of the Stevens to leave the Annex dock after she had been injured by the collision in question, was a question to be left to be determined on the reference. This ground is untenable. The minutes show no such ruling. On the contrary, evidence was given upon that question, not only by the libellant, but also by the claimant. Moreover, the question was argued at the hearing, by the libellant as well as by the claimant.

The other ground is that in another action tried since the trial of this action, the libellant's witnesses have given evidence bearing upon this question inconsistent with, if not contradictory of, what they testified in this cause.

If there were no right of appeal with liberty to introduce new evidence, it would no doubt be proper to permit a re-hearing of the cause, provided the fact be as claimed that the testimony given by these witnesses on the subsequent case alluded to, is such as to contradict their testimony given in this case and compel a different result. But there being a right of appeal with liberty to introduce new evidence, I do not feel bound to reopen the case for the purpose of introducing new evidence here—and this the more because at the trial the claimant's proctor rejected the proposition of the other side to try the two cases referred to together, and allow all evidence given in the one to be read in the other so far as material. Motion denied.

## Case No. 7,338.

The JOHN E. CLAYTON.

[4 Blatchf. 372;[1] 18 How. Pr. 319.]

Circuit Court, S. D. New York. Oct. 6, 1859.

SALVAGE—AMOUNT OF—GENERAL RULE.

1. As a general rule, the rate of salvage allowed in the case of a vessel found derelict at sea, is a moiety of her value; and this, except in very special cases, is the extreme limit.

2. The considerations stated, which are taken into account, in fixing a salvage compensation.

3. An allowance by the district court, as salvage, in this case, of two-fifths of the value of a derelict vessel, reduced by this court to one-fourth of such value.

[Appeal from the district court of the United States for the Southern district of New York.]

This was a libel in rem, filed in the district court, to recover salvage. The master and hands of the sloop Thomas E. Crocker, five in number, were on their way to the fishing grounds, which were about thirty miles from Sandy Hook, on the morning of November 27th, 1856, and, when some twelve or fifteen miles from the hook, discovered a vessel, which was afterwards found to be the schooner John E. Clayton, on her beam ends, with a large hole stove in her side, sufficiently to have sunk her instantly, had it not been for her cargo, which was wood. She lay in the open sea, about two miles from their track, and, when reached, it was ascertained that her crew had abandoned her. The weather was fair, but the sea somewhat rough, with a strong breeze from the land. The sea was breaking over the vessel, and drifting her further from the land. It was necessary to strip her of her sails, and cut away her foremast, in order to right her. The libellants were assisted by another vessel, the Tobiatha, and both vessels were engaged from six or seven o'clock in the morning till two in the afternoon, in righting the derelict vessel and preparing her to be towed to New York. They reached Jersey City about nine o'clock that evening. The vessel saved was admitted to be of the value of $3,000. The district court

[1] [Reported by Hon. Samuel Blatchford, District Judge, and here reprinted by permission.]

allowed a gross sum of salvage, to the amount of $1,200, being two-fifths of the value of the vessel. [Case unreported.] The claimants appealed to this court.

Frederick R. Sherman, for libellants.
Charles Donohue, for claimants.

NELSON, Circuit Justice. As a general rule, it is undoubtedly true, that the rate of salvage of a vessel which is derelict at sea, is a moiety of her value. This, however, except in very special cases, in which great hardships and dangers have been encountered, is the extreme limit. The courts always look to the nature and character of the service, the time consumed by the salvors, the peril involved and the expense, as well as to the situation and condition of the vessel saved and its value, in fixing the compensation; not upon the idea of a quantum meruit, but by way of rewarding the service in proportion to the degree of merit belonging to the particular case.

Now, in the present case, there is nothing in the evidence showing any extraordinary degree of merit, or any great sacrifice of time or money. The vessel was found some twelve or fifteen miles from the bay of New York, within two miles of the track of the salvors on their fishing expedition, and only a day was consumed in raising and bringing the derelict to port. The weather was pleasant, and no particular hardship or danger was encountered. I cannot but think that the amount allowed by the court below exceeded a reasonable compensation for the service, and that one-fourth of the value will afford ample reward to the salvors, and is the most that should be awarded under the circumstances.

The service rendered by the Tobiatha seems to have been very slight, according to the evidence. I shall, therefore, modify the decree of the court below, by awarding to the Thomas E. Crocker and hands $600, and to the Tobiatha and hands $150, without costs on either side in this court; the costs to the libellants in the court below, as there decreed, to stand.

## Case No. 7,339.

The JOHN E. HOLBROOK.

[7 Ben. 356.] [1]

District Court, S. D. New York. June, 1874.

SEAMAN'S WAGES—EXTRA PAY—ATTACHMENT.

1. The wages of a seaman are not subject to attachment.

2. A mate filed a libel against a vessel to recover wages due him. One of the owners defended the action on the ground that an attachment of the amount due had been served on him: *Held*, that the mate was entitled to his wages, and to ten days' extra pay, under the 35th section of the shipping act (17 Stat. 269,—now section 4529 of the Revised Statutes.)

This was a libel filed against a vessel by a mate, to recover for wages due him, and also ten days' double pay for the delay in payment, under the 35th section of the shipping act of June 7th, 1872. The owners defended the action. The answer was put in by one of the owners, who was master of the bark, and set up as a defence, that, previous to the filing of the libel, an attachment had been served upon him, in a suit brought against the mate in this court, in a cause of assault and battery. Ten days had not expired, when the libel was filed, from the time when the wages were due.

R. D. Benedict, for libellant.
W. R. Beebe, for claimant.

BLATCHFORD, District Judge. I think that, under section 35 of the shipping act, the libellant is entitled to double pay for ten days. Under section 61 of the same act, wages due to a seaman cannot be attached, and a payment of wages to a seaman, nothwithstanding an attachment, is valid. Let a decree be entered for the libellant for $225 and costs.

[1] [Reported by Robert D. Benedict, Esq., and B. Lincoln Benedict, Esq., and here reprinted by permission.]

## Case No. 7,340.

The JOHN FARRON.

[7 Ben. 53.] [1]

District Court, S. D. New York. Nov., 1873.[2]

LIEN—REPAIRS AND SUPPLIES—DOMESTIC VESSEL—TWELFTH ADMIRALTY RULE—OWNER—POSSESSION—NOTICE.

1. A material man, who had made repairs on a vessel in New York, claimed to have a lien upon her therefor, either under the statute of New York, of April 24th, 1862, or under the general maritime law, which he sought to enforce against her in admiralty. The repairs were done on the orders of parties who had agreed to purchase the vessel, and had given their notes for the price, but had received no bill of sale—the agreement of purchase specifying that these expenses for repairs should be paid by them, and not be chargeable as a lien upon the vessel, or to her owner. The vessel was not enrolled at the time, and no bill of sale was given, because the enrolment of the vessel could not be perfected till these repairs were done and the vessel measured. The owner, who lived in New York, gave possession of the vessel to the purchasers, for the purpose of these repairs, knew of the orders given, but gave none himself, and, on the failure of the purchasers to pay the price of the vessel, took possession of her again. Part of the bill was paid by the purchasers, and suit was brought against the vessel for the rest: *Held*, that there was no lien upon the vessel for these repairs, as no action on contract could be maintained against the owner to recover for them.

[Disapproved in The James H. Prentice, 36 Fed. 780.]

2. The shipwright, under the circumstances, was bound to have investigated the title which

[1] [Reported by Robert D. Benedict, Esq., and B. Lincoln Benedict, Esq., and here reprinted by permission.]

[2] [Reversed in Case No. 7,341.]

the purchasers had, before undertaking work which he supposed would be on the credit of the vessel, and that he was responsible for the knowledge he might have gained by such inquiry.

3. The agreement did not amount to a sale of the vessel, and the possession given was only for the purposes set forth in the agreement.

4. The 12th admiralty rule does not mean that, when the master or owner cannot be sued on contract, the vessel may be sued in rem.

5. The state statute gave no support to the claim, the debt not falling within its provisions.

In admiralty.

D. McMahon, for libellant.

R. D. Benedict and J. F. Malcolm, for claimant.

BLATCHFORD, District Judge. The libel in this case sets forth that, in June or July, 1872, the steamboat John Farron, sometimes called the Ella M. Stevens, being at the port of New York, the libellant, Gustavus Pierrez, at the request of her captain and owners, furnished her with supplies and materials, and work and labor, of the value of $1,571 90; that that sum, with interest thereon from July 27th, 1872, is still due; that said supplies and materials and work and labor were necessary and proper, and said vessel could not have proceeded on her voyage, or procured her employment, without the same, and they were furnished on the credit of the said vessel; that said vessel, during the entire period aforesaid, was a domestic vessel, owned by persons residing in the state of New York, or who had possession or control of her, as masters, owners, charterers, builders, or consignees, or agents of some one or all of them, in such way or to such extent as authorized them to charge her for the said work and supplies; that, during said period, she lay in tide waters of the port of New York, moored to a pier in the city of New York; that, during said period, she made no departure, in the way of her business, out of said port, nor has she made any since; that the libellant claims that he has a lien for the said work and materials, on the said vessel, by virtue of the act of the legislature of the state of New York, passed April 24, 1862, entitled "An act to provide for the collection of demands against ships and vessels" (Laws 1862, c. 482); that such lien is of a maritime nature, and he is entitled to enforce the same in the admiralty; and that, if it is not a lien under the local law, and enforceable as such in the admiralty, he has a good lien therefor, against the said vessel, under the general maritime law. The libel prays for process against the vessel, and for her condemnation. The libel was filed on the 29th of July, 1872.

An answer is interposed by one Henry F. Hamill, as claimant of the vessel, which sets forth that he was owner of the vessel during the several times stated in the libel; that, on the 20th of May, 1872, an agreement was made between him and Henry Gardner and Charles E. Stevens, of which a copy is annexed to the answer; that Gardner and Stevens took possession of the vessel on or about that day, with the understanding and agreement to fulfil the terms of said agreement; that, from the covenants expressed therein, they agreed to pay all bills and demands against the vessel, as is more fully set forth therein; that the libellant knew, or had reason to know, the contents of said agreement; that the services rendered and the materials furnished were furnished on the credit of Gardner and Stevens, and not on the credit of the claimant or of the vessel; that the claim is not a lien upon the vessel; that she was a domestic vessel at the time, and was owned by the claimant, who resided in the state of New York; that Gardner and Stevens had possession of the vessel for the purposes and under the authority set forth in said agreement, and not otherwise; that it is not true that any one had possession of her in such a way as authorized him to charge her for the said work and supplies; that it is not true that, during all the time alleged, she lay in the waters of the port of New York, or moored to a pier in the city of New York, or that she made no departure out of the port of New York; that she departed from New York and went to Jersey City during said period; and that the libellant has no lien on the vessel, either under the statute set up in the libel, or under the general maritime law.

The agreement referred to was in these words: "We, said Henry Gardner and Charles E. Stevens, do, upon the 20th day of May, 1872, agree to purchase from Henry F. Hamill, owner of the steamboat called the John Farron, as she now lies at or near Weehawken, N. J., the said steamboat, for the sum of ten thousand dollars ($10,000), upon the following terms, viz.: In notes of twelve hundred and fifty dollars each ($1,250), with interest, first note to be for 3 months, next 6 months, next 9 months, next 12 months, next 15 months, next 18 months, next 21 months, next 24 months, which shall be last, and which will, when paid, complete the payments; said notes to be made and signed by Henry Gardner and indorsed by Charles E. Stevens, with mortgage on said boat to secure same, insurance on boat, policy payable, in case of loss, to said Hamill; and, upon delivery of bill of sale, which shall be upon 25th day of May, 1872, we agree to deliver to said Hamill said notes, signed, indorsed and stamped, and mortgage, and insurance policy, and, upon such delivery, we are to have possession of said boat, and be allowed to commence making all alterations and repairs we may think proper; and we do agree that all work or repairs, or any or all bills so contracted, will be paid by us, and shall not be a lien in any way, either upon the said boat or her owner, the said Henry F. Hamill. It is understood that we purchase said steamboat as she now lies, with all on

board; and we further agree to pay to said W. H. Hazard, Jr., the sum of two hundred and fifty dollars in cash on said day." This agreement was signed by Gardner and Stevens, and delivered to Hamill. At the same time an agreement containing substantially like provisions, and agreeing to sell the vessel to Gardner and Stevens, was signed by Hamill and delivered to them.

Before the late war, the vessel was enrolled at the custom house in New York in the name of one Leary, as owner. She was then sold to the United States, and her former enrolment was cancelled, and no new enrolment of her was made. Afterwards, she was sold at auction by the United States, and purchased, at such sale, by Hamill, but she had never been enrolled in the name of Hamill. Hamill could give no bill of sale of her until she should be enrolled in his name, so that the enrolment might be copied into the bill of sale; and there could be no mortgage until there was a bill of sale. On the 27th of May, 1872, Hamill went to the custom house in New York, with Stevens, and there signed his name to a blank bill of sale, which had that date inserted in it, but had not in it the name of any grantee or any consideration. He acknowledged it before a notary public there. As repairs were to be made on the boat, she could not be measured until the repairs were made, and her measurement was required to be inserted in the enrolment, and so she could not be enrolled until after she was repaired and measured, and so the bill of sale could not be completed or the mortgage given until after she was repaired. All this was stated between the parties then and there at the custom house. Hamill then left the blank bill of sale, so executed, in the hands of a broker at the custom house, with instructions to hold it, and not to deliver it to any one until he, Hamill, should give further orders in respect to it. Nothing further was done in regard to it, and, some three or four months afterwards, the broker, on demand of Hamill, delivered it up to Hamill. It does not appear that the vessel was measured or enrolled. The vessel was lying at Weehawken, in New Jersey, and had been lying there unused for some time. Stevens, being desirous of obtaining possession of her, to commence making repairs on her, requested Hamill to let him have possession of her. Hamill did so, and she was brought to New York, and moored in a slip there. About that time the notes provided for by the agreement were given to Hamill, and policies of insurance on the vessel were taken out in the name of Gardner, expressing that the loss, if any, was to be payable to Hamill. The policies were delivered to Hamill, but he never gave any bill of sale or received any mortgage. Stevens, after obtaining possession of the vessel, employed the libellant to repair her boiler and engine, and do some other iron work, and the claim in respect thereof is that for which this suit is brought. In employing the libellant, and before the work was commenced, Stevens informed the libellant that he, Stevens, and Gardner had purchased the vessel, and that the libellant would receive his pay for the work when it should be completed. The libellant knew Hamill personally, and knew that the vessel had been lying for a long time at Weehawken, engaged in no business, and that, while lying there, she belonged to Hamill. While the repairs were going on, Stevens and his employees gave all the directions in regard to them. Hamill was on board of the vessel while the repairs made by the libellant, and other repairs, which were being made at the same time, were progressing, but he gave no directions in regard to them, and exercised no acts of ownership over the vessel. The notes given to him were none of them paid, and he still retains them. Some money was paid by Gardner on account of bills for repairs to the vessel, but, the bills not being paid in full, the libellant and other parties sued the vessel in rem, and then Hamill took possession of her. The libellant had no information, until after this suit was brought, as to the contents of the agreement between Hamill and Stevens and Gardner.

It cannot be doubted, on these facts, that Hamill never parted with his title to the vessel. He always remained her owner. Nor did he ever, by anything he did or said, hold out to the libellant that Stevens and Gardner were her owners, in any such sense as gave them any right to bind the vessel for the repairs, as against the rights of him, Hamill, under the agreement. He gave them possession of the vessel, but it was not as owners, as against him, nor was it as his agents, as owner, so as to bind him personally for the repairs, but it was possession under the terms of the agreement, and for its purposes, and subject to its restrictions. Stevens, it is true, stated to the libellant that he and Gardner were owners of the vessel, and had purchased her. But that was not true. The libellant knew that Hamill had owned her. This was sufficient to put the libellant on inquiry to ascertain the facts from Hamill, or to examine the records of the custom house at New York, as he knew that Hamill resided and had resided at New York. If he had done this, he would have learned at once, that he could have no lien on the vessel, for this work, as against Hamill. He is chargeable with notice of all he could have learned on inquiry, from Hamill. The agreement was not a purchase, but an agreement to purchase. By it, even when the notes, and policies of insurance, and bill of sale and mortgage were all of them passed and delivered, so as to give to Stevens and Gardner a right to the possession of the boat, the provision in regard to possession shows, that such possession, and

such ownership in Stevens and Gardner as would then exist, was to be such a qualified possession and ownership, that the alterations and repairs which Stevens and Gardner should make, at least so long as the purchase money notes were unpaid, were not to be a lien on the vessel or a personal charge against Hamill.

In a cause of action claimed to arise from circumstances occurring during the ownership of a vessel by a person whose vessel is proceeded against, it has never been held that any suit could be maintained against such vessel, where her owner was not himself personally responsible in respect of the cause of action, or where his personal responsibility had not been given up, as in the case of a bottomry bond, by taking a lien on the vessel. The Druid, 1 W. Rob. Adm. 391, 399. In the present case, the libellant has no cause of action against Hamill, and, therefore, none against the vessel.

The state statute relied upon by the libellant gives no support to this action, for, that statute purports to give a lien against a vessel only for debts contracted by her master, owner, charterer, builder, a consignee, or his agent. This debt does not fall within any of such debts.

Nor does the 12th rule in admiralty, as amended May 6th, 1872, give a right to the libellant to proceed against this vessel in rem. The rule, as amended, reads thus: "In all suits by material men, for supplies or repairs, or other necessaries, the libellant may proceed against the ship and freight in rem, or against the master or owner alone in personam." But this rule does not mean, that, when the master or owner cannot be sued on the contract (because, as in this case, there was no master with whom a contract could be made, and the contract in fact made was not made with the owner or with his agent), the vessel may be sued in rem. The rule does not abrogate, and is not in conflict with, the recognized principle, before mentioned, which requires that there must be a cause of action against Hamill, founded on contract, before there can be a cause of action against the vessel. The libel must be dismissed, with costs.

[On appeal to the circuit court, this decree was reversed, and a decree entered in favor of the libellant. Case No. 7,341.]

## Case No. 7,341.

The JOHN FARRON.

[14 Blatchf. 24.] [1]

Circuit Court, S. D. New York. Nov. 11, 1876.[2]

MARITIME LIENS—ENFORCEMENT—MATERIAL MEN—ADMIRALTY JURISDICTION—REPAIRS TO VESSEL.

1. The case of The Lottawanna, 21 Wall. [88 U. S.] 558, decides, that a material man furnishing repairs and supplies to a vessel in her home port, does not thereby acquire any lien upon the vessel, by the general maritime law, as received in the United States, but that, so long as congress does not interfere to regulate the subject, the rights of material men furnishing necessaries to a vessel in her home port may be regulated, in each state, by state legislation; that such contracts are maritime, and fall within the domain of the admiralty jurisdiction; and that, when, in such cases, a lien is given by the state laws, such lien may be enforced by the district courts of the United States, under the 12th rule, as modified by the supreme court of the United States, May 6th, 1872.

[Cited in The Columbus, Case No. 3,044; The New Champion, 17 Fed. 816; The Sylvan Stream, 35 Fed. 315; Clyde v. Steam Transp. Co., 36 Fed. 502.]

[Cited in Atlantic Works v. The Glide, 157 Mass. 525, 33 N. E. 163.]

2. The provision for a lien, made by a state lien law, will be enforced, when the contract is maritime, in the courts of admiralty, although the same law gives an unconstitutional power to the state courts to proceed in rem to enforce such lien.

[Cited in The Hezekiah Baldwin, Case No. 6,449; The Canada, 7 Fed. 732.]

3. The statute of New York, of April 24, 1862 (Laws 1862, p. 956, § 1), gives a lien on a vessel for a debt contracted by her "master, owner, charterer, builder, or consignee," "or the agent of either of them," within the state, on account of labor or materials furnished in the state for repairing such vessel. H., the owner of a vessel, contracted in writing to sell her to S., and delivered possession and control of her to S., who, as her apparent owner, contracted, in New York, upon her credit, a debt for repairs to her. In the contract of sale it was agreed that S. should have possession, and might make repairs, but that such repairs should not be a lien on the vessel, or a claim against H., but the creditor had no notice of such agreement: *Held*, that there was a lien on the vessel for the debt, under such statute.

[Followed in The Henry Trowbridge, Case No. 6,379. Cited in The Lucia B. Ives, Id. 8,590; The Canada, 7 Fed. 735. Distinguished in The Sea Witch, 34 Fed. 655. Applied in The Alvira, 63 Fed. 158, 159.]

[Appeal from the district court of the United States for the Southern district of New York.]

In admiralty.

Dennis McMahon, for libellant.

Robert D. Benedict, for claimant.

JOHNSON, Circuit Judge. Since the decision of this case in the district court [Case No. 7,340], the supreme court of the United States, in the case of The Lottawanna, 21 Wall. [88 U. S.] 558, has declared the law in regard to some questions about which conflicting views were entertained by different judges. It must now be deemed settled, that material men furnishing repairs and supplies to a vessel, in her home port, do not thereby acquire any lien upon the vessel, by the general maritime law, as received in the United States, but that, so long as congress does not interpose to regulate the subject, the rights of material men furnishing necessaries to a vessel in her home port may be regulated, in each state, by state legislation; that such con-

[1] [Reported by Hon. Samuel Blatchford, Circuit Judge, and here reprinted by permission.]

[2] [Reversing Case No. 7,340.]

tracts are maritime, and fall within the domain of the admiralty jurisdiction; and that, when, in such cases, a lien is given by the state laws, such lien may be enforced by the district courts of the United States, under the 12th rule, as modified by the supreme court of the United States, May 6th, 1872. This view is maintained to be the law by the supreme court, while admitting that the practice may be somewhat anomalous, upon the ground that it has existed from the origin of the government, and that, whatever may have been its origin, and whether it was or was not based upon the soundest principles, it has become firmly settled, and it is now too late to question its validity. These must be accepted as the controlling views of the supreme court upon this subject, and must be followed by this court. In the cases of The Edith [Case No. 4,283] and The Circassian [Id. 2,726], decided in this court, in February, 1874, the views expressed by my learned predecessor must yield to the later judgment of the supreme court, in the case of The Lottawanna [supra], in so far as they are not in harmony.

The principal point of difference material in this case is in respect to the power and rightfulness of maintaining the lien created by state legislation, while disregarding as unconstitutional the provisions of state statutes which attempt to confer upon state courts the power to proceed in rem, in enforcement of such liens. It is this anomaly which the supreme court accepts as the law, and which, therefore, it is the duty of this court to act upon. In the courts of New York (In re The Josephine, 39 N. Y. 19, and Brookman v. Hamill, 43 N. Y. 554), the state lien law was held to be unconstitutional, because it attempted to give process in rem, and thus was held to invade the grant of admiralty jurisdiction to the United States. The adjudication did not go beyond the validity of the proceeding in rem, and, therefore, the provision for the lien in the specified cases remains to be enforced, when the contract is maritime, in the courts of admiralty. The decisions in The Edith and The Circassian [supra] were made in view of the law as it was at the time understood, and also in view of the possibility that the supreme court might determine the law to be that material men had a maritime lien even in the case of a domestic vessel, and in the absence of any state law conferring a lien. I am, therefore, of opinion that the state law conferring a lien may, in case of a maritime contract, be availed of in the courts of admiralty.

The state law of April 24th, 1862 (Laws 1862, p. 956, § 1), gives a lien "whenever a debt * * * shall be contracted by the master, owner, charterer, builder, or consignee, of any ship or vessel or the agent of either of them, within this state, for either of the following purposes: 1st. On account of work done, or materials or other articles furnished, in this state, for or towards the building, repairing, fitting, furnishing or equipping such ship or vessel." The claim of the libellants coming plainly within the designated purposes, the question is, whether the debt was contracted by a person sustaining such a relation to the vessel as is included in the terms employed by the statute. The debt was contracted upon the credit of the vessel, by Stevens, or Stevens and Gardner, who were in possession, and had the control of the vessel, by the consent of Hamill, the claimant, and he had been, and claims still to be, the owner. This possession was delivered about the 27th of May, 1872, and from that time on, until about the 1st of August, when the claimant took her from the marshal, on bonding her in this proceeding, he had no actual possession, and neither exercised nor attempted to exercise any control over her. On the 20th of May, 1872, Hamill, as owner, entered into a written contract, by which he agreed to sell the vessel to Stevens and Gardner, and they agreed to buy her, for $10,000, payable in notes of $1,250 each, with interest, at 3, 6, 9, 12, 15, 18, 21, and 24 months, made by Gardner, and indorsed by Stevens, with a mortgage on the boat as security, and policies of insurance to cover the same, payable, in case of loss, to the claimant. Hamill further agreed, by the same instrument, that, on the 25th of May, he would deliver a bill of sale to Gardner and Stevens, upon their delivering to him the notes, mortgage and policies, as above provided. It went on: "and I do agree to allow said Gardner and Stevens, upon delivery of said papers, to have possession of said steamboat called John Farron, and do all repairs and alterations which they wish to said boat; but the said repairs or alterations, of whatsoever kind or nature, shall not be a lien or claim upon said steamboat, or her owner, the said Henry F. Hamill, but shall be paid by said Gardner and Stevens." On the 25th, which was Saturday, nothing appears to have been done, but, on the 27th, the parties met at the custom house, to carry out the bargain. It then appeared to be necessary to remeasure the boat, and that this could not be done till the proposed repairs were completed. The boat had been the property of the United States, and had been sold at auction, and purchased by Hamill, but he had not had her enrolled, and there were, therefore, no papers by which a formal bill of sale could be completed. Stevens and Gardner gave the requisite notes to Hamill, which, however, were wrong in form, and were, in a few days, replaced by others in correct form, which Hamill received and retained. No mortgage was given, for the same reason that the bill of sale was not executed. Hamill signed and acknowledged a printed bill of sale, under his seal, and dated May 27th, 1872, filling up none of the other blanks, except

that his name, as sole owner of the steamboat or vessel called the "Ella M. Stevens," was inserted. This paper was left at the custom house, with the custom house brokers who were attending to the business. They were told by Hamill not to part with it without his orders, and it was subsequently given up by them to him. As they left the custom house, Stevens asked Hamill when they could have possession, and was told that Hamill would instruct his watchman to give them possession. About June 1st possession was, accordingly, given. The boat was at Weehawken, and was brought, under the orders of Stevens, to the foot of Le Roy street, where Stevens went aboard, and took charge of her, and from that time he had the possession and control of the vessel. He hired persons as engineer and fireman, and put them on board, and employed and made contracts with mechanics to repair her. Hamill did not exercise any authority or control over the vessel from the time when possession was given by his orders to Stevens, until after this suit was instituted. Before possession was given to Stevens, he had said, in Hamill's presence and hearing, when they were at the custom house, that they (Stevens and Gardner) were going to run the boat on the North river, and that he (Stevens) was going as master, and Gardner was to go as clerk.

It was not the intention of the parties that the title of the vessel should pass from Hamill to Stevens and Gardner, by the delivery of her into their possession; but it was their purpose to put her under their entire control, leaving the unfulfilled portion of the contract to be carried out in the future, by the completion of the bill of sale and the execution of the mortgage. Stevens and Gardner being thus in possession, by the consent of the owner, were enabled to appear as owners to third persons, and thus to obtain credit for the vessel as her owners, or through Stevens as her master. Having obtained fresh credit from the libellant, I think the vessel was liable to answer for the debt, under the statute of New York before cited. Hawes v. The James Smith [Case No. 6,238]; The May Queen [Id. 9,360]; Weaver v. The S. G. Owens [Id. 17,310]; Jackson v. The Julia Smith [Id. 7,136]. I do not understand the position I have stated to be in conflict with what was said by the court in The Druid, 1 W. Rob. Adm. 391, 398, nor with the explanatory observations of the same learned judge in The Bold Buccleugh, 3 W. Rob. Adm. 220, 231. In the first of these cases, the question was as to the liability of the vessel for the wilful misconduct of the master in colliding with another vessel. It was said that the vessel was not liable unless the owner was, and it was held that the owner was not liable for the wilful trespass of the master. But the court had no occasion to consider the effect of apparent ownership by consent of the actual owner. In the latter case the question was, whether a change of ownership did, under the circumstances, defeat a lien for damages for a collision occurring in the time of the former owner; and it was held that the claim could still be enforced against the vessel.

The agreement between Hamill and Stevens and Gardner, that they should subject the vessel to no lien by repairs, cannot prevent a lien occurring as to persons having no knowledge or notice of that agreement; and this appears to have been the fact in respect to the libellant.

The taking of the vessel to the dock in New Jersey for a single day, in the process of repairing her, was not a departure, within the meaning of the statute, and, therefore, no specification of the claim was necessary to be filed under the statute. There must be a decree for the libellant in the usual form, which may be settled on notice.

## Case No. 7,342.

The JOHN FRETTER.

Circuit Court, D. Michigan.

NEGLIGENT TOWAGE—LOOKOUT.

SWAYNE, Circuit Justice. Where there is no lookout, the fault is of the grossest character, and every doubt relating to the consequences is to be resolved against the tug. It is impossible, in the nature of things, that the captain can perform properly his other duties and also that of the lookout, and he must not attempt it. A crew is not competent without a lookout, either on tugs or steamers. If there be none, the tug cannot avoid her responsibility by the oaths of the captain or crew, if there be the slightest doubt as to the spring-head of the catastrophe.

[Cited in The Armstrong, Case No. 540, and in The Coleman, Id. 2,981.]

JOHN F. WARNER, The (EVANS v.). See Case No. 4,563.

## Case No. 7,343.

The JOHN GILPIN.

[Blatchf. Pr. Cas. 291.] [1]

District Court, S. D. New York. Dec., 1862.[2]

PRIZE—PLEADING—VIOLATION OF BLOCKADE.

1. A claim and answer in a prize case should be confined to the issue of prize or no prize.

2. The failure to bring in any one of the officers or crew of the vessel but the mate excused.

3. The offence of attempting to violate a legal blockade is not consummated merely by the existence of a purpose to commit the act, but the vessel must be intercepted while endeavoring to carry out the guilty design.

4. However earnestly the criminal intent may have been entertained and proceeded upon for a time, if it be really given up before the arrest the property is not liable to confiscation because of the previous wrongful purpose.

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[1] [Reported by Samuel Blatchford, Esq.]

[2] [Reversed in Case No. 7,344.]

5. A vessel setting out with the object of evading a legal blockade will be relieved from the penalty following her detection in seemingly adhering to that purpose in her doings, only upon clear evidence that at the time of capture the fraudulent and guilty intention had been wholly relinquished.

6. It is not the mere mental design which the law punishes, but the overt act in starting for or proceeding towards the prohibited port with the knowledge that it is blockaded, and continuing on that course up to the arrest. In this case the vessel and cargo were not in the act of attempting to violate the blockade when captured.

7. The cargo was the product of the enemy country, and was procured by purchase in an enemy port during the war by citizens of a loyal state. Trade of every description with an enemy during war is, by the law of nations, inhibited to the subjects of the nation prosecuting the war.

8. By statute (12 Stat. 257) all commercial intercourse between citizens of the loyal states and those belonging to the insurrectionary states is unlawful, and the property acquired through such intercourse is subject to forfeiture.

In admiralty.

BETTS, District Judge. This vessel and cargo were captured, as prize, April 25, 1862, in the Mississippi river, opposite the city of New Orleans, by the United States gunboat Katahdin, and were brought thence to this port for adjudication. They were here libeled September 16, 1862, and the monition and attachment issued thereon were returned duly served October 7 thereafter. On the 26th of September, 1862, a claim to the cargo, consisting of 318 bales of cotton, was interposed by Nahum Stetson, treasurer of the Weymouth Iron Company, a corporation established by the laws of the state of Massachusetts, averring that the company were owners of the cotton at the time of its attachment, with which claim deposition was offered, as a test affidavit, and filed on the return day of the monition, October 7. On the same day Nathaniel H. Babson and six other persons filed a claim and answer to the libel, alleging that they were citizens of Massachusetts and owners of the vessel. Those claims and answers sufficiently denied the legality of the capture of the vessel and cargo as prize, and, in addition to that issue, attempted to make evidence, by allegations therein of various matters of excuse and defence against the charges in the libel, extraneous and independent of the issue of prize or no prize. This mode of pleading is faulty, and not allowable as a primary defence in a prize suit. The point has been largely considered in this court in repeated cases recently before the court, and the decisions fix the practice which must prevail here until it is changed by a contrary determination of the appellate courts. The Delta [Case No. 3,777]; The Empress [Id. 4,476].

No papers relating to the vessel and cargo were found on board of her when she was captured, or have been brought into this port. The evidence embraces only the examination of the mate, who was on board at the capture, and was afterwards brought with the vessel to this district. The assistant district attorney, by affidavit on file, sufficiently excuses the failure to produce other members of the crew, they having been dispersed in the general disturbance attending the capture of the city of New Orleans by the United States naval forces, at the same time with the seizure of this vessel, and the apprehension and imprisonment of the master of the vessel as a notorious rebel, by the military authority. This case is thus brought within the authority of the preceding case of The Elizabeth and Cargo [Id. 4,350], and the usages under the continental and British practice in prize suits.

The mate testifies, on his preparatory examination, that he resides in New Orleans, and his family in the state of Louisiana; that he was present at the capture of the vessel at the wharf of Algiers, in the Mississippi, opposite New Orleans; that he heard the captain say that Dundridge, who resides in New Orleans, was owner of the vessel; that Forsyth, the master of the vessel, resides in New Orleans; that six persons were on board when the vessel was captured; that eight, including a supercargo, composed the ship's company, all of whom came on board at New Orleans; that he, the witness, was first mate when the vessel was taken; that he does not know the exact port to which she was destined when she left New Orleans; that he was told by her master that it was some port of the northern states; that she was laden with cotton and staves; that he does not know that she cleared from New Orleans, and does not know the owner of the cargo; and that he, the witness, and the master knew that New Orleans was under blockade before the vessel left or attempted to leave that port. The vessel left New Orleans on the 15th or 16th of February last, and went down the river several miles below Forts Jackson and St. Philip, and there anchored for several days, when the commander of the forts ordered the vessel back above the forts, and the design to get out was given up. The supercargo returned to New Orleans. The crew consented, at the master's request, to stay with the vessel until the blockade should be raised. No further attempt was made to get out of New Orleans.

The court has had occasion, in more than one previous instance, to advert to the rule of the prize law which subjects neutral property to capture when attempting to violate a legal blockade. The offence is not consummated merely by the existence of a purpose to commit the act, but the vessel must be intercepted while endeavoring to carry out the guilty design.. However earnestly the criminal intent may have been entertained and proceeded upon for a time, if it be really given up before the arrest, the property is not liable to confiscation because of the pre-

vious wrongful purpose. This is wholly a question of evidence, and, no doubt, a vessel setting out with the object of evading a legal blockade will be relieved from the penalty following her detection in seemingly adhering to that purpose in her doings, only upon clear evidence that at the time of capture the fraudulent and guilty intention had been wholly relinquished. 1 Kent, Comm. 147. It is not the mere mental design which the law punishes, but the overt act, in starting for or proceeding towards the prohibited port, with the knowledge that it is blockaded, and continuing on that course up to the arrest. Hall. Int. Law, c. 23, § 23, and citation. Had this capture been made whilst the vessel was proceeding down the river from New Orleans, the vessel and cargo would have been, within the meaning of the rule, guilty of an overt act. They stopped, however, before leaving the port, waiting for authority to make the contemplated voyage, and returned to the place of departure, where they remained until arrested as prize. The cause of the seizure was not that the vessel and cargo were in the act of evading the blockade, but was a cause not connected with that offence. I think, therefore, that on the facts and the law of the case that charge is not sufficiently proved to demand the condemnation of the vessel or cargo.

The libellants having suspended the proceedings against the vessel, and prosecuted them against the cargo, THE COURT said:

The prosecution of the vessel under this capture having, for the present, been suspended by the libellants, and the action being now continued against the cargo, no judgment is declared in relation to the vessel. The cargo was seized while waterborne. It was obtained and shipped with the intention to transport it to another state, though a loyal one, of the Union. In this respect, it stands subjected to a double liability to seizure and condemnation. It was enemy property, procured by purchase in an enemy port, and also a product of the enemy country, and it could not, in that condition, be obtained and brought thence by our own citizens, through purchase, or by barter or exchange, because trade and traffic of every description with an enemy, during a state of war, is, by the law of nations, inhibited to the subjects of the nation prosecuting the war (Wheat. Capt. Mar. 101; 1 Kent, Comm. 74, 81; Hall. Int. Law, 470, 484, 498); and, by statute, all commercial intercourse between citizens of the loyal states and those belonging to the insurrectionary ones is declared to be unlawful, and the property acquired through such intercourse is subjected to forfeiture (12 Stat. 257). A decree of condemnation and forfeiture of the cargo of the schooner will be entered.

This decree was reversed on appeal by the circuit court, November 7, 1863. [Case No. 7,344.]

## Case No. 7,344.

### The JOHN GILPIN.

[Blatchf. Pr. Cas. 661.] [1]

Circuit Court, S. D. New York. Nov. 7, 1863.[2]

PRIZE—PROPERTY OF ENEMY—RESIDENCE OF OWNER.

1. Decree of the district court, condemning the cargo, reversed.

2. A citizen temporarily residing in the enemy's country at the breaking out of the war is entitled to a reasonable time to collect his effects, and convert them into available and manageable funds, so as to enable him to withdraw them from the country.

3. The transaction in this case was an honest and bona fide effort for that purpose.

[Appeal from the district court of the United States for the Southern district of New York.]

In admiralty.

NELSON, Circuit Justice. This vessel, with her cargo, consisting of cotton and stores, was captured about the 25th of April, 1862, in the port of New Orleans, by gunboat No. 8, of Captain Farragut's fleet, after the taking of the city of New Orleans. The proceedings against the vessel were suspended in the court below, and a decree of condemnation was rendered against the cargo as enemy property. [Case No. 7,343.]

The claimants are the Weymouth Iron Company, a corporation of the state of Massachusetts. It appears from the test oaths that, in the latter part of 1860, this company shipped large quantities of nails manufactured by them, which were consigned to a house in New Orleans for sale on commission. The shipment was at their risk; the sale was to be made on their account, and the proceeds were to be remitted. At the breaking out of the war, a large stock of these nails, unsold, remained in the hands of the agent. After the disturbances of the war, the article being unsalable, the agent, Mr. Baldwin, exchanged the nails for the cotton, which was put on board of the schooner with the intent to ship the same, as the proceeds of the nails, to the owners in Massachusetts. The original design was to get access to the blockading squadron, and obtain permission to send the proceeds home; but, access for that purpose not having been obtained previous to the capture of the city, the vessel remained at her wharf, and was there found under the circumstances stated, where she was seized, as already mentioned, as prize of war. It further appears from the test oaths that the agent had much difficulty in preventing the property from being seized by the enemy, and had to resort to various devices to conceal and preserve it for the owners. The precise time when the exchange of the nails for the cotton took place in New Orleans does not appear. It

[1] [Reported by Samuel Blatchford, Esq.]

[2] [Reversing Case No. 7,343.]

is, however, fairly to be inferred from the proofs, that it was as early as June, 1861, and prior to the proclamation of the president prohibiting commercial intercourse with the enemy, in pursuance of the act of July 13, 1861 [12 Stat. 257], which proclamation was issued on the 16th of August following.

I have had before me heretofore the question involved in this case, and came to the conclusion that a citizen temporarily residing in the enemy's country at the breaking out of the war was entitled to a reasonable time to collect his effects and convert them into available and manageable funds, so as to enable him to withdraw them from the country. The whole transaction in this case seems to have been an honest and bona fide effort for this purpose. The case, as it stands upon the proofs, is a meagre one. But one witness on board of the vessel, the mate, was examined in preparatorio, and none of the ship's papers are produced. Their absence and also the absence of the other hands on the vessel are sought to be accounted for by the confusion and disorder that reigned in the city at and after the capture.

The only question is, whether or not the cotton, under the facts and circumstances stated, was enemy property. There is no question of blockade. The vessel and cargo were, at the time of capture, waiting at the wharf with a view to obtain permission for a lawful voyage, that the proceeds of the nails might be sent home. I cannot think that they should be regarded as enemy property, and must, therefore, reverse the decree below, and direct one to be entered for the claimants dismissing the libel.

## Case No. 7,345.

### The JOHN GILPIN.

[Olcott, 77.] [1]

District Court, S. D. New York. April, 1845.

SALVAGE—RIGHT OF POSSESSION—"WRECK OF THE SEA."

1. A vessel, in point of fact, for 12 or 14 hours in a condition where her instant destruction was menaced, and the lives of those who might remain on board of her greatly jeopardized, may be rightly taken possession of by salvors.

[Cited in The Ida L. Howard, Case No. 6,999; The Hyderabad, 11 Fed. 755; The Ann L. Lockwood, 37 Fed. 237.]

2. Parties taking such possession have a right to retain it until the salvage is completed, and no other person has the right to interfere with them, provided they are able to effect the salvage, and are conducting the business with fidelity and vigor.

3. In this country, it is clear that salvage compensation may be obtained in admiralty for services rendered within the ebb and flow of the tide, without regard to location, whether on the high seas, or inter fauces terrae.

4. The common law "wreck of the sea," if found within high-water mark on shore, is within the privilege of salvage.

5. By the principles of maritime law, those beginning a salvage service, and in the successful prosecution of it, are entitled to be regarded as the meritorious salvors of whatever is preserved, even if wrongfully interrupted in the work by others who complete the salvage.

[Cited in Murphy v. Dunham, 38 Fed. 511.]

[Cited in Eads v. Brazelton, 22 Ark. 499.]

6. Not only the actual toil and expenses are to be considered in a case of salvage, but also the imminent contingency that their services might prove unavailing by the breaking up of the vessel, before any amount of property could be saved.

[Cited in Baker v. The Slobodna, 35 Fed. 541.]

In admiralty.

D. Lord, Jr., for libellants.

Griffin & Bidwell, for claimants.

BETTS, District Judge. This is a cause of salvage. The material facts are as follows: The brig, in attempting to go to sea on the afternoon of the first of January, 1841, grounded on the outer middle, in the harbor, below the Narrows, and from one to two miles off shore. It was then snowing, and the wind blowing heavily from the northeast. A boat's crew was sent off from the brig to Staten Island, to obtain a lighter, and in her absence every effort was made on board, and with the aid of the steamboat Osiris, to draw her off the bank, but without success. It was near night when the boat returned to the brig, and a lighter came down about the same time; but the brig was then bilged, her masts had worked loose in their steps, and the master supposed they must go overboard. Water was in the hold and cabin, and the ship's company were exposed to the storm and sea on deck, while the vessel was so careened as to render it difficult to maintain a standing upon her. The master, pilot and brig's company left her in the lighter, without attempting to take out of her the valuables on board at all, more than a part of their clothing. The storm and wind was then increasing, and the master of the lighter declared it unsafe for his vessel to remain out and near the vessel during the night. He returned to Staten Island, with her, taking the two mates and one or two of the men. The master, with the rest of the crew, went up to the city in a steamboat, which was met coming down to their relief. The time at which the lighter arrived at the island is not clearly stated, but most probably it was between 7 and 8 p. m. Some of the witnesses supposed it was later. The same evening, and within an hour after her arrival, the libellants put off for the wreck. The storm was still severe and unabated, but the wind was beginning to bear round to the northwest. The libellants are wreckers, and keep a vessel and crew in readiness to go out during the winter to the aid of vessels requiring assistance in the harbor and off the coast.

The claimants allege that the master of the first lighter, the Hiram Dixon, was em-

[1] [Reported by Edward R. Olcott, Esq.]

ployed by the master of the brig to return immediately to her with his lighter, and keep by the wreck until assistance could be sent down from the city by the owners. There is great conflict of testimony upon this point, but I find the preponderance of evidence to be, that no such engagement was entered into. The Hiram Dixon, on her return, had discharged all the duties she was engaged to perform in respect to the wreck. I do not, therefore, discover any foundation for the charge, that a fraudulent arrangement or confederation was entered into between the libellants and the master, or any of the crew of the Hiram Dixon, or that the libellants went down to the vessel and surreptitiously took possession of her with intent to supplant her master and owners in giving her relief. Even had the asserted engagement with the Hiram Dixon been proved, such an arrangement could not well be made a continuing possession of the brig, so as to oust, or extinguish all right of the libellants to hold her as salvors, having gone aboard and taken charge of her in the perilous condition in which she was found. It is to be observed it was then mid-winter, at the height of a northeast storm of wind and snow, in the night time, and that the brig lay at a point most exposed to danger from the wind and waves coming upon her from that direction, and that there was every probability she must be immediately broken up, causing the loss of every thing on board. She was apparently abandoned, and if her crew might have been absent to procure assistance from other vessels and more force, their ability to return to the wreck or the chance of affording any aid after the lapse of a few hours, must, in the then condition of things, have been most dubious contingencies.

The libellants, in the exercise of their calling as wreckers, coming to a vessel in that plight, would be guilty of a dereliction of duty if they failed to employ all their means for the instantaneous preservation of property so circumstanced. This may not be strictly and technically a case of derelict—Clarke v. The Dodge Healy [Case No. 2,849],—if really the master of the brig had gone to the city to obtain the necessary help to save the cargo and brig, intending, at the time, to return with all practicable dispatch. It appears he came to the wreck by 8 or 9 a. m. the following day, in a steam-tug, with men to assist in saving the cargo. The animus revertendi et recuperandi may thus far have continued with the master, but this mental hope or purpose must be regarded inoperative and unavailing as an actual occupancy of the vessel, or manifestation to others of a continuing possession. She was absolutely deserted for 12 or 14 hours in a condition when her instant destruction was menaced, and the lives of those who should attempt to remain by her would be considered in highest jeopardy. She was quite derelict; and being thus found (The Boston [Id. 1,673]; Rowe v. The Brig [Id. 12,093]; 1 Sir Lionel Jenkins, 89) by the libellants, the possession they took of her was lawful (The Emulous [Case No. 4,480]).

Possession being thus taken when the vessel was, in fact, abandoned and quite derelict, under peril of instant destruction, the libellants had a right to retain it until the salvage was completed, and no other person could interfere against them forcibly, provided they were able to effect the purpose, and were conducting the business with fidelity and vigor. Abb. Shipp. 554; Holt, Shipp. 522; Edw. Adm. 175; 3 Hagg. Adm. 159, 160, 161; Id. 167, 243, 385. The argument, that the brig not having been out to sea when wrecked, varied the relation of the parties, has no foundation in law or reason. The exigency was no less imminent that immediate relief should be afforded her; nor have merchants and underwriters a less interest that prompt and efficacious assistance be rendered vessels imperiled in great bays and roadsteads, than if they happen to be outside a harbor; and that the stimulant, inducing aid, be applied, by constituting those who render it, salvors. The doctrine is clear in this country that salvage compensation may be obtained in admiralty for services rendered within the ebb and flow of the tide, without regard to location, whether on the high seas, or inter fauces terrae. The Emulous and The Boston [supra]; American Ins. Co. v. Canter, 1 Pet. [26 U. S.] 511; Hobart v. Drogan, 10 Pet. [35 U. S.] 108; U. S. v. Coombs, 12 Pet. [37 U. S.] 72. And there is no apparent reason why the rule should be restricted to tide waters, and not embrace all navigable waters out of the jurisdiction of any particular state. This principle would seem to bring the common law "wreck of the sea," if found within high water mark on shore, within the privilege of the law of salvage. 1 Pet. [26 U. S.] and 12 Pet. [37 U. S], before cited. The English rule is not in conflict with the American (The Euraces; [The Frederick] 1 W. Rob. Adm. 16; The Westminster, Id. 229; Id. 172), except perhaps, in the particular of the wreck of the sea (The Augusta, 1 Hagg. Adm. 17; Holt, Shipp. 522). Justice Story, commenting upon this distinction, in U. S. v. Coombs, says: "It is true that it has been said that the admiralty has not jurisdiction of the wreck of the sea. 3 Bl. Comm. 106, 107. But we are to understand by this, not what, in the sense of the maritime and commercial law, is deemed wreck or shipwrecked property, but 'wreck of the sea,' in the purely technical sense of the common law. A passage has been sometimes relied on, in one of the earliest judgments of Lord Stowell, the case of The Two Friends, 1 C. Rob. Adm. 271, in which it is intimated that if the goods, which are subject to salvage, have been landed before the process of the admiralty court has been served upon them, the jurisdiction over

them, for the purpose of salvage, may be gone. The supposed difficulty in that case was not that the court had not jurisdiction; but that in cases of salvage on the instance side of the court, no process of the court could be served on land, but only on the water. This exception is inapplicable to the courts of the United States, where admiralty process, both on the instance and prize side of the court, can be served on land as well as on water." Had the crew of the brig been in sight in a boat, or on shore, after abandoning the vessel, and evincing no intention to return, and being unable to relieve her, those who should come to the rescue of vessel or cargo, would acquire the rights and privileges of salvors.

The evidence shows that the libellants, after falling in with the wreck, applied all the means and diligence within their power, and which the circumstances of the case admitted, in saving the property. It further appears that Roff, the master of the salving vessel, was skilled in this business; is a man of energy, and that he not only exerted whatever means he possessed, but engaged men and vessels to aid him wherever they could be advantageously employed. Whilst so engaged, the master of the brig returned to her, and demanded the possession to be surrendered to him. The libellants refused compliance with the demand, asserting that they were legally in possession of the brig as salvors, and should retain it in that character. Roff said he had found her there stranded and deserted, no one being with her or keeping guard of her, and he intended to hold her, and save the cargo. Henry Dixon testifies that he went down to the brig about 9 o'clock, with her master, in the steam-tug Hercules, who went aboard with the witness; told him that the brig was in charge of the wreckers, and witness must make arrangement with Roff, and go to work stripping her. Roff hired the riggers brought down by the master, and employed them to help dismantle the brig. The master would have no rightful authority, on such facts, without tender of a full satisfaction to the libellants, to exact the surrender of the vessel to him, she being aground and helpless, and not in a salved state, or capable of being restored to the owners; and the facts abundantly show, that the change of possession could not have been then made without involving the probable loss of vessel and cargo. The master, with his crew, left the brig under the belief that she must go to pieces that night; he gave no intimation of returning to her; she lay in a perilous position, on her beam ends, filled with water to her hatches, and the sea making a breach over her. The storm continued raging that night, and the sea was so rough that it was impracticable for any other craft than small vessels to be brought alongside, or made useful to the brig or her cargo. The master had come down in a steam-tug, without lighters, to aid in unlading the cargo; and all the testimony shows that no effective assistance could have been rendered the wreck, except by such lighters, nor was it intended to use the tug for any further purpose than to bring the master and his few attendants to the wreck.

In the afternoon, an agent for the owners came to the brig in a steam-tug, with men engaged to assist in saving the cargo, and demanded possession of her from the libellants. This demand, as before, was disregarded, but Roff declared his willingness to employ the men brought down, if they would work, and did engage all who consented to stay with him. At the close of that day, Roff was arrested under the directions of the owners, by a deputy marshal of the United States, and taken forcibly from the wreck to the city, and the agent took possession of the wreck for the owners, turning the libellants out of her. The warrant was obtained on a charge of larceny, committed by Roff, on board the wreck. The agents of the owners and underwriters, after the dispossession of the libellants, conducted operations for saving the cargo, until the brig, four days afterwards, went to pieces, and was totally lost. It is not necessary to determine whether, if the vessel had been afloat, and being brought into port, the law would have entitled her owners to possession, to the exclusion of the salvors, to complete the salvage themselves; and if so, on what terms or conditions; because here, most probably, the vessel could not be surrendered to them as saved, nor was the interposition of the owners necessary for the rescue of the property. The result proved they were unable to effect it. The dispossession of the libellants, then, in successful operation, was, under the facts, clearly wrongful; and in respect to Roff, accompanied with circumstances of extreme aggravation. No justification is shown for his arrest on a criminal charge. It was manifestly employed to make him give up the brig, and the proceeding was dropped so soon as his removal was accomplished. The unquestionable responsibility of the owners and underwriters imparted no privilege to them in respect to the salvors, which could not be claimed by strangers or owners, without responsibility; and, in my opinion, they had no authority to force the vessel and cargo out of the possession of the salvors, without making or tendering them full remuneration for the services already performed by them. The court cannot, however, act upon that proceeding as ground for damages or otherwise, in so far as the false imprisonment or tortious arrest of Roff is concerned. The remedy for that wrong must be sought elsewhere; but it is in consonance with the established principles of

maritime law to hold those beginning a salvage service, and who are in the successful prosecution of it, entitled to be regarded as the meritorious salvors of whatever is preserved, and entitled to the sole possession of the property (1 Ld. Raym. 393; 2 H. Bl. 294; 1 Saund. 265; 8 East, 57; 1 Dod. 417; 2 Hagg. Adm. 361; 3 Hagg. Adm. 160, 167, 243; Edw. Adm. 175); and the same would seem to follow, even if they have been wrongfully interrupted or intercepted in the work by others, who complete the salvage, and bring in the salved property.

It does not become necessary, in this case, to consider minutely the course of conduct pursued on board after the libellants were dispossessed, because the amount of property saved furnishes adequate means for compensating them; but the testimony seems to call for the remark from the court, that owners and underwriters would undoubtedly have been large gainers had the business been left in the hands of the first salvors. A great parade of force was made, and an enormous outlay of charges incurred, and yet the amount saved in the four days the wreck was under their charge, holds no corresponding proportion in favor of the owners to the beneficial services rendered by the libellants. The libellants were quietly, but most efficiently employed; they were industrious, untiring and fearless, and thoroughly acquainted with the duties required of them. They had shipped and saved the rigging of the brig, loaded and dispatched one lighter, and half filled a second, before the arrest of Roff; and their enterprise promised a speedy and successful result.

In the account of sales of the property the owners do not fully discriminate between that saved by the libellants, and that sent up by those succeeding them. They credit the proceeds of property saved by Roff at $5,494 85, but the rigging and materials are not included, and out of $9,205 32, the proceeds of the cargo put on board the lighter (W. S. Rost), only $1,058 65 are credited to Roff. The evidence affords strong ground in support of the claim of the libellants, that the latter vessel was half laden by them; and if the $2,255 26 credited to materials, be the sails, rigging, &c., of the wreck, they belong also to the credit of the libellants. If the account is stated upon their allowances, then of the whole sum of sales, $42,495 78, $11,294 07 would be rightfully claimed by the libellants as the amount of the property saved by them. But this view of the case is not pressed, nor are the facts investigated with the intent to adjust fully the rights or equities that might attach, in favor of the libellants, to them; for whether the salvage service has been best performed by the one or the other set of salvors, could not vary the right of the libellants to their just compensation, and the amount restored to the owners by the different salvors affords ample means of remuneration to the libellants.

This is not a case for extravagant compensation, although the services were well timed, faithful, and beneficial, and involved risks and fatigues beyond that of ordinary labor, and outrank a mere quantum meruit reward (The Hector, 3 Hagg. Adm. 90, 95; Id. 120, 121; Id. 204, 205), yet they are not entitled to be placed in the highest order of perils and salvage services. Still more than the actual toil and expenses are to be considered in view of the imminent contingency that their efforts might be unavailing by the breaking up of the vessel before any amount of property could be rescued. Under similar hazards, the English admiralty awarded a liberal compensation for services in themselves attended with little danger or exposure. The Westminster, 1 W. Rob. Adm. 229. The imputations of embezzlement are not supported. The conduct of the libellants was unexceptionable, and is deserving a liberal consideration. If the amount of property saved by all had been small, I should apportion their compensation upon the aggregate so rescued from loss and destruction, regarding the libellants as equitably, and, according to the rules of maritime law, entitled to a reward for that brought in by those who supplanted them. But in the view I take of the evidence, it appears that the libellants got out of the wreck her materials, the full lading by the Alice Ellis, and one-half of the lading of the W. S. Rost, which, according to the account of sales rendered by the owners, produced $11,294 07.

I decree that the libellants recover one-fifth of this sum, being $2,258 81, and their costs to be taxed.

## Case No. 7,346.

The JOHN G. PAINT.

[2 Ben. 174.] [1]

District Court, E. D. New York. Feb., 1868.

SALVAGE — LYING BY VESSEL IN DISTRESS—DUTY OF SALVORS—APPORTIONING SALVAGE.

1. Where a bark bound to New York, which had lost her rudder in a gale, was fallen in with, off the New Jersey coast, by a brig bound to Boston, which took off from the bark the captain's wife and family and a sick sailor, and agreed to keep by her, and the brig accordingly kept in company of the bark for six days, at times towing her, in the course of which the brig lost two hawsers and an anchor, and her master had his leg and two fingers broken by the towing hawser, the command thus devolving on the mate; and on the sixth day they made land, which turned out to be Absecom, and thereupon, though the wind and weather were favorable for keeping on, the mate ordered the hawser, by which he was towing the bark, to be cast off,

[1] [Reported by Robert D. Benedict, Esq., and here reprinted by permission.]

and directed the bark to anchor, and she lay at anchor all night; and the next morning, before she came back to the bark, the latter engaged a tug to tow her to New York; the bark and her cargo being worth $70,000 or $80,000: *Held*, that the case was clearly one of meritorious salvage service on the part of the brig.

2. The same law which gives to salvors a reward exceeding any value of the labor bestowed, exacts of them all diligence, and is careful to mark any relaxation of that anxious solicitude for the safety of a vessel in distress, the encouragement of which is the object of all salvage reward.

3. The action of the mate in not keeping on with the vessel when off Absecom, but anchoring the bark, was a mistake.

4. The court would allow twenty per cent. of the value of the bark and her cargo as salvage, less $3,500, deducted on account of such mistake.

5. The court would allow to the owners of the brig the expenses incurred in performing the salvage, and one-half the remainder, by reason of the increased hazard to their vessel in consequence of the disabling of the master.

6. The master was also entitled to a liberal portion by reason of his injuries, and the mate's share must be diminished in consequence of his mistake.

This was a libel filed on behalf of the owners, master, and crew of the brig Sallie Brown, to recover salvage for services rendered to the bark.

Scudder & Carter and D. D. Lord, for libellants.

Owen, Gray & Owen, for claimants.

BENEDICT, District Judge. The facts in this case, which can hardly be said to be in dispute, disclose a clear case of meritorious services rendered to a vessel disabled at sea by the loss of her rudder, consisting of lying by her, and from time to time towing her, for the space of six days.

It is quite evident that it was, in a great degree, owing to the salvors that the bark was not abandoned at sea, and their efforts resulted in the safe arrival of the bark at her port of destination. The only circumstance at all detracting from the merit of the salvors is, that after Absecom was made, and when the wind was fair, and both vessels might well have proceeded to New York, the bark was directed to cast off the hawser and come to anchor, which she did, and was thus compelled to pass a night in a position of some danger from passing vessels, and when, in case of a blow, she might have gone ashore. This circumstance was claimed to amount to an abandonment of the bark by the salvors, and it was insisted that all claim to salvage was forfeited thereby.

Upon a careful consideration of the evidence, I am satisfied that there was no intention on the part of the salvors of abandoning the bark, but, on the contrary, that they directed her to anchor with the intention of standing by her during the night, and taking her into New York in the morning; and would have done so, had not the master of the bark in the morning, and with the brig in sight bearing down for him, hastened to employ a tow-boat to take him in.

Nevertheless, it was a mistake not to have proceeded during the night, instead of anchoring; occasioned, it would seem, by a doubt as to his precise locality on the part of the mate of the bark, upon whom the responsibility had then devolved, the master having been disabled by a broken leg. This mistake caused some additional peril to the bark during the night, which better seamanship on the part of the brig would have avoided. No harm resulted from the mistake beyond the delay; and yet it detracts from the merit of the salvors, as the position of the bark called upon the mate to make every effort to bring her into port without delay, and he could with diligence have satisfied himself as to his real locality, about which no doubt was entertained on board the bark, and could without danger have proceeded during the night.

The same law which gives to the salvors a reward exceeding any value of the labor bestowed, exacts of them all diligence, and is careful to mark any relaxation of that anxious solicitude for the safety of a vessel in distress, the encouragement of which is the object of all salvage rewards.

All the other circumstances of the case favor a liberal reward to the salvors. They fell in with the brig in mid-ocean, themselves bound to Boston, the brig to New York. She was in distress, and at the captain's request the salvors took on board their vessel from the bark the captain's wife, three children, a servant girl, and a sick man, and agreed to stand by her and assist her into port. Had they refused their services, the master of the bark, as he was situated, would doubtless have concluded that he would be justified in abandoning his vessel.

During the six days following the salvors kept by the bark, part of the time towing her, and at times not wholly without danger. In the performance of this service, two hawsers belonging to the brig were lost, as was also her anchor, and her master had his leg and two of his fingers broken by the towing hawser—a circumstance which, while it increased the responsibility of the mate, in case of bad weather or accident, would have greatly increased the risk of the brig and her cargo. In addition to the loss of anchor and hawser, the brig was put to the expense of insurance from New York to Boston. No other loss was sustained by the brig. During most of the time the wind was fair and the weather fine. The value of the bark and her cargo, not including the duties upon her cargo, appears to have been between $70,000 and $80,000. No tender of any sum as salvage was made, but a valid claim to the extent of $3,000 was conceded, upon the argument by the claimant of the bark.

The libellants claim twenty-five per cent. Upon considering all the circumstances, I shall award twenty per cent. of the net value

of the bark, cargo, and freight, less $3,500, deducted by reason of the failure to proceed when off Absecom. Let a reference be had to ascertain the value of the bark, cargo, and freight, and the question of apportioning the salvage among the salvors await the coming in of the report.

The amount of the salvage having been fixed at $8,954.06, the court, in appropriating it, rendered the following opinion:

BENEDICT, District Judge. In disposing of the question of apportionment, I think it necessary only to say that in fixing the amount to be awarded to the owners of the salving ship, I have considered them entitled to a liberal share, from the circumstance that the hazard to their vessel was increased by the injury which the master sustained in effecting the salvage, substantially disabling him, and leaving their vessel under the command of a mate.

To the master I have also awarded a liberal portion from the fact that he had a leg and two fingers broken in effecting the salvage, which confined him to the hospital for a considerable period, and from which he has not yet entirely recovered.

The chief-mate was by reason of the injury to the master compelled to assume an increased responsibility, which he is entitled to have considered in determining his portion; but I award him less than I should have otherwise done, because of his mistake in directing the distressed vessel to anchor in a dangerous place, instead of proceeding with her at once into port—which mistake entailed a considerable expense, and would not, in my opinion, have occurred, had the mate been more solicitous for the safety of the distressed vessel.

The salvage will be accordingly apportioned as follows: Out of the gross salvage, let the costs be paid, and to the owners of the salving vessel the sum shown to have been expended by them, or necessarily disbursed by reason of the salvage service—to wit, the sum of $1,597.97. Let the net salvage remaining be divided equally, and one-half, to wit, the sum of $3,604.25, be paid to the owners as their portion of the salvage. Let one-half the remainder, to wit, the sum of $1,802.12, be paid to the master of the salving vessel. Out of the balance remaining, let the mate and second mate have an equal portion, to wit, $375 each. And let the remainder, to wit, $1,052, be divided equally among the seamen of the salving vessel.

## Case No. 7,347.

The JOHN GRIFFIN.

Circuit Court, E. D. New York. 1871.

[Reversing Case No. 7,348. Nowhere reported; opinion not now accessible.]

## Case No. 7,348.

The JOHN GRIFFIN.

[4 Ben. 19; 11 Int. Rev. Rec. 63.][1]

District Court, E. D. New York. Feb., 1870.[2]

SMUGGLING—EVIDENCE OF ACCOMPLICE — MASTER —CUSTOM HOUSE OFFICERS.

1. The bark John Griffin was libelled as forfeited for a violation of the 50th section of the act of March 2, 1799 [1 Stat. 665], for smuggling cigars. One Albreu who owned the cigars, testified that the captain of the bark, in Havana, had made an agreement to smuggle cigars for him; that he sent the cigars from Havana to Matanzas, where the bark was lying, and received a letter from the captain, saying they were shipped; that he then came to New York, and after the arrival of the bark in New York, received his cigars, which were brought him by a carman, and paid the captain the agreed freight. It also appeared in evidence that on the seizure of the cigars Albreu's papers were also seized among which were the invoices of the cigars from Havana to Matanzas, and the letter from the captain. The captain denied that the cigars ever were on board the vessel, and otherwise contradicted Albreu, but gave no satisfactory explanation of the letter. Some other testimony was given confirming some parts of Albreu's story. His character for truth was seriously impeached. *Held*, that the evidence sufficiently sustained the charge against the vessel, and that she must be forfeited.

[See note at end of case.]

2. The government assumes no obligations towards ship owners to prevent fraudulent discharges of cargo, and the liability of the vessel is the same whether the officers of the customs do or do not prevent such discharges.

In admiralty.

B. F. Tracy, U. S. Dist. Atty., for the United States.

F. B. Wilcox, C. Donohue, and J. McGowan, for claimants.

BENEDICT, District Judge. This is a proceeding in rem to enforce the forfeiture of the bark John Griffin for a violation of the 50th section of the act of March 2, 1799. The charge against the vessel is, that in the month of October, 1869, a quantity of cigars of the value of about $5,000, brought in her from a foreign port, were unladen and delivered from her at the port of New York, without a permit from the collector and naval officer, contrary to law.

In support of this charge, one John Albreu, who owned the cigars alleged to have been smuggled, is produced as a witness, and testifies, that in September, 1868, he was in Havana and in Matanzas, at which last named port the bark, John Griffin, was then loading for New York, under the command of William Downey whom he well knew. That he met Downey in Havana and applied to him to smuggle some cigars into New York for him, but no arrangement was then made. That Downey afterwards left Havana and

[1] [Reported by Robert D. Benedict, Esq., and here reprinted by permission. 11 Int. Rev. Rec. 63, contains only a partial report.]

[2] [Reversed by the circuit court; case not reported. Decree of the circuit court reversed in 15 Wall. (82 U. S.) 29.]

went to Matanzas and Albreu was informed by a letter—from whom he does not say—that Downey would take his cigars and accordingly he sent them to Matanzas, packed in twenty-two boxes or cases, marked "G. Matanzas," and in three or four days received a letter from Downey, saying they were "shipped all right," whereupon he started for New York by the next steamer.

That afterwards the bark arrived in New York from Matanzas, and he saw Downey and learned from him that his cigars were all right, and arranged with him to be at the corner of Liberty and William streets, at 11 a. m., the next day, to receive them. That at the time and place appointed a carman came with a load of his cigars, enquired for him, and delivered his load to him; whereupon he went to South street and there in an office paid Downey $2,000 on account of the freight;—that he then went back and received the remainder of his cigars in the same way, and again went to the office in South street and paid Downey $1,200 more, being the balance of freight on the cigars, at the rate of $25 per thousand.

That these cigars, which he so received and paid freight on, were the same cigars which he had sent from Havana to Matanzas, to be brought to New York by Downey, and upon their receipt he stored a portion in a room on the fourth floor of 96 Nassau street, corner of Fulton street.

That subsequently officers of the customs seized his papers at his house, and among them the invoice by which these cigars were shipped from Havana to Matanzas, and with it the letter of Downey acknowledging the receipt of them. The cigars at 96 Nassau street were also seized and are now held as forfeited, no duty having been paid on them.

Besides these cigars Albreu says he had a trunk and a barrel which he asked Downey in Matanzas to take to New York for him; that Downey said he would see about it, and the articles were left at Matanzas to be called for, and a day or two after the delivery of the cigars he received the trunk and barrel at his house from an expressman.

This is the substance of the evidence given by Albreu, and it is the testimony of a witness by his own showing an accomplice in the unlawful act charged on Downey. He is also under powerful pressure, caused by seizures of his property, which are pending undisposed of.

His character for truth has been seriously impeached and he is proved to have made statements which conflict with the story he now tells. The prosecution have therefore sought to sustain the testimony of Albreu by confirmatory evidence, and it has been otherwise shown that the cigars seized at 96 Nassau street were there stored by Albreu; that Albreu hired the room on the 20th day of October, 1868, and on that day the bark, John Griffin, Downey being still master, finished discharging a cargo of sugar and molasses which she had brought from Matanzas to New York. Whether any other vessel arrived in New York from Matanzas at or about this time does not appear.

It has also been shown that the boxes or cases, in which the cigars seized were packed, were distinguishable not only by the mark "G. Matanzas" and their numbers, but also, because although they have a general appearance, resembling sugar-boxes, they differ somewhat from the ordinary sugar-box of Cuba in size, and are hided in a different manner. It also appears that Albreu did have in Matanzas twenty-two cases containing cigars, answering to this description, which he desired to smuggle into New York. The invoice by which Albreu says they were shipped from Havana to Matanzas is also put in evidence, and it calls for twenty-two cases cigars similar in character to those seized, marked "G. Matanzas," shipped to Matanzas, September 20th, 1868. It is also admitted by Downey, that he did meet Albreu while his bark was at Matanzas, and was applied to by Albreu to bring some packages, including a trunk, to New York, and that he again met him in New York the day after the arrival of the bark. A witness named Molina, who was in the employ of Albreu, is also called, who swears that twenty-two boxes of cigars were delivered to Albreu, on the corner of Liberty and William, and stored at 96 Nassau street, and that he went with Albreu to South street and saw Albreu pay Downey money in an office there.

The letter which Albreu says he received from Downey, in Havana, after the cigars were sent to Matanzas, and which is shown to be in the handwriting of Downey, and to have been found in Albreu's writing-desk, with the invoice, is also produced, and is as follows: "Matanzas, Sept. 23, 1868. Mr. John Albreu: Dear Sir: Your 22 boxes, trunk and barrel packages are all on board safe. I wish your boxes were all hided the same as all sugar boxes. They are too easily distinguished, but I think they will be all right. Yours, respectfully, W. Downey."

This letter affords to my mind strong corroboration of Albreu's story, and taken in connection with the facts established outside of Albreu's testimony, plainly indicates the vessel here proceeded against. It is true that the letter does not name the bark John Griffin, but it expresses a solicitude which clearly indicates an interest on the part of the master of the John Griffin in the landing of the cigars without detection, and it manifestly relates to the cigars which were stored at 96 Nassau street on the day the John Griffin finished discharging in New York, and, unexplained, would naturally be considered to refer to the vessel, of which the writer was the master, which is the vessel proceeded against.

The effect of the master's letter, as impli-

cating his vessel in this transaction, is, moreover, increased by the explanation of it which is attempted, and the noticeable manner of the witness in giving that explanation. It is in evidence that the letter was shown to the master, soon after its seizure, by the officers of the customs, and he was then charged with having brought the cigars, but he then attempted no explanation of the letter, although he denied the charge.

When examined in chief, as a witness for the claimants, he did not allude to any explanation of the letter, but simply says: "These boxes and trunk and barrel didn't come in the John Griffin, and were never on board of her. Albreu never paid me any money, as he states. No such interview took place at the office in South street. I was never there with Albreu at any time."

Upon cross-examination, however, he says that when applied to by Albreu to take his goods, he refused; that Albreu afterwards told him that he had made arrangements to have his goods go on board a vessel, and wanted him to see that they were on board, and that subsequently a man whom he used to see often, but whose name he does not know, came to him and asked him to look at some goods belonging to Albreu, on a brig in Matanzas; that he thereupon went with him, and found some boxes and a trunk in the poop of a vessel, but did not count the boxes, or notice the name of the vessel, or know any of the officers of the vessel, or whether she was English or American, or what was her name, or where she was bound, or where the boxes were going. He admits that he wrote to Albreu, while in Matanzas—don't recollect what he wrote about—but surmises that the letter in evidence refers to the boxes he saw on the brig. The letter, both body and signature, he says, looks like his handwriting, and he won't say he didn't write it, but he has no recollection of having signed it, and has now no belief as to whether he wrote it or not. Such an explanation of such a letter tends strongly to discredit the evidence of the master giving it, who, it should be remarked, admits that he was engaged in assisting Albreu to smuggle, and being part owner of the vessel here proceeded against, and personally involved in the charge made by the government, is greatly interested in the event of the prosecution.

It is hardly conceivable that a smuggler who had arranged to smuggle a large amount of property in this unknown brig, would deliberately, and without any apparent necessity, provide for a knowledge of the fraud by a third person, bound to New York, and competent to convey information to the officers, and to prove the fraud against him.

It is improbable that Downey, himself a ship-master, would not know the name, or nationality, or destination, of a vessel lying in shore at Matanzas, where he was also loading, and on board of which he claims to have gone to see as to the shipment of some $5,000 of property.

It is difficult to explain the failure to produce the testimony of the man whom Downey says went with him, and who, for anything that appears, could have been found and examined as a witness. It is hard to understand how Downey came to write to Albreu that twenty-two boxes were all on board safe, if, as he swears, he never counted the boxes he saw on the brig. If it be true, as he says, that he never knew (not that he has forgotten) on what vessel the boxes were, nor how many there were, nor where they were bound, nor the name of the master who took them, why do so vain a thing as to see them at all, or why write to Albreu at all? And why regret that they were so hided as to be easily distinguished, or why think that they would be all right?

The offering of an explanation so unsatisfactory is of itself a strong ground of suspicion, and, with the other facts proved, has convinced me that the statement of Albreu is substantially correct, and that the John Griffin was the vessel referred to in the letter as having the cigars on board. In arriving at this conclusion, I have not overlooked the testimony of the two mates, the cook, and the stevedore who discharged the bark, all of whom, with more or less particularity, deny any knowledge that these cigars were ever on board the vessel; but, as has too often happened in cases of a similar character (see Nelson v. U. S. [Case No. 10,116]; also, The Struggle, 9 Cranch [13 U. S.] 74), the positive statements of persons composing the crew are overborne by the surrounding circumstances, proved by testimony more reliable.

The further evidence of the custom-house inspector, who was charged with the duty of inspecting the discharge of the bark, has also been introduced by the claimants, showing that he saw no such merchandize as those twenty-two boxes landed from this vessel, or on board of her; but, at the same time, he says, that, although he inspected her discharge, in the ordinary way of inspecting such cargoes, he was not present much of the time, and that all he really knows is, that he saw some sugar on board of her, and, at night, saw some sugar on the dock by her. For aught that he saw, a much larger quantity of merchandize could have been landed without detection. It would, certainly, appear to be desirable that the revenue laws, and their administration, should be such as would enable the government to have some accurate knowledge as to what cargo is actually landed from vessels arriving from foreign ports, but the government assumes no obligations toward shipowners to prevent fraudulent discharges of cargo, and the liability of the vessel is the same, whether the officers of the customs do or do not prevent the illegal landing of cargo.

It is only necessary to add that the other

owners of this vessel have placed themselves upon the stand, and show that they had no knowledge of the landing of any such cigars, and received no freight from the transportation of any such merchandize on the voyage in question, which evidence, while it absolves them from complicity with their master, is not inconsistent with his guilt. My conclusion, therefore, is, that upon the evidence as it stands, it must be held that these cigars were transported from Matanzas to New York in the bark John Griffin, and illegally landed, from the vessel, without a permit, and being of a value exceeding $400, the vessel thereby becomes forfeited to the United States. Let a decree be entered accordingly.

[NOTE. This decree was reversed by the circuit court (case not reported), and the United States appealed to the supreme court, which reversed the decree of the circuit court in an opinion by Mr. Justice Miller. 15 Wall. (82 U. S.) 29. It was held that the case made amounted to something more than probable cause, throwing the onus probandi on the claimant of the vessel. Act March 2, 1799, § 71. Being a clear prima facie case for the government, it required, both by the statutes and the ordinary rules of evidence, such testimony on the part of the claimant as should satisfactorily rebut the presumption of guilt which it raised.]

## Case No. 7,349.

The JOHN H. ABEEL.

[4 Ben. 58.] [1]

District Court, S. D. New York. Feb., 1870.

COLLISION IN EAST RIVER — LOOKOUT — VESSEL FREE AND VESSEL CLOSE HAULED—PLEADING.

1. The sloop Sarah B. Walton was beating up the East river, close hauled on her starboard tack, the wind being to the northward and eastward. The sloop John H. Abeel was coming down the river, having the wind free, and, not having a careful lookout, failed to see the Walton or take measures to avoid her. The Walton, seeing that the Abeel did nothing, undertook to go about but missed stays and fell off before the wind, so as to receive a glancing blow on her starboard bow. *Held*, that the collision was caused by the failure of the Abeel to keep a lookout and that the Walton was not in fault.

2. The libel of the Walton was not faulty in failing to set up her attempt to tack and her missing stays.

3. The fact alleged by the Abeel, that the Walton had a defective tiller which caused her to miss stays, might have been important, if the Walton had been seen from the Abeel, but was no defence under the circumstances.

In admiralty.

Benedict & Benedict, for libellant.

W. R. Beebe and W. J. Haskett, for claimant.

BLATCHFORD, District Judge. This is a libel filed by the owner of the sloop Sarah B. Walton, against the sloop John H. Abeel, to recover for the damages caused to the former vessel by a collision which occurred between the two vessels on the 1st of April, 1868, in the East river, between the island called the North Brother and the island called the South Brother. The Walton was beating up the river, the wind being to the northward and eastward. The Abeel was going towards New York and had the wind free. The Abeel struck the starboard bow of the Walton, and carried away her bowsprit and did other damage. The Walton being close hauled on the wind and the Abeel having the wind free, it is not disputed that it was the duty of the Abeel to keep clear of the Walton, and the general duty of the Walton to keep her course. The defence is, that, when the Walton was on her starboard tack, and was about in the middle of the channel between the two islands, and the Abeel was off the starboard bow of the Walton, the Walton undertook to go about and missed stays, and then fell off and came into the way of the Abeel, and that the collision was caused by this improper manoeuvre on the part of the Walton. Undoubtedly, if the attempt of the Walton to go about was a change of course which caused the collision, the Walton was in fault. While, by article 12 of the Rules, it was the duty of the Abeel to avoid the Walton, it was equally, by article 18, the duty of the Walton to keep her course and not embarrass the movements of the Abeel. But, by article 19, it is provided, that, in obeying and construing such rules, due regard must be had to any special circumstances which may exist in any particular case rendering a departure from the rules necessary in order to avoid immediate danger. It is established, by the proofs, that the Walton did not undertake to go about until she saw that the Abeel was taking no measures to go under her stern. The Abeel ought to have starboarded and given way to the Walton, and allowed the Walton to keep her course and run out her tack. Instead of that, it is plain that there was no proper lookout kept on the Abeel. No notice was taken by her of the Walton's approach. The Walton, seeing that the Abeel was coming on without starboarding, undertook to go about with a view of letting the Abeel pass in safety, at a time when a collision was inevitable, if the Walton had kept on, and when, by keeping on, the Walton would have been struck square on her starboard side. Under those circumstances, it was not a fault contributing to the collision for the Walton to go about. She changed her course in order to avoid the immediate danger which she had been thrown into by the persistent refusal of the Abeel to give way. If the Walton had not missed stays there would probably have been no collision. On missing stays, the Walton did the next best thing she could do. She fell off before the wind, so as to receive a glancing instead of a square blow. But the approach of the Walton and her attempt to tack and her missing stays were wholly unobserved by any person on board of the Abeel. The ma-

[1] [Reported by Robert D. Benedict, Esq., and here reprinted by permission.]

noeuvres of the Walton in no manner controlled or embarrassed or modified any movement on the part of the Abeel. It was not until after the Walton had missed stays, and until she was falling off before the wind, that she was discovered by the Abeel. Then the Abeel luffed up sharp, but it was too late. The collision was owing to gross negligence on the part of the Abeel, in not keeping a proper lookout. It is claimed that she had four persons forward at the time. This makes the matter so much the worse. One of those persons, Roberts, says, that he was forward and had been there about an hour, and that the captain, the steward, and another man were there with him. Yet Roberts says, that he did not see the Walton attempt to tack or miss stays. The captain says, that he did not see the Walton before the Abeel hit her. The other two persons were not produced as witnesses. A worse case of reckless inefficiency rarely occurs.

An objection is taken to the libel, because it does not aver that the Walton attempted to tack and missed stays. The libel alleges, that the Walton was beating, that the wind was east, that the Abeel had the wind free, and that the collision was caused by the carelessness and negligence of those on board of and in charge of the Abeel, in not keeping a proper lookout as required by law, and in not avoiding the Walton, as she was bound to do. The attempt to tack by the Walton and her missing stays are set up in the answer as the sole cause of the collision. It was for the claimant to set up, in his answer, as he has done, the alleged change of course on the part of the Walton, as causing the collision; and the averments in the libel are sufficient.

The fact relied on by the defence, that the Walton, by reason of some pieces that had been put upon her bottom, and by reason of the description of tiller she had in use at the time, could not come about as readily as if she had had different appliances, is of no consequence. This fact might have been important, if the Abeel had been trying to avoid the Walton, and been embarrassed, in doing so, by the movements of the Walton. There must be a decree for the libellant, with a reference to a commissioner to ascertain the damages.

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JOHN HART, The (STANNARD v.). See Case No. 13,290.

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## Case No. 7,350.

### The JOHN HENRY.

[3 Ware, 264.] [1]

District Court, D. Maine. Dec., 1860.

COLLISION—MUTUAL FAULT—DAMAGES.

1. If two vessels come in collision, with faults on both sides, or the fault is inscrutable, the damage is divided between them, by the maritime law.

[Cited in The Worthington and Davis, 19 Fed. 839; The Max Morris, 28 Fed. 884.]

2. At common law, where the plaintiff can recover only on the strength of his own title, and not on that of the weakness of his adversary, his complaint is rejected, if the collision is traced in part to his own fault.

In admiralty.

Mr. Cushing, for libellants.

Mr. Shepley, for respondents.

WARE, District Judge. The ship John Henry, of Bath, J. Carver, master, of about 550 tons burthen, sailed from that port for Savannah on the 10th of August last, on a south-west course, and about the same time, the schooner Wm. A. Richardson, J. Bailey, master, of 170 tons burthen, sailed from Newburyport for Porto Rico on a course S. E. by south, half east. They were sailing on converging lines, and on the 15th, and between nine and ten in the morning, came in sight of each other nearly abreast at about one mile or three-fourths of a mile distant, in latitude 41, 34 north, and longitude 69, 01 west. There had been a heavy fog during the night, which partially cleared away in the morning; and the wind being northeast, blowing a breeze, of between six and eight knots an hour abaft the beam of each, both had a fair wind. If they continued their course there would be manifest danger of a collision. The ship, having the wind, luffed into a course about south and the schooner bore away into the same. Both continued on that course for some time, but how long is uncertain, and there is some uncertainty, at least the counsel are not agreed, whether at this time they came within speaking distance. The ship then luffed more into the wind, and the schooner bore away more, but the latter soon came into her south course, while the ship hauled to the wind longer; but after, gradually wore around, and consequently must have come into a course nearly parallel with the schooner. Exactly how long they continued this course is uncertain. Either when they first met or at this time the schooner hailed the ship. She continuing to luff and the schooner continuing her southerly course without changing it, or coming more into the wind, as the testimony from the schooner is, the vessels thus came in collision, so that the larboard bow of the ship struck the larboard quarter of the schooner at an acute angle, cutting her down in such a manner that in a short time she filled with water. The crew of the schooner were saved on board the ship, and her wreck, two or three days afterwards, was taken up by another vessel and towed into another port and there sold for salvage. For this collision thus taking place in open day, with sea room enough, a fair wind for both vessels and a moderate breeze, the parties have two theories. The first, that of the schooner, is that she, after for a short time

[1] [Reported by George F. Emery, Esq.]

bearing away before the wind, hauled into a course due south, and steadily kept that without change, while the ship, after luffing for a time, came down before the wind and struck her while sailing in that course. It is admitted that the man at the schooner's wheel left a moment before the collision, which would have made it haul more into the wind. But this was when a collision became inevitable and could not have led to it. Exactly how long a time intervened between the vessels' first coming in sight, and that of the collision, cannot be ascertained, but from the testimony and the admitted facts it must have been as much as fifteen minutes.

To this theory the counsel for respondent objects that the acknowledged facts are irreconcilable with it. The schooner sailing on nearly a right line due south, the ship luffing into the wind and then coming down on this line, must have sailed in a curved line and had a longer distance than the schooner. If they sailed nearly equally, the schooner must have been ahead sufficiently to have allowed another vessel to pass under her stern. It is an admitted fact that the schooner, with a free wind, out-sailed the ship, and from all the testimony as well as the undisputed facts in the case, that she sailed about as fast under the lee of the ship's sails, when on a course nearly parallel. As this continued about fifteen minutes and the schooner was running about seven miles an hour, allowing for the ship making a circuitous course, she must have been nearly a quarter of a mile ahead. They must, therefore, have met in a point between the two courses in endeavoring to pass each other's tracks. Both parties have illustrated the theories by diagrams, but I can see no sufficient answer to this argument. It rests on certainties, and my opinion is that the vessels met in endeavoring to cross each other's track. If this be so, the ship must have borne away before the wind and the schooner have luffed into it too soon, and there have been faults, or error of judgment, on one side or the other or both. It becomes important, therefore, to determine in whom it lay; for an error of judgment is imputed as a fault. The direct testimony is, of necessity, confined to the two vessels, and if that be followed on either side exclusively, this might not be difficult, as each would naturally endeavor to throw the blame on the other. Accordingly, on the side of the schooner, it is said, that while she kept her course due south, the ship, in endeavoring to cross her track by coming under her stern, bore away too soon. But as from all the evidence the vessels sailed at nearly the same rate, if the schooner had kept steadily her course of due south, she must have been, at this time, sailing at the rate of six or seven miles, more than her length in advance, while the ship was crossing down from more than speaking distance. They could not have met without the schooner changing her course, nor could they have met without the ship changing. The only place they could have come together was in the space between the two. And this agrees with the testimony of both sides when compared. For while on the one the witnesses say that the schooner luffed to run across the ship's bows, on the other it is said that the ship bore away to come under the schooner's stern.

In this state of the case the cause of the collision may have been an error of judgment on the one side or the other or on both, or from the testimony, which is all we have for our guide, the cause may be uncertain. That two vessels meeting in the open sea, in broad daylight, with a moderate and fair wind for both, and both equally bound and desirous to keep out of the other's way, cannot come into collision without errors somewhere, is clear. An eye witness, seeing the manoeuvres of both vessels from a point out of danger, might see where the fault lay, and would give a more impartial, if not sounder judgment than could be obtained from either of the vessels in danger. But this is not our situation. We can form our opinions only from the evidence, and the witnesses on each side clear their own vessel and charge the blame on the other, and on each side the witnesses are equally credible. The only conclusion that I can extract from this conflict of testimony is, that there were errors of judgment on both sides, and this antecedent to all evidence is the most probable solution. If this was not the case, the fault is inscrutable. In the hurry, excitement, and perturbation of the moment, either, not knowing what the manoeuvre of the other might be, without an impeachment of his intention, might make a mistake. In either of these cases, of faults on both sides or the fault inscrutable, the rule of the maritime law is the same, the damage done shall be divided equally between the two. The rule of the common law, as is, I think, correctly stated by Lord Campbell, is different. Dowell v. General Steam Nav. Co., 32 Eng. Law & Eq. 158. The plaintiff can recover only on the strength of his own title and not on the weakness of that of his adversary. That law had its foundations laid in an early age, when witnesses and parties were more unscrupulous than in this, when the lessons of experience are better understood, had a great fear of injustice on the part of prosecutors and a particular dread of the slippery conscience of witnesses. It required, therefore, of the plaintiff to come with clean hands, and it would be a conclusive objection to him that the injury was caused in part by his own fault. The maritime law which seeks less logical consistency than substantial justice, and is governed in part also by the general interest of commerce on the high seas, when there are faults on both sides, or the fault is inscrutable, divides the loss between the parties. The Catharine

v. Dickinson, 17 How. [58 U. S.] 173; 1 Pears. Mar. Law, 122. The decree will therefore be, that the whole damages to both vessels be put into one mass and equally divided between them. A court of admiralty has full jurisdiction over costs, either to give, divide, or refuse them altogether, and has sometimes gone so far as to throw them on the prevailing party, when he has evidently sought the litigation. But in the present case I can see no sufficient reason for departing from the common rule. The costs will therefore follow the damages, and the amount of these will be referred to a commissioner to report.

## Case No. 7,351.

The JOHN H. STARIN.

[9 Ben. 331.] [1]

District Court, S. D. New York. Feb., 1878.

PRACTICE IN ADMIRALTY—EVIDENCE TAKEN IN FORMER SUIT.

Two suits in rem, in admiralty, were brought against the same vessel for a collision—one by the owners of a schooner, and the other by the master of the schooner in behalf of the owners of her cargo. The libellant in the latter suit moved for an order that he be allowed to read in evidence against the claimants in that suit a deposition which had been taken on behalf of the libellants in the former suit. *Held*, that the motion must be denied.

These were two suits in rem, in admiralty, against the same steamboat, for a collision—one brought by the owners of a schooner, and the other brought by the master of the schooner on behalf of the owners of her cargo. The libellant in the latter suit moved for an order that he be allowed to read in evidence against the claimants in that suit a deposition which had been taken on behalf of the libellants in the former suit.

W. W. Goodrich, for the motion.

R. D. Benedict, opposed.

BLATCHFORD, District Judge. No case is cited where an application to allow the reading in one case of a deposition taken in another case has been granted, unless the parties to the two cases were the same. That was so in Grunninger v. Philpot [Case No. 5,853]. In the present case the parties are not the same. In the one suit, the owners of the schooner sue for the damages they sustained by the collision; in the other suit, the master of the schooner sues to recover for the damages sustained by the owners of the cargo by the collision. The causes of action are different, although both grow out of the same collision. In Grunninger v. Philpot the causes of action were the same. Even if the parties and the causes of action were the same, as in Brewer v. Caldwell [Id. 1,848], I should feel bound to regard the decision in that case as a controlling one.

Certainly, the claimant in the second suit would have no right to read, as against the libellant in that suit, depositions which such claimant had, as claimant in the first suit, taken in that suit against the libellants therein. The right ought to be reciprocal, in any rule on the subject. The motion is denied.

[1] [Reported by Robert D. Benedict, Esq., and Benj. Lincoln Benedict, Esq., and here reprinted by permission.]

## Case No. 7,352.

The JOHN JAY.

[3 Blatchf. 67; [1] 30 Hunt, Mer. Mag. 199; N. Y. Times, Oct. 10, 1853.]

Circuit Court, S. D. New York. Oct. 8, 1853. [2]

PLEADING IN ADMIRALTY—AMENDMENT OF LIBEL ON APPEAL—JURISDICTION.

1. On an appeal from a decree of the district court dismissing a libel in rem for the foreclosure of a mortgage on a vessel, this court will not permit the libel to be amended so as to convert the suit into an action to recover possession of the vessel.

[Cited in Reed v. Crowley, Case No. 11,644.]

2. The courts of admiralty of the United States have no jurisdiction of a suit, where the subject matter in controversy is simply the title to, or right of property in a vessel, and where the suit is brought to recover the possession.

[Cited in The Amelia, Case No. 275; The G. Reusens, 23 Fed. 404.]

[See note at end of case.]

3. Nor have those courts any jurisdiction of a suit in rem for the foreclosure of a mortgage on a vessel.

[See note at end of case.]

[Appeal from the district court of the United States for the Southern district of New York.]

This was a libel in rem, filed in the district court, to foreclose a mortgage, given by the purchaser of the steamboat John Jay, to secure the consideration money. The sale was absolute, and the transfer was duly recorded in the office of the collector and enrolled in the name of the vendee. The mortgage was given back at the time of the execution of the bill of sale, and provided for the payment of the purchase money by instalments, some of which had become due previous to the commencement of the suit. The libel set out the mortgage and the default in payment, and concluded with a prayer for a decree that the purchase money be paid, or the ship be condemned to pay the same. The claimant [George Logan] claimed under the vendee and mortgagor. The district court dismissed the libel for want of jurisdiction, holding, that the admiralty court possessed no power to entertain proceedings for the foreclosure of a mortgage. [Case No. 1,597.] The libellants appealed to this court from that decision, and also made a motion here for leave to amend the libel, so as to change the character of the proceeding from a suit to foreclose a mortgage, to a possessory action to recover posses-

[1] [Reported by Samuel Blatchford, Esq., and here reprinted by permission.]

[2] [Affirming Case No. 1,597. Decree of the circuit court affirmed in 17 How. (58 U. S.) 399.]

sion of the vessel, on the ground of the general principle, that, in the case of a default in the payment of a personal mortgage, the title becomes absolute in the mortgagee.

Charles Jones, for libellant.
George F. Betts, for claimant.

NELSON, Circuit Justice. The amendment sought goes to the gravamen of the matters in controversy, and introduces a new and different subject of litigation from that put forth and contested in the court below. It is probable, from the liberality with which amendments in pleadings are allowed in courts of original jurisdiction, that if this application had been made to that court, it might have been granted on some terms. But, even there, I apprehend, it would have been the exercise of very considerable indulgence to have allowed it. But, be that as it may, it is clear that I have no authority, in this court, to make the amendment; for, to make it, and entertain the suit, would obviously be, in effect, to assume, not appellate, but original cognizance of the subject matter of the litigation. The questions of the title to, or right of property in the vessel, or of the right to the possession of it, all of which would become involved in the controversy, if the amendment be made, have never been before the court below, and, of course, have never been passed upon by it. In hearing the case, therefore, this court would not be sitting as an appellate court. The amendment to the libel allowed by the appellate court in the case of Houseman v. The North Carolina, 15 Pet. [40 U. S.] 40, and which was held to be error, was much less effectual in changing the subject of the litigation, than the one proposed in this case. Upon this ground, therefore; the motion must be denied.

There is, also, another difficulty in the way of allowing the amendment. As I am at present advised, its allowance would not remove the objection to the jurisdiction. I am not aware of any case, or of any settled practice or usage of the courts of admiralty in this country, affirming the jurisdiction of those courts in cases where the title to, or right of property in vessels, simply, has been in dispute, and where the proceedings have been instituted to recover the possession, except between part owners; and I shall not be the first to set the precedent. The appropriate remedy is at common law, in an action of trover, or replevin, where, in the latter action, if the party seeks to obtain the possession in the first instance, he must give security for the return of the property, with damages for its detention in case he fails. Though the remedy is summary, and enables the person claiming the title to get immediate possession of the property, yet the rights of the adverse party are protected. But the proceeding in admiralty in a case where the title to a vessel, or the right to its possession, simply, is in dispute, and where the vessel is seized in the first instance, and taken out of the possession of the adverse party, is harsh, and may frequently lead to abuse. [There was an instance before us at this session, involving a case of grievous wrong, in which the rightful owner was deprived of the possession and use of the ship, and is still, and where the libellant was a man of straw, and the owner of course remediless as to the loss of the use of the vessel, besides the heavy expenses incurred in the custody and care of it pending the litigation. We refer to Erlen v. The Brewer [Case No. 4,519a.] [3] The jurisdiction in question was not exercised by the high court of admiralty in England, till it was conferred upon it by the late act of parliament of 3 & 4 Vict. c. 65. The John, 2 Hagg. Adm. 305; The Fruit Preserver, Id. 181; The Warrior, 2 Dod. 288; and see the cases collected in Leland v. The Medora [Case No. 8,237]. There is some conflict in the cases on this subject in the English admiralty, but the weight of them is against the jurisdiction. The act of parliament conferring it contains several regulations providing means possessed by the courts of common law and equity, of arriving at the truth and justice of the case; and, among others, the court is empowered to award issues of fact to be tried before the common law courts. I do not see that there is any thing in the question of the mere title to, or right of property in a vessel, beyond what there is in the case of any other article of personal property, that should make it the subject of admiralty jurisdiction. The dispute between part owners of a vessel about her employment is a very different matter. So is the exercise of the power to dispossess a master who has become disloyal to his owners; and such like cases. No doubt, the title to a vessel may frequently come, collaterally, in question, in cases where the subject matter in dispute is clearly within the admiralty jurisdiction. But I am speaking of cases where the subject matter of controversy is simply the title to, or property in the vessel, or the right to her possession, disconnected from matters that are confessedly within admiralty cognizance.

As I have looked into the whole of this case, and concur with the court below that it had no jurisdiction, I may as well dispose of the case finally, and shall therefore affirm the decree below, leaving the party to go before the proper tribunal at law, for redress.

[NOTE. The libellants appealed. The supreme court, in an opinion delivered by Mr. Justice Wayne, affirmed the decree of the circuit court. Mr. Justice Wayne passed over the questions of pleading made in the case, and confined himself "to the inquiry whether or not a court of admiralty has jurisdiction to decree the sale of a ship for an unpaid mortgage, or can, on that account, declare a ship to be the property of the mortgagees, and direct the possession of her to be given to them," and held that while courts of admiralty have always taken the same view of a mortgage of a ship, and of the remedies for the enforcement of them, that courts of chancery have done of such a mortgage, and

[3] [From N. Y. Times, Oct. 10, 1853.]

of any other mortgaged chattel, they have never, in this country, taken jurisdiction of such a contract to enforce its payment, or by a possessory action to try the title or a right to the possession of a ship. 17 How. (58 U. S.) 399.]

## Case No. 7,353.

The JOHN J. WILTSIE.

[3 Ben. 251.] [1]

District Court, S. D. New York. May, 1869.

MASTER—FAILURE TO EXHIBIT ENROLMENT.

Where a canal-boat was not enrolled or licensed, and had no documents, *held*, that the failure of the master to exhibit such enrolment or license when demanded, did not subject the vessel to the penalty provided by the 13th section of the act of February 18, 1793 (1 Stat. 309).

This was an information, filed in behalf of the United States against a canal-boat, to recover a penalty for the failure of her master to exhibit to the proper officer of the revenue an enrolment or license, when demanded. It was admitted that the vessel had not taken out any enrolment or license, and that the master could not exhibit any enrolment or license, when the demand was made.

E. Pierrepont, Dist. Atty., for the United States.

O. Frisbie, for claimants.

BLATCHFORD, District Judge. As it is admitted, in this case, that the canal-boat was not enrolled or licensed, and had no documents to exhibit to the officer, there was no violation of the thirteenth section of the act of February 18, 1793 (1 Stat. 309), on the part of the master of the boat, in not exhibiting an enrolment or license to the proper officer. The information does not allege that the vessel was enrolled or licensed, nor does it allege that the vessel was not enrolled or licensed. It merely alleges that the vessel was required to be enrolled and licensed, and that there was a violation of the said thirteenth section, by the neglect and refusal of the master to exhibit the enrolment and license of the vessel. The thirteenth section was intended to inflict a penalty only for the failure of the master of the vessel to exhibit the enrolment or license of the vessel, when required to do so, provided the vessel had taken out, in fact, an enrolment or license. The section provides, "that it shall be lawful, at all times, for any officer concerned in the collection of the revenue, to inspect the enrolment or license of any ship or vessel, and, if the master of any such ship or vessel shall not exhibit the same, when thereunto required by such officer, he shall pay one hundred dollars." By the provisions of the eighth section of the act of July 18, 1866 (14 Stat. 180), where the master of a vessel is subject to a penalty for a violation of the revenue laws, the vessel is holden for the payment of the penalty, and may be seized and libelled therefor. A failure to exhibit an enrolment or a license, under the thirteenth section of the act of 1793, presupposes that the document has been taken out by the vessel. The penalties for trading with a vessel without her being enrolled and licensed, are inflicted by the sixth section of the act. There are no allegations in the information founded on any violation of that section. The information is dismissed.

[1] [Reported by Robert D. Benedict, Esq., and here reprinted by permission.]

## Case No. 7,354.

JOHN KYLE STEAMBOAT CO. v. NEW ORLEANS.

N. U. PACKET CO. v. SAME.

[23 Int. Rev. Rec. 19; 9 Chi. Leg. News, 124.]

Circuit Court, D. Louisiana. 1876.

WHARFAGE TAX — UNCONSTITUTIONAL — WHEN A TAX PAID UNDER VOID LAW MAY BE RECOVERED BACK.

This was an action brought to recover money paid by the plaintiffs as wharfage tax to the city of New Orleans. The court charged the jury that the supreme court of the state had held that where the nullity of a tax arose from its conflicting with the constitution of the state, that then there was a natural obligation to pay that void tax, but since this objection comes from the fact that the ordinance was in conflict with the constitution of the United States, the courts of the United States are not bound by what the state courts think as a natural obligation, which arose from such void act, and therefore the court will not follow the state decision, but instructs the jury that the money may be recovered back.

In admiralty.

James H. Davidson and Hornor & Benedict, for plaintiffs.

B. F. Jonas, for defendant.

BILLINGS, District Judge (charging jury). These are actions brought against the city to recover money paid under an ordinance which the supreme court of the United States has decided was contrary to the constitution of the United States, and was therefore void and of no effect. The constitution of the United States provides, continued Judge Billings, that no state shall pass any law which imposes a tonnage tax on vessels. The object of that provision was that all matters pertaining to the levying of such duties upon vessels should be put in the power of congress. The ordinance of the city to levy the tax (which was read), remains in force practically quite a number of years. There is very little—indeed I do not know there is any—fact that you gentlemen can pass upon in this case. It is admitted by the defendants, and in fact agreed

to by both sides, that the amounts paid under the ordinance was in the first case $4,954, and in the second, $4,147.34, so that there is no question about the amount, and the only question is, as to what conclusion between the parties you are to arrive at upon these conceded facts. The defence or defences that are interposed here are purely questions of law, and I wish to say that in this court your duty is entirely different with regard to your view of the law from what it is in the state courts. In the state courts of Louisiana the method of review is by appeal, which takes up all the evidence. In the supreme court of the United States the method of review is by writ of error, in which case it takes up nothing but the errors in law, and it is my duty to declare to you the law as I believe it, and it is your duty to accept what the court says implicitly, and if I am wrong, the parties have a method of reviewing by bill of exceptions or writ of error. Whatever I have said to you was law, but if on the other hand, you should not take the law from the court, they would have no way of knowing that it is an error of law or fact, because the supreme court of the United States, in common law actions, do not have the facts before them, except as far as they appear from the pleadings and bills of exception, therefore I instruct you to take the law from the court.

The court is requested to charge for the defendants: (1) "That the plaintiffs cannot recover the amounts paid by them if a natural obligation had existed in favor of the city." I give you that charge, because the Code expressly says that if a party pays through error of law, money, that he shall not recover it, if there was any natural obligation for it to be paid. But while I give that charge to you, I will add to it that in this case, since the supreme court of the United States have decided that this ordinance was void, and that there was no natural obligation on the part of those plaintiffs to pay this tonnage tax, for the reason that a void law is no law. Now, if this was a case that arose under the constitution of the state of Louisiana, I should be very seriously embarrassed by a decision which the supreme court of the state of Louisiana have rendered, because they have held that where the nullity of a tax arose from its conflicting with the constitution of the state of Louisiana, that then there was a natural obligation to pay that void tax, but since this objection comes from the fact that the ordinance was in conflict with the constitution of the United States, the courts of the United States are not bound by what the state courts think as a natural obligation which arose from such void act, therefore I shall not follow the decision which the able counsel for the city called my attention to recently in the Twenty-Third Annual. There is no doubt but that the supreme court of Louisiana decided that this tax upon the insurance companies, although it was void, it not being uniform, nevertheless, the insurance companies were under a natural obligation to pay. I differ from that. This is not a case where that decision binds me. It is not any decision construed by any statute of the state, but is a decision which gives their conclusion as to what would follow in the case of void laws, and therefore I charge you that a natural obligation would support this claim, but that there is no natural obligation here. Should you find that this money was paid under this ordinance, I do not understand there is any question about that.

(2) "The plaintiffs cannot recover if they paid voluntarily, without duress or compulsion." I refuse to give you that charge. It seems to me that if any one man pays the city government money which he supposes due when it was not due, that that is just the case contemplated by the Code when it says that in case of error he may recover it back. Therefore I refuse that charge.

(3) "That all amounts paid by them over three years from the beginning of this suit, is barred by prescription." I refuse to charge that.

(4) "The allegations of the petition being that said money was collected illegally by duress and compulsion, then the whole claim is barred by the prescription of one year as a quasi offence." That is a question of law which has been given by the court. I have given the best examination that I could to it, and shall rule upon it, subject to the parties against whom my ruling is, to make his application for a new trial before me, when I will hear them very fully. It seemed to me yesterday that that objection was a valid one, that it was a quasi offence, but the more I have examined it, the more I doubt. The language of the Code is, that the action that is prescribed springing up by a quasi offence shall be an action for damages resulting from the quasi offence, and I find that this action, which is for money paid, is really an action for damages. It is in one sense an action for damages, but I very much doubt it is such an action for damages as that article of the Code contemplates. Then the pleadings here are very peculiar. The substance of this petition of the plaintiff's is for money had and received —money paid in error, but he puts in one expression, that it was paid under duress. Now, ordinarily there is no doubt of the principle that the plaintiff is bound by his own petition as far as the cause of action goes, its characteristics and consequences that flow from it; but in this case there is one pleading put in by the defendant, and that is an anomaly. I think he has pleaded, first, a general denial; and secondly, he pleads among other things that these amounts, if ever paid, were paid willingly and without duress, and then he proceeds in the same answer, to plead that the claim

of the plaintiffs is barred by prescription. Now it seems to me that holding this plea before the court, he is at least bound by the whole of it, and that if he has seen fit to put in a special plea here along with his plea of prescription, he must take both together. and he denies there was any duress; therefore I charge you that if you find this money was paid, although it was more than a year, or more than three years, I say to you that the plea of prescription, as set up in this answer, cannot be sustained, even if you could find that the money was paid more than one or three years ago. That would not discharge the defendants. I do not see, then, that you have anything to consider excepting the amounts paid and the times they were paid, because, although I do not think that the parties would be entitled to interest until judicial demand; but you will have to look and see from the admission how much is conceded here, as it was by agreement it was paid. Then it seems to me if you find that the amounts stated were paid under the allegations in these pleadings, it is your duty to find a verdict for the plaintiffs in each case for that amount, leaving the questions of law to be determined by the court. I will now add to what I have already stated to you in the third charge, and charge you that a natural obligation to pay, even where the payment was in error, would prevent a party from having the right to pay it back, but I will state to you that in this case the payment (as I understand it to be conceded), was under this ordinance, which was entirely void.

The counsel for the city asks me to leave all questions of fact to you. That is eminently proper, but do not allow yourselves to get confused by that expression, because I do not see in this case any room for difference as to what the facts are. But now I say that you have heard the evidence and admissions, and if you find as a fact that the money was paid by the agents of these steamboat companies under this ordinance which has been read to you, and which the court tells you the supreme court of the United States have decided to be void, and of no effect, and which this court declares of no effect; if you find as a fact that this money was paid under that ordinance, there was no natural obligations, and no obligation of any sort on the part of these people to pay. Therefore, if you find that this money was paid under that ordinance, they have a right to recover. There will be a necessity for two verdicts, the two cases being submitted at the same time.

The verdicts in both cases were for plaintiffs.

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JOHN LAND, The (The D. M. HALL v.). See Case No. 3,939.

JOHN LAUGHLIN, The (GRIFFENBERG v.). See Case No. 5,811.

## Case No. 7,355.

The JOHN L. DIMMICK.

[3 Ware, 196;[1] 9 Am. Law Reg. 224.]

District Court, D. Maine. Sept., 1858.

SEAMEN—DOUBLE WAGES — SHORT ALLOWANCE—BREACH OF CONTRACT—OBLIGATIONS OF THE MASTER—LIEN.

1. To entitle seamen to double wages, under the act of congress, July, 1790, c. 29, § 9 [1 Stat. 135], on account of being put on short allowance of provisions, both the conditions mentioned in the act must concur, the vessel must have left her last port with a less amount of provisions than is required by the act, and the crew must have actually been put on short allowance during the voyage.

2. The statute is in its nature a penal law, and is not to be enlarged by construction beyond the natural and obvious meaning of its terms.

3. To bring a case within the statute, the short allowance must be during the passage of the vessel, and before she arrived at her port of destination.

4. When the crew is put on short allowance without necessity, in a case not within the act of congress, there is a wrong in breach of contract, and a remedy will be given by a court of admiralty, in the form of additional wages.

5. It is a well-understood term of contract. that the crew, during the period of their service, shall be furnished with provisions by the owners, sufficient in amount and of a suitable quality; and to refuse such a supply, without necessity, is as much a breach of the contract as to refuse payment of their wages, though this obligation is not expressed in the written or printed contract.

6. When the ship was lying in the bay of Mobile four months, waiting for cargo, and the usual supply of provisions from the ship's store were withheld, the crew being required to furnish themselves, by taking oysters from the oyster-beds, when the state of the weather permitted it to be done, and the supply being insufficient in quantity, they were held to be entitled to additional wages.

7. The daily allowance to seamen, in the merchant service, ought to be equivalent to the navy ration.

8. The general rule of the maritime law is that the ship is liable, in specie, for all the obligations of the master, whether arising ex contractu or ex delicto, resulting from acts done in the exercise and within the proper scope of his authority as master.

In admiralty.

Gen. Fessenden and D. W. Fessenden, for libellant.

Shepley & Dana, for respondents.

WARE, District Judge. This is a libel in rem., claiming extra wages, on the ground of an alleged short allowance of provisions. The libellant shipped on board of the John L. Dimmick, on the sixth of November, 1857, for a voyage from Portland to Mobile, thence to one or more ports in Europe, and thence back to her port of discharge in the United States, for wages at the rate of $18 per month. The ship arrived at Mobile on the 28th of November, and lay there, before proceeding to Havre, till the 7th of May, 1858, about six months. The first week after her ar-

[1] [Reported by George F. Emery, Esq.]

rival, the crew were employed in discharging her outward cargo, and in other work on the vessel; and up to this time we have no complaint of the provisions. After these services were performed, the ship remained lying at anchor in the bay, about fifteen or twenty miles from the city, waiting for freight, until the last days of March, or the first of April, a period of about four months. They were then informed that they would not further have served to them their usual allowance of food from the ship's stores, but they were to live on oysters; and these were to be procured, as it subsequently appeared, by themselves. It seems that these shell-fish are found in great abundance in that bay, and of a superior quality, and are taken with great facility. It is stated by some of the witnesses, that it is not unusual for vessels lying there to be supplied with oysters, in part, at least, instead of ordinary ship fare. From this time, for about four months, and till they began to take in cargo, according to all the libellant's witnesses, their principal food was oysters, with the usual allowance of bread, and a small quantity of flour and potatoes and turnips to cook with them. The crew went themselves, in the ship's boats, to the oyster banks to procure them, and brought them on board to the amount of sixteen or twenty barrels at a time. From this time to about the first of April, when they began to take in cargo, oysters were the staple article of their food, and nearly, if not entirely, the only article of animal food, except when the state of the weather prevented them from obtaining a supply. Then they had the usual ship fare of salted meat served out to them; once, and only once, during the four months, their table was spread with fresh meat. This was at Christmas. For at least two-thirds of the time, if not more, their food, for morning, noon, and night, was oysters, boiled with a little flour and potatoes or turnips. Three or four times during the four months they had beans, and about as many rice. Twice a week they had two small cakes baked for them, of soft bread, a specimen of which was brought into court, and one of them allowed for breakfast and one for dinner, instead of the allowance of ship bread. Most men, unless of a very quiescent temper, would have been dissatisfied with the sameness of this diet; but these men complained most of the insufficient quantity. They had not enough to satisfy the cravings of nature, and some of the witnesses say that not unfrequently they left the table as hungry as they went to it. When, for want of oysters, salt meat was allowed, it was, according to the testimony of the cook and the men, given with a sparing hand, not much exceeding half a pound a day. Twice the men went aft in a body, to complain to the captain. The first time they did not see him, though he was in the cabin. The second time they carried with them their breakfast of oysters, and asked him if he thought it enough. He said no; but if they did not open more, he would have them called at four o'clock, instead of from five to six, the usual hour of rising.

What constitutes a full or short allowance in the merchant service, is not fixed by the law. In the want of such a rule, the courts have thought that it ought to be equivalent to the navy ration. That is fixed at one pound of meat and fourteen ounces of hard bread, with one quarter of an ounce of tea, or one ounce of coffee or cocoa, and an addition of other farinaceous or vegetable food, as rice, peas or beans, or dried fruit. It is a liberal allowance for a hearty, hard-laboring man. If the witnesses of the libellant are to be believed, the allowance to this crew was far below the navy ration. The case of a short allowance is then clearly made out, unless this testimony is overcome by that offered by the claimant. Two witnesses were examined on this point, the mate and the steward. They appeared not unwilling to give a coloring to their testimony favorable to the owners. But when fairly examined, their testimony, I think, leaves the case about where it stands on that for the libellant. The credit of his witnesses is rather confirmed than impaired, and it may be added that they gave their testimony with a degree of coolness, deliberation, and apparent freedom from prejudice and passion, unusual in such cases. It ought, also, not to be forgotten, that during the whole of this four months of short allowance, there was no insubordination; the crew were uniformly obedient and submissive, with no appearance or pretence of even disrespectful language or behavior on their part, except in a single instance towards the mate, which is the subject of another suit now pending in court. There is one part of the mate's testimony that calls for attention, as it serves, if true, to explain and extenuate any complaint of this exclusive diet on oysters. He says that before the crew were put on this diet they were consulted by him, the whole crew being present, and that they unanimously expressed a preference to have oysters rather than fresh meat. In this I think the mate must be mistaken, as all the other witnesses say, including the steward, that they never heard anything of the kind until they heard it from the mate in the court-room.

Upon these facts, the claimant has brought a libel claiming double wages, under the act of congress, of July, 1790, chap. 29, sec. 9, for the period of four months, while the crew were on short allowance. That act provides that every ship or vessel of 150 tons burthen, or more, bound on a voyage across the Atlantic, shall, on leaving her last port, have on board, under deck, 60 gallons of water, 100 pounds of salted flesh meat, and 100 pounds of ship bread, for each and every person on board, besides such other stores as may be put on board by the master or any passengers, and in a like proportion for a

longer or shorter voyage, and in default of this supply, if the crew are put on short allowance during the voyage, the seamen shall be paid double wages for the period of such short allowance. This act appears to me to bear on its face the character of a penal statute. It does not change the nature of the case that the penalty is given to the seamen. It is, therefore, like other penal laws, to receive a strict construction. The two facts of a deficient supply and an actual short allowance are connected in the act by a copulative and not disjunctive word. Both must, therefore, concur to constitute the quasi misdemeanor, which is visited with the penalty. The Childe Harold [Case No. 2,676]; The Mary [Id. 9,191]. The first inquiry then, is, was there a deficient supply on board when the ship sailed? The last port from which she sailed, before the short allowance, was Portland, and her port of destination, Mobile. Now, I think it is satisfactorily shown that the ship on sailing had as large a supply of provisions as the law requires for such a voyage. One of the facts, therefore, does not exist, which is necessary to make up the delinquency. It is true, as argued by the libellant's counsel, that if the provision is withheld from the crew, it is to them, for whose benefit the law was made, the same grievance as if the provisions were not there. Still, in the construction of a penal statute, where the law makes two acts necessary to complete the fault, it is a bold step for a court to say that it shall be completed by one. But, if this were done, there is another difficulty behind, which appears to me to be not easily overcome. The short allowance, to bring the case within the statute, must be during the voyage. Now, when was the voyage ended? Within the meaning of this act of congress, it was, I think, on her arrival at Mobile. A voyage, in the most common and familiar acceptation of the word, is the transit from one place or port to another, and I think that the meaning intended by the law-makers of this law. The object of the legislature in requiring a given amount of provisions, proportionate to the ordinary duration of the passage, was to prevent that terrible calamity, a famine at sea. This is, at least, one of the most common meanings of the word, and is, I think, its meaning in this statute. The short allowance did not commence until one week after the arrival at Mobile, and not until the discharge of her outward cargo. My opinion, therefore, is, that this libel cannot be maintained for the statute penalty. But does it follow that the seaman is without remedy for a great wrong? I think not.

This statute penalty does not, and was not intended to, affect the mutual rights and obligations of the parties resulting from the nature of the contract. What are these within its fair meaning? The seaman engages to render faithfully all the services that pertain to the navigation of the ship, and all those that are naturally or by custom incident to that duty, as the making some slight reparations of the ship in calking or painting the deck or other part of the vessel, which is occasionally required, and, also, in the loading and unloading the cargo, according to the custom of the trade in which she is engaged. But it has never, to my knowledge, been considered an incident to their general duty as mariners to occupy their time, while lying in port, in procuring provisions for the ship's use, either by fishing or otherwise. On the other hand the seamen stipulate for and the owners promise to pay the agreed wages. This stipulation and promise is embodied in the written contract. But there is always implied another stipulation and promise, though not put in writing, that provisions for the board of the crew shall be furnished by the master and owners, and that these shall be served out to them in sufficient amount and of suitable quality. This proviso is just as binding on the owners as the written promise to pay their wages. To withhold from them an adequate supply, or to furnish food that is unwholesome, or of an unsuitable quality, is just as much a fraud in the contract, as it would be to pay them their wages in clipped coin or depreciated bank bills. I am unable to see the ground on which a distinction can be made between one and the other. If it be a manifest wrong and fraud on the contract, it would be a reproach to the law not to furnish a remedy. What difficulties might present themselves in the refined and subtle technicalities of the common law it is unnecessary here to inquire. The wrong is not beyond the remedies of a court, professing, like the admiralty, to decide ex aequo et bono, on enlarged principles of natural equity and the universal justice.

The seamen's contract so obviously includes board that it may be deemed unnecessary to refer to authorities in support of this. But the old sea laws were curiously directory on this as well as on other subjects. The Conselato del Mare (chapter 145) obliges the master to give the seamen meat three times a week, that is Sunday, Tuesday, and Thursday, and wine every morning and afternoon, and to double their rations on festival days. And if during the voyage he is in want of provisions or other necessaries, and if he is without money, the ship is bound. Chapter 239. And it seems that they were purchased on the credit of the ship solely, for if that was lost the creditor lost his debt. But this is a libel in rem against the vessel, and it is argued that even admitting there is a wrong for which the seamen are entitled to a remedy, that it is one for which neither the owners nor the ship are liable; that when the owners have put on board the vessel provisions to the amount and of the quality required, if the master unnecessarily puts the men on short allowance, this is his own personal delinquency, for which he alone is responsible.

The general rule is that the owners are responsible for the acts of the master done in his character of master, and within the scope of his authority as such. "Omnia facta magistri debet prestare qui eum praeposuit" (Dig. 14, I. 1, § 5); "ejus rei nomine cujus ibi praepositus fuerit" (Dig. 14, I. § 7). This is the language of the Roman law, and the word facta, acts, include both the contract and faults or torts of the master committed in the transaction and management of the business within the legitimate range of his authority. For though faults, like crimes, are in their nature personal, and imputable only to the delinquent individual, yet, says the jurisconsult, the exercitor of a ship and the institor of a shop or store is considered as in some measure culpable for employing an unsuitable man for his business. "Aliquatenus culpae reus est, quod opera malorum hominum uteretur, ideo quasi ex maleficio teneri videtur." Dig. 44, VII. 5, § 6; Inst. IV. 5, § 3. The law of France precisely agrees with the Roman law. The 216th article of the Code de Commerce provides that the owners are civilly responsible for the acts of the captain in what relates to the ship or the voyage. "Tout proprietaire est civilement responsible des faits du capitaine pour ce qui est relatif au navire et a l'expedition." And the commentators explain the word faits—acts—as a generic term, which includes des fautes et des engagemens, faults and contracts. Emerig. Contrats a la Grosse, c. 4, § 2, by Boulay Paty. And this is in perfect conformity with the ancient and well-established maritime law of Europe. The Consolato del Mare (chapter 77) provides that the captain shall be liable for any damage done to merchandise by bad storage, and adds, that "in all damages mentioned above, and in all those which shall be mentioned in the chapters of the sea, which the ship ought to pay, the captain is bound for his part, and each part owner for his part. The ship is liable, but has its remedy over against the person who is guilty of the fault."

The law of this country, as to the liability of owners for the acts of the master, as I understand it, is the same as the general maritime law of the world. And it stands on the general principles of the law of agency. The principal is always responsible to third persons for the acts of his agent, for his faults, his acts of misfaisance or nonfaisance, committed in the transactions of the business confided to him, as well as for his own contracts. Story, Ag. § 452. It is, without question, entirely within the scope of the master's authority to direct and regulate the allowance of provisions for the crew. In doing this, he acts strictly within the limits of his powers. If he puts the crew on short allowance during the voyage, and the vessel was not, when she sailed, provided with the required amount of provisions, the act of congress determines the nature and the extent of the indemnity to the crew. They shall be allowed and paid double wages, and the penalty may be recovered with the stipulated wages. The seamen have the same remedies for both against the masters, owners, and the ship. If he puts them on short allowance in a case that does not fall within the statute, as when the vessel has been supplied with the amount of provisions required, or when the vessel is not at sea on the voyage, but lying in port, or if he provides for them food of an unwholesome or unsuitable quality, and that without necessity, it seems to me to be not only an injury to the crew in the nature of a tort or nonfeasance, as it appears to have struck Judge Betts in the case of The Childe Harold [supra], but, also, a plain breach of the well-understood terms of the contract by the authorized agent of the owners, for which they are answerable on the ordinary principle of the law of agency. And as this was an economy practiced by the captain for the benefit of the ship and owners, and at the expense of the crew, it is most equitable that the ship's owners should pay for it. The crew had not only cause to complain of the insufficiency of their allowance, but for being restricted almost exclusively to a single article of animal food, and for part of the time, one or two weeks after the oysters had, from the heat of the weather, become unwholesome, and absolutely unfit for food at all.

I allow, under the circumstances of the case, to the libellant, two months additional wages, one-half the time the crew were on short allowance. Decree $36 damages and costs.

## Case No. 7,356.

The JOHN LOWE.

[2 Ben. 394.] [1]

District Court, E. D. New York. April, 1868.

CLAIM FOR REPAIRS—STALE CLAIM.

Where repairs were furnished in April, 1866, at New Brunswick, N. J., to a canal-boat, whose owner resided at Albany, N. Y.; and no steps were taken to enforce a lien upon the boat for the repairs, until August, 1867, although the vessel was several times at New Brunswick in the intervening period; and where the then owner, after the repairs were made, had mortgaged the boat, and she was sold, under that mortgage, to a bonâ fide purchaser, who claimed her in the suit brought to enforce the material-man's lien: *Held*, that the lien had been lost by the failure of the libellant to enforce it for so long a period.

[Cited in Griswold v. The Nevada, Case No. 5,839; The Sarah J. Weed, Id. 12,350.]

In admiralty.

BENEDICT, District Judge. This action is brought by Lewis H. Hoagland, to enforce an

[1] [Reported by Robert D. Benedict, Esq., and here reprinted by permission.]

alleged lien upon the canal-boat John Lowe, for a bill of repairs furnished to that vessel at the port of New Brunswick, N. J., in April, 1866. It is not disputed that the repairs were done upon the request of the owner who was then master, and that the vessel was a vessel foreign to the port where she was repaired—nor is it contended that they were not necessary. But it is contended, first, that the work was done upon the personal credit of the owner exclusively, and not upon the credit of the vessel, and consequently no lien was created; second, that if a lien did exist, it has been lost by laches.

It is unnecessary to determine the first of these defences, as I am of the opinion that the latter must prevail. It appears that the vessel was an Erie Canal boat, enrolled at New York, and her owner resided at Albany, in this state. At the time of the repairs she was engaged in making a trip through the Raritan Canal, and was at New Brunswick several times after incurring the debt in question. No steps were taken to enforce the lien during that season—nor during the winter—nor until August of the next season. In the spring of 1866, the vessel was mortgaged by her owner to one Griffin, who subsequently, and before the commencement of this action, sold her, under the mortgage, to the present claimant, who is a bonâ fide purchaser for value without notice of the existence of any such outstanding demand.

It also appears that the libellant saw the vessel once certainly in New Brunswick, after the time when the repairs were done, and not since; but it does not appear that any steps were taken by the libellant to find the vessel during the period between her last visit to New Brunswick and the bringing of his suit. When his suit was commenced, the vessel appears to have been found without difficulty, and there is no evidence in the case indicating any effort to keep her out of the way.

Upon such a state of facts, it must be presumed that with proper effort the vessel could have been found at any time, either at the place of her enrollment, or the residence of her owner, or upon the Erie Canal, where she is proved to have been employed after her last visit to New Brunswick.

When the nearness of the latter port to the port of New York is considered, and taking into view the habits of these boats and the nature of their employment, I am of the opinion that, in the absence of special circumstances, and as against a bonâ fide purchaser, the allowing a season to end, a winter to pass, and a new season to begin, without any effort to find the vessel for the purpose of enforcing the lien, should be held to be a waiver of it. A decree must accordingly be made dismissing the libel—but it will be without costs.

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JOHN L. STEPHENS, The (MORRISON v.). See Case No. 9,847.

## Case No. 7,357.

### The JOHN MARTIN.

[2 Abb. U. S. 172.] [1]

District Court, E. D. Michigan. April Term, 1870.

SEAMEN—DESERTION—FORFEITURE OF WAGES.

1. A tug-boat was engaged in towing vessels between Lake Erie and Lake Huron. During a trip, when the tug was off Detroit, the engineer, who was verbally hired by the month, and whose time was not up, demanded to be landed at that place, saying he had a better offer. The master refused, whereupon the engineer left his post of duty and did not return to it. Upon the return of the tug he was put ashore at Detroit. *Held*, that this was a case of desertion, and that the engineer by his conduct had forfeited all wages due to him.

[Followed in The Magnet, Case No. 8,955. Cited in The J. F. Card, 43 Fed. 93.]

[2. Cited in The Balize, Case No. 809, to the point that the court may, in its discretion, alleviate the rigor of the general rule, and, in view of mitigating circumstances, may impose a less penalty than that of entire forfeiture of wages.]

3. A tug, engaged in towing vessels between Lake Erie and Lake Huron, is not a vessel bound to "a port in any other than an adjoining state," or to "any foreign port," within the meaning of section 5 of the act of 1790 (1 Stat. 133),—prescribing the kind of contract to be entered into between master and mariner.

[Cited in Worth v. The Lioness No. 2, 3 Fed. 925.]

4. The term "voyage," as applied to vessels engaged in foreign and inter-state commerce within the meaning of the maritime law, is not applicable to a tug, making short trips from one body of water to another.

5. Section 5 of the act of 1790 (1 Stat. 133), and section 25 of the act of 1856 (11 Stat. 62), relating to the desertion of mariners,—must be construed together as statutes in pari materia. They do not repeal the maritime law of desertion.

6. An offer by an engineer, who has disobeyed orders and deserted, made five or six weeks after such desertion, to return, is not made within a reasonable time.

7. Where the statutory penalty for desertion is invoked, there must be statutory proof; otherwise it is not required.

Hearing upon a libel in admiralty. This was a libel in rem, for wages. The libel alleged that the libelant was hired and shipped in March, 1868, to serve as engineer on board the tug for one hundred dollars per month wages; that he entered into such service on March 16, 1868, and served until September 23, of the same year, and claims a balance due of one hundred and twenty-nine dollars and ninety-six cents. The answer of William Livingstone, Junior, and other claimants, admitted the employment of libelant "on board of said tug as engineer, and at the rate of one hundred dollars per month, as alleged in the first article of said libel;" alleged that the agreement of libelant was to serve the entire season of navigation

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[1] [Reported by Benjamin Vaughan Abbott, Esq., and here reprinted by permission.]

of 1868; denied that libelant well and faithfully performed his duty on board the tug; and denied also that there is due to libelant the balance claimed, or any sum whatever. The answer further alleged disobedience by the libelant of the lawful commands of the master of the tug, and desertion; and claimed damages in loss of time and business in consequence of such disobedience and desertion, in the sum of two hundred dollars, and in the further sum of two hundred and fifty dollars for injuries to the engine of the tug, occasioned by the incompetency of the engineer the owners were obliged to employ for want of a competent one at hand or within their reach to take the place of libelant.

A. Russell, for libelant.
Moore & Griffin, for claimants.

LONGYEAR, District Judge. The proofs as to what the contract was, and in relation to the time of actual service, entirely agree as to the wages per month, and as to when the service commenced and when it ended, and entirely accord with the allegations in the libel. As to what the contract was in relation to the terms of service, whether it was a simple hiring at one hundred dollars per month, indefinite as to the length of time it was to continue, or whether it was a part of the agreement that the libelant should serve the entire season of navigation, as alleged in the answer, the testimony is contradictory.

The proofs upon this point stand entirely upon the unsupported testimony of William Livingstone, Jr., one of the claimants, on the one side, and of the libelant, on the other. Neither is corroborated, and as both stand before the court on an equal footing as to interest and credibility, the testimony of the one exactly balances that of the other. This allegation, therefore, as to length of time libelant was to serve, is not made out, and the contract must stand as set up in the libel: viz: a hiring at one hundred dollars per month, indefinite as to time of service beyond what those terms signify. Those terms signify: 1. A hiring for one month at least. 2. If the service is continued beyond the month without any new agreement, it will be implied that it is at the same wages, and of course for another complete month, and so on from month to month. Such, then, was the agreement.

Under this agreement, libelant served from March 16, 1868, to September 23, 1868, both days inclusive, five months and eight days, which, at one hundred dollars per month, amounts to six hundred and twenty-six dollars and sixty-six cents. Libelant acknowledges the receipt of five hundred and ten dollars, which leaves a balance of one hundred and sixteen dollars and sixty-six cents, which amount, with interest from September 23, 1868, to date of decree, the libelant is entitled to recover, unless he is debarred of the same by the matters set up and proven by the respondents.

It appears in the proofs that the tug did not go into commission until April 21, 1868, a month and six days after the service of libelant commenced; and it is claimed that for that time libelant has no lien for his wages, his claim, if any, being against the owners in person, and not against the tug. There is no allegation in the answer on which to found this claim, and it must therefore be disregarded.

In this view of the question, it is of course unnecessary to consider what would have been its effect if it had been set up. The defense set up is forfeiture of wages, in consequence of disobedience of orders and desertion. It appears that the tug was engaged in towing vessels between Lakes Erie and Huron, and that on September 23, 1868, as the tug was coming down with a tow from Lake Huron, on its way to Lake Erie, as she was approaching Detroit, and some two or three miles distant, libelant came to the master, and asked him if he was going to stop at Detroit, and said he had to get off there, as he had had a better offer. On being told by the master that he should not stop at Detroit, libelant said the boat should not pass Detroit; that he would stop the engine; but did not carry his threat into execution. He and the master had some words. The master called the mate and one of the men as witnesses, and said to libelant, "I want the boat to go through to Lake Erie—stop her at your peril." Then libelant went to his room, and the tug went on with its tow to Lake Erie, the second engineer working the engine. Did not stop at Lake Erie to look for a tow, but came back light, on account of the difficulty with libelant, and landed him at Detroit. Another engineer was found and employed within two or three hours, and the tug went on to Lake Huron, and the next day procured a tow down.

Libelant testifies that one reason of his leaving was, that from March to September he had no change of bed-clothes, and the tug was an old boat. The master and owner both testify, that they never before heard any fault found by libelant with his bed or board on the tug. The only reason he gave for quitting was that he had a better job.

Livingstone testifies that libelant came to him for his pay twice—once next day after he quit, and once some five or six weeks afterwards, and was refused on both occasions, for the reason that he quit as he did. Libelant testifies that when he went for his pay, and was refused, he offered to return to the boat, but does not state on which occasion. Livingstone says it was on the second occasion, and after libelant had lost the situation he left the tug to obtain.

Up to the time libelant demanded to be put ashore at Detroit, as above stated, he had always obeyed orders and performed his duties well. The earnings of the tug about

that time were about one hundred and fifty dollars per day. No shipping articles were signed by libelant, and the agreement was not in writing; no entry of the desertion was made upon the log-book or list of the crew, nor were any of the statutory formalities observed; and therefore the defense of deserting must be made out, if at all, under the maritime law, independent of the statutes upon the subject.

It is claimed, on behalf of libelant, that desertion is a statutory offense, and can be proved only in the manner and form prescribed by statute; or in other words, that the statutes upon this subject have by implication repealed the maritime law of desertion.

In regard to repeal of laws by implication, the rule is this: that a general statute, without an express repealing clause, will not repeal an existing law upon the same subject, unless the two are irreconcilably inconsistent. The leaning of courts is against the doctrine. The two laws will be reconciled, if possible, so that both may stand. Seug. St. Const. Law, 123, 126.

Now, by the maritime law, briefly stated, desertion, to work a forfeiture of wages, must be not only an absence without leave, or in disobedience of orders, but with the intention not to return—to abandon the vessel and the service. Cloutman v. Tunison [Case No. 2,907]; 1 Conk. Adm. 129.

By the statute (Act 1790, 1 Stat. 133, § 5), a forfeiture of wages is worked by an absence without leave for forty-eight hours at one time, whether it was with or without the intention to return. The statute also imposes additional penalties, viz: forfeiture of the seaman's goods and chattels, and payment of damages.

There is no inconsistency in these two laws. By both, the absence must be without leave, and all antecedent wages and advances are forfeited. If the intention not to return exists, and forfeiture of wages alone is sought, then the maritime law is sufficient, and may be resorted to; but if such intention cannot be shown, and an absence of forty-eight hours at one time can be; or if a forfeiture of goods and chattels and payment of damages is sought in addition to forfeiture of wages, then a statutory desertion must be made out; or, in other words, there is both a statute desertion and desertion by the maritime law. If the former is relied on, then the statutory proof must be made; otherwise, not.

It is true that the contrary doctrine was held for a number of years by some of the federal courts, particularly by the district courts for the Southern district of New York and Eastern district of Pennsylvania, as appears by the cases cited by the learned counsel for libelant, and other cases. See The Cadmus [Case No. 2,280]; The Martha [Id. 9,144]; The Elizabeth Frith [Id. 4,361]; The Union [Id. 14,347]. Also, Wood v. The Nimrod [Id. 17,959]; Snell v. The Independence [Id. 13,139]; Knagg v. Goldsmith [Id. 7,872].

I think it will be found that nearly, if not quite all the decisions upon the point, hold the doctrine here contended for, and even Judge Betts, who made the decisions above cited [The Cadmus, The Martha, The Elizabeth Frith, The Union], some ten years after the last of those decisions was made, came around squarely upon this doctrine, and in the case of The Osceola [Case No. 10,602], made use of the following language: "The statutory evidence is necessary to convict a seaman of a desertion which carries a forfeiture of wages when not shown to be willful, and with intention not to return to the vessel. The desertion punished as an offense by the maritime law, is defined in the same terms, and established by the same process, as it was prior to the act of July 20, 1790." And I think it may be considered the established doctrine, by authority as well as on principle, that the act of 1790 did not repeal the maritime law of desertion. See 2 Pars. Shipp. & Adm. pp. 102, 103, note 2; 1 Conk. Adm. 129, 131; 3 Kent, Comm. 198; Cloutman v. Tunison [supra]; Coffin v. Jenkins [Case No. 2,948]; The Cadmus v. Matthews [Id. 2,282]; The Union v. Jansen [Id. 14,348]; Burton v. Salter [Id. 2,218]; The Rovena [Id. 12,090]; Piehl v. Balchen [Id. 11,137]; The Swallow [Id. 13,664]; The Crusader [Id. 3,456]; Jameson v. The Regulus [Id. 7,198].

But there is another fatal objection to the proposition under consideration as applicable to the present case. The seamen or mariners who are liable to the statutory forfeiture are described in section 5 of the act of 1790 as follows: "Any seaman or mariner who shall have subscribed such contract as is hereinbefore described."

The cases in which such contract is required, and the nature of the contract, are prescribed in the first sentences of the act, in the following words: "Every master or commander of any ship or vessel bound from a port of the United States to any foreign port, or of any ship or vessel of the burden of fifty tons or upward, bound from a port in one state to a port in any other than an adjoining state, shall, before he proceed on such voyage, make an agreement in writing or in print, with every seaman or mariner on board such ship or vessel, * * * declaring the voyage or voyages, term or terms of time for which such seaman or mariner shall be shipped."

Now in this case, the vessel is a tug, engaged in towing vessels between Lakes Erie and Huron, through the Detroit and St. Clair rivers, and over the St. Clair flats. She was from the port of Detroit, in the state of Michigan, but was not bound to "any foreign port," and although a vessel of upwards of fifty tons burden, she was not bound to a "port in any other than an adjoining state." She, in fact, was not bound to any port whatever. Her destination and employment was almost exclusively out upon the open water. It is true, in the prosecution of her occupation, she might

and might not run into Canadian waters, or stop at points on the Canadian shore for wood or other supplies, as it is shown that she did at Malden, on September 23, on her way back from Lake Erie to Detroit, but clearly this does not bring her within the description of vessels to which the statute is intended to apply. It is said that she also frequently ran into waters and sometimes took her tows into ports in the state of Ohio; but Ohio is an adjoining state, and therefore not within the statute.

The statute was intended to apply to vessels engaged in foreign commerce, and inter-state commerce, other than between adjoining states, and of course not to a case of this kind. See Milligan v. The B. F. Bruce [Case No. 9,602]. The act of 1856 (11 Stat. 62, § 25) must be construed together with the act of 1790, in pari materia, and as constituting part and parcel of the same general system, and therefore the remarks above made in relation to the act of 1790 will apply with equal force to that of 1856. Was there, then, a desertion by libelant, within the meaning of the maritime law? As we have already seen, absence from the vessel without leave, and with the intention not to return, are essential elements, although not all the elements of the offense. That these elements existed in this case I think is clearly made out by the proofs. It cannot be said that because the master brought libelant to Detroit, and put him ashore, that therefore libelant did not quit without leave. It clearly appears that the master was compelled to do this in consequence of the conduct of the libelant, and in order to enable him to continue the prosecution of the business of the tug. Beginning with the demand of libelant when approaching Detroit, to be put ashore, followed as it was by his quitting his post and going to his room, leaving the engine to be worked by his second, or not at all, and his refusal to stay and work the engine at Lake Erie till the tug could pick up a tow and bring it back, thus compelling the master, against his will, to abandon the enterprise and put back into the home port to obtain an engineer, and libelant's finally leaving the vessel at Detroit to accept an engagement, as he said, upon another vessel, constituted but one act, and that act is clearly desertion, so far as absence without leave, with intention not to return, is essential to make out the offense.

But it is said that desertion can only take place during a voyage. This is no doubt correct as a general rule. The term "voyage," however, as applied to vessels engaged in foreign and inter-state commerce within the meaning of the maritime law, is clearly inapplicable to a tug, making short trips, generally not from port to port, but from one body of water to another, merely furnishing the motive power to other vessels themselves bound on a voyage, not taking on freight at one port and delivering it at another, but picking up its burdens upon the water, and wherever its aid is invoked, and dropping them again upon the water. It would be a misnomer to apply the term "voyage" in the sense of the maritime law to such trips.

The reason of the rule that desertion can take place only during a voyage, applied to a case like the one under consideration, results in this: that desertion can take place only during the term of service agreed upon, whether that be for the entire season of navigation, or for specified time.

But, as applied to the facts in this case, it can make no difference whether a trip is regarded as a voyage or not, because, in view of the position above assumed, that the entire conduct of libelant, commencing with his demand to be put ashore at Detroit, and ending with his leaving the vessel, was but one act of desertion, the desertion did take place during a trip or voyage, if we choose so to call it.

Notwithstanding all this, however, if libelant had, as is contended in his behalf, a legal right to terminate his engagement at any moment, and consequently to make the demand he did, and to enforce it as he did, then of course there was no desertion.

As we have already seen, the hiring was by the month, and libelant left at the end of eight days of the month in which he left. An agreement to pay by the month cannot be construed into an agreement to pay by any less period.

The monthly service and the monthly wages are indivisible, and both by the admiralty and the common law, if the service is abandoned during the month without justifiable cause the obligation to pay for past services is destroyed.

The common law courts, after a long contest have, however, somewhat ameliorated this rule, so that they will now allow a recovery for what the services are actually worth, not beyond the contract price, subject to a set-off or recoupment for damages resulting from the non-performance.

Libelant has not chosen to adopt this course, however, but has chosen to arrest the vessel in a court of admiralty, and submit his rights to be decided on the principles of the admiralty law, and the owners insist that the rights shall be determined by the strict rules of that law. By that law, libelant had no right to leave till the end of the month, without justifiable cause. See The Swallow [Case No. 13,664].

Had he such cause? He says one reason of his leaving was, that his bed was not changed during the whole six months and upwards that he was on the tug, and the tug was an old boat; but he made no complaint of that kind during the whole six months. He did not give these as reasons for leaving, but gave another and a different reason at the time he left; and he did not mention it in his testimony as first given, although he was asked his reasons for leaving. I cannot believe, therefore, that even if the facts

sworn to by him existed, they constituted any part of the cause of his leaving. It may be said that the hiring being by the month, libelant will forfeit only his wages for the month in which he left. A moment's reflection will show the unsoundness of the position. The hiring being by the month, either party could terminate the contract at the end of any month; but until it was so terminated, the service was by virtue of the original agreement, and was one entire thing.

But it is claimed that libelant offered to return to the vessel and resume his position as engineer. An offer to return within a reasonable time, and before the place has been filled by another, will, as a general rule, avoid the forfeiture. See 2 Pars. Shipp. & Adm. 99, and cases cited in Nolen, 4, 6; also, The Philadelphia [Case No. 11,084].

Libelant testifies that when he called on the owners for his pay and was refused, he offered to return, but he does not state when this occurred. Livingstone, one of the owners, testifies that libelant called twice for his pay—once the next day after he left, and again some five or six weeks after—and that it was upon the last occasion that he offered to return. As this is not inconsistent with libelant's statement, it must be taken to be the truth. This was not within a reasonable time, and another engineer had been engaged, and was then occupying the position. The forfeiture was, therefore, not avoided by the offer to return.

It is true the kind of service under consideration does not call for the same rigorous application of the law as ocean service, because there the consequences of desertion may be vastly more serious. The court may in its discretion alleviate the rigors of the general rule, and in view of mitigating circumstances, may impose a less penalty than that of entire forfeiture of wages. But I fail to see any mitigating circumstances in this case. They are, rather, of an aggravated character. When the tug is in the midst of a trip, with several vessels in tow, and at a point, and at a time when it might and probably would cause the tug to be mulcted in damages, and the loss of the towage, if she should stop to look up another engineer, this man, without any previous notice, and without any cause other than to accomplish his own advantage, suddenly proposes to leave the vessel, and demands that the tug shall stop and put him ashore; and to enforce his demand, defiantly threatens to stop the engine; and when he is overawed from doing this by the orders and counter-threats of the master, he goes to his room, and refuses to, or at least does not further discharge his duties, and thus compels the master to return and put him ashore. This seems to me a case truly in which the law should be rigorously applied. A decree must be entered dismissing the libel, and for costs to claimants, to be taxed.

[See Case No. 7,358.]

## Case No. 7,358.

### The JOHN MARTIN.

[Brown, Adm. 149.] [1]

District Court, E. D. Michigan. May, 1866.

WAGES—AUTHORITY OF ENGINEER—FORFEITURE.

The engineer of a steamboat has no authority to make any alteration in the engine at the home port without the consent of the owner, and his conduct in so doing will work a forfeiture of his wages.

[See The Almatia, Case No. 254.]

Libel in personam for wages as engineer upon the tug John Martin, then employed in towing vessels upon Detroit and St. Clair rivers. Answer that libellant, without the knowledge or consent of the master or owner, removed certain portions of the engine and machinery from the tug, and greatly damaged the same, whereby the tug was delayed at Detroit for two days, and respondent suffered damage to a greater amount than the wages claimed to be due. It appeared upon the trial that libellant, who was an experienced engineer, was dissatisfied with the construction of the engine in some minor particulars, and suggested to the master a change in the cut-off quadrant, and reversing lever that would render the engine safer and more manageable. The master did not give an express assent to the alteration, but made an evasive answer which libellant construed as an acquiescence. On arriving at Detroit, the home port of the tug and the residence of respondent, the boiler was found to need some slight repairs, and libellant, without consulting the owner, seized the occasion to make the alterations he had suggested, took apart certain portions of the engine, carried them to a founder, and was superintending the work when he was discovered by the owner and discharged. The tug was delayed more than a day, and lost a valuable tow.

H. B. Brown, for libellant, contended that if the alteration was made in good faith, with the design of improving the engine, and libellant used reasonable skill, he ought not to be subjected to a forfeiture of his wages because he had failed to obtain the authority of the owner; citing 2 Hil. Torts, 473; Story, Bailm. §§ 429, 431, 433, 440.

W. A. Moore, for respondent.

WILKINS, District Judge. I was satisfied at the close of the proofs that this libel ought to be dismissed, but the lucid argument of the proctor for libellant induced me to withhold a decree until further deliberation. I believe fully the testimony of the respondent Pridgeon as to the rate at which libellant was employed as engineer of his tug, and also as to his loss incurred by libellant's unauthorized conduct in disabling the vessel by undertaking to remodel the engine at the

[1] [Reported by Hon. Henry B. Brown, District Judge, and here reprinted by permission.]

home port, without the consent of the owner, who was personally present when the vessel reached the wharf. The engineer's conduct was unexcusable, and at the season and under the circumstances occasioned damage more than the amount of wages due.

In navigating a steamboat, the engineer commands and controls his own department, but this power cannot be extended beyond the voyage. When that terminates his power ceases, except so far as is necessary for repairing the engine and making ready for another voyage. He has no authority to remodel the engine without the consent of the owner. That consent was not obtained in this case, and the act of the engineer was one of gross insurbordination—working a forfeiture of his wages. Libel dismissed.

[See Case No. 7,357.]

JOHN M. WELSH, The (BROCK v.). See Case No. 7,359.

## Case No. 7,359.

The JOHN M. WELCH.

[9 Ben. 507;[1] 24 Int. Rev. Rec. 207.]

District Court, E. D. New York. May 8, 1878.[2]

WHARFAGE—LIEN—DOMESTIC VESSEL—CONSTITUTIONAL LAW — STATE LAW — PRESUMPTION OF LAW—DISCRIMINATING RATES OF WHARFAGE.

1. Where a canal-boat, owned in the state of New York, brought a cargo of coal from Baltimore, by way of the Chesapeake and Delaware Canal, Delaware river, and Delaware and Raritan Canal, to the city of New York, and there discharged at a wharf, *held*, that the barge was liable to pay wharfage at the rates fixed by the statute of the state of New York, passed May 21, 1875 (Laws N. Y. 1875, c. 405).

2. The conclusion of the supreme court of the United States, arrived at in Ex parte Easton, 95 U. S. 68, that the contract for wharfage is a maritime contract, and gives rise to a lien upon the vessel, must be considered as referring to the case then before the court, which was the case of a domestic vessel.

[See note at end of case.]

3. The clause in the state statute above cited, which fixes certain rates of wharfage, but excepts from its operations all canal-boats navigating the canals of the state of New York, and provides that such vessels shall pay wharfage at the less rates fixed by the act of 1860, does not render the statute unconstitutional.

[See note at end of case.]

4. A statute fixing reasonable rates of compensation to be paid to a wharfinger for the use of his wharf by a vessel moored thereto does not create a tax upon tonnage or an impediment to commerce. The rate fixed by the statute of New York, of 1875, may be presumed to be reasonable compensation for the service described.

5. The power of a state over the subject-matter of wharfage-rates includes the power to discriminate as to the rate between vessels of different classes and between vessels engaged in different occupations. The provisions of the statute of New York, of May 21, 1875, whereby the wharfage of canal-boats navigating the canals of the state of New York is fixed at a less rate than that for other vessels, does not, in words or in effect, create a discrimination between citizens or products of different states, and is not repugnant to article 4 of the constitution of the United States.

[See note at end of case.]

6. There is no presumption that a canal-boat navigating the canals of New York is owned by a citizen of the state of New York, nor that a canal-boat otherwise employed is owned by a citizen of another state; and if wharfage, payable by a vessel, can be considered to be an impost upon the cargo brought by the vessel, still it cannot be presumed that cargoes carried in canal-boats navigating the canals in the state of New York are the products of that state, nor that cargoes carried in vessels otherwise employed are the products of another state.

A libel was filed to recover for wharfage upon a boat that had brought a cargo of coal from Baltimore to New York by way of the Delaware river and the Delaware and Raritan Canal. The owners of the boat, who were citizens of New York, intervened, and, before the trial of the cause, applied to the supreme court of the United States for a writ of prohibition to the district court of the Eastern district of New York, where the libel was filed, which writ was refused. Ex parte Easton, 95 U. S. 68. Thereafter the cause was tried and decided, the following opinion being rendered.

J. J. Allen, for libellant.

E. D. McCarthy, for claimants.

BENEDICT, District Judge. This is an action in rem to recover wharfage. The defence interposed raises three questions: First, whether a contract for wharfage is a maritime contract, and so within the jurisdiction of the admiralty; second, whether, by the maritime law of the United States, a lien upon the vessel arises out of such a contract; third, whether, if the court has jurisdiction to enforce a lien upon the vessel for wharfage, the statute of the state of New York, which fixes the rates of wharfage to be charged in the port of New York, can be resorted to for the purpose of determining the amount of such lien.

The first and second of these questions, passed on by this court in former cases, have been set at rest by the determination of the supreme court in a proceeding taken by the respondents to obtain a writ of prohibition in this very action. Ex parte Easton, 95 U. S. 68.

It has been supposed by some that, in the proceeding referred to, the supreme court, on page 75 of the opinion, by implication decides against the existence of a lien for wharfage in the case of a domestic vessel. But such cannot have been the intention. The case before the supreme court was that of a domestic vessel, and the libel claimed a lien by the maritime law alone, without any reference whatever to the statute of New York, or to any claim of right based thereon. Not only

[1] [Reported by Robert D. Benedict, Esq., and Benj. Lincoln Benedict, Esq., and here reprinted by permission.]

[2] [Reversed in 2 Fed. 364.]

did the pleadings show the vessel to be domestic, but the brief submitted to the supreme court, which has also been submitted as the argument of the respondent upon this hearing, contains the expression, "Attention is called to the fact that the boat John M. Welch is a domestic craft," and again, "The petitioners, however, are citizens of New York, and the boat is a domestic vessel;" and the petition for prohibition, upon which the application was based, averred that "the laws of the state of New York give no such lien." There is therefore no room to doubt that the case was understood by the supreme court to present the question whether the contract of wharfage by the maritime law of the United States gives rise to a lien upon the vessel. It cannot be denied that the proposition stated by the court on page 75 of the opinion is limited to the question of a lien for wharfage by the maritime law upon a foreign vessel, but that question was not the question presented by the case before that court. The question of a lien for wharfage upon a domestic vessel, was the question presented to the court for its decision; and the opinion of the court upon that question is to be found, not on page 75, but on page 77 of the opinion, where the law is declared without exception to be not only that the contract for wharfage is a maritime contract, but also that a maritime lien arises in favor of the wharfinger against the vessel for the payment of reasonable and customary charges for the use of his wharf.

This determination by the supreme court of the United States therefore, leaves no room to raise again the question decided by this court in the case of The Kate Tremaine [Case No. 7,622], cited apparently with approval by the supreme court,—[Ex parte Easton] 95 U. S. 76,—whether the rule applied to the demands of material men against a domestic vessel, is to be applied to demands for wharfage.

There is, then, left but the single question as to the constitutionality of the statute of the state of New York by which rates of wharfage at wharves in New York and Brooklyn are fixed. This question was also argued before the supreme court upon the motion for a prohibition, but it was left by the court to be decided as one of the questions of the cause, without any intimation of an opinion in regard to it.

A similar question was raised and decided by this court in the case of The Ann Ryan [Case No. 428], where the effect and validity of the wharfage act of 1870 was called in question. That act has since been amended; but the present statute passed May 21, 1875 (Laws N. Y. 1875, c. 405), seems to be identical, so far as the point here made is concerned, with the act of 1870. So it has been treated by the advocates.

At the request of the advocate for the claimant, I have again examined the question in the light of the brief submitted on this occasion, but I find no reason for changing the opinion expressed in the case of The Ann Ryan [supra]. It may, however, be worth while to notice briefly some of the points now urged in opposition to the statute. The present statute of New York called in question is the act of 1875, the material portion of which is as follows:

"Section 1. It shall be lawful to charge and receive within the cities of New York, Brooklyn, and Long Island City, wharfage and dockage at the following rates, viz.: From every vessel that uses or makes fast to any pier, wharf, or bulkhead, within said cities, or makes fast to any vessel lying at such pier, wharf, or bulkhead, or to any other vessel lying outside of such vessel, for every day or part of a day, as follows: From every vessel of 200 tons burden and under, two cents per ton, and from every vessel over 200 tons burden two cents per ton for each of the first 200 tons, and one-half of one cent per ton for every additional ton, except that all canal boats navigating the canals of this state, vessels known as North river barges, market boats, and sloops employed upon the rivers of this state, and schooners exclusively employed upon the rivers of this state, shall pay the same rates as such boats or barges were liable to pay under the provisions of that act passed April 10, 1860; * * * and the class of sailing vessels now known as lighters shall be at one-half of the first above rates, * * * and from every vessel or floating structure other than those above named, or used for transportation of freight or passengers, double the first above rates; except that floating grain-elevators shall pay one-half the first above rates."

In view of the decisions there is no room to contend, and it has not here been contended, that a state statute fixing rates of compensation to be paid to a wharfinger, for the use of his wharf by a vessel moored thereat, is a tax upon tonnage, or an impediment to navigation. But if I have rightly comprehended the argument it is contended that the statute under consideration is not in legal effect a wharfage act, because, as it is said, under the name of wharfage it allows a greater sum to be charged than is reasonable compensation for the use of the wharf; which extra charge is in substance simply a burden imposed by the state upon navigation and commerce among the states; whence, it is insisted, the statute should be held to be repugnant to the constitution of the United States as being an illegal regulation of commerce.

In order to sustain this argument it is necessary to decide that the sum allowed by the state statute to be charged vessels of the class to which the claimant's vessel belongs, is more than a reasonable compensation for the service rendered, or benefit received. But on what ground shall a court declare the charge here sought to be enforced to be more than is reasonable? If

want of apparent reason—I do not say that reasons do not exist—for the distinction in rate made by the statute between canal boats engaged in navigating the canals of this state, North river barges, market boats, sloops employed upon the rivers of this state, schooners exclusively employed upon the rivers of this state, lighters, and other vessels, permits the conclusion that some of the rates are unreasonable, how can it be declared to be the higher rate rather than the lower rate that is the unreasonable rate? Moreover, if the state of New York has the right to fix rates of wharfage, I am unable to see how any rate declared by this statute to be legal can by the courts be declared unreasonable, and for that cause illegal. The power of the state over the subject matter of wharfage rates, includes the power to discriminate as to the rate between vessels belonging to different classes, and between vessels engaged in different occupations; and where distinctions of that character are found in the statutes of the state, it must be presumed by the courts that those distinctions are founded upon some good reason. One reason may be found in the fact that vessels engaged in certain kinds of navigation are necessarily compelled to spend a greater portion of their time at the wharf than is ever spent by vessels in other employments, and so may justly be allowed to obtain their wharfage at a less rate per day. I find, therefore, no ground on which to rest a distinction between this statute and those wharfage acts of other states that have been upheld by the courts. Packet Co. v. Keokuk, 95 U. S. 80, and cases there cited.

More plainly still is this statute free from objection as creating a tax upon tonnage. It has none of the features of a tax law. The rates fixed by it are not to be paid directly or indirectly to the state, but to the owners of wharves, and they are to be paid for wharfage accommodation actually furnished.

Another ground of objection to this statute is, that it is repugnant to article 4 of the constitution, because it creates a discrimination between citizens of different states. But this objection rests upon the presumption that canal boats navigating the canals of New York, and schooners employed upon the river, are owned by citizens of New York, while boats otherwise engaged are owned by citizens of other states. Manifestly, no such presumption can be indulged in, and the objection falls with the presumption on which it rests.

Again, it is said that wharfage is in fact paid by the shippers of the cargo as part of the freight charged, and the statute therefore, in effect, creates an impost upon goods brought from a foreign state into New York, or a tax upon non-citizens for the use of a domestic port. Here, too, the objection rests upon an unwarranted presumption. What foundation, in fact, is to be found for the assertion that shippers of cargoes on board canal boats, not engaged in navigating the canals of New York, that moor at the wharves of New York and Brooklyn are not citizens of the state of New York? The brief speaks earnestly of increased freight charges made because the merchandise is brought from another state; of a discrimination in favor of citizens as against non-citizen-carriers; of the exclusion of interstate craft from the wharves of New York by vexatious tolls; of the act as applicable to all vessels indiscriminately, except domestic vessels. These expressions seem to me to have no application to the statute under consideration. The statute in no way favors the tonnage owned by citizens of New York, nor does it directly or indirectly establish an inequality in commercial intercourse. While its effect, taken in connection with the other statutes of the state, is to allow wharfingers to charge different rates of wharfage according to circumstances prescribed in the act, still, neither in words nor in operation does it create a distinction between the citizens of different states, or between commerce among the states and purely internal commerce. Those citizens of New York whose canal boats navigate the harbor of New York and the East and the Hudson rivers, pay the same rate of wharfage as do those citizens of other states whose boats are engaged in the same business; and those citizens of other states whose boats are engaged in navigating the canals of this state, pay the same rate of wharfage as do the citizens of New York who are engaged in that business. The most that can be said is that the statute has an indirect effect to favor the navigation of the canals and rivers of this state by reducing the amount of port charges incident to voyages upon those waters. But the act is nevertheless, in substance and effect, a wharfage act; and I am unable to see how the indirect effect above indicated renders it repugnant to any provision in the constitution of the United States.

For these reasons I am of the opinion that the present wharfage act of New York, above set forth, is a valid enactment, and therefore to be resorted to by this court in order to determine the rates of wharfage which the libellant is entitled to charge for the wharfage service shown to have been rendered. There must, therefore, be a decree for the libellant for the sum admitted to be the amount of wharfage due for the period during which the libellant's wharf was used, if calculated according to the rates fixed by the laws of the state, viz. sixty dollars, and he is also entitled to costs.

[NOTE. The claimants appealed this case to the circuit court, which reversed the decision of the district court, dismissing the libel, with costs to the claimants. Mr. Circuit Judge Blatchford, who delivered the opinion, held that

the construction put upon the opinion of the supreme court in Ex parte Easton, 95 U. S. 68, by District Judge Benedict, was a wrong construction, and, further, that the proper construction should be that the decision of the supreme court was that in the case of Ex parte Easton there was nothing to show that the district court was proceeding to act without jurisdiction. Continuing, Judge Blatchford held that the libel did not show that the vessel was not a foreign vessel, or one belonging to a port of a state other than New York. Because it did not show this, and because if it was a foreign vessel, or one belonging to some other state, a maritime lien would exist against it for wharfage, in short, that the complainants had not made out their case, which was to show affirmatively want of jurisdiction. By implication, had it been shown that the vessel was domestic in New York, then no maritime lien would lie. Viewing this decision in this light, Judge Blatchford decides that the only lien which was claimed and could be considered was the lien imposed by the state law for the wharfage charges allowed by the statute of 1875. This statute the court holds to be invalid, upon the ground that it is a violation of the right of congress to regulate commerce between the states, the statute imposing a higher rate of wharfage upon vessels coming by way of the Raritan Canal in New Jersey than by canals within the state of New York. 2 Fed. 364.]

JOHN NEILSON, The. See Case No. 4,241.

JOHN P. BEST, The (FLEISHMAN v.). See Case No. 4,861.

## Case No. 7,360.

### The JOHN PERKINS.

[21 Law Rep. 87.]

Circuit Court, D. Massachusetts. May, 1857.[1]

SALVAGE — IMPENDING COLLISION — VOLUNTARY SACRIFICE—VESSEL ENCLOSED IN ICE—INEVITABLE ACCIDENT — CONTRIBUTION BY GENERAL AVERAGE.

1. The act of cutting the cable of a vessel at anchor, done by one of her crew in order to avoid an impending collision with a vessel adrift, does not amount to a salvage service rendered to the latter vessel, although she may have been preserved from destruction thereby.

2. A vessel enclosed in the ice in Boston Harbor was deserted, during a gale, by all her crew, save one who remained because he thought it less dangerous for him, than to attempt to reach the shore. The others intended to return when the gale should abate. *Held*, that none of the crew were absolved from their contract or duty to the ship, and consequently that no exertions for the safety of the vessel by the seaman who remained on board could constitute him a salvor thereof.

[Distinguished in The Triumph, Case No. 14,183. Cited in The Olive Branch, Id. 10,490; New York Harbor Protection Co. v. The Clara, 23 Wall. (90 U. S.) 17; The C. P. Minch, 61 Fed. 513.]

3. Where officers and crew properly leave a vessel to save their lives, so that the anchors cannot be used, and the ship then drifts into collision with another, it is a case of misfortune without fault, in which each vessel bears its own loss.

4. A voluntary sacrifice, such as cutting a cable, made by one vessel to avoid an apprehended collision with another vessel, is not a case to which the law of contribution, by general average, can be extended.

[Cited in The James P. Donaldson, 19 Fed. 270. Distinguished in Sonsmith v. The J. P. Donaldson, 21 Fed. 677.]

[Appeal from the district court of the United States for the district of Massachusetts.]

The facts of this case are sufficiently shown in the opinion of Ware, J., in the district court [Case No. 10,252].

C. G. Thomas, for libellant.

W. G. Russell, for claimant.

CURTIS, Circuit Justice. This is an appeal from a decree of the district court in a cause of salvage. The libel was filed by Nickerson, one of the crew of a fishing schooner called the Wyvern for himself, and by Thomas Lewis, master of the Wyvern, in behalf of the owners, officers, and crew of that vessel. It appears from the pleadings and proofs that during the severely cold weather of the month of February, 1856, the John Perkins, the Wyvern, and two other vessels were accidentally enclosed in a large field of ice, which extended along the shores of Massachusetts Bay, and continued to make until their immediate escape became impossible. Though the vessels were embedded, the field of ice was moved by the wind and sea. In this condition these vessels remained for several days, drifting helplessly with the field of ice, which was constantly becoming thicker and more dangerous by the piling of masses on each other, which the intense cold at once rendered solid. The crews became alarmed for their own safety. On Saturday, the 11th of February, the crew of the Wyvern, with the exception of Nickerson, the libellant, left her and went on shore over the ice. Nickerson thought this attempt more dangerous to him than it was to remain on board, and he therefore remained. About noon of Sunday, the 19th, the crew of the John Perkins left her and went first on board the Acorn, a steamer which was one of the vessels enclosed, and during the afternoon went on shore, together with the crews of the two other vessels, deeming it too hazardous to life to remain. The wind was blowing a gale, and there can be no doubt that the condition of all the vessels was one of extreme peril.

The libel pleads that at about half-past eleven o'clock of the night of Sunday, Nickerson discovered the John Perkins drifting directly towards the Wyvern, which had one anchor down; that to prevent a collision and the destruction of both vessels, Nickerson cut the cable of the Wyvern, and thus prevented the destruction of both vessels. And it is for this act salvage is claimed. There is very great conflict in the testimony respecting the danger of a collision between the John Perkins and the Wyvern. But I do not deem it necessary to pronounce

[1] [Reversing Case No. 10,252.]

any opinion upon it; for I think the act alleged to have been done, did not amount to a salvage service rendered to the John Perkins.

I cannot distinguish this case from that of Beane v. The Mayurka [Case No. 1,175], decided by this court in 1854. In that case two vessels were at anchor inside the breakwater in Delaware Bay. In a gale of wind the Mayurka drifted, dragging her anchors, and came in collision with the Sarah Adeline, whose master, to avoid the destruction of both, slipped her cable, tried to hold on with her small anchor and kedge, but went ashore. It was held that as the two vessels were subject to a common peril which threatened the immediate destruction of both; and, as the master of the Sarah Adeline found he could not otherwise release his vessel, it was his imperative duty to slip his cable to save his own vessel and the lives of the crew; that this could not be deemed such a voluntary interposition to save the property of another, by one under no legal obligation to interpose, as to constitute a claim for salvage. I am satisfied of the correctness of that decision. As was observed by Sir John Nichol in The Calypso, 2 Hagg. Adm. 217, both civil and military salvage resolve themselves into the equity of rewarding spontaneous services rendered in the protection of the lives and property of others. However others may incidentally profit by an act, if it was done not for the purpose of benefitting others, but to save property under the charge and protection of the actor, he was legally bound by his contract to do all which was done for the preservation of the property under his charge, and it cannot be treated by a court of admiralty as a spontaneous service, and cannot found a claim to a salvage compensation. When vessels are entangled by a collision, it is not unfrequently necessary, voluntarily, to destroy parts of their rigging, or spars, or both, to enable them to separate. Such damages receive their character from the character of the collision, and are apportioned, or paid for by the wrong doer, or borne by the party on whom they fall, according to the existence or absence of fault. Such sacrifices do not constitute a claim for salvage, though the acts done may sometimes involve personal danger, and may relieve both vessels from otherwise certain destruction. And I can perceive no sufficient reason why sacrifices necessarily made to avoid a collision, should not fall within the same rule. But it is insisted that the libellant stood on such a relation to the Wyvern that he could be a salvor of that vessel as well as of the John Perkins; and that having rendered assistance whereby both vessels were relieved from peril, he may well be considered the salvor of each. This position requires examination; for if a mere stranger, under no duty by contract or otherwise, renders assistance upon the sea, by means of which two vessels are prevented from destroying each other, no reason is perceived why he may not claim a salvage compensation from each. In this case, Nickerson was one of the crew of the Wyvern. It is laid down by numerous authorities, and is undoubtedly a part of our maritime law, that seamen are bound by their contract to exert themselves to the utmost to save the vessel and cargo from peril. Abb. Shipp. (6th Am. Ed.) p. 751, pt. 5, c. 2, § 2; The Two Catherines [Case No. 14,288]; Pitman v. Hooper [Id. 11,185]; The Dawn [Id. 3,666]; The Massasoit [Id. 9,260]; Mesner v. The Suffolk Bank [Id. 9,493]. And while that contract subsists and is operative, services rendered by them in saving another vessel, or cargo, or both, being due by force of their contract, will not enable them to claim as salvors. In the case of The Neptune, 1 Hagg. Adm. 236, Lord Stowell said: "The doctrine of this court is justly stated by Mr. Holt—that the crew of a ship cannot be considered as salvors. What is a salvor? A person who without any particular relation to a ship in distress, proffers useful service, and gives it as a volunteer adventurer, without any pre-existing covenant that connected him with the duty of employing himself for the preservation of that ship: not so the crew, whose stipulated duty it is, (to be compensated by payment of wages,) to protect that ship through all perils, and whose entire possible service for this purpose is pledged to that extent." In Hobart v. Drogan, 10 Pet. [35 U. S.] 122, Mr. Justice Story in delivering the opinion of the supreme court, after saying it is laid down by Lord Stowell, that the crew of a ship cannot be considered salvors, quotes the above definition of a salvor, and uses the following language, "And it must be admitted, that, however harsh the rule may seem to be in its actual application to particular cases, it is well founded in public policy, and strikes at the root of those temptations which might otherwise exist to an alarming extent, to induce pilots and others to abandon their proper duty, that they might profit by the distress of the ship which they were bound to navigate." This definition of Lord Stowell in the case of The Neptune, and its consequence that seamen cannot be salvors of their own vessel, had previously received the sanction of Mr. Justice Thompson, in the case of The Wave [Case No. 17,300], in an elaborate opinion, not reported when Hobart v. Drogan [supra] was decided.

It is true there is a class of cases in which seamen have been considered entitled, in case of shipwreck, to recover their wages out of the proceeds of the wreck saved by them; and in some cases, where the disaster occurred in a foreign country, an additional amount to pay the expense of their return home. See The Dawn [supra], where the authorities are elaborately examined. And

in some of these cases it was considered that this claim of the seamen was in the nature of a claim for salvage. Mr. Justice Story so considered in the case of The Two Catherines [Case No. 14,288]. In his note to Abb. Shipp. pt. 5, p. 753, c. 2, § 2, he says: "Lord Stowell, in the case of The Neptune, 1 Hagg. Adm. 227, puts the case of shipwreck as an exception to the rule, as to the earning of freight being a preliminary to the payment of wages, and so it was intimated in The Two Catherines [supra], the doctrine ought to be; but the court then thought the rule upon the authorities had not been construed as liable to such an exception, and therefore put the allowance of wages in case of shipwreck upon grounds of a qualified salvage." I infer from this passage, as well as from what he said in Hobart v. Drogan, and Pitman v. Hooper [supra], that if the case of The Neptune had been before him, when he decided the case of The Two Catherines, he would have placed that decision upon the same exception asserted by Lord Stowell, and not upon a claim to a qualified salvage. More recently, Judge Sprague in the district court for the district of Massachusetts, after a careful examination of the authorities, has held that wages, as such, by operation of the contract, and not by way of salvage, are recoverable in cases of shipwreck, if the crew either assisted or were ready to assist in saving the vessel. The Massasoit [Case No. 9,260].

It being perfectly settled that the seamen are entitled to recover in such a case, and also that the quantum of their claim is fixed by the amount of wages due, adding perhaps the expense of their return, it does not appear to me intrinsically important, whether such an allowance is denominated a quasi salvage compensation, or held recoverable solely under the contract. If salvage, it is so qualified that its compensation is limited to the specific allowance growing out of, and due under the contract, as that is interpreted by the maritime law, and the right to such allowance does not change or trench upon the settled rule that a seaman acting under a subsisting contract has no standing in a court of admiralty as a salvor of his own vessel. Undoubtedly, when the contract ceases to be binding on the seaman, even if the voyage has not been completed, he may then become a salvor. Such was the case of Mason v. The Blaireau, 2 Cranch [6 U. S.] 268. And, as was said by Lord Stowell, in The Neptune, and is repeated in Hobart v. Drogan [supra], it may be possible that a seaman may render a service exceeding the duty which he owes by his contract and become a salvor. But so far as I know, no such case has ever been presented to a court in England or in this country. The case of Mesner v. The Suffolk Bank [Case No. 9,493], decided by Judge Davis, in this district, in 1838, would seem to have involved all the considerations in favor of the claim of one of the ship's company to be a salvor, which could well be presented. The steamer New England bound from Boston to ports in the state of Maine, came in collision with a sailing vessel in the night time; a large hole was made in the bow of the steamer, which immediately began to fill. The passengers and crew took refuge on board the sailing vessel, which was not seriously injured. The master and some of the crew of the steamer got one of its boats and lay by in it, at a prudent distance. In this state of things, and while the steamer was rapidly filling with water, the libellant, who was the engineer of the steamer, took an axe, boarded the steamer, cut a hole in the promenade deck over the captain's office, and by great personal exertion rescued a package of bank bills, amounting to the sum of $46,000, which belonged to the defendants, and restored them to the custody of the defendants' agent, who was a passenger on board. The libellant acted, not on any order of the master, but upon an offer of a liberal reward made by the agent, whose authority to make the offer the defendants denied. And when he finally left the steamer, the water was already over the guards, and she sunk within a few minutes. I was of counsel for the libellant, and pressed the points, that it was admitted contingencies might occur, in which one of the ship's company could be a salvor; that in this case the property saved had been abandoned by the officers and crew of the steamer, and without the gallant and successful effort of the libellant, must have immediately perished; that the libellant being the engineer of the steamer had no duty to perform save to manage and take care of the machinery of the boat; that his duties under his contract terminated when the steamer was finally abandoned as unnavigable; and that what he did was beyond the line of his duty and entitled him to claim as a salvor. But Judge Davis, whose experience in the administration of the maritime law, as well as the soundness of his judgment and his careful research, will cause his decisions to be long remembered here with respect, and whose inclinations to uphold the rights of seamen, with a strong hand, were never doubtful, dismissed the libel. I advised an appeal; for I was desirous of obtaining the opinion of my eminent predecessor, whose views in the case of The Two Catherines had been strongly pressed on Judge Davis; but my client was not willing to appeal. Though I am not prepared to deny that cases may arise in which the crew may become salvors of the vessel, it is not easy for me to foresee how such a case can arise, while their contract continues in force. The degree of distress certainly does not change the character of the service; and if the amount of personal exertion and hazard, incurred in preserving the property, can change the character of the service, what becomes of the rule of the

maritime law, under which, as Lord Stowell says, "it is the stipulated duty of the crew, (to be compensated by payment of wages,) to protect that ship through all perils, and whose entire possible service for this purpose is pledged to that extent," and how, as Mr. Justice Thompson asks in the case of The Wave [Case No. 17,300], can we fix the point at which seamen may withdraw their services as seamen, under their contract, and set themselves up as salvors. No doubt a seaman must sometimes judge for himself, whether he will or will not do an act to save life or property. The peril may possibly be so great, as to justify his refusal, even if ordered by the master to do it. But however great it may be, if he choose to encounter it to guard the vessel from destruction, he must be deemed to be acting under his contract, and in the gallant discharge of his duty, and not as a salvor.

I come now to the application of these principles to the facts of this case. The libellant voluntarily remained on board the Wyvern when the rest of the ship's company went on shore, simply, as he admits, because he considered it more dangerous for him to go, than to remain. Though the master and crew of the Wyvern temporarily left the vessel under the pressure of the danger arising from the force of the wind, it was their intention to return on board when the gale should have abated; and though they undoubtedly considered the danger imminent, there is no reason to say, upon the evidence, they thought the condition of the vessel hopeless. They not only intended to return, but expected to return. And they at no time were far enough distant to lose sight of the vessel in the day time, or to be unable to return promptly, when the gale should abate. This was, therefore, not a case of a derelict vessel, nor were those of the crew who went on shore, or the libellant who remained on board, absolved from their duties as seamen; the latter to do any thing which he might find practicable for the safety of the vessel while he remained on board. and the former to return on board and continue their voyage, when circumstances should permit and the master require them to do so. Clarke v. The Dodge Healy [Case No. 2,849]; The Emulous [Id. 4,480]; Lewis v. The Elizabeth and Jane [Id. 8,321]; The Aquila, 1 C. Rob. Adm. 39. I can see no ground for saying his relation to the vessel was dissolved, or the duties growing out of that relation terminated; nor was it so considered in the court below. It is not pleaded in the libel nor shown by the proofs that he was in any way absolved from the obligation which he was under as one of the crew of the Wyvern, to cut her cable when he found that was the only means of preserving her from destruction. I cannot treat him therefore as a stranger to both vessels and capable of rendering a salvage service to both; but only as one of the crew of the Wyvern, voluntarily on board, and bound by his contract to act, as he did act, for the preservation of the vessel under his charge. And his claim for salvage must be rejected.

Without intending to express any opinion upon the questions, whether the libellant did in fact render the service alleged, or whether there was danger of a collision, such as is alleged, it is not unimportant to remark that the proof of the asserted service, and of its necessity, is derived solely from the libellant himself, and that there is no small difficulty, upon the proofs, in determining whether his statements on these essential points are true. When strangers interpose to save property, if it is derelict, there can hardly be a case in which it is doubtful whether a salvage service has been performed; if still in the custody of the ship's company, or some of them, they may be relied on as disinterested witnesses to describe the material facts. But if the crew, or individuals of them, may become salvors, the owners, as in this case, may have no protection, arising from the presence of those to whose charge they committed their property, since these are the very persons setting up the hostile claim, and, in the absence of all other evidence, proving, by their own testimony, the necessity for, and the rendition of the service. The temptations which may arise from such exposure, may afford an additional proof of the wisdom of the rule, that the crew of a vessel cannot be its salvors. But it is further insisted on behalf of the owners of the Wyvern, that the John Perkins was in fault for drifting towards the Wyvern and rendering it necessary to cut her cable, and so there is a valid claim for damages in the loss of the cable and anchor.

Upon the evidence before me, I should find it difficult to come to the conclusion that, if the crew of the John Perkins had remained on board, they could have prevented that vessel from drifting, save by letting go their anchors and thus subjecting their vessel to the imminent hazard, not to say the certainty of being destroyed by the moving field of ice. But if this were not so, I should still be unable to say that the absence of the crew was any fault on their part. They left for the shore to save their lives from imminent danger, and were justified in doing so. And I do not think their vessel can be treated as guilty of a tort, when its navigators were in no wrong. The same vis major which drove them from the vessel, caused her to drift; and if their presence could have prevented its drifting, the vis major which deprived the vessel of their presence is as much the proximate and efficient cause of the drifting as it would have been if that vis major had deprived the Wyvern of her anchors. Both men and anchors are necessary to prevent a vessel from drifting. If a vessel parts her cables in a storm and consequently drifts into collision with another vessel, it is a misfortune without fault, and each bear

its own loss. Steinbank v. Rae, 17 How. [58 U. S.] 532. If the officers and crew of a vessel are washed overboard, or properly leave a vessel to save their lives, so that the anchors cannot be used, I think the same law applies to a subsequent collision. It is true there are many cases in which the vessel is treated as the offending thing, and is charged or forfeited irrespective of the conduct or intentions of those who own her. The Malek Adhel, 2 How. [43 U. S.] 233; The Porpoise [Case No. 11,284]. But this is for illegal or negligent uses of the vessel, by the officers and crew or some of them, and is resorted to from motives of public policy to suppress an offence or wrong, or to afford an indemnity to an injured party. I am not aware of any case where the vessel has been so treated, when neither its owners, or navigators, were chargeable with any fault. The claim for damages must therefore be dismissed.

It is further suggested that there may be a claim for a general average contribution for the loss of the cable and anchor. When the case of Beane v. The Mayurka [Case No. 1,175], was decided, I understood the law, as settled by the supreme court, to be, that the admiralty had not jurisdiction of such a claim. But at the last term of the supreme court this subject has been carefully examined (Dupont v. Vance, 19 How. [60 U. S.] 162), and it is now settled, that the owner of cargo jettisoned has a maritime lien on the vessel to secure the payment of the contributory share due from the vessel, and that this lien may be enforced by a libel in rem in the admiralty. But the question here is whether a voluntary sacrifice made by one vessel to avoid or escape an apprehended collision with another vessel, makes a case for contribution in general average. It is certainly true that such a claim, when viewed theoretically, has an equity very similar to, if not identical with, that on which the famous Rhodian law was founded, and out of which the more modern doctrines of the law of general average have grown. "Omnium contributione sarciatur quod pro omnibus datum est." Poth. Pan. 14, 2, 1. "Equissimum enim est, commune detrimentum fieri eorum qui propter amissas res aliorum, consecuti sunt ut merces suas salvas habuer unt." Id. 14, 2, 6. At the same time it is quite clear that the Roman law never applied the principle between mere strangers. The Digest (9, 2, 29, 3) says: "Labeo scribit, si cum vi ventorum navis impulsa esset in funes anchorarum alterius, et nautae funes praecidissent, si nullo alio modo, nisi praecisis funibus, explicare se potuit, nullam actionem dandam."

This is the precise case under consideration, except that the cable is cut by the mariners of the other vessel, which can scarcely weaken the claim. Emerigon cites this as good law and refers to the laws of Oleron and Wisbuy as containing a similar rule as to the removal of an anchor. 1 Emerig. Ins. p. 416, c. 12, § 14. And at the common law, there are cases of urgent necessity in which one whose property is destroyed, has no action—as pulling down a house to prevent the spread of a fire, as was resolved in 12 Coke, 13, 63. See, also, Vin. Abr. "Necessity," pl. 8; 4 Term R. 797; [Respublica v. Sparhawk] 1 Dall. [1 U. S.] 363; 17 Wend. 290; 2 Denio, 461. But whether an action would or would not lie, where the mariners of one vessel can escape only by cutting the cable of another vessel, and do so, the question here is whether the law of general average extends to a case where the cable of a vessel is cut by its crew to prevent an apprehended collision with another vessel. I am not aware that the right of contribution has ever been extended beyond those who voluntarily embarked in a common adventure. Very eminent writers upon maritime law have considered that the right grows out of, and depends upon a contract implied by the law from the relation created by the contract of affreightment. Such is the opinion of Pothier, Traité des Contrats de Louages Mar. pt. 2, art. Prelim., of Pardessus, Droit Com. pt. 3, tit. 4, c. 4, § 2. Chief Justice Parsons declares in Whitteridge v. Norris, 6 Mass. 131, that the requisites to a case of general average, are, a contract, by which distinct properties of several persons become exposed to a common peril, and a relief from that peril at the expense of one or more of the concerned, who thereupon are entitled to a contribution from the rest. And in the case of Dupont v. Vance, 19 How. [60 U. S.] 162, as well as in Lawrence v. Minturn, 17 How. [58 U. S.] 109, 110, it will be found that the supreme court considered that the master, in case of necessary voluntary sacrifice to escape peril, was acting as the authorized agent of all concerned in the common adventure, and so bound all by his act, a principle which could hardly apply between mere strangers. I have on a former occasion declared that I did not consider the right to recover a general average contribution arises from a contract,—Sturgis v. Cary [Case No. 13,573],—but from a principle of natural justice, that they who have received a common benefit from a sacrifice voluntarily made by one engaged in a common adventure, should unite to make good the loss which that sacrifice occasioned. But I never entertained a doubt, that from the relation of the parties to a common adventure, the law would imply a contract for the purpose of a remedy; nor did I then suppose that it would be implied between strangers, who were not united in a common adventure by one or more contracts of affreightment. The ancient as well as the modern codes of sea laws proceed upon the assumption that the master, representing all the aggregate interests by holding that office, has the rightful power to judge upon the

sacrifice of one of the interests which he thus represents, for the benefit of the others. But they afford no ground for the position that he may judge and act for mere strangers, whose property has not been confided to his care. In my opinion the only subjects bound to make contribution are those which are united together in a common adventure and placed under the charge of the master of the vessel, with the authority to act in emergencies as the agent of all concerned, and which are relieved from a common peril by a voluntary sacrifice made of one of those subjects. Consequently, I must reject the claim for general average. The decree of the district court must be reversed; but the questions are so novel, and attended with so much difficulty, and the equitable considerations in favor of some of the claims are such, that I do not think it fit to charge the appellees with costs.

JOHN PERKINS, The (NICKERSON v.). See Case No 10,252.

## Case No. 7,361.

### The JOHN RICHARDS.

[1 Biss. 106.] [1]

Circuit Court, D. Michigan. June Term, 1856.[2]

PARAMOUNT TO STATE LIEN — NEITHER CAN BE PLEADED IN ABATEMENT—NOT BARRED—JURISDICTION—MARITIME LIEN.

1. A maritime lien on a vessel is paramount to a domestic lien, under the statute of a state, of subsequent date. And if a judgment and sale take place under the statutory lien, it will not displace or affect the prior lien.

[Cited in The E. A. Barnard, 2 Fed. 721.]

2. The vessel in the hands of such purchaser is subject to the prior lien.

3. As the liens set up are distinct, the plaintiffs being different, neither of these suits can be pleaded in abatement to the other.

4. Though the statute declares that all claimants may come in, and that all liens not presented are barred, this cannot affect a maritime lien.

5. The purchaser, under the statute lien, could not object to the jurisdiction of the admiralty court, as the suits and rights of the parties are distinct.

[Appeal from the district court of the United States for the district of Michigan.]

In admiralty.

Alfred Russell, for libellant.

Simon Towle, for respondent.

McLEAN, Circuit Justice. This is an appeal in admiralty. [Joseph] Riggs, a citizen of Michigan, filed his libel, June 25th, 1855, for supplies furnished the schooner, John Richards, in a home port. Among other intervening libellants, J. Brayman, a citizen of Ohio, a material-man, filed his libel in the district court, September 8th, 1855. The marshal seized the vessel and made the usual return, "held in custody until the further order of the court." No person interposed a claim. Proclamation was made, order of reference, &c., and the vessel was condemned and sold the 24th of December, and the claimant became the purchaser. [See Case No. 11,827.]

The respondent's title is set up under a bill of sale from the sheriff of the county of Wayne. This sale was founded on a procedure of a circuit court commissioner under the 122d chapter of the Revised Statutes of Michigan, of 1846, for the enforcement of a lien on the vessel for repairs, &c., at the home port. The lien under which the libel was filed, was prior to that at the home port and was incurred at Toledo, in the state of Ohio, which was a foreign port, in a procedure of the admiralty.

The vessel was seized by the sheriff before it was taken into custody by the marshal, of which the marshal had no notice, and the sale of it by the sheriff was prior in time to the sale of the marshal, both being made on the 24th of December, 1855.

A question was made and argued at the hearing, as to the admissibility of certain papers, to show the procedure before the commissioner. If the proceeding of the commissioner was legally a matter of record, the proof would be defective, but from the view I take of the case it is unnecessary to decide this question.

The first section of the act gives a lien against all vessels which navigate the waters of the state, for supplies, repairs, &c. After the seizure of the vessel, twelve weeks notice is to be given, and all persons who have any demands against such vessel, under the provisions of this chapter are required to deliver an account of their respective claims, to the officer within three months from the publication of notice, and any lien, under the statute, if not presented within the time, ceases.

This proceeding is in the nature of an attachment, in which all the creditors under the act may come in and prove their debts; and if bond and security shall be given to pay the creditors, the vessel shall be released. The 7th section of the act declares that a second warrant shall not issue against the same vessel. The 36th section provides, that the procedure, shall not be instituted against any vessel which has been seized under process of the courts of the United States, nor against any vessel which has been sold by order of such courts, except claims which originated subsequent to such sale.

That there is under the maritime law, a lien on the ship for materials furnished or repairs, is too well established to be controverted. And that this lien does not depend upon the possession of the vessel as a common law lien, is also clear. In the case

[1] [Reported by Josiah H. Bissell, Esq., and here reprinted by permission.]

[2] [Affirming Case No. 11,827.]

of The General Smith, 4 Wheat. [17 U. S.] 443, the court held that this lien did not attach to the home port of the vessel. This was a distinction not found in the Maritime Code, and was no doubt adopted from deference to state regulations. Still a domestic lien at the home port of the vessel may be enforced under a maritime jurisdiction. It is conceded in the case that the lien of the libellant was prior to the lien of the respondent, under the Michigan statutes. But as the property was first seized under the statute, it is contended that the subsequent seizure by the marshal was illegal, and consequently that the district court had no jurisdiction of the case.

No procedure under the statute of seizure or sale, could affect the lien of the libellant. The claim of the respondents was distinct from that of the libellants. The sale of the sheriff was subject to the prior lien. In the hands of the purchaser under the sheriff, the vessel was liable to the claimant, and he could have enforced his lien.

The statute provides that all claimants may come in, as under an attachment and have their rights adjusted. But this is limited to claims under the statute, and did not embrace the claim of the libellant. All liens under the statute which are not presented, are barred expressly by it. No one, it is supposed, will contend that the statute embraces a maritime lien, or that the legislature had power to regulate such a lien. The rule is different in a court of admiralty. All who have an interest in the vessel may come in and be made parties and their rights will be protected. In the present case, the respondent could have exhibited his claim, and it would have been decreed subject to the satisfaction of the prior lien. But the respondent did not intervene, though he had actual notice of the admiralty procedure. He stands upon his purchase under the sheriff's sale, which did not displace the lien of the claimant. Such sale was no bar to the libel suit, and consequently the title of the respondent is unsustainable against that of the libellant.

The force of the respondent's right must rest on the alleged illegality of the procedure by the marshal. The principle is admitted, that where there is a concurrent jurisdiction the pendency of the suit may be pleaded in abatement in the suit subsequently commenced. But in these cases there is no conflict of jurisdiction. The suits are distinct, by different plaintiffs, and for distinct causes of action. The only thing common to both actions is a lien of each on the same vessel. But here there is no conflict, as all must admit that the prior lien, must be first satisfied, and that the claimant by the first lien is not disputed.

No impropriety is perceived in the arrangement between the marshal and the sheriff, to hold the property under the circumstances, subject to the right of the parties. Neither party claimed the vessel, but an interest in it, which was a mere lien, and the only question is, whether the maritime court had jurisdiction. If it had, there is an end to the controversy, as it proceeded on the paramount lien. There is nothing on the face of the record to raise a doubt as to the jurisdiction. No plea was filed to the jurisdiction, and the facts stated on the record show affirmatively, that there was jurisdiction. In such a case, the truth of the record cannot be questioned, nor its irregularity.

The decree of the district court is affirmed, with costs.

NOTE. See The Globe [Case No. 5,483]; The N. W. Thomas [Id. 10,386], and cases there cited; also The Skylark [Id. 12,928], Dec. Term, 1870, and cases there cited. The statute of New York was not intended to impair maritime liens; if it were, it would be nugatory. Such liens are beyond the reach of state legislation. The Chusan [Id. 2,716]. The purchaser of a boat, sold by order of a state court, takes it subject to any existing liens. McAllister v. The Sam Kirkman [Id. 8,658]. It is proper that the sheriff should yield to the marshal; but if the marshal do not serve his warrant, by taking possession, this court does not take jurisdiction; the practice is to wait until the sheriff's custody has ceased,—a sale by the sheriff does not affect a subsequent sale under order of the court in admiralty. The Julia Ann [Id. 7,577]. The same doctrine announced in The Gazelle [Id. 5,289]; and in the Oliver Jordan [Id. 10,503].

JOHN RICHARDS, The (RIGGS v.). See Case No. 11,827.

JOHNS (BROCKET v.). See Case No. 1,915.

## Case No. 7,362.

JOHNS et al. v. BRODHAG.

[1 Cranch, C. C. 235.] [1]

Circuit Court, District of Columbia. Dec. Term, 1804.

SURETIES—INSOLVENT DEBTOR—PRACTICE.

Sureties of an insolvent debtor, in a bond for duties to the United States are not entitled to judgment against their principal at the first term.

This cause stood on the appearance-docket of this term.

Mr. Morsell, for plaintiffs, moved for judgment in an action brought to this term on a bond given by the defendant, with the plaintiffs as sureties, to the United States, for duties; the plaintiffs having paid the duties, and the defendant having become insolvent. This suit was brought under the act of congress of the 2d of March, 1799, § 65 (1 Stat. 676).

Mr. Key, for defendant, contended—1st, That sureties are not entitled to judgment at the first term. 2d, That if they have that remedy, it can be used only in cases of such kinds of insolvency as are mentioned in the

[1] [Reported by Hon. William Cranch, Chief Judge.]

act of congress of the 2d of March, 1799, § 65, supra.

Mr. Mason and Mr. Morsell, for plaintiffs, relied on the words "the like advantage, priority or preference for the recovery," etc. They admitted that the United States could not recover judgment on a bond for duties, but by a jury trial in common form; but contended that the surety who pays the debt of an insolvent principal has a right to a trial at the first term.

THE COURT (FITZHUGH, Circuit Judge, absent) were of opinion that the surety was entitled only to the priority of payment out of the effects of the insolvent; not to the trial at the first term: Because the clause giving such trial is subsequent to the clause which gives "the like advantage, priority," &c.; because, by the words of the act, the priority of suit is only given when the duties are due to the United States; because the defendant cannot get a continuance of the cause unless the attorney of the United States be present; and because, in a suit by a surety, many more facts can be pleaded by the defendant than in a suit by the United States—such as the surety had not paid, or an offset, or that he was not insolvent, &c.

The motion was overruled, and the cause took its regular course through the dockets.

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JOHNS (CAMILLOZ v.). See Case No. 2,343.

JOHNS (JONES v.). See Case No. 7,471.

JOHNS (McLAUGHLIN v.). See Case No. 8,871.

JOHNS (NICHOLLS v.). See Case No. 10,232.

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## Case No. 7,363.

JOHNS v. SLACK et al.

[2 Hughes, 467.] [1]

District Court, D. West Virginia. Jan., 1875.

FRAUD—SALE OF LAND—PENDENCY OF CONFISCATION PROCEEDINGS—ABSENCE OF PURCHASER—UNPAID PURCHASE-MONEY—LIMITATION.

1. A person who is counsel for vendors of land, and a party interested in the proceeds by marriage, does not per se commit a fraud by moving for the sale of the land, for the recovery of unpaid purchase-money in the absence of a defaulting purchaser.

2. The pendency of confiscation proceedings by the United States against a person entitled to the equity of redemption in land, does not vitiate or help to vitiate a sale of the land, made durante bello, while that person is absent with the other belligerent power.

3. A sale of land for unpaid purchase-money is not vitiated by the fact that it is made while the purchaser is absent during war with the other belligerent power, and had no notice of the motion for the sale, or of the sale itself.

4. A sale of land lying in the outer part of a town may be made in lump and not in parcels, although it be known to the commissioner for the sale that a company had been formed for its purchase in lump, which might prevent competition between bidders.

5. It is too late in 1870 to bring a bill for setting aside such a sale, made in 1864, on the ground of fraud.

[This was a bill in equity by John Johns, assignee of John N. Clarkson, a bankrupt, against John Slack and others, to set aside a certain conveyance as fraudulent.]

A purchase had been made in 1855, of a large and now exceedingly valuable property in the outer part of the town of Charleston, Kanawha county, West Virginia, consisting of about 123 acres. Up to 1861 payments had been made of purchase-money, at that time not greatly reducing the original amount agreed to be paid. Legal proceedings had been taken to subject the land to sale in lump for the payment of the purchase-money due, and a decree obtained for the purpose. From this decree appeal had been taken to the court of highest resort, and it had been there affirmed; and there was no obstacle left in the way of a sale. Meantime $4000 more of the purchase-money had been paid. At this stage of the matter, the Civil War had broken out, and the purchaser, John N. Clarkson, had joined the Confederates and soon left the country, to which he did not return until about the year 1870. No steps were taken for a sale until the April term of the circuit court of Kanawha county, 1864. Then, on motion of counsel for the vendors, who had married a party interested in the proceeds of sale, a commissioner, Lovell, was appointed to make sale of the land, which was sold on June 25th, 1864, when the fighting was substantially over in that part of the country. The sale was made while confiscation proceedings were pending (though they were not actively pressed) against Clarkson, which would have affected his equity of redemption. The sale was made to a company of persons, which was formed for the purpose of purchasing it, and was cried out to one who had been selected to act for them, namely, Greenberry Slack. It was made while Clarkson was still absent and unable to return, being a public enemy. It was stated in evidence that the company was got up with a view to its being made to embrace all persons who would be likely to bid for any part of the property; and it was charged that the commissioner was in fact interested in the purchase, and that he colluded with the scheme of the company, by selling the property in lump, instead of cutting it up into lots, and in other ways. The bill to set aside the sale was not brought till about 1870, which was about as soon as Clarkson dared return to the country.

James H. Ferguson, William W. Gordon, and Hunter H. Marshall, for complainant.

Samuel Price, N. Goff, Jr., and William H. Hogeman, for defendants.

JACKSON, District Judge. The bill alleges that at a judicial sale made in 1855, in a suit

[1] [Reported by Hon. Robert W. Hughes, District Judge, and here reprinted by permission.]

in the circuit court of Kanawha county, in which Isaac Reed, as guardian, was complainant, and Mrs. E. V. Cox and others were defendants, John N. Clarkson became the purchaser of a tract of 122½ acres of land, adjoining the town of Charleston, in the county of Kanawha, for the sum of $15,400. He paid a portion of the purchase-money and executed his notes for the residue. Failing to discharge the notes as they fell due, such proceedings were had in the case as resulted in the appointment of William R. Cox and W. E. G. Gillison as commissioners to resell the property. After this decree was obtained, Clarkson paid four thousand dollars of the unpaid purchase-money, after which no steps were taken to resell the property until 1864. The last order made in the case, prior to the war, was at the fall term, 1859. A short time after, the condition of the country became very unsettled, and hence no move was made to enforce the decree, as we have said, until 1864. At the April term, 1864, of the circuit court of Kanawha county, on motion of William E. G. Gillison, F. A. Lovell was appointed a commissioner, instead of Cox and Gillison, to make the resale of the land under the decree rendered in 1859. Shortly after his appointment, Lovell, as commissioner, advertised the land for sale, and on the 25th of June, 1864, sold the land pursuant to the several orders theretofore made in the case of Reed v. Cox's Heirs [unreported], at which sale Greenberry Slack became the purchaser.

I have briefly given the history of this case, at least what I regard as material, to the time when the present controversy commenced. Upon this state of facts, the plaintiff in this proceeding seeks to set aside the conveyance made to the defendants, by Commissioner Lovell, in pursuance of the order of said court; alleging, first, that the action of Gillison, who held a double relation to the case, that of party in right of his wife, and counsel, was under the circumstances fraudulent. In reply to this position, I have to remark that it was his unquestioned right (if he thought proper) to act as counsel for the protection of his wife's interests, as well as those of her friends. It was a question which he alone could best determine, whether it was prudent for him to maintain that legal relation to the case, and I am not aware of any legal rule that would be violated by such action. Being interested in right of his wife, he had an undoubted right to protect her interests and take such action as in his judgment would best subserve those interests. When, therefore, he thought the time had arrived to take such action, it was not only his legal right to move, but it was clearly his duty to do so. In determining this question, he had to exercise his discretion, the exercise of which is, under the circumstances, the subject of complaint. It does not occur to me, however, that it was improperly exercised in the respects referred to, nor do I perceive that any injury has resulted from his action in this respect. At this point it is sought to connect the confiscation proceedings pending against Clarkson with the action of Gillison, by charging that he took advantage of the absence of both Clarkson and Cox to enforce the decree, pending proceedings of confiscation. The fact that Clarkson and Cox were absent and within the Confederate lines, and that confiscation proceedings had been commenced against them, and that such proceedings "constituted a damaging cloud upon the title of the property," seems to me to be of little or no consequence. At the time of the sale, the proceedings had been pending for some time, and it was evident that there was no serious purpose on the part of the officers of the government to do more than confiscate any personalty Clarkson might have. In fact, this court had announced at a very early period after the passage of the confiscation acts, that in its judgment no estate in fee was liable to confiscation, and that opinion was published and most likely known to all interested parties in this district. But it must be borne in mind that the proceedings in confiscation were against Clarkson, who had only an equitable or contingent interest, and not against the parties who held the legal title to the property in question. Clarkson had no title to it, and could have none until the purchase-money due the estate of Cox was paid and fully discharged. At the time of the sale such was not the fact; on the contrary, the balance due on the original purchase, with the accumulated interest, was about equal to the original debt. Clarkson left the country early in 1861, with a full knowledge of the fact that a decree had been entered in the circuit court of Kanawha county (which had been affirmed by the court of appeals, the court of last resort) directing a resale of the land. This fact was also well known to the people of Charleston, as the property seems to have been the subject of much talk. Every one who took an interest in the property was informed of its situation. In fact, it nowhere appears that there was any effort upon the part of any one to conceal its true condition. Hence, I conclude that the condition of the property was so well understood that the confiscation proceedings pending at the time did not influence Gillison's action, nor does the evidence disclose the fact that he in any way alluded to their pendency or used them for any purpose whatever. Nor does it appear that the pendency of such proceedings seriously affected the sale of the land in controversy. It is also alleged that the decrees should have been modified so as to lay the property off into lots for sale. But this was not done. And the question is asked why Gillison pressed the sale of the property without having first obtained such action before the sale was made. It is sufficient to say that it was not the duty of Gillison or those he represented to ask the court for a modification of the decree in that respect. It had been entered some years before and appealed from by Clarkson to the

court of appeals, and by that court affirmed. The rights of all had been determined, and it was not in the power of either party to modify it. All they could legally and rightfully do was to execute it. Gillison considered the entire tract bound for the debt he represented. They had a lien on the whole tract, and were entitled to have it sold, unless Clarkson, or some one for him, could satisfy the court that a portion of the tract would pay off the balance of the debt; in which event, the court might have so decreed. But it nowhere appears that Clarkson, or any one for him, brought this matter to the attention of the court. If at this stage of the proceedings any one was chargeable with neglect to do what might have been proper under the circumstances, it certainly was not Gillison. In no view of this question as presented, was he bound to take such action. If there was any neglect in regard to this matter, it must be with those whose absence from their homes and the country would more properly account for it. It therefore seems to me that the point attempted to be made by the plaintiff, that "it was a fraud on the part of Gillison to force a sale of the lands of Clarkson at the time and under the circumstances then existing," is not well taken. I am unable to see anything in the conduct of Gillison calculated to prejudice the rights of any one. What he did he clearly had the right to do. He waited until 1864, a period of five years after the final order had been entered, before he took any steps to enforce the decree. It is apparent that he delayed action until peace and tranquillity could be restored to the country. When he did move, the war was substantially over, and the country in this region quiet. But it is evident that the moving consideration with Gillison was to save the debt due Cox's estate. When he moved for the sale, the property had been occupied by both of the contending armies, the fine mansion house had been to a great extent dismantled, the trees, shrubbery, and fences destroyed, and the value of the property supposed to be materially affected. It was at that time abandoned, the house unoccupied, the fields in commons. Its rapid decay consequent upon its abandonment was a most potent reason for his action in the premises. There is no view that I can take of Gillison's conduct that would justify me in sustaining the charge of fraud against him. To sustain this allegation no direct proof has been brought, nor do I think the facts and circumstances of the case warrant the inference of fraud.

The next position of the plaintiff is "that the combination entered into by the purchasers of the land in question, evidenced by a written agreement, and the purchase of the land in pursuance thereof, was, under the circumstances, a fraud on the rights of Clarkson which renders the sale void." An examination of the agreement must satisfy any one that it does not of itself import or constitute a fraud upon the part of those who executed it. The fraud is, therefore, if it exist at all, subsequent to the execution of this instrument, and must have grown out of it. And first, it is contended that the sale is void, whether Lovell, the commissioner, was guilty of any official misconduct in the sale or not. To support this position the proceedings in confiscation are again invoked; this time in connection with B. H. Smith, another of the defendants, instead of Gillison. As I have before remarked, the proceedings in confiscation seem not to have influenced the action of any one, nor does it appear that any one was deterred from bidding by reason of their pendency. It will not be gravely contended that the mere existence of such proceedings amounts to anything, when the purpose of the government was either well known, or it was within the power of any one desiring information on the subject to ascertain her object. The government not only did nothing for two years before the sale of the property (after filing her libel), but, as we have seen, when the property was advertised for sale under the order of the circuit court of Kanawha county, she took no steps to prevent the sale. Under this state of things it must be presumed that she had abandoned her proceedings in confiscation, and subsequent events certainly tend to confirm this view of the case. I therefore conclude that there was nothing in the relation of the government, or its agent, B. H. Smith, to this case, that would authorize this court to conclude that the proceedings in confiscation tended to cast a cloud upon the title, or that there was any such relation to the case on the part of the government, or its officer, as would justify presumption of fraud in fact or in law upon the rights of Clarkson. In this connection, however, it is alleged that independent of the consideration just referred to, the purpose and object of this combination was to perpetrate a fraud upon the rights of Clarkson, and that the parties to this agreement had conspired together to secure that result. To support this position, the evidence of a number of witnesses has been taken by the complainant, as to conversations had with parties to this contract who were members of this combination. In considering this allegation it becomes necessary for the court to examine the evidence in support of, as well as the denials of the defendants to the truth of, the allegation, and the evidence adduced by them in support of their positions. To do this, the court is required to weigh the evidence and to look at it in the same light that a jury would be expected to examine and pass upon it. The motives of the witnesses, their relation to the case, the circumstances by which they are surrounded, and their character for credibility, are all elements to be considered and weighed by the court in making up its judgment.

Having indicated the rules for our guidance in this particular, let us briefly examine

the evidence of George High, James A. Young, and Charles C. Young, to this point. The first witness, High, details a conversation with Whittaker in which he says Whittaker stated that "he had labored hard to get up the company and get all the moneyed men into it so as to have it their own way, whereby there would be no opposition bidding." This conversation occurred after the sale, and conceding the statement to be true, would of itself tend to prove little or nothing; but he is contradicted in toto by Whittaker, and in part by McWhorter. Applying to him the well-known rule of "falsus in uno, falsus in omnibus," I deem it unnecessary at this time to notice his testimony in regard to Atkinson, who is dead, except to say that if what he asserts of him be true, that the members of the company were not to bid against each other, it does not, under the circumstances of this case, amount to anything, for the reason that the evidence discloses the fact that there was but one man in the company of any considerable means, the remaining members being men of moderate means, which of itself is a fact strongly tending not only to discredit his statements, but to establish the fact that the object of the combination was to enable men of small means to bid for the property, which is admitted to be true by John Slack, Sr. James A. Young details a conversation with Atkinson as to the value of the property, stating that Atkinson admitted that they had purchased the property far below its value by getting the moneyed men combined together. Charles C. Young speaks of a conversation with Greenberry Slack, on the morning of the sale, in which he stated that he expected to get the property for less than twenty thousand dollars, and that it was worth one hundred thousand dollars. If these conversations ever occurred, they are nothing more than idle declarations and unsworn statements that are of little or no value when met by the statements of the parties under oath. Both statements are improbable, and, I might say, almost incredible. The conversation with Atkinson took place after the sale, whilst the one with Slack was on the morning of the sale. When Atkinson is said to have spoken the sale was over, and he could have had no motive in making such a statement. The conversation with Slack is a mere expression of opinion as to what the property would sell for. There is no evidence tending to show that the statements in any way affected the value of the property or prevented any one from bidding. It is difficult to perceive what good could be accomplished by such statements, or how Slack or Atkinson could hope to be benefited by them. The evidence clearly shows that neither Slack nor Atkinson were wanting in sense, but, on the contrary, they were both successful business men of limited means. Slack contradicts Young, and is sustained by his co-defendants and many other witnesses, who testify that the property brought its full value. The statements of the two Youngs are, as I have said, very improbable, but, if not, they stand before the court with such a cloud resting upon them as to create doubt in the mind of the court as to the truth of their statements. Whilst Slack, on the one hand, is strongly sustained both by his co-defendants and the facts of the case as they are mainly developed, on the other hand the Youngs, whose statements seem to me so improbable, stand, if not entirely discredited, with their character for truth so assailed and impeached as to render it impossible for the court to credit their statements.

It will be observed that thus far I have examined the evidence relied on by the plaintiff to establish fraud on the part of Gillison and Smith. Passing from the consideration of the questions involved in their action, as well as the facts and circumstances attending the sale, I propose to examine the next position of the plaintiff, "that Lovell, the commissioner who made the sale of the land in question, was guilty of such official misconduct as to render the sale void." This is a very grave charge under any circumstances, but it is particularly so when preferred against a man whose lips are forever sealed by death, and who can have no opportunity to meet it or to explain the transaction upon which it is founded. It is therefore eminently proper that the evidence tending to fix a stain upon the memory of a man whose reputation up to the time of the transaction alluded to was without spot or blemish should be most carefully scrutinized. Therefore, before the mind of the court can be brought to this conclusion, the plaintiff must be required to establish the truth of the allegations by such credible evidence as not to leave its mind in doubt. This allegation of the bill would seem to resolve itself into two propositions. First, that the commissioner was guilty of such misconduct as would have prevented the court (if informed of his conduct) from confirming his action. Second, that he had such an interest in the result of the sale as would disqualify him from acting as such commissioner. I have to some extent examined the conduct of Lovell on the day of sale in connection with Gillison. As we have seen, he was the commissioner of the court, charged with the naked duty of selling the land under the decree. Upon the day of sale he cried the property nearly the entire day, having at noon adjourned over for a short period for dinner. No undue haste was exhibited by him, no improper act on the day of sale is proven against him. True, there is an effort to prove that he did or said something about the title of the property. But this is not clearly proven. On the contrary, if he did anything, he replied to the questions concerning it, that he was acting as commissioner, and that persons desiring information about the title had better inquire of some

lawyer, probably of Colonel Smith. Admit this to be true, and what is there in it? He is selling as commissioner, and sells only such title as is invested in him by the decree of the court. The question asked was not an unusual one at judicial sales, and the reply to it was, in my judgment, not only proper, but quite as usual. But the material fact is, who was deterred by his answer from bidding? What witness has been introduced to show that he would have given more for the property, or would have even bid upon it, except for the conduct of the commissioner?

Upon this most material point the evidence is silent. Much has been said by counsel in their arguments, tending to cast reproach upon the conduct of this commissioner on the day of sale. I confess that in the examination I have given this case, I have been unable, after most diligent labor, to find in the conduct of Lovell on the day of sale, any act that in the least reflects upon his character, or assails his action as commissioner. It is, however, alleged that he was a member of the company who purchased the property, and that he fraudulently concealed his interest, thus defrauding the creditors of Clarkson by selling the land at a sacrifice. And here we have a most pertinent inquiry. What interest does the evidence show that Lovell had? If we look for direct proof on this point, none has been adduced except the evidence of Harvey Young, which is contradicted by John Slack, Sr. The written contract between the purchasers, filed by the defendants, does not disclose it. The deed made by Slack for the benefit of the purchasers does not show it (although made long previous to the institution of this suit). We must, therefore, look to the only other source, and which is mainly relied on to fix the interest of Lovell, viz., his admissions and declarations. To establish this point, the testimony of Harvey H. Young and others is chiefly relied on. It is to be remarked, that nearly all the declarations (except in one of the conversations Lovell had with Young) were made after the sale. They were made when Lovell was not on oath, and when no opportunity was given the defendants for a cross-examination of him to ascertain the truth of his statements. The purchasers acquired their rights to the property immediately after the sale, and some time previous to the date of these declarations. Admissions of this character cannot affect the title of the defendants. The principle is well settled that "admissions made after other persons have acquired separate rights in the same subject-matter, cannot be received to disparage their title, however it may affect that of the declarant himself." The application of this principle might well be relied on to dispose of the declarations of Lovell, and further discussion upon this point rendered unnecessary. But it is not necessary to rely alone upon this principle. If the declarations ascribed to Lovell are true, he must have had some motive for making them. What that motive was is immaterial at this point of our discussion. He would then stand before the court as a witness of depraved and corrupt character, having furnished the evidence of his own guilt. The declarations, if true, convict him, as was well remarked, of "perfidy and gross turpitude." If he were living and they were sworn to, they would be disregarded as coming from a source so corrupt as to entitle them to little or no credit. But when they are made, not under the sanction of an oath, and offered as the declarations of a witness who admits his own baseness, they become utterly worthless; and a judge sitting as a chancellor, with the right to draw "all inferences which a jury might draw, and all things which they may lawfully presume will be drawn and presumed by the court," would wholly disregard testimony derived from a person so immoral and corrupt in character, and treat it as unworthy of credit.

It may be conceded, however, for the sake of the argument, that the declarations of Lovell are true, and entitled to consideration by the court in making up its judgment. Admitting to be true all they tend to prove, would the result be different? I think not. Testimony of this character is regarded as the weakest and most unreliable known to the law. It opens the door to fraud, is the most difficult to answer, and is usually resorted to by parties hard pressed to make out a case. In this case the declarations relied on are those of a dead man, and are to be received with the utmost caution. Evidence of this character, unless very strongly supported, is too weak to authorize the court to grant the relief sought for. Here, however, the declarations of Lovell are not only not strongly supported, but they are opposed by the united testimony of all the defendants that have spoken in this cause, who swear positively that at no time was Lovell a member of the company, nor did he at any time have any interest in the property purchased. But suppose Lovell was living, and introduced as a witness by the plaintiff, and admitted that the declarations made to Young and others were true, no one could or would question that the case would be much stronger against the defendants than it now stands. What would then be its condition? Would it not, upon this vital point to the plaintiff, resolve itself into an issue between Lovell claiming an interest in the property on the one hand, and all the defendants on the other denying his interest? Undoubtedly this would be the position of the case on this point. And the court would be required to decide between the testimony of a witness, standing alone, admitting his own turpitude, and the testimony of a number of persons opposed to him, who stand before the court unimpeached, and as far as this court can see, unim-

peachable. Under such circumstances, it will readily be perceived where the weight of evidence would lie. Certainly no one of the counsel for the plaintiff would claim, before a jury, a verdict upon the evidence of Lovell alone, confronted and met by all the defendants in this case. If they did, the answer would simply be, the preponderance of evidence is with the defendants, and the jury would be compelled to find in accordance with the facts. I presume it will not be pretended that the evidence of all the witnesses who prove the declarations of Lovell, makes the case stronger for the plaintiff than he (Lovell) could make it, were he present. If therefore the case upon this point would fail if Lovell were present, admitting all to be true that is here claimed to have been said by him, certainly no one will be bold enough to question the correctness of the conclusion arrived at, founded upon evidence of his admissions and declarations in his absence. The defendants, however, are not driven to rely upon this position alone. They have assailed nearly every important witness introduced by the plaintiff tending to establish Lovell's complicity in the alleged frauds. A number of them admit their subornation in this case and the falsity of their testimony, while others stand in a position calculated to weaken the faith of the court in their statements, if, in fact, they are not so far discredited as to force the court to the conclusion that their evidence should be entirely disregarded.

It is a remarkable fact, running through all the evidence relating to Lovell's declarations as to his interest, that not a witness of unblemished character, with a single exception, has been produced to prove them. The Youngs, and all others introduced for the purpose of proving his interest in the company, are men who belong to a particular class that seem to be present when needed, although many of them live out of the town of Charleston. Another fact is also striking, that Lovell lived here, was known by every one, and yet no one of unquestionable character, unless it be Harvey Young, who is contradicted by John Slack, Sr., and Ruffner, could be found to prove what the Youngs and their contemporaries have testified to. The court is therefore constrained to conclude that the evidence offered by the plaintiff is in a great measure derived from those of questionable character, whilst that of the defendants is from men who stand before the court unimpeached, and I infer unimpeachable, as it appears from the record in this case that both plaintiff and defendants have done all in their power to strengthen and fortify their positions.

Passing from the various questions I have discussed, I propose to consider briefly the object and effect of the combination which it is alleged was formed for the purpose of defeating competition at the sale. That the object was to enable the defendants to bid at the sale and become the purchasers is clearly shown both by the agreement and the evidence. Surely it was a proper one, and has been sanctioned both by usage and law. I am not aware of any principle, either moral or legal, that would be violated by the formation of such an association as the evidence shows this one to be. If such was not the case, then our great industries and enterprises would at once be stayed, and the march of progress in the development of all the great resources of the country would be at an end. In every stage of society this mode has been adopted for the accomplishment of objects of greater or lesser magnitude. I cannot, therefore, see any objection to the formation of this association, nor to its avowed object. If we look to the effect produced by its formation, certainly the evidence does not show that any one was prevented from bidding, nor do we perceive that the property, at the time, sold for less than its value. Whilst the testimony upon this point is conflicting, yet it is clear to my mind that the weight of the evidence in the cause supports this conclusion. It cannot be denied that the evidence is of the most conflicting character. After a careful examination of it, I have reached the conclusion that not only the preponderance but the great weight of the evidence is with the defendants. The allegations of fraud, so much relied on, are not sustained by testimony strong enough to justify the court in granting the relief prayed for. It is wanting in the essential elements that I have already shown it to be deficient in. But when we weigh the testimony offered by the plaintiff with that of the defendants, which is supported and sustained by the answers filed in this case, in which they deny in most explicit and emphatic terms every allegation of fraud, the court cannot escape the conclusion that the plaintiff has failed to sustain his case by that preponderance of testimony which would justify the court in setting aside the deed from Lovell, which is sought to be cancelled and annulled by this proceeding. And I may here remark that courts do not look with much favor upon a proceeding instituted, as this was, so long after the property had been sold, and passed into the hands of other and subsequent purchasers without notice. In this case it seems to me there was unnecessary delay in the institution of this suit. In the view I have taken in this case, I deem it unnecessary to discuss the legal questions arising on the demurrer and presented by the pleas of the defendants. Upon full consideration of this case, I am of opinion that the case is with the defendants, and that the bill be dismissed with costs.

NOTE. The court did not consider, at the hearing of this cause, the exceptions taken, either to the depositions themselves or to the evidence they contained, for the reason that its at-

tention was not called to them by either party in the discussions of counsel; but the counsel on both sides discussed all of the evidence read in the cause, and made no reference in their discussions to any exceptions to the depositions or testimony contained therein.

## Case No. 7,364.

The JOHN SANDERSON.

The ALBERT G. LAWSON.

[4 Ben. 178.] [1]

District Court, S. D. New York. May, 1870.

COLLISION IN EAST RIVER—VESSEL AT ANCHOR—NEGLIGENCE.

1. The schooner S., while at anchor in the East river, between Blackwell's and Manhattan Islands, having her sails up, was run into by the schooner L., about 9 a. m. *Held*, that it was no fault in the S. to leave her sails up, while at anchor, in broad daylight, at a place where she could be seen from a long distance, and was not obstructing the channel.

2. The collision was caused by the negligence of the L. in tacking too close to the bows of the S. and in not discovering that she was at anchor.

In admiralty.

D. McMahon, for the Lawson.

Beebe, Donohue & Cooke, for the Sanderson.

BLATCHFORD, District Judge. These are cross libels for a collision, $1,000 damages being claimed in the first case, and $1,800 damages in the second case. The collision took place in the channel between Blackwell's Island and Manhattan Island, near to the Blackwell's Island shore, about opposite between 78th street and 79th street, about 9 o'clock on the morning of Sunday, the 4th of October, 1868. The wind was fresh from the north-east, and the tide was running flood, the wind blowing against the tide. The Lawson had left New York City for a voyage through the said channel, and through Hell Gate, to the eastward. She was going with the tide and beating. The Sanderson had come from Nova Scotia, and had passed through Hell Gate bound to New York City. The whole contest in the case is as to whether the Sanderson was at anchor or not, at the time of the collision. I am satisfied, on the evidence, that she was, and that she had been thus at anchor for some two hours before the collision. She came to anchor under the direction of a competent licensed Hell Gate pilot, who was on board of her, and who anchored her, because she was unable to stem the strong flood tide, even sailing before the wind, she being a very dull sailer. When she anchored, which she did not do until the tide began to carry her backward, she clewed up or took in all her sails but her two jibs, her foretopsail, her foresail, and her main sail. As she thus lay, her foretopsail was the only sail which was allowed to draw to any extent, her main sheet being hauled right aft. What drawing there was by her sails was proper and necessary, to keep her steady and prevent her from dragging her anchor afoul of the Croton water pipe, which crossed to Blackwell's Island a short distance astern of her. She was anchored as close to Blackwell's Island as it was proper for her to be, leaving abundance of channel room to the westward of her. She had a proper and competent watch kept on deck, and her wheel was properly attended to after she anchored. In this posture of things, the Lawson, in beating, ran across the bows of the Sanderson, from the New York side, and tacked near the Blackwell's Island shore, and so close to the bows of the Sanderson, that the flood tide carried the Lawson against the Sanderson, the port bow of the Lawson striking the port bow of the Sanderson, and the Lawson being, therefore, a little between the Sanderson and the Blackwell's Island shore, though nearly head and head. Prior to the collision, and when it was seen, from the Sanderson, that a collision was imminent, everything was done on board of the Sanderson, that could be done, to avoid the collision and mitigate its effects. The helm of the Sanderson was put hard a-starboard, so as to sheer her, as far as her anchor chain would allow, towards Blackwell's Island, and give the Lawson a chance to clear her to the westward, and ten fathoms more of chain were run out on the Sanderson, the fifteen fathom shackle being under water. The collision happened through the recklessness and negligence of those in charge of the Lawson. The evidence shows, that they were intent only on overhauling another schooner, which was beating through the channel ahead of them, that, in their reckless sailing, they nearly collided with that other schooner, close to the bows of the Sanderson, and that they jumped to the conclusion that the Sanderson was not at anchor, because they saw her sails up, and saw the tide running against her bows. Ordinary attention would have shown them that she was not under way, for she was in plain sight from their vessel, for a long distance, the shores of the channel being straight, and, as she was at anchor, her position was not at any time altered, as they were approaching. It was no fault in the Sanderson to leave her sails up, while at anchor thus, in broad daylight, at a place where she could be seen from a long distance, and when she left abundance of channel to the westward of her. After she came to anchor, other vessels beating through tacked short of her, and passed safely by. Nothing but gross inattention and want of care could have put the Lawson where she was, it being clear that the Sanderson was at anchor.

The libel against the Sanderson must be dismissed, wih costs. In the case against

[1] [Reported by Robert D. Benedict, Esq., and here reprinted by permission.]

the Lawson, there must be a decree for the libellants, with costs, with a reference to ascertain their damages.

JOHNS (UNITED STATES v.). See Cases Nos. 15,480 and 15,481.

## Case No. 7,365.

JOHNSEN v. FASSMAN et al.

[1 Woods, 138; 5 Fish. Pat. Cas. 471; 2 O. G. 94.] [1]

Circuit Court, D. Louisiana. April 6, 1871.

PATENTS—APPLICATION AND ISSUE—ABANDONMENT.

1. The fact of abandonment must result from the intention of the patentee expressly declared or clearly indicated by his acts.

2. The issue of letters patent by the patent office is prima facie evidence that there has been no voluntary abandonment of his invention to the public by the inventor, either before or after his application for letters patent.

3. The rule to be deduced from the authorities on the question of abandonment after application is, that after the issue of letters patent, the abandonment must be shown to be positive, actual and intentional by some act or declaration of the inventor, or by such gross laches as indicate unmistakably an intention to abandon the invention to the public.

4. Where nothing was relied upon to defeat complainant's patent but the inventor's delay in prosecuting his application for the patent, his application having been finally rejected by the commissioner, April 11, 1857, and not appealed until August 16, 1866, during four years of which time the patent office was closed to him by reason of his residence in a state that was in rebellion, *held*, that no direct or implied abandonment was shown.

[Cited in Colgate v. Western Union Telegraph Co., Case No. 2,995.]

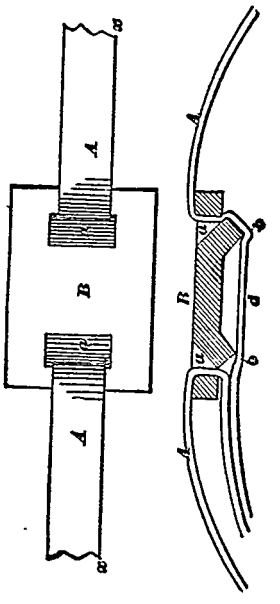
5. A patent relates back to the date of the application; and patents granted to other inventors during the pendency of such application, so far as they cover the same invention, are void, and are no protection to an infringer.

[Cited in Goodyear Vulcanite Co. v. Willis, Case No. 5,603; American Roll-Paper Co. v. Knopp, 44 Fed. 611.]

6. A cotton-bale tie, in which the lower edges of the transverse slots are provided with lips or flanges projecting downward at an angle with the plane of the buckle, to prevent the end of the band from slipping, *held* to be infringed by a tie in which the slots are provided with toothed or serrated edges for the same purpose.

[Final hearing on pleadings and proofs. Suit brought upon letters patent [No. 59,144] for an "improvement in cotton-bale ties," granted to complainant [Charles G. Johnsen], as assignee of Charles Swett, October 23, 1866. The nature of the patented invention and of the alleged infringement are set forth in the opinion.

[1] [Reported by Hon. William B. Woods, Circuit Judge, and by Samuel S. Fisher, Esq., and here compiled and reprinted by permission. The syllabus and opinion are from 1 Woods, 138, and the statement is from 5 Fish. Pat. Cas. 471.]




[The above engraving represents the Swett tie in plan and in section. The end of the band, A, is passed through the slot, a, and bent backward. The other end, having passed around the bale, is thrust through the other slot, and under the projections, b, b, as shown at d; so that when the bale expands, as it is released from the press, the band is tightly gripped between the tie and the bale, or between the bale and the upper part of the band, and thus held securely. An illustration of the "alligator," or defendant's tie, will be found in the report of the case of Cook v. Ernest [Case No. 3,155].[2]

A. Phillips, C. Roselius and S. S. Fisher, for complainant.

Lea, Finney & Miller, for defendants.

WOODS, Circuit Judge. This cause is submitted for final decree upon the pleadings and evidence. The object of the suit is to enjoin defendants from infringing upon an improvement in cotton-bale ties, which the complainant avers was patented to Charles Swett, October 23, 1866, and by whom all rights under said patent have been assigned to complainant. The claim of Swett's patent was for "a new and improved fastening block for securing metallic bands or hoops to cotton-bales," described thus: "A block of suitable size, either made by casting or stamping out of metal. In this block are formed two slots or holes parallel with each other across the block; the length of the slots is to be equal to the width of the hoops to be used. From the corner and inner edges of the slots, projections extend out obliquely beneath said slots and nearly covering their lower openings." After applying the bands as described in the specification, "then, when

[2] [From 5 Fish. Pat. Cas. 471.]

the bale is removed from the press, the elasticity of the cotton presses firmly against the ends of the hoops and prevents them being withdrawn."

The answers of defendants allege, by way of defense, that long before the date of the patent of Swett and of his assignment to complainant, Swett had abandoned his invention. They aver that the application of Swett for letters patent was made in the year 1856, and was rejected in the same year, and again, upon an amendment of specifications, was finally rejected by the commissioner of patents, April 11, 1857, for want of novelty; that Swett acquiesced in the decision of the commissioner from that date until August, 1866; that from the date of the rejection of his application in April, 1857, down to August, 1866, Swett took no steps whatever to obtain letters patent for his said invention, but acquiesced entirely in the rejection of his application, and abandoned his pretension to a patentable invention; and that in the meantime many different forms of blocks, plates and buckles with slots for the insertion of a hoop or band, and various devices to hold and fasten the ends of the bands together, with the aid of the expansive pressure of the cotton in the bale, were in notorious use; that on April 18, 1865, letters patent, embodying those general features, were issued to defendant E. Victor Fassman, and were reissued on an amended specification on December 11, 1866, relating back, however, to the said April 18, 1865. They allege that an appeal to the supreme court of the District of Columbia was taken by Swett; but aver that it was not until the year 1866, long after the application of Swett had been abandoned, and that the effect of the decree of that court was merely to overrule the decision of the commissioner of patents, rejecting said application for want of novelty.

The answer also denies any infringement of the complainant's patent by the defendants, or any of them, so that the only questions presented by the pleadings are: (1) Did Swett abandon his invention before the issue of his letters patent? and (2) have the defendants infringed? The facts as to the delay between the application of Swett, April 23, 1856, and the issue of letters patent to him, October 23, 1866, are correctly stated in the answer. Defendants rely upon these facts as proof of abandonment, and offer no other evidence. There is no proof of actual abandonment. Are these facts sufficient evidence to support the defense of abandonment? The fact of abandonment must result from the intention of the patentee expressly declared or clearly indicated by his acts. In the case of Adams v. Jones [Case No. 57], Mr. Justice Grier said: "By the application filed in the patent office the inventor makes a full disclosure of his invention, and gives public notice of his claim for a patent. It is conclusive evidence that the inventor does not intend to abandon it to the public. The delays afterward interposed, either by the mistakes of the public officers or the delays of courts, where gross laches cannot be imputed to the applicant, cannot affect his right." In the case of Dental Vulcanite Co. v. Wetherbee [Id. 3,810], Mr. Justice Clifford says: "The next objection to be noticed is that the inventor abandoned his invention, because his application for a patent was made April 12, 1855; was rejected February 6, 1856; and because he did not appeal at all or make any new application until March 25, 1864. Actual abandonment is not satisfactorily proved, and it is not possible to hold that any use of the invention, without the consent of the inventor, while his application for a patent was pending in the patent office, can defeat the operation of the letters patent after they are duly granted. Such delays are sufficiently onerous to a meritorious inventor, if his patent is allowed to have full operation after it is granted; but it would be very great injustice to hold that any delay, which the inventor could not prevent, should, under any circumstances, affect the validity of his patent." So in the case of Rich v. Lippincott [Id. 11,758], Mr. Justice Grier charged the jury as follows: "If you find that the application in 1836, renewed in 1837, was for the same subject matter now patented, and if such application was not withdrawn by Fitzgerald, but the delay was caused by the conduct of the commissioner of patents in refusing to grant the patent for the same invention since patented, then Fitzgerald should not be considered to have abandoned his invention to the public, unless he abandoned it before 1836, which is not contended." In this case the patent was issued in 1843. In McMillin v. Barclay [Id. 8,902], the question is asked: "Upon what reasoning should the inventor be regarded as having given up his invention to the public, merely because a public officer has repeatedly denied his application for a patent, and the recognition of his right has thus been denied for years, when he was powerless to prevent it?" The issue of the letters patent by the patent office is prima facie evidence that there has been no voluntary abandonment of his invention to the public by the inventor, either before or after his application for letters patent.

The rule to be deduced from the authorities on the question of abandonment after application for letters patent we think to be this, that after the issue of letters patent, the abandonment must be shown to be positive, actual and intentional by some act or declaration by the inventor, or by such gross laches as indicate unmistakably an intention to abandon the invention to the public. Nothing is relied on in this case but the delay of the inventor in taking his appeal from the decision of the commissioner of patents to the supreme court of the district. The application of Swett was finally reject-

ed, on amended specifications, April 11, 1857. He appealed on August 16, 1866. Here was a delay of nine years and four months. In the case of Dental Vulcanite Co. v. Wetherbee, supra, there was an interval of eight years between the rejection by the patent office and the appeal. That was not considered by the distinguished judge who decided that case as sufficient evidence of abandonment. But in the case on trial, if we were disposed to hold that a delay of nine years and over was sufficient evidence of abandonment unless accounted for, there is a fact disclosed by the record which would relieve Swett of the imputation of gross laches—that is, that he was a citizen of one of the states in revolt during the late rebellion—to wit, the state of Mississippi—so that for four of the nine years of the interval between the rejection of his application and his appeal, the patent office was closed to him. Bearing this fact in mind, we are clear that no direct or implied abandonment is shown by the record in this case. The fact that, between the date of the application of Swett and the issue of his letters patent, other letters patent were issued to other inventors for substantially the same invention, gives them no right to infringe on Swett's patent. His patent relates back to the date of his application; any patent for the same invention granted to another inventor, while his previous application was pending, so far as it covers Swett's invention, is void, and is no protection to an infringer.

The next and only other question presented for determination is the question of infringement. An inspection of the models of the buckles used by the defendants clearly shows that they all embody the principle and infringe on the Swett patent. The only tie about which I have had any doubt is known as the alligator tie. This tie consists in a buckle, the opening or slot of which has serrated or toothed edges, which, when the pressure is removed from the bale, prevents the slipping of the end of the tie. There are no lips or flanges turned down at an angle with the plane of the buckle, as in the Swett patent. The serrated edges in the alligator tie are substituted for the flange in the Swett tie. The application of Swett was first rejected by the patent office on the ground of want of novelty—the commissioner deciding that it was substantially identical in form and effect with the common sliding clasps or buckles used on hat bands, suspenders, harness, etc. Mr. Chief Justice Carter, in his opinion reversing the decision of the commissioner, says: "Inspection of the device satisfies my judgment that this conclusion is erroneous. The contrivance is neither buckle nor sliding clasp, although performing more or less the office of each, and for the purpose designed, more effectual than either. The clasp and buckle are both without the flanges that constitute the distinguishing excellence, enabling it to hold the contents of the bale by the very process exerted in escape. It embraces, also, the advantage undisclosed in either clasp or buckle—viz.: tying itself up to its work through the agency of force exerted against it, a function employed by neither clasp nor buckle. The teeth in the alligator tie perform the same function as the flanges in the Swett tie, and on the same principle, viz.: "they hold the contents of the bale by the very process exerted in escape; it ties itself up to its work through the agency of force exerted against it." It is the same device acting on the same principle, performing the same function, only modified in form. We think it to be an infringement on the Swett patent, now the property of complainant. Let there be a decree for complainant, enjoining defendants as prayed in the bill, and let the case be referred to a master to take an account of profits.

[Patent No. 59,144 was reissued May 7, 1872 (No. 4,896). For another case involving this patent, see Johnson v. Beard, Case No. 7,371.]

JOHN SHAW, The (COFFIN v.). See Case No. 2,949.

## Case No. 7,365a.

Case of JOHNSON.

[Betts' Scr. Bk. 65.]

District Court, D. Kentucky. 1842.

BANKRUPTCY—MUNICIPAL OFFICER—EFFECT OF DISCHARGE.

[1. A municipal officer who receives moneys as license fees is a public officer, within the bankrupt act of August 19, 1841 (9 Stat. 440, c. 9), and, if a defaulter in such office, cannot maintain a voluntary petition under the act.]

[2. A discharge under Act Aug. 19, 1841 (9 Stat. 440, c. 9), frees the bankrupt from all debts provable under the act, whether actually proved or not.]

In bankruptcy.

MONROE, District Judge. It appears, on the petitioner's own showing, that he was indebted some six or eight hundred dollars to the city of Louisville, in consequence of his defalcation as clerk of the board of mayor and council, on account of moneys received by him according to his duty as such officer, for licenses to hacks, etc., and which he had failed to pay over according to the laws of the city. It was decided:

1st. That Johnson was a public officer within the statute, for that, though such terms may in some of their predicaments in other acts of congress be confined to the officers of the federal government, yet, regarding the subject of the statute with the context of the words, and their juxtaposition with executors, administrators and guardians, they do here include all state officers, and that the officers of a city corporation, exercising within its territorial limits a portion of the public authority of the

state, are literally, and in the sense of the law, public officers.

2d. That the construction contended for by the petitioner's counsel, that he might be declared a bankrupt, and be discharged of all his debts except that which he owes in consequence of his defalcation as a public officer, and of it, also, or not, as the creditor might elect to prove it against his bankrupt estate or stand off, was not maintained, because the declaration on the 4th section, that the "discharge and certificates shall be a full and complete discharge of all debts, contracts, and other engagements of the bankrupt which are provable under this act," does not leave the effect of the discharge in bar of any debts whatever, to depend upon whether it be proved by the creditor and claimed against the estate or not; that this form of expression could not have been employed to narrow the effect of the certificate, but was probably selected to embrace all contingent and uncertain demands, the holders of which expressly permitted by the succeeding section "to come in and prove under the act."

3d. That the object was most manifestly to exclude every person owing debts in consequence of his defalcation as a public officer, which in officers of the federal government they had, but six days before, declared should be henceforth deemed a felony, together with all other persons coupled with them in the exclusion from entering this door of the court with their own original petitions for the benefit of the act.

## Case No. 7,366.

Ex parte JOHNSON et al.

[The case reported under above title in 1 N. Y. Leg. Obs. 166, is the same as Case No. 133.]

## Case No. 7,367.

Ex parte JOHNSON.

[1 Wash. C. C. 47.] [1]

Circuit Court, D. Pennsylvania. April Term, 1803.

WITNESS FEES.

A witness recognised and attending the court on the part of the defendant, if sworn and sent before the grand jury on the part of the United States, is entitled to be paid by the United States for his attendance on the trial.

In the case of U. S. v. Coalter [unreported], who was indicted this term for murder committed on the high seas, and acquitted; it appeared that a Mr. Johnson, who had been recognised to appear as a witness for the defendants, had nevertheless been marked on the indictment, and sent up to the grand jury by the district attorney. It was now moved that the marshal should pay him for his attendance, as if he had been recognized on the part of the United States. The district attorney opposed the motion, and declared that he was not sent up as a witness on the part of the United States, but from a wish, on his part, that the jury should hear as well the witnesses for, as against the prisoners.

WASHINGTON, Circuit Justice. I have no doubt but that Johnson was sent to the grand jury from the best motives on the part of the attorney, but I cannot say that I approve of the practice, and would not have permitted it, had the subject been mentioned in court. As the indictment, when found, amounts to nothing more than calling upon the accused to answer, it is highly improper that the grand jury in their retirement, and without the legal aid of the court as to what is and what is not proper testimony, should in fact decide the cause, which they do if they through mistake of the law should not find the bill. The accused having the benefit of a speedy, candid, and open trial, under the direction of the court, where all his witnesses are heard, can suffer no inconvenience from this rule. If therefore the attorney chose to make use of the defendant's witness, and marked him on the indictment as a witness for the prosecution, he must be paid by the United States.

[1] [Originally published from the MSS. of Hon. Bushrod Washington, Associate Justice of the Supreme Court of the United States, under the supervision of Richard Peters, Jr., Esq.]

## Case No. 7,368.

In re JOHNSON.

[Betts' Scr. Bk. 62.]

Circuit Court, D. Cape Fear, North Carolina. Aug. 15, 1842.

BANKRUPTCY—ORDER FOR DISCHARGE — PRACTICE —"DISTRICTS."

[1. A decree of bankruptcy, and an order for the discharge of the bankrupt, must, under Act Aug. 19, 1841 (5 Stat. 440, c. 9), be made in court, and not at chambers.]

[2. Albemarle, Cape Fear, and Pamlico, as defined in Act April 29, 1802 (2 Stat. 156), are "districts," within the bankrupt act of August 19, 1841, § 7 (5 Stat. 446), providing that bankruptcy proceedings must be in the district where the bankrupt resides.]

[This was a petition by Neill Johnson, a bankrupt, for a final discharge, under Act Aug. 19, 1841 (5 Stat. 440, c. 9). Questions in connection therewith were referred to this court by the district judge.]

DANIEL, Circuit Justice. In this case it is stated by the district judge that the petitioner, having been previously decreed a bankrupt, on the 25th day of April, 1842, filed a petition for a final discharge and certificate in the clerk's office of the district court of Cape Fear, and on the 2d day of May, 1842, moved, by his attorney, in open court, that a day might be named for the

hearing of the said petition before the judge of the district court, at chambers, wheresoever he might be at the said day so to be named; and his honor being willing to hear the said petition at Fayetteville, in the said district, on the 1st Monday in August, 1842, but doubting his power, under the act of congress, to hear the petition for a final discharge and to decree a certificate at chambers, or at any other place than the town of Wilmington, where the stated courts for the said district are by law to be held, did thereupon, in his discretion, adjourn to circuit court for the district of North Carolina the question whether the district judge had power to decree at chambers the discharge and certificate prayed for.

By the sixth section of the act of congress [of August 19, 1841 (5 Stat. 445)], it is declared that the district court in every district shall have jurisdiction in all matters and proceedings in bankruptcy arising under this act, and every other act which may hereafter be passed on the subject of bankruptcy; the said jurisdiction to be exercised summarily, in the nature of summary proceedings in equity; and for this purpose the said district court shall always be declared to be open. One main object of the provision just quoted was evidently dispatch; and with that view is the district court empowered to hold as many sessions for hearing cases in bankruptcy as the exigencies of the community shall require. But, in all the proceedings directed or authorized by the statute, the character and identity of the court seem to be contemplated; it is the court by whom the requisite measures are to be taken. Some aid in interpreting this section of the act of congress may be obtained from the reference it contains to summary proceedings in the courts of equity, for the accomplishment of which these courts are considered as always open; for instance, the awarding of writs of injunction and ne exeat. Judges in chancery grant these writs summarily, and when not sitting as a court, but all subsequent proceedings upon them are had as acts of the court. By parity with this practice in chancery, to which the act of congress probably refers, the district judge might regularly receive petitions, and perhaps order a summons or notice for the hearing of the question of bankruptcy; but the return of notices or process should be into the district court proper, and much more, is it thought, should the decision of every question affecting the rights of the petitioner or his creditors be before the same tribunal, and regularly constituted and described by law. With respect to the place at which the proceedings in bankruptcy are either to be commenced or prosecuted, the seventh section of the act of congress gives the rule. By this section it is declared that all petitions by any bankrupt, or by any creditor against any bankrupt, and all proceedings in the case to the close thereof, shall be in the district court within and for the district in which the person supposed to be a bankrupt shall reside or have his place of business at the time when such petition is filed, except when otherwise provided by this act.

There can be no question that any proceedings in bankruptcy, to conform to the language so plainly expressed in this section, must, from the petition down to the final decree, inclusive, take place within the district of the bankrupt's residence, or that in which was situated his place of business at the time of the filing of his petition. The state of North Carolina, however, constitutes, of itself, one district, and that is subdivided into three smaller, separate districts, distinguished by the act of congress of April 29, 1802, by certain geographical boundaries and limits, set forth in sections 8 and 9 of the act, viz. the district of Cape Fear, of Albemarle, and of Pamlico; and it has been made a question whether the seventh section of the bankrupt law, which requires the proceedings to be had in the district of the bankrupt's residence, would be complied with by the institution and prosecution at any place within the state the subject of it being a citizen and resident of that state. At first view, some ambiguity might seem to grow out of the language of the law, when compared with the arrangement of the districts within the state of North Carolina. Upon a closer consideration, however, such ambiguity is deemed rather apparent than real. The subdivision of the state was doubtless intended for the accommodation of the inhabitants of the several districts, respectively, in their ordinary business in the courts. In instances of bankruptcy, when traveling and expenses of every kind are burthensome and inconvenient, these causes may be supposed to operate with augmented influence, and in a proportionate degree to call for such a construction of the laws as would remove or mitigate the evils which had prompted to a division of the state. The seventh section of the bankrupt law should therefore receive that interpretation which will insure, to the utmost, these desirable results. Such an interpretation accords as well with the language as with the objects of this law. In conclusion, it is the opinion of the judge of the circuit court, upon the matters adjourned in this case, that the district judge has not the power, out of court, either to make a decree declaring the party a bankrupt, or awarding to him a final discharge and certificate as such, but that a decree to either effect must be the act of the court, performed in court; and it is further the opinion of the judge of the circuit court that the petition in this case, and all proceedings had thereon to the close thereof, should be had and prosecuted in the district of Cape Fear, in which it appears that the petitioner resided at the time of filing his petition.

## Case No. 7,369.

In re JOHNSON et al.

[2 Lowell, 129.] [1]

District Court, D. Massachusetts. May, 1872.

BANKRUPTCY — FRAUDULENT PREFERENCE—PARTNERS—JOINT AND SEPARATE CREDITORS.

1. The conveyance of the joint assets of an insolvent firm to a continuing partner is a fraudulent preference by the bankrupt act [of 1867 (14 Stat. 517)]; if made within four months of a petition in bankruptcy, it may be set aside by the joint creditors.

[Cited in Re Lane, Case No. 8,044.]

2. Whether joint creditors can share equally with separate creditors in the separate property of the continuing partner, if there is no joint estate and no solvent partner, quaere.

[Cited in Re Clap, Case No. 2,784.]

3. It seems that joint creditors may assent, after petition in bankruptcy, to such conveyance, and come in with separate creditors to prove their debts against the separate estate of the continuing partner, if he has assumed the joint debts.

[Cited in Mattocks v. Rogers, Case No. 9,300.]

[Cited in Rich v. Solari, 6 D. C. 373.]

Johnson & Stowers were copartners in the trade of retail grocers, and dissolved their firm November 4, 1870. Stowers intended to continue the business with new partners; and he paid Johnson $5,000 for his interest, and gave him a bond to pay the joint debts, and Johnson gave Stowers a conveyance of all the joint estate. A few days afterwards Stowers discovered that the firm was insolvent, and tried to make a settlement with the creditors; failing in which he brought a petition in this court December 2, 1870, to have the firm adjudged bankrupt, alleging fraud on the part of Johnson in the contract of dissolution. A trial was had; and the firm were adjudged bankrupt, on the ground of insolvency, without a determination of the question of fraud. In re Stowers [Case No. 13,516]. The assignees collected $3,821.07 from the assets, which had been conveyed by Johnson to Stowers; and on the presentation of his account a separate creditor objected that this money should have been returned as the separate property of Stowers, instead of being credited to the joint account. Both partners were liable, individually, to this creditor, and neither had any separate estate, unless the joint assets had become separate by the contract of dissolution, and its consequences. Evidence was taken before the register, and reported by him; and he expressed the opinion that the arrangement between the partners was rendered voidable by the fraud of Johnson, and that the assets should be treated as the joint property of the firm.

S. A. Bolster, for separate creditor.

C. P. Hinds, for joint creditors.

LOWELL, District Judge. That partners may dissolve their connection, and, as part of the arrangement, may convey all the assets to one of them, and may thus lawfully convert joint into separate estate, has become an established doctrine in equity as well as at law. Ex parte Ruffin, 6 Ves. 119; Ex parte Fell, 10 Ves. 347; Howe v. Lawrence, 9 Cush. 553; Robb v. Mudge, 14 Gray, 534; Ex parte Williams, 11 Ves. 3. The rule, and the reason for it, are thus stated in Story on Partnership (section 358): "While the partnership is solvent and going on, the creditors have no equity, strictly speaking, against the effects of the partnership. All they can or may do is to proceed by action at law for their debts against the partners; and, having obtained judgment therein, they may cause the execution issued on that judgment to be levied upon the partnership effects, or upon the separate effects of each partner, or upon both. There being, then, no lien and no equity in favor of the creditors against the partnership effects until such execution is issued and levied thereon, it follows that these effects are susceptible of being legally transferred bona fide, for a valuable consideration, to any persons whatsoever, and as well to the other partners as to mere strangers." The injustice of this doctrine, when applied to a settlement in bankruptcy in which the courts recognize the assets as severed, but refuse to sever the debts, has struck many learned judges. Thus, Sir J. Leach, V. C., in Ex parte Freeman, Buck, 474: "I agree that it may be some hardship upon the joint creditors that the joint stock, to which they have specially given credit, should, by the dealing of their debtors with each other, be thus converted into separate estate. That hardship would have been avoided, if it could have been held that where, upon a dissolution, one of two partners is to become the sole owner of the joint stock, and it is a part of the consideration that he shall pay the joint debts, such joint stock shall not, in bankruptcy, be considered as converted into separate estate, unless he has paid the joint debts. The cases of Ex parte Ruffin [supra], and the others which have followed it, have established that the legal principle which converts the joint estate into the separate estate, by the mere force of the contract, is too strong for this equity."

Several of the cases present strong illustrations of this hardship. In Howe v. Lawrence, 9 Cush. 553, the firm had been dissolved but a few weeks before the bankruptcy, and but few new debts had been contracted, and there was newly acquired property to represent them.

The rule can never satisfy the courts or the suitors, and it has been made subject to several exceptions in England, which are of very doubtful application, to say the least, in this country. One of them is involved in this case; namely, that if there is absolutely no joint estate and no solvent partner, that is, no partner out of bankruptcy, the joint creditors may come in against the separate

[1] [Reported by Hon. John Lowell, LL. D., District Judge, and here reprinted by permission.]

estates of the partners in competition with the separate creditors. This exception is called "an eccentric variation," by Daniel, J., delivering the judgment of the supreme court in Murrill v. Neill, 8 How. [49 U. S.] 426, and at pages 427, 428, the learned judge expresses great doubt of its soundness, and of its having been adopted in this country. He cites McCulloh v. Dashiell, 1 Har. & G. 96, as expressly repudiating it. It has been doubted or positively denied by several other courts in America. See In re Marwick [Case No. 9,181]; Howe v. Lawrence, 9 Cush. 553; Somerset Potters' Works v. Minot, 10 Cush. 592; Weyer v. Thornburgh, 15 Ind. 124; In re Byrne [Case No. 2,270]. There are others which uphold it, and I have carefully read them; but I do not see in them a very full and careful consideration of the authorities, and reasons which have been brought to bear against it. I find it difficult to say that the clear and decisive command of the bankrupt act (section 36), requiring the joint estate to be appropriated to pay the creditors of the copartnership, and the separate estate of each partner to pay his separate creditors, is dependent for its operation upon the accident that the joint fund has already been exhausted before the bankruptcy, in paying the joint debts, or in any other lawful way. Mr. Justice Bigelow, speaking of the statute of Massachusetts which congress has adopted, totidem verbis, says, that it is distinct and peremptory, and recognizes no such exception. Howe v. Lawrence, ubi supra.

The better mode of meeting the difficulty seems to me to be to permit the joint creditors to assent to the conversion, and thus to become separate creditors, even after bankruptcy has occurred. The decisions have been tending to this point, though but few have yet reached it. The early cases laid down the rigid rule, that there could be no substitution or conversion by which a joint debt of two partners should become the separate debt of the remaining partner; because there was no consideration for the relinquishment of the responsibility of the retiring partner. Lodge v. Dicas, 3 Barn. & Ald. 611; David v. Ellice, 5 Barn. & C. 196. This strict construction, under the guise of protection to the rights of the creditor, really destroyed them, in many cases; and it is now well settled, in England, that if the creditor has assented to the change, whether expressly or by a course of dealing, the debt is severed. Thompson v. Percival, 5 Barn. & Adol. 925; Oakeley v. Pasheller, 4 Clark & F. 207; Hart v. Alexander, 2 Mees. & W. 484; Lyth v. Ault, 7 Exch. 669; 1 Lindl. Partn. (2d Ed.) 454. In bankruptcy, it is always permitted to a creditor who has assented to the arrangement to prove against the estate of the substituted debtor. Colly. Partn. (5th Am. Ed.) § 918; Robs. Bankr. p. 508.

The law in this country is not entirely uniform, but the better opinion seems to be in accordance with the later decisions in England. Story, Partn. (6th Ed.) §§ 155, 156; Pars. Partn. 421; Waydell v. Luer, 3 Denio, 410; Backus v. Fobes, 20 N. Y. 204; Shaw v. McGregory, 105 Mass. 96; Harris v. Lindsay [Case No. 6,124]. In Wild v. Dean, 3 Allen, 579, decided in 1863, it was held that, even in bankruptcy, to enable a creditor to share in the continuing partner's estate it was not enough that the continuing partner had become bound to the retiring partner to assume all the debts, and that the creditor had assented, but there must be a new promise to pay each creditor in particular. This decision does not seem to accord with the recent authorities above cited; and the law of Massachusetts was very soon changed by St. 1865, c. 113, which gives the creditor his election, and permits him to exercise it even after the debtor has become a statute bankrupt. This appears to be a reasonable rule, as I have before said. The courts have thought the choice should be made before actual bankruptcy; because that act is supposed to fix the rights of all parties, and under all circumstances, beyond any possible modification. In this I find the courts have been too rigid, because bankruptcy often follows very close on the change of the firm, and before the creditors have had an opportunity to elect; and there is really no reason why they should not elect by offering to prove their debt, as well as in any other way. It is the bankrupt who loses the power of action, and not his creditors, by his filing a petition in bankruptcy. There is no possible equity against this rule; because any new creditors whom the continuing partner may have dealt with, may well enough be put to inquire the terms on which the old firm was dissolved; and they, in fact, would usually know it. The doctrine which severed the assets and refused to sever the debts, not only did an injustice to the joint creditors, but often gave an altogether unexpected and unjust advantage to separate creditors; for it, of necessity, let in against the assets all the separate creditors, though their debts may have been contracted during the continuance of the firm.

I come now to a consideration which appears to me not to have received its due weight in some of the discussions of this subject. It has been held by highly respectable authority, and is the law of New Hampshire, and perhaps of some other states, that the creditors themselves have an equity, independently of the partners, to require the assets to be marshalled at least when the firm is actually insolvent. Ferson v. Monroe, 1 Fost. (21 N. H.) 462; Jarvis v. Brooks, 7 Fost. [27 N. H.] 37; Benson v. Ela, 4 Fogg (35 N. H.) 402; Jackson v. Cornell, 1 Sandf. Ch. 348; Burtus v. Tisdall, 4 Barb. 571. But the better opinion appears to be, that, there being no such thing as a preference known to common law or to equity, there is no way, in the absence of a bankrupt law, of reaching any result which will make the

marshalling compulsory, excepting by attachment, or through the intervention of a court of equity; and that until suit brought the partners may honestly dispose of their property as they please, though it be to pay all their joint property to a separate creditor, or vice versa. I do not see how this conclusion can be escaped in the absence of a bankrupt law. Indeed, it is involved, together with much more, in the decision of Ex parte Ruffin, and all the cases which have followed it. See an able and learned discussion of the subject in the notes to Silk v. Prime, 2 Lead. Cas. Eq. (3d Am. Ed.) 359, etc. But the point to which I now refer is this: When the bankrupt act lays down a positive rule of distribution for the joint and separate assets, and creates a fraud before unknown, called a preference, it is obvious that partners who owe debts of both kinds may commit that fraud by conveying their joint property to a separate creditor, or even by dissolving their firm and dividing their property, and thus working out a preference to all their separate creditors. In an early case under this bankrupt law, I held that such an act was in itself fraudulent, if it would bring about this illegal result, and was so intended. In re Waite [Case No. 17,044]; and see Collins v. Hood [Id. 3,015]; Ex parte Shouse [Id. 12,815]; In re Byrne [Id. 2,270]; Phillips v. Ames, 5 Allen, 183. Upon these authorities, and taking into view our doctrine of preference, so different from that adopted in England, we may say that the creditors, whether joint or several, have a right, by statute, to set aside any conversion of one class of assets into the other, if it be done by partners who are insolvent, with intent to give a preference, provided bankruptcy occurs within four months. In this case, the joint creditors might have declared upon this conveyance by Johnson to Stowers as a preference; for the firm was actually insolvent, and the necessary effect of the conversion would be, if they became bankrupt, to give the separate creditors of Stowers a preference. I am aware of the strong reasons for not interfering with the rights of partners to dissolve their firm. It is not precisely that point which I am dealing with: insolvent partners have full liberty to dissolve; but if they directly or indirectly make preferences, their acts, so far as they affect creditors, can be avoided within four months. This very brief period of limitation is their safeguard. In this case, the continuing partner petitioned, within four months, in the interest of the joint creditors; and, as it turns out that the firm was actually insolvent when they dissolved, the conversion of the joint assets necessarily involved a preference, and the intent may be presumed. Both partners being in bankruptcy, there is no one against whom an action can be brought, and the point comes up for decision properly enough on the assignees' account.

It is to be regretted that the evidence is not so full as it might, perhaps, have been on the question of fraud. If Johnson committed a fraud in fact upon Stowers, the result is the same; because it is only an honest conveyance, and one that both the partners are bound by, that would bind the creditors. Ex parte Rowlandson, 1 Rose, 89. It was on this ground that the register based his opinion, and it is a sound one in law; but I have thought the fact somewhat doubtful, and have therefore gone beyond that consideration. Both classes of creditors are to share alike.

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JOHNSON (ALBANY EXCH. BANK v.). See Case No. 133.

JOHNSON (ALBREE v.). See Case No. 146.

JOHNSON v. The AMBASSADOR. See Case No. 6,491.

JOHNSON (AMERICAN INS. CO. v.). See Case No. 303.

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## Case No. 7,370.

JOHNSON v. The ANNE.

[Oliver's Forms (1842) 465.]

District Court, D. Massachusetts. Oct. 12, 1818.[1]

SHIPPING — COMPENSATION OF PILOT — APPARENT INSURRECTION OF PASSENGERS—EVIDENCE.

[1. A pilot, who has conducted into port a ship in distress from lack of provisions, has a lien on the ship for his services to the amount of his agreement, notwithstanding such agreement was made with the passengers of the ship, then in a state of mutiny and rebellion; there being strong circumstantial evidence that the mutiny was not bona fide, but pretended, and that the contract had been acquiesced in by the master and mate.]

[See note at end of case.]

[2. The ordinary course of human conduct is evidence worthy of the consideration of the court, even when opposed to actual testimony.]

[See note at end of case.]

[This was a libel in rem by Aaron Johnson against the schooner Anne for services rendered as pilot.]

[A British ship cleared from a British port for Quebec, with passengers, but on the voyage the passengers rose in apparent insurrection, deprived the captain of command, and extorted a promise from the mate to navigate the vessel into Boston harbor. While proceeding in this way they fell in with libelant's fishing vessel, and the mate, acting in behalf of the passengers, employed libelant to pilot the vessel into Boston harbor. The passengers all testified that they shipped for the United States, and not for Quebec. Held that this testimony, together with other suspicious circumstances, rendered it at least doubtful whether the apparent insurrection was not part of a prearranged plan, to which the officers and charterers were parties, in order that, under the British navigation acts, more passengers might be carried than would

[1] [Reversed in Case No. 412.]

be allowed if the clearance was for the United States; and that under such circumstances the vessel should be held liable for libelant's compensation as pilot.]

The complainant's libel in this case alleged that the complainant was taken from on board his fishing boat, and carried on board the schooner Anne, by the directions of Edward Dunnegan, then acting as master of the Anne, and was requested by Dunnegan to pilot the Anne into the port of Boston, with an offer of fifty dollars for such service; that the complainant declining the offer, and, attempting to leave the Anne to return to his fishing boat, was forcibly detained on board the Anne, and almost the whole of his provisions were taken from his boat, and brought on board the Anne, and these provisions have never been paid for; that the libellant piloted the Anne safely into the port of Boston; that his fishing voyage was broken up, etc., to the damage of five hundred dollars. To this libel the following claim and answer were filed: "District Court of the United States for Massachusetts District, Holden at Boston, Oct. 13, 1818. In the matter here depending on the libel of Aaron Johnson v. Edward Dunnegan, and the British schooner Anne, George Manners, consul of his majesty, George the Third, king of the United Kingdom of Great Britain and Ireland, comes, and claiming for and in behalf of William Bryant and John Daniel, both of the borough of St. Ives, in the county of Cornwall, in Great Britain, owners of the said vessel, and subjects of his said majesty, propounds and gives your honor to understand and be informed, and also Edward Dunnegan, heretofore mate of said schooner Anne, now here libelled and made party in this process,—and William Bryant, junior, here present, and now master of said schooner, respectfully and humbly propound and set forth, that the said schooner Anne, on or about the tenth day June last, was under contract by charter-party to proceed from Cork, Ireland, to Quebec, having passengers on board; that said schooner, in her way to her port of destination, stopped at the port of Padstow, in Cornwall, and thence departed, and, having touched at St. Ives, proceeded on her voyage towards Quebec; the number of passengers on board said vessel being about sixty; that on or about the seventh of August, the said passengers forcibly took from the said William Bryant, junior, the command of said vessel, and confined him to his cabin, and required of the said Dunnegan to take the command of said vessel, and compelled him to take an oath that he would navigate the said vessel into the port of Philadelphia or Baltimore, in the United States; that, while said vessel was proceeding towards a port in the United States, he, the said Bryant, still being in confinement, the libellant came on board the Anne, from an American fishing vessel, called the Reindeer, and at the time when the said vessel, called the Anne, was about one day's sail from ports of the neighboring British provinces, and the said Johnson, at the request of the passengers on board said vessel, and contrary to the will of the captain, and of the said Dunnegan, the mate, contracted with them, the said passengers, to navigate the said vessel, as a pilot, into some port of the United States, for the consideration of one dollar for each passenger, to be paid by the passengers; and the said Manners, as consul, for the owners, and the said Bryant, the captain, and the said Dunnegan, severally declare that no contract, express or implied, was ever made by them, or either of them, with the said Johnson, excepting under the compulsion of said passengers; but that, on the contrary, the acts done by the said Johnson were done at the instigation of the said passengers, and against the will of all persons, owners, or lawfully in command of the said vessel; and that, by the acts of the said Johnson, in consenting to aid the said passengers, while in a state of mutiny and revolt, against the lawful commands of the captain of said vessel, and causing her to depart and deviate from the course of the voyage, in which she was lawfully engaged and pursuing, great evil, damage, loss, and disaster hath happened and accrued to said owner and master, of all which the said Johnson is well knowing; and these respondents now humbly crave the interference and aid of this court, in redressing the wrongs occasioned by said Johnson in navigating the said vessel out of her course; and that all persons interested and represented by the said George Manners, as consul as aforesaid, and the said Captain Bryant, may have such sum or sums of money to them awarded and decreed as may be a reasonable compensation in the premises."

George Manners (consul), for owners of the said vessel.

William Sullivan, for Captain William Bryant, Jr., and Edward Dunnegan, lately mate of the Anne.

Phineas Blair, for libellant.

DAVIS, District Judge. The object of this libel is to recover compensation for the libellant's services in piloting the schooner Anne from Brown's Bank to Boston, under peculiar circumstances, and for the injury alleged to have accrued to the libellant and others, in breaking up the fishing voyage of the schooner Reindeer, to which he belonged, and from which a supply of provisions was furnished to the suffering people on board of the Anne. The suit was commenced against Edward Dunnegan, alleged to have been acting master of the Anne when the libellant's engagement was made, but in reality the mate. It would have been more correct to have named the real master in the first process, but care has been taken that all interested should have full opportunity of being

heard. The British consul had notice of the suit, and has attended in behalf of the master and owners in the different stages of the proceedings. George Manners, consul of his Britannic majesty, claiming in behalf of William Bryant and John Daniel, both of St. Ives, in the county of Cornwall, in Great Britain, owners of the said schooner Anne, aver that the said schooner, on or about the 10th June last, was under contract by charter party to proceed from Cork, in Ireland, to Quebec, and then sailed from Cork for her said port of destination; that afterwards, in the course of her said voyage, the command of the vessel was forcibly taken from the master by the passengers on board, who compelled the master to direct her course for the United States, and obliged the crew to obey his orders; that in this situation, and being in want of provisions, she was met by the schooner Reindeer, to which the libellant belonged; that the provisions furnished from the Reindeer were fully paid for, and all demands satisfied; that said Johnson's (the libellant's) services as pilot were not wanted, nor requested by the captain, but that his agreement was wholly with the passengers, or with Edward Dunnegan, who acted by coercion from the passengers; and, on these agreements, it is concluded that the vessel is not liable for the compensation demanded.

The schooner Anne was chartered by the captain to Thomas Hunt, of Cork, on the 19th May last, for a voyage to Quebec, "to carry as many passengers," says Captain Bryant, "as were by law allowed to go." The expression in the charter-party is: "Such passengers as said charterer may think fit to embark or put on board." On the 10th June the vessel sailed from Cork with about sixty passengers. An additional number were put on board by Hunt, when the vessel was about five leagues from Cork, contrary, as Captain Bryant states, to his remonstrances. On the 19th of June, Captain Bryant put in at Padstow, on the coast of Cornwall, having met with bad weather, and the vessel having sustained some injury in her spars and sails. At Padstow and at St. Ives the requisite repairs were made; the surplus number of passengers, exceeding the limits prescribed by law, were discharged; additional provisions were taken on board; and on the 16th of July the vessel again put to sea. On the 7th August, in latitude 49°, 34', there was a serious occurrence in the voyage, which is thus recorded in the log-book: "At meridian, the passengers, one and all, told the master he must not proceed to Quebec; that to the United States was their agreement, and there they would have the ship proceed; ordered him to his cabin; then threatened to heave the mate overboard, if he did not navigate the ship either to New York, Philadelphia, or Baltimore; therefore, put him to his oath to do the same."

With this account all the evidence substantially corresponds. The mate adds, in his testimony, that, after he had become engaged to navigate the vessel to the United States, the passengers directed him to inform Captain Bryant that he need not confine himself below, but might continue to command the ship, except as to her navigation; meaning, it is presumed, the direction of her course. It appears, also, that the crew were required by the passengers to obey the mate's orders. There are also several entries in the log-book of falling in with British vessels, and that care was taken to prevent the captain from having any communication with them. In about a week after this transaction there began to be some solicitude in regard to provisions. The usual daily allowance was lessened, and from time to time reduced, so that on the 10th September, when the Reindeer was spoken with, the persons on board the Anne had only one day's supply of bread, and no other provisions. Dunnegan went on board the Reindeer, to procure provisions and a man to pilot them to some convenient port in the United States. He fortunately succeeded in both objects. The provisions, which were promptly furnished, were paid for at a high price. Johnson, the libellant, was willing to pilot the Anne to Portland or Boston for $2 for each person on board, but at length consented to do it for half that sum. He took charge of the vessel, and arrived with her at Boston, three days afterwards; Captain Bryant, whom he consulted, preferring to come to Boston, rather than to go to Portland. The libellant applied to the passengers for his compensation, but was unable to obtain it, and now, by this process, resorts to the vessel, which, it is contended on his behalf, is liable, under the circumstances of the case, for the payment.

It has been said for the respondent that the libellant's services were not necessary. This cannot, I think, be admitted. The carpenter of the Anne, who expresses this opinion, says that the weather was thick and foggy; and Dunnegan, who was out in his reckoning two hundred miles, could not be entirely relied on; and after such a long, anxious, and, for a time, distressing voyage, it must have been a great relief to have a person on board who was well acquainted with the coast, and in whom they could have confidence. There appears to me reason to infer from the evidence that Captain Bryant had this feeling, in common with the passengers. It is true, he makes no agreement with the pilot; tells him he has been deprived of the command of the vessel, and refers him to the passengers. But there are, I think, several indications that he wished him not to leave the vessel; and, though one of the crew testifies that he heard the captain say he did not want a pilot, in this remark he stands unsupported. The captain

himself does not say this in his affidavit. He does, indeed, now declare that he did not wish for a pilot; but it does not appear that he made a communication of this sort to Johnson, when conversing with him on the subject. Several witnesses testify that Captain Bryant requested some of the passengers, by all means, not to let the pilot go away; others, whose situation appears to have been less favorable to know what took place, heard no such request. If we should lay this part of the evidence out of the case, there would still remain a sufficient number of circumstances, the evidence of which is not disputed, to manifest Captain Bryant's disposition to have the pilot retained, though he avoided any direct engagement of his services. Isabella Dola, whose deposition is offered by the consul, says the captain observed to Johnson that the passengers were able, and he hoped he would get his fees of them; he also interposed to quiet the tumultuous noises made by the passengers, from an apprehension that Johnson would be disgusted or alarmed, and would decline to remain; and when Johnson, at length, consented to stay, but made it a condition that they should take more provision from the Reindeer, and a second subscription was opened for that purpose, Captain Bryant was a subscriber, to a small amount, indeed, but three times more than was subscribed by any other person.

In regard to the first subscription for provisions, it was purely from necessity, and on account of the privation which they all experienced from their scanty allowance; but the second subscription must, I think, be connected with Johnson's offer, and as indicating a wish that he should be retained. But it is said that this vessel was in the hands of mutineers, felonious revolters, and pirates; that Johnson, after he came on board, knew the situation of the vessel; that he ought to have declined the performance of any services which would promote the views of the passengers; and that, if he had so done, the mate could have carried the vessel into a port in Nova Scotia, or the captain might have been relieved by some British vessel.

The ground on which the cause is placed, and the very serious manner in which the considerations to repel the libellant's claim have been urged, demand the attention of the court, and have led to a careful examination of the evidence in regard to the points which have been raised. It cannot but be remarked that there are some strange appearances in the case, which naturally excite a curiosity to find the clue which shall interpret the apparent mystery. With me, however, it is not merely curiosity which prompts to the inquiry. A serious duty imposes the obligation to investigate the true character of this voyage, so far as relates to the points referred to my determination. In the first place, we find all the passengers, excepting Isabella Dola, contending that they were, according to their original agreement, to be conveyed to the United States, and that they were to be landed at Baltimore or at Philadelphia. This is recorded in the log-book as their declaration. So say Roche, Raleigh and his wife, John McCarthy, and Harvey Hunt and his sister, who were among the passengers, and have testified in the cause. Dunnegan, the mate, though he shipped with the master for Quebec, yet, in conversation, the day before, with Thomas Hunt, the charterer, was told by him that he was to go to the United States. It is apparent, therefore, that Thomas Hunt did agree with these people that they should be conveyed to the United States. Now, if Captain Bryant were not privy to the agreement, and tacitly consenting to a course which would admit of its execution, what is the inference? Would Thomas Hunt deliberately adopt a plan for deceiving a considerable number of his countrymen, together with his own son and daughter, and for exposing them to great inconvenience and severe disappointment, in a concern most interesting to all of them? It would be difficult to believe this of any man. Are we, then, to suppose that, without any concurrence on the part of Captain Bryant, he planned the enterprise, as is suggested by the counsel, of forcibly and feloniously taking the command of the vessel from the commander, and diverting her course from its real destination? Or would he, without any arrangement, knowing his own engagements with the passengers, consent that his son and daughter should embark in a vessel in which, on such a supposition, there must have been great reason to expect an insurrection or some very unpleasant altercation. These difficulties inevitably arise on the ground assumed in the defence, and they are not all that occur. That these passengers, one and all, should deliberately commit the daring offence imputed to them, would seem in no small degree improbable. Still, such offences are known to occur, and we are not to reject conclusions from evidence from mere impressions of improbability. But there would seem peculiar rashness in the enterprise, when we consider the line of British coast to be approached or passed, and the probability of meeting a British cruiser, or some other vessel, competent to restore the captain's authority. Most strange does it appear that men, who had persons of intelligence among them, should have the mate under their entire control, and yet should suffer him to make the strong entries against them which we find in the log-book? Did they not examine the log-book? If they did, could they read what the mate has recorded, without terror? How are these things to be explained? I will say, with

Sir William Scott: "I am not deaf to the fair pretensions of human testimony; but, at the same time, I cannot shut my senses against the ordinary course of human conduct." A view of the British law on the subject of passengers may relieve the cause of its difficulties. Comparing Act 43 Geo. III. c. 56, with 57 Geo. III. c. 157, it appears that foreign vessels are limited to one for every five tons of the vessel's measurement; British vessels, if bound, with passengers, to the United States, are subject to the like regulation; but, if bound to Canada, Nova Scotia, New Brunswick, or to Prince Edward's Island, may receive on board one for every ton and a half. Under such regulations, as the tide of emigration, which sets so strongly west ward, is known to be mainly directed towards the United States, we see a strong inducement for an ostensible destination to some of the places which will admit of the greatest number of passengers, though the real destination may be to the United States. In the present instance, if the Anne had been put up for the United States, she could have taken but fifteen passengers; a difference from the number which she actually had on board of material importance both to the owner and the hirer of the vessel.

A consideration of the evidence, in reference to the clue which the state of the British law on this subject, presents to my mind the most satisfactory explanation of many particulars, which have been testified, some of which have been considered by the consul as false or highly improbable. The case of Isabella Dola may seem to militate with the explanation suggested, and the same may be said of the proceedings, on the part of the passengers, while the Anne was detained in England; but there are considerations by which these circumstances may be reconciled with the suggested plan of the voyage. These appearances, taken in connection with the considerations of an opposite tendency, which the case presents, can, at most, produce only a doubtful state of mind as to the real plan and purpose of the voyage; and the libellant's compensation for his services ought not to be defeated, unless the allegations on which the defence rests be proved beyond a reasonable doubt.

The consul has remarked that there have been repeated instances of the enormities which he considers as characterizing this transaction, and in confirmation of the remark it may be observed that it appears by the log-book of the Anne that a ship was spoken from Ireland, with passengers for St. Andrews; "but now," says the entry, "for New York." In all instances of such description which occur, are we to resort to the belief of actual insurrection, felony, and piracy? Or does not the state of things, in regard to this branch of business, under the existing regulations, admit a more benign interpretation, and point to a course of proceeding, culpable, indeed, as relates to British subjects, but not of the flagrant character which, at first view, may have been presumed.

Under these circumstances, and with reference to this cause I do not think it unreasonable to infer that Captain Bryant was not unwilling to proceed to the United States, when he fell in with the Reindeer, and that the libellant's services, which, it appears to me, were acceptable to him, as well as to the passengers, should be a charge against the vessel. If there were any other considerations necessary to support this result, the general interests of commerce and navigation should be mentioned. The services which were rendered by Johnson were not, indeed, compelled, as has been argued, but they were granted on a request so urgent as could not be resisted without violence to the feelings of humanity. It is not expedient nor just to permit services of this character, rendered bona fide and without culpable participation, to be defeated by equivocal or ambiguous circumstances; and I feel no apprehension that there is a departure from the rules and principles which ought to govern a national tribunal, in sustaining the present demand, to a reasonable extent. I shall limit the compensation by a reference to what was originally considered as satisfactory, as well as to what appears reasonable, and decree to the libellant sixty dollars, in full for his services, with costs. As to the claim which he makes for the breaking up of the voyage of the Reindeer, if there be any ground for salvage or compensation on that score, the claim should come from the master and owners. I shall not sustain it in its present form. There appears, indeed, reason to doubt whether such a demand would have been presented to the court had not the opportunity offered to connect it incidentally with the suit for the libellant's personal services. It will be considered whether it be advisable to insist on a demand of this description. The provisions which were furnished were paid for at a high price. No intimation was given of any additional demand; and whether such demand can now be sustained appears to me by what I can learn from the evidence, to be extremely questionable.

NOTE. There was an appeal from this decree to the circuit court. The circuit judge, in his opinion, remarks: "I cannot say that the conclusion drawn by the district judge, as to the real state of the facts, is not fully warranted by a decisive weight of evidence." Again: "I can have no doubt that the pilot has rendered a meritorious service, and is entitled to a just compensation from some of the parties." Again: "If the transaction is to be taken as a case of real mutiny, in which the master was forcibly deprived of his lawful authority, and driven from the command of the ship, neither the passengers, nor the mate, who succeeded, by the appointment of the passengers, as master, had competent authority to enter into any contract binding upon the owner, no more, indeed, than any pirate or roving plunderer upon the ocean. If, on the

other hand, it is to be taken as a merely feigned and fictitious proceeding, it becomes material to ascertain whether the master, in point of fact, entered into the contract directly or impliedly on his owner's account; for, if the contract, though for the benefit of the ship, was made by the pilot, under a knowledge of all the circumstances, with other persons, on their own personal responsibility, I do not see how, because they have failed to perform it, a resulting security falls on the ship." As the circuit judge considered it clearly proved that the master refused to be accountable for the pilotage, and explicitly disavowed any agency in the transaction, he did not think there was sufficient evidence to warrant him in holding the pilotage to be a lien on the ship. The decree of the district court was reversed, without costs to either party. See The Anne [Case No. 412].

## Case No. 7,370a.

JOHNSON v. A RAFT OF SPARS.

[21 Betts, D. C. MS. 108.]

District Court, S. D. New York. Jan., 1853.

ATTORNEYS—ACCORD AND SATISFACTION — CLANDESTINE AND COLLUSIVE SETTLEMENT—SEAMEN—SUITORS GENERALLY—EVIDENCE.

1. As a general principle, it is competent to litigating parties to adjust their controversies by amicable settlement, upon terms satisfactory to themselves, and courts will favor such settlements:

2. But a clandestine and collusive settlement of a cause in litigation, by the parties out of court, without the knowledge of the attorney of the prosecuting party, and without provision for the satisfaction of his costs already accrued, will not be regarded conclusive upon him; especially if his client had a clear cause of action, and is of no personal responsibility.

3. The rule is more stringent in respect to seamen, because of their known heedlessness and want of responsibility; and a private settlement of their suits for wages, made out of court with them personally, will be presumed made with the intent to defraud their proctor of his costs, and will not bar the action for the recovery of these costs. Bright v. The Mary Jane, MSS., Oct., 1833 [unreported.]

4. In respect to suitors generally, it will be presumed they are able to satisfy their own lawyers, and courts will not allow an action after a settlement of the demands between the parties, for the purpose of enforcing payment of the attorney's costs, unless it be found that the settlement was made with the design to defraud the attorney of his costs, and that his client is unable to respond to him for the amount.

5. The evidence submitted in this case does not prove any fraudulent collusion between the parties, nor but that the libellant is amply competent to satisfy the costs; and, it being a case of tort for collision, it is not specially privileged. Judgment for claimants.

[This was a libel by William Johnson against a raft of spars (Street and McLean, claimants) for collision. The hearing is now upon objections by libellant's proctor to a settlement made by the parties.]

Before BETTS, District Judge.

JOHNSON (BANK OF UNITED STATES v.). See Case No. 919.

## Case No. 7,371.

JOHNSON v. BEARD.

[2 Ban. & A. 50;[1] 8 O. G. 435.]

Circuit Court, S. D. New York. April, 1875.

PATENTS—ORIGINAL AND REISSUED — EVIDENCE—DRAWING OF PATENT CHANGED—MOTION TO REOPEN.

1. In determining the question whether a reissued patent is broader in its scope than the original, the court is confined to an examination of the record in the patent office of the original and reissued patents, and cannot go outside of it for information.

2. The parties to a suit under a reissued patent, in order to enable the court to determine whether the reissue is broader than the original, have the right to bring the record of the original and reissue before the court in a form which is authenticated by evidence, satisfactory to the court, that the record which they offer is correct.

3. Where it appeared that the drawing of a patent had been changed at the time of a reissue thereof, and the complainant in a suit under the reissue had introduced in evidence a certified copy of the patent office model, which conformed to the drawing of the reissue, *held*, that the defendant ought to be permitted to show the condition of the model at the time when it was filed in the patent office, and at the date of the original patent.

4. A motion to reopen a case for the purpose of introducing testimony tending to show that the patent office model of an invention had been changed when a reissue of the patent was granted, was made at the final hearing, it being alleged that the testimony was newly discovered. *Held*, that an opportunity should be given to the defendant to make this proof, unless the parties preferred to admit it.

5. The invention described and claimed in letters patent No. 59,144, granted to Charles G. Johnson October 23, 1866, and reissued May 7, 1872, and No. 4,896, for an improvement in bale ties, *held* not to have been infringed by the use by the defendants of what is known as the "Eureka" tie.

[This was a suit in equity for an alleged infringement of letters patent of the United States for bale ties [No. 4,896], granted to Charles G. Johnson, as assignee of Charles Swett, May 7, 1872. This patent was a reissue of an earlier patent [No. 59,144], granted the same patentee October 23, 1866 (antedated April 23, 1866), upon an application originally filed in the patent office in the year 1856. At the time of the reissue the drawing was amended to conform to the model as it then was. The defendant in the suit set up that this change was unwarranted, and vitiated the patent. A duplicate of the model conforming in all essential particulars to the drawing of the reissue, and certified to by the commissioner of patents several months subsequently to the date of the reissue, was put in evidence by the complainant.

[After the proofs were closed, the defendant moved to open the record for the introduction of testimony to prove the condition of the model at the time when it was filed

[1] [Reported by Hubert A. Banning, Esq., and Henry Arden, Esq., and here reprinted by permission.]

at the patent office, as well as at the time of the grant of the original patent, it being alleged in support of the motion that the defendant had discovered, after the proofs were closed, that the model had been changed after its filing in the patent office, and that originally, and even as late as October 23, 1866, it was in the condition shown in the drawing of the original patent. This motion first came up in an interlocutory proceeding, and, after argument by counsel, was denied upon the ground that the essence of the allegation was fraud in the grant of the reissue, and in a collateral proceeding like a suit for infringement, the question of fraud could not be inquired into. When the case came on for final hearing the motion was renewed. The question having been argued at considerable length, the court took it under advisement and rendered the following oral decision.] [2]

Samuel A. Duncan and George Gifford, for complainant.

J. H. B. Latrobe and George Harding, for defendant.

WOODRUFF, Circuit Judge. In regard to the motion which was made in the case yesterday, I am constrained to the conclusion that fairness and justness to this defendant require that he should be permitted in some way to put upon the record in this cause the fact, if it be a fact, that the original record of the patent, embracing, of course, the patent, specification, and model, is not before the court. I understand it to be an important point in the defence that the reissued patent is broader in its scope than the original. I am bound to assume that the court has to determine that question by an examination of the record, and cannot go outside of it for information. I understand the supreme court to have settled, distinctly and finally, that this court cannot enter into the examination of any question of fraud upon the commissioner who granted the reissue, or of any matter which is outside of the record; and that the only power which the courts have over reissues, when their validity is sought to be impeached upon such grounds, is to look at the record of the original patent and of the reissue, and to determine upon their face whether or not, as matter of law, the reissue is a lawful one, without inquiring by what means it was procured, and without inquiring what matters of fact were involved de hors the record. The act of the commissioner in granting the reissue is final and conclusive.

If that be the view in which I am bound to deal with this case under the instructions of the supreme court, then this court is to be furnished with the record of the original patent on the one hand and with the reissue on the other, and then, governed by legal principles, declare whether that reissue patent is or is not valid. In order to do that, the court must have, first, the original record, without any inquiry, as I have said, as to what was before the commissioner on the reissue—I have nothing to do with that—but I am to be furnished with the original record.

A model is produced here and certified to be a copy of a model which is now, or was when the testimony was taken, in the patent office at Washington. I do not perceive that that is conclusive. If the patent office had been burned and all the models destroyed, and this question had then arisen, I think the parties must have been permitted to take proof, so that when the courts came to pass upon the question, they would necessarily have to determine, first, what was that record, and, second, does the reissued patent conform with it or has it gone beyond the scope and limit of the original. If that be the correct view of the subject, then the party producing a certified copy of a model from the patent office does not conclude the defendant. He may, and the defendant should, be permitted to show that what he produces is the original, or a true copy of the original. I can readily suppose a case in which, for some purpose, if the model at Washington had been destroyed, the defendant might have in his possession a certified copy of the original model as it was filed—made by the patent office directly after it was filed—and so might be able to place before the court a certified copy of the original model.

I quite agree that the question is not entirely without doubt. It may be, and has, very plausibly been argued that, for this court to enter into an inquiry of what was the original model, is to enter into an inquiry whether or not the commissioner was not deceived when he made the reissue. That question may be incidentally involved; but after all, the main question is, not whether the commissioner of patents was deceived or defrauded, but whether in point of fact the reissue conforms to the original.

I am constrained to hold that the defendant ought to be permitted to place this fact upon the record. Certainly the supreme court has not yet gone so far as to say that what was the original model may not be proved in the court for the purpose of making the comparison which the supreme court says may be made. To deny this motion would be to deprive the defendant, if a final decree shall be entered against him, of an opportunity to review this question, because he will have no opportunity to say to the supreme court that the judgment or decree should be reversed, because he was not permitted to show what was the original model with which the reissue was compared. I think the defendant ought not to be placed in that situation.

If I was inclined to believe that it would

[2] [From 8 O. G. 435.]

ultimately have no effect upon my determination of this case, I am not so clear upon this subject but that I should deem it my duty to give to the defendant the benefit of an exception, so that my ruling upon so important a question as this may be in favor of the plaintiff, might be the subject of review. The supreme court may go the whole length and say that the court was not at liberty to inquire what the commissioner had before him; but if they say that, they will go further than they have, in my opinion, yet gone. Up to this point they say that the court may look at the record. If the court may look at the record, the parties have a right to bring that record before the court, in a form which is authenticated by evidence, satisfactory to the court, that the record which they offer is correct.

I am, therefore, disposed to give the parties an opportunity to make this proof, unless the parties are still of opinion that such proof would not affect their case and prefer to admit it. If they do of course the case may go on.

(The parties thereupon stipulated, for the purposes of the suit, a state of facts regarding the former condition of the model, and the case proceeded to a final hearing. The conclusions of the court were expressed as follows:)

WOODRUFF, Circuit Judge. My conclusions in this case are: First, that Charles Swett, the person named in the bill of complaint as assignor of the complainant, and therein alleged to be the inventor of the invention and improvement for which the letters patent therein mentioned were issued to the complainant, was not the inventor of any tie or mode of fastening cotton-bale ties made or used by the defendant herein; nor any tie, buckle, or method of fastening cotton-bale ties which is substantially the same in construction, or operating in substantially the same way, as the ties made and used by the said defendant. Second, that neither the original patent issued to the said complainant on the 23d day of October, 1866, upon or for the alleged invention of Charles Swett in the said bill of complaint mentioned, nor the specification annexed thereto, nor the model of the alleged invention, nor any record of such invention, in any manner shows, claims, intimates, or suggests a tie or method of fastening cotton-bale ties which is substantially the same in construction, or operates in substantially the same way, as the tie made or used by defendant herein. Third, that the practicability of employing the tie or method of fastening made and used by the defendant was not conceived by the said Swett, nor by the complainant, until after the said original patent was issued, and was borrowed from the suggestions of other parties. Fourth, that if the reissued patent granted to the complainant, dated May 7, 1872, and the claims made in the specification annexed thereto, must be construed so as to include (as the patented invention) the tie or method of fastening used by the defendant and called the "Eureka tie," such reissue is invalid. Fifth, that the defendant has not by making, selling, and using the said Eureka tie infringed any right of the complainant, and such making, using, and selling is no infringement of any exclusive privilege legally vested in the complainant or to which he is in any manner entitled. The statement of these conclusions is sufficient to enable counsel to prepare a decree in such more technical or specific form, if any, as may be proper. The state of my health forbids that I should attempt an elaborate discussion of the various points very ably presented by the counsel for the respective parties. Let the bill of complaint be dismissed, with costs.

[For another case involving this patent, see Johnsen v. Fassman, Case No. 7,365.]

## Case No. 7,372.

JOHNSON et al. v. The BELLE OF THE SEA.

[15 Int. Rev. Rec. 146; 4 Leg. Gaz. 108.]

Circuit Court, E. D. Pennsylvania. April 1, 1872.[1]

BOTTOMRY—ASSIGNMENT OF BOND—PAYMENT.

1. The captain of the Belle of the Sea executed a bottomry bond, payable within ten days after the safe arrival of the ship at New York. The bond passed by assignment into the hands of the libellants, who were agents of the respondents. Upon a libel filed, the court *held*: The payment of the debt of the ship-owner, by his agents, with their own money, would not work a satisfaction of the debt or an extinguishment of the lien of the bottomry bond. By the assignment of the bond the libellants took the place of the bottomry creditor.

[See note at end of case.]

2. The application of the freight money to the payment of unsecured disbursements of the libellants, leaving the surplus only to be credited on the bottomry bond, was proper.

[See note at end of case.]

[Appeal from the district court of the United States for the Eastern district of Pennsylvania.

[This was a libel by Johnson and Higgins against the Belle of the Sea and her owners.]

S. C. Perkins, for libellants.

Henry Flanders, contra.

McKENNAN, Circuit Judge. The district court rendered a decree in favor of the libellants [case unreported], and the respondent now seeks to reverse it, on the ground that the advances made by the libellants extinguished the lien of the bottomry bond, the freights, general average, and insurance only being pledged for their reimbursement; and that by their representations to the purchaser of the vessel they are estopped from asserting any lien upon it. The captain of

[1] [Affirmed in 20 Wall. (87 U. S.) 421.]

the Belle of the Sea executed, at Port Lewis, in the island of Mauritius, to Houdlette & Perkins, a bottomry bond for $29,444 05 gold, payable within ten days after the safe arrival of the ship at New York. The validity of this bond is not contested. Upon the arrival of the ship at New York, therefore, a lien for the sum stated, in favor of the bottomry creditor, attached to the ship and her cargo, according to the stipulations of the bond. The bond passed into the hands of Baring Bros., by whom it was duly assigned to S. G. & G. C. Ward, and by them to the libellants, in consideration of the payment of $46,805 31, its currency value. The libellants thus became apparently bona fide holders of it, and entitled to the security of its lien. But the respondent alleges that this lien was released or extinguished by an agreement by the libellants with the owners of the ship that they would take up the bond and look only to the freights, general average, and insurance for their reimbursement. This he is plainly bound to prove. I think he has failed to do it.

It is evident that the libellants had proposed to the agents of the Barings to pay the bond and take an assignment of it, before they had any interview with Edmund Kimball, the owner of the ship. Their occupation was that of adjusters of averages, and they were doubtless desirous to be employed in that capacity in reference to this ship. Whatever estimate they may have made of the comparative resources and liabilities of the ship, whatever assurances they may have given as to their ability to marshal and adjust them for the best interests of the owner, these are to be considered as reasons suggested for their employment rather than as importing a stipulation that they would accept such resources as their sole security for reimbursement. Proposing to pay the amount of the bond, and to take an assignment of it, it is improbable that they intended to forego the certain security thus afforded them, and depend upon the problematical sufficiency of the ship's credits to return their large advances. Admitting that they were the agents of the shipowner, the payment of the debt with their own money would not work a satisfaction of the debt, or an extinguishment of the security for it. By the assignment of the bond they took the place of the bottomry creditor, and there is no incompatibility in the rights to which they thus succeeded and their duties and obligations as agents of the debtor. Certainly there is no implication, in equity, at least, that by becoming agents of the debtor they thereby surrendered or lost any of their securities as creditors. Admitting further that they paid the bond in pursuance of an arrangement with the owner to that effect, still the debt with its incidents subsisted, and would only be discharged by payment in money or in some other conventional mode. The respondent's defence really concedes this much; for he does not allege that the bond itself was satisfied, but only that it is not a lien upon the ship, because the libellants paid it on the faith and credit of the freights, general average and insurance exclusively. But such conclusion can only result from an express or implied agreement to that effect. That the libellants expressly agreed to take up the bond and forego its lien does not appear in all the proofs; nor is it to be inferred from the fact of their agency or from an agreement to take it up with their money, and to adjust the liabilities and marshal the resources of the ship for the best interests of her owner.

It is to be observed that, at the time the bond was transferred to the libellants, it was a valid lien upon the ship, and the only question is whether, by any arrangement with the owner, they are disabled from enforcing it. Thus this case is distinguished from Minturn v. Maynard, 17 How. [58 U. S.] 477, relied upon by the respondent's counsel, where there was no maritime contract, but where an agent invoked the jurisdiction of admiralty to recover a balance of accounts for money expended in paying for supplies, repairs and advertising of a steamboat, furnished on the personal credit of his principal, and not on the credit of the boat.

If the libellants represented to the respondent that, if certain claims of the freightors were paid, there would be a balance in their hands in favor of the ship or her owner, and he thereupon paid these claims and purchased the ship, they could not maintain this suit. But this is a fact which it devolves upon the respondent to prove. The proof of it rests upon his unsupported testimony. It is distinctly and positively denied by the libellant, Higgins, who is alleged to have made the representation. Thus affirmed by one party and denied by the other, it cannot be considered as established, and the estoppel, which rests upon it, necessarily fails.

The district court rightfully sanctioned the application of the freight money to the payment of the unsecured disbursements of the libellants, leaving the surplus only to be credited on the bottomry bond. So applying it, with the other proper credits, the sum of $5,271 99 remains unpaid on the bond. For this amount, with New York interest from July 1, 1869, a decree will be entered in favor of the libellants, with costs in this court, but without their costs in the district court.

[NOTE. The claimants appealed, but the supreme court, in an opinion delivered by Mr. Justice Strong, affirmed the decree of the circuit court, with interest and with costs, holding that "the ship was not discharged from the bottomry lien, unless the bond was actually paid, or unless the libellants agreed to pay it, and look to the freights, the general average, and the insurances exclusively for their reimbursement." 20 Wall. (87 U. S.) 421.]

## Case No. 7,373.

JOHNSON v. BISHOP.

[Woolw. 324; [1] 8 N. B. R. 533; 21 Pittsb. Leg. J. 77.]

Circuit Court, D. Iowa. Oct. Term, 1868.

STATUS OF ASSIGNEE IN BANKRUPTCY—MAY MAINTAIN ACTION FOR POSSESSION—BUT NOT AGAINST STATE SHERIFF.

1. Under the 14th section of the bankrupt act [of 1867 (14 Stat. 522)], the assignee becomes vested with the title, and entitled to the possession, of the property of the bankrupt, and he may maintain an action for its recovery in a court of justice.

[Cited in Doe v. Childress, 21 Wall. (88 U. S.) 647; Townsend v. Leonard, Case No. 14,117; Bradley v. Frost, Id. 1,780.]

[Cited in Miller v. Mackenzie, 43 Md. 406.]

2. But such action cannot be maintained in a federal court, to take such property from a state sheriff, who has taken it upon attachment duly issued to him out of a state court before the proceedings in bankruptcy were commenced.

[Cited in Connor v. Long, 104 U. S. 233.]

[Cited in Sullivan v. Rabb, 86 Ala. 433, 5 South. 746.]

3. The sheriff's possession is that of the court of which he is an officer; no other court will interfere therewith as long as the proceedings are pending.

[Cited in Adler v. Roth, 5 Fed. 895.]

4. Whether or not the state court has been ousted of its jurisdiction by the proceedings in bankruptcy, depends upon two questions of fact: One, whether the debtor has been adjudicated a bankrupt? and the other, whether he is the only member of the firm? Of the action of the federal court on these matters the state court is not bound to take judicial notice.

[Cited in Eyster v. Gaff, 91 U. S. 526; Kimberling v. Hartly, 1 Fed. 575.]

[Cited in Hill Manuf'g Co. v. Providence & N. Y. Steamship Co., 113 Mass. 500.]

5. The federal courts have not exclusive jurisdiction of actions in behalf of assignees in bankruptcy. If their rights are not regarded in the state courts, their remedy is under the 25th section of the judiciary act [1 Stat. 85].

[Cited in Sanford v. Sanford, 58 N. Y. 67.]

This was a writ of error to the district court. The defendant, who was sheriff of the county, had, in his character as such officer, taken the property here in question upon attachments issued to him out of the state court against Loeb & Company, a partnership. Afterwards Loeb, who was the only member of the firm, voluntarily applied to the district court for his discharge from his debts under the bankrupt act. The plaintiff was appointed his assignee; and thereupon brought in that court this action, which was detinue for the goods attached and held by the defendant as sheriff and under the writs. The defendant moved the district court to dismiss the suit for want of jurisdiction. This motion was granted, and the plaintiff having duly excepted, he sued out this writ to reverse the order. Section 14 of the bankrupt act, after providing for an assignment of the bankrupt's effects by the judge or register, says, that such assignment shall relate back to the commencement of said proceedings in bankruptcy, and thereupon, by operation of law, the title to all such property and estate, both real and personal, shall vest in said assignee, although the same is then attached on mesne process as the property of the debtor, and shall dissolve any such attachment made within four months next preceding the commencement of said proceedings.

Mr. Gillmore, for plaintiff in error.

Mr. Rankin, for defendant in error.

MILLER, Circuit Justice. If the matters set forth in the plaintiff's petition are true, which we are here to assume, the title to the goods attached vested in the assignee as soon as the assignment to him was executed. And with this title he acquired a right of immediate possession. This possession he could recover in a court of justice. But to what court should he apply? Had this property been in the possession of a party who could not shelter himself behind the jurisdiction of a court of law, undoubtedly the federal court would have had jurisdiction of the case. It would then have been within the terms of the 1st and 2d sections of the act. Does that circumstance take the case out of the statute?—that is, does the fact that, at the time the bankruptcy proceedings were instituted, the property was in the hands of the sheriff, under attachments issued out of the state courts, deprive the federal court of its jurisdiction? The property is held by the sheriff under writs rightfully issued, and his possession is the possession of the court by the command of whose writ he seizes it. And so long as the proceedings, in virtue of which it was taken, are pending, that possession will not be interfered with by any other court.

This general principle has been acted upon in England in many cases in which two courts of concurrent jurisdiction were sought to be brought into collision. Payne v. Drewe, 4 East, 523; Evelyn v. Lewis, 3 Hare, 472; Russell v. East Anglian R. Co., 3 Macn. & G. 104. By this salutary rule harmony is maintained between the several superior courts of law and chancery, which have co-extensive and concurrent jurisdiction in a great variety of cases. The importance of the rule, and of scrupulously obeying it in this country, is greatly increased by the fact that the federal and state courts, although exercising their jurisdiction in the same territory, over the same subjects, and often the same classes of litigants, draw their existence from different sources, and are to one another foreign tribunals. In no other way can unseemly and mischievous collisions be avoided.

In Hague v. Lucas, 10 Pet. [35 U. S.] 400,

[1] [Reported by James M. Woolworth, Esq., and here reprinted by permission.]

property had been taken in attachment by the state sheriff, and released on bail, when the marshal of the United States seized it on execution out of the federal court. It was held, that the latter could not levy on the property, because it was in the possession of the state court by virtue of its writs first levied. In Peck v. Jenness, 7 How. [48 U. S.] 612, the property had been taken in attachment out of the state court, after which the debtor was discharged under the bankrupt act of 1841 [5 Stat. 440]. The question was, whether, under the law, this discharge dissolved the attachment. And it was held that it did not. In Pulliam v. Osborne, 17 How. [58 U. S.] 471, it was held that when co-ordinate liens were obtained by one judgment in a state court, and another in a United States court, a seizure by a sheriff under an execution on the former, gave priority over the latter. In Taylor v. Carryl, 20 How. [61 U. S.] 583, a vessel had been attached on state process, and afterwards arrested in admiralty. Sales being made in each suit to different persons, the purchaser under the decree in admiralty brought replevin against the purchaser under the attachment proceedings in the state court. It was held that the admiralty process and proceedings and decree and sale were ineffectual to make a title, because that court could not take the property from the state court which had possession of it. And the rule was so held in the similar cases of The Oliver Jordan [Case No. 10,503]; The Robert Fulton [Id. 11,890]; and in Freeman v. Howe, 24 How. [65 U. S.] 450; Ex parte Robinson [Case No. 11,935]; Ex parte Dorr, 3 How. [44 U. S.] 103; and Buck v. Colbath, 3 Wall. [70 U. S.] 334. In the last mentioned case, it is said, that "it is only while the property is in possession of the court, either actually or constructively, that the court is bound or professes to protect that possession from the process of other courts. Whenever the litigation is ended, or the possession of the officer or court is discharged, other courts are at liberty to deal with it according to the rights of the parties before them, whether those rights require them to take possession of the property or not."

It is claimed that, upon this principle, the motion cannot prevail, because the bankruptcy proceedings, terminating in a discharge of the debtor, operated to discharge the attachments out of the state courts at once, without any order in that behalf, so that the sheriff was left without any authority to hold the property. It may be true that the attachments have ceased to have any binding force. But whether they have or not, is the question; and this question depends, not only upon a proposition of law here urged upon us, but also upon two questions of fact, that is, whether Loeb has been adjudicated a bankrupt; and whether he was the only member of the firm of Loeb & Company. Of the principle of law the state court is bound to take judicial notice, but of the two facts stated, it is not bound to take such notice.

No court is bound to take judicial notice of the proceedings of another court. If material to a controversy before it, it must be informed thereof by the pleadings, and if the allegations are denied, they must be proven by the record. The state court can have no knowledge, or even notice, of the proceedings in the federal court, by which its right to possess and adjudicate the property in question is affected. It should be informed, in a proper way, of those proceedings, before its possession is interfered with or assailed. It would be a violation of judicial comity, and provoke unseemly conflicts, to seize the property out of the hands of its officer, just as much in the case before us, as in the cases cited. Information of these facts, in some proper pleading, must be communicated to the court. If the allegations are denied, they must be proved by the record of the district court. To that record the state court must pay heed, and give effect to the principle of law here insisted on. Then all collision will be avoided, and that comity which, in order to have harmonious action, must obtain between the two jurisdictions, will be secured.

Nor is there any foundation for the idea that the federal courts have exclusive jurisdiction of such suits in behalf of the assignee. Neither the 14th section, which gives him the right to sue for and recover the estate, debts, and effects of the bankrupt, nor the 1st section, which fully defines the jurisdiction of the district court, declares it to be exclusive in this class of cases. On the contrary, his right to appear in the state court in this case, and there assert his claim to possession of this property, is expressly recognized by the clause of section 14 which authorizes him to prosecute and defend all suits at law or in equity pending at the time of the adjudication of bankruptcy, in which the bankrupt is a party in his own name. And if the state courts fail to recognize his legal rights, a presumption not here to be indulged, he can, in the proper mode, bring the case from the highest court of the state to the highest court of the United States. Peck v. Jenness, 7 How. [48 U. S.] 612.

I am therefore of opinion, that until some action is had in the state court relinquishing possession of the property in controversy, no action can be brought for that possession in any other court. The judgment of the district court is accordingly affirmed, with costs. Judgment affirmed.

## Case No. 7,374.

JOHNSON et al. v. BOND.

[Hempst. 533.] [1]

Circuit Court, D. Arkansas. April, 1847.

CONSTITUTIONAL LAW—CONTRACT—ABROGATION OF REMEDY—STATUTE OF LIMITATIONS.

1. A law which takes away all remedy is equivalent to a law impairing the obligation of the contract, and hence unconstitutional and void.

2. The repeal of the 20th section of the limitation law (Rev. St. 529), without allowing any, even the shortest time to sue, after the return of the absent person to the state, was unconstitutional, and the repealing act (Acts 1844, p. 25) void.

[This was an action of debt by Richard C. Johnson and Charles L. Tilden against John W. Bond.]

A. Fowler, for plaintiffs.

George C. Watkins, J. M. Curran, and P. Jordan, for defendant.

JOHNSON, District Judge. To the defendant's fifth plea of set-off, the plaintiff has replied the statute of limitations of three years, to which the defendant, in his second rejoinder avers, that at the time of the accrual of the causes of action as stated in the plea of set-off, the plaintiffs were, and from thence until within three years next before the commencement of this suit, continued to be out of, and did not return to, the state of Arkansas. The plaintiffs move to strike this rejoinder from the record files, on the ground that it is no answer to the replication. The rejoinder is valid, unless the 20th section of the statute of limitations, providing for absence from the state, has been repealed. Rev. St. 529.

The act of 1844 (Acts 1844, p. 25) does, in fact, repeal this section, and the question arises, whether the repealing act is constitutional. I am clearly of opinion that it is not; because it takes from the party all remedy upon his contract, without affording him any, even the shortest time in which to bring suit after the return of the person absent to this state. Piatt v.. Vattier [Case No. 11,117]. It has been repeatedly held that a statute of limitations which abrogates all remedy upon contracts, is equivalent to a law impairing the obligation of the contract itself, and, consequently, unconstitutional and void. Bronson v. Kenzie, 1 How. [42 U. S.] 311.

The motion to strike out must, therefore, be overruled, and the rejoinder adjudged good.

JOHNSON v. BRADLEY MANUF'G CO. See Case No. 4,015.

[1] [Reported by Samuel H. Hempstead, Esq.]

## Case No. 7,375.

JOHNSON v. BROWN.

[4 Cranch, C. C. 235.] [1]

Circuit Court, District of Columbia. May Term, 1832.

SLANDER—ACTIONABLE WORDS—COLLOQUIUM—WORDS OF DISGRACE.

1. It is not actionable to say of a white man, that he is a "yellow negro," "a villain and a liar;" although the plaintiff had previously intermarried with a white woman, which marriage would have been unlawful, if he had been a negro or mulatto: there being no colloquium respecting the marriage, nor any marriage averred.

2. Neither the constitution of Maryland, nor any statute of that state, or of the United States, deprives a colored person, merely as such, of any civil rights as a citizen.

3. Mere words of disgrace, unless written and published, are not actionable.

[This was an action by Henry Johnson against Jesse Brown.]

The defendant demurred to the declaration in slander.

Messrs. Key and Dunlop, for plaintiff, cited the Maryland law of 1717, c. 13, § 5; Eden v. Lagarè, 1 Bay, 171; King v. Wood, 1 Nott & McC. 185; Atkinson v. Hartley, 1 McCord, 203, 204; Starkie, Sland. & L. 19, note; Id. 21.

R. S. Coxe, for defendant, cited Starkie, Sland. & L. 47.

The case being submitted on those authorities, CRANCH, Chief Judge, delivered the opinion of the court, (nem. con.,) as follows:

Slander; in saying of the plaintiff, "he is a yellow negro, son of a bitch, a villain, and a liar." The declaration avers, that the plaintiff is a free white male citizen of the United States, and had contracted matrimony with a free, white, female citizen of the United States. That the defendant, knowing the premises, and maliciously intending to bring the plaintiff into disgrace, and to subject him to the pains and penalties of the laws made and provided against mulattoes or negroes contracting matrimony with white women, and the other disabilities of that class of people, on the 8th of November, 1830, at Washington, &c., in a certain discourse of and concerning the plaintiff, said, "he," meaning the said plaintiff, "is a yellow negro, son of a bitch, a villain, and a liar;" meaning thereby that the plaintiff was stained with black blood, and was of negro or mulatto origin, and, as such, subject to the laws and penalties and disabilities provided for, and relating to, that class of people. By means of the speaking of which, &c., the plaintiff is hurt in his good name, &c., insomuch that divers good citizens, to whom his innocence was unknown, have, from the time of the speaking of the said words, hitherto, "suspected the plaintiff to be guilty as charged, and refuse to have intercourse with him," &c. to his damage of $5,000.

[1] [Reported by Hon. William Cranch, Chief Judge.]

To this declaration there is a general demurrer, and the questions are, 1st. Are these words actionable per se? 2d. If not, are they actionable connected with the averment that the plaintiff had married a white woman, and that that fact was known by the defendant at the time of speaking and publishing the words, and that he spoke them with intent to subject the plaintiff to the pains and penalties prescribed by the laws against mulattoes and negroes contracting matrimony with white women; and without the averment of a colloquium respecting the marriage?

1. The words spoken do not charge that the plaintiff, being a free negro or mulatto, intermarried with a white woman; but merely that the plaintiff was a yellow negro. They do not charge the plaintiff with any offence; nor do they charge him with being in any condition which subjects him to legal disabilities. Neither the constitution of Maryland, nor any statute of that state, or of the United States, deprives a colored person, merely as such, of any civil rights of a citizen. It is true that in the slaveholding states, a general rule of evidence has been adopted, by which every person having negro blood, is presumed to be a slave until the contrary is proved; and such a person may be liable to some inconvenience in proving his freedom; but whether his liability to that inconvenience, is sufficient ground to make the words actionable, I have great doubt. They contain no imputation of crime, nor of moral turpitude; and mere words of disgrace, unless written and published, are not actionable. It is, indeed, actionable to say of a man, he is excommunicated; but it is because he is liable to the writ de excommunicato capiendo; so, to say that he is outlawed; for he is liable to the writ of capias utlegatum. But to say of a man that he is a yellow negro, does not subject him to any arrest to which a white man is not equally liable. The case of Eden v. Lagarè, 1 Bay, 171 (Anno 1791), cited by the counsel for the plaintiff, in which it was held to be actionable to call a white man a mulatto, was decided upon the ground that, by the laws of South Carolina, a mulatto is deprived of all his civil rights, and liable to be tried, in all cases, without a jury. See, also, King v. Wood, 1 Nott & McC. 184, and Atkinson v. Hartley, 1 McCord, 203 (Anno 1821). We do not perceive any principle in the present case, which makes the words actionable in themselves.

2. The second question is, whether they are actionable taken in connection with the other averments in the declaration. These averments are, that the plaintiff had intermarried with a white woman; that this was known by the defendant at the time of speaking the words; and that he spoke them with intent to subject the plaintiff to the pains and penalties provided by law against mulattoes or negroes contracting matrimony with white women. These pains and penalties may extend to slavery for life, unless the offender was born of a white woman, in which case the penalty is servitude for seven years. The words, however, do not charge him with this offence, nor is it alleged that they were spoken in reference to the marriage. Without such an allegation, we think the action cannot be supported, and that, therefore, the judgment upon the demurrer ought to be entered for the defendant. Judgment for the defendant.

See, also, 2 Saund. 307; Ludwell v. Hole, 1 Strange, 696; Davis v. Miller, 2 Strange, 1169; Starkie, Sland. & L., 292, 293, 302; Alleston v. Moor, Het. 167; Carn v. Osgood, 1 Lev. 280; Aston v. Blagrave, Ld. Raym. 1369; Savage v. Robery, 2 Salk. 694.

## Case No. 7,376.

JOHNSON et al. v. BYRD.

[Hempst. 434.] [1]

Circuit Court, D. Arkansas. June, 1841.

PARTNERSHIP NOTE — SUING ALL PARTNERS — INCONSISTENT STATUTES—REPEAL—CONSTRUCTION.

1. At the common law, the plaintiff was compelled to sue all the partners, on a note executed in the name of the partnership, and a failure to do so might be pleaded in abatement.

2. But in Arkansas that rule has been changed by statute (Rev. St. 628), and the plaintiff on a contract, may sue all or as many of the joint contractors as he may see proper.

3. Where two statutes are inconsistent with each other, the latter impliedly repeals the former.

4. Statutes should be so construed that both may stand, if possible.

[This was an action of assumpsit by Samuel Johnson and Benoni C. Duplaine against Richard C. Byrd.]

Chester Ashley and George C. Watkins, for plaintiffs.

F. W. Trapnall and John W. Cocke, for defendant.

JOHNSON, District Judge. This is an action of assumpsit brought by the plaintiffs against the defendant upon two promissory notes, signed by "R. C. Byrd & Co.;" the plaintiffs averring that the company consisted of the defendant and one Sterling H. Tucker. A plea in abatement has been filed by the defendant for the non-joinder of Sterling H. Tucker, averring that he is living and resident within this state. The plaintiffs have demurred to this plea, and the sole question is, Can this action be maintained against the defendant alone? According to the principles of the common law the plaintiff is compellable to sue all the partners upon a note executed in the name of the copartnership, and cannot maintain it against a part of them only, if others are living. 7 Term R. 253; 1 H. Bl. 236. But a statute of this State has changed the com-

[1] [Reported by Samuel H. Hempstead, Esq.]

mon law upon that subject. Two provisions, incompatible it is true, are contained in the Revised Statutes. Under the title of "Practice at Law" (section 64), the following provision will be found: "Every person who may have cause of action against several persons, and entitled by law to but one satisfaction therefor, may bring suit jointly against all, or as many of them as he may think proper." This act is approved December 18, 1837. Under the title "Abatement" (section 3), will be found the following provision: "When one or more of the partners of any company or association of individuals shall be sued, and the person or persons so sued shall plead in abatement, that all the parties are not joined in the suit, such suit for that cause shall not abate, if the plaintiff forthwith sue out a summons against the other partners named in such plea, and on the return of such summons, the names of the other partners named in such plea may be inserted in the declaration, and the suit shall proceed in other respects thereafter as if the partner named in such plea had been included in the original suit." Rev. St. 58. This act was approved December 9th, 1837. That there is an incongruity and incompatibility in the provisions just recited, seems to me manifestly clear. One declares that any person who may have cause of action against several persons and entitled to but one satisfaction, may bring suit jointly against all, or as many of them as he may think proper. The other provides, that when one partner of a company shall be sued, he may, by plea in abatement, compel the plaintiff to join the other partners in the suit, and upon his failure to do so, his suit shall be abated. By one enactment of the legislature the plaintiff on a joint cause of action is permitted to sue all or as many as he may think proper. By the other he is compellable to sue all the joint contractors. These provisions, in my judgment, cannot stand together. They are repugnant and inconsistent, one with the other. If by one enactment the plaintiff has a right to sue one only of several joint contractors, can it be affirmed to be consistent and compatible with the right to allow the defendant to meet him with a plea in abatement for his failure to do that which by law he was not bound to do?

If the plaintiff is permitted by law to sue one joint contractor, the defendant surely cannot, by the same law, be permitted to defeat his action, because he refuses to sue all joint contractors. In this rejugnancy between the two enactments, one must yield to the other, as they cannot both stand and be reconciled. It is a well-settled principle that between repugnant and inconsistent enactments the latter law repeals the former. The provision conferring the right to sue one joint contractor was approved subsequently to the provision giving the right to one partner, if sued alone, to plead it in abatement. The latter, therefore, is impliedly repealed by the former. The demurrer is sustained.

## Case No. 7,377.

JOHNSON et al. v. CERTAIN GOODS.

[6 Law Rep. 118.]

District Court, D. Massachusetts. 1843.

SALVAGE—COMPENSATION.

Salvage: The salvors were allowed one half of the property saved, and the costs and expenses out of the other half.

In admiralty.

Theophilus Parsons, for libellants.
William Gray, for claimants.

SPRAGUE, District Judge. This is a libel for salvage; the only question is the amount that shall be allowed. It is a case of derelict. The general rule is to allow one half, but this rule is not inflexible. It seemed to me, on a former hearing, that considering the merit of the service and the amount of property, that the general rule should be so far departed from as to allow the salvors one half and the costs and expenses out of the other half, and a decree was made accordingly. Since that, a claim exceeding four hundred dollars has been made by the government for duties, and the salvors now contend, that the whole amount of this claim should be taken out of the other half, and this on two grounds. (1) That it is but carrying out the spirit of the former decree, and (2) that independent of that decree it would be just and proper. The former decree was made with distinct reference to the costs and expenses then incurred. Their amount was taken into view; no suggestion was made that any claim for duties existed, and it is not to be inferred that had such claim been known, a decree would have passed wholly exonerating the libellants therefrom.

The question now before the court must, therefore, be decided independently of the former decree. The brig Gem sailed from Provincetown fitted for a whaling voyage of twelve months. After being out between two and three months, she fell in with the wreck of the schooner Barr, on a coral reef in the Gulf of Mexico, and, with considerable labor and some peril, saved from her a quantity of merchandise, which they immediately carried to Provincetown, and the same have been sold for $3,831. The only question of fact, which has been much contested at the bar, is, whether the brig returned and broke up her voyage solely for the purpose of saving these goods. That she did in fact return is not denied; but that it was solely for this purpose seems to be negatived rather than proved by the testimony of the salvors themselves, who are permitted in such cases, from necessity, to be witnesses in their own

behalf. Two of them have deposed in this case. One of them says, that the voyage was not utterly abandoned for the purpose of saving these goods, and the other in answer to that inquiry says, that he does not know. Considering the desperate condition of the property which was saved, which in all probability must have been totally lost but for the timely exertions of the salvors, and that there was some peril in rendering those services and considerable labor; and considering the value of the brig and the amount of property saved, I am satisfied with the former decree so far as related to the costs and expenses, but I think that the duties ought to be charged upon the whole property, and should not be thrown wholly upon the half belonging to the claimants. A decree will be entered accordingly.

## Case No. 7,378.

JOHNSON v. CHAPMAN et al.

[2 Cranch, C. C. 32.] [1]

Circuit Court, District of Columbia. Nov. Term, 1811.

TRESPASS—JOINT ACTION—ONE DEFENDANT AS WITNESS FOR OTHER.

In trespass one defendant cannot be a witness for the other, in a joint action, although they plead severally.

Assault and battery. The defendants [Chapman and Alexander] severed in pleading, having been taken at different times.

Mr. Swann, for defendants, offered to examine the defendant, Alexander, as a witness for Chapman, on the authority of the case of Piles v. Plum [Case No. 11,165], decided yestesday.

But THE COURT (THRUSTON, Circuit Judge, absent) refused, saying that the case decided yesterday is not to be considered as authority; the court having since looked into the authorities cited in Lofft's Gilbert, 250.

JOHNSON (CHESAPEAKE & O. CANAL CO. v.). See Case No. 2,648.

## Case No. 7,379.

JOHNSON et al. v. CHIGAGO et al.

[The case reported under above title in 8 Chi. Leg. News, 121, is the same as Case No. 10,316.]

JOHNSON (CLARKE v.). See Case No. 2,855.

JOHNSON (COOPER v.). See Case No. 3,197.

JOHNSON (CORBET v.). See Case No. 3,218.

[1] [Reported by Hon. William Cranch, Chief Judge.]



## Case No. 7,380.

JOHNSON et al. v. The CORIOLANUS.

[Crabbe, 239.] [1]

District Court, E. D. Pennsylvania. March 11, 1839.

IMPRISONMENT OF SEAMEN—FOREIGN PORT—CONSULAR CERTIFICATE—SEAMAN DYING ON VOYAGE — REPRESENTATIVES ENTITLED TO WAGES FOR WHOLE VOYAGE.

1. Nothing but an extreme case of extraordinary violence, where the safety of the vessel or those on board requires it, will justify the imprisonment of a seaman, on shore, in a foreign port, at the discretion of the master.

[Cited in Chester v. Benner, Case No. 2,660.]

2. A consular certificate of the facts inducing the summary imprisonment of a seaman in a foreign port, is not evidence, and this court will always examine the facts for itself.

[Cited in The Elwin Kreplin, Case No. 4,427.]

3. Where a seaman is unjustifiably imprisoned, by the master, in a foreign port, a charge will not be allowed against him, for the amount paid another seaman, hired in his place.

4. It is the settled law of this court, that the representatives of a seaman dying on the voyage in the service of the ship, are entitled to his wages for the whole voyage.

[This was a libel for wages by John Johnson and William Johnson, administrator of George Adams, deceased, against the ship Coriolanus (Merrill, master).]

This case came on for a hearing, before Judge HOPKINSON, on the 7th March, 1839, and was submitted to the judge, on the evidence, and without argument.

Mr. Grinnell, for libellants.

F. E. Brewster, for respondent.

HOPKINSON, District Judge. The libellant John Johnson shipped, at New York, at eighteen dollars a month, for a voyage commencing on the 8th November, 1837. His libel states the voyage to be from New York to Mobile, thence to Marseilles, and back to a port of discharge in the United States; and that the ship arrived at Philadelphia on the 12th February, 1839, making fifteen months and four days, for which he claims, at eighteen dollars a month, $272 25, giving certain credits to be deducted. It appears, however, by a reference to the shipping articles, that the voyage contracted for at New York was for six calendar months, and a port of discharge in the United States. It also appears, by other shipping articles, that, at Marseilles, the six months having expired, a new voyage was contracted for, from Marseilles to Cette, thence to Rio Janeiro, and thence to a port of discharge in the United States. The new contract was made on 1st May, 1838; the rate of wages of the libellant, as well as of the rest of the crew, was reduced to twelve dollars a month. Some attempt has been made to prove that coercion or duress was used, to compel the men to sign these last articles. The proof is by no

[1] [Reported by William H. Crabbe, Esq.]

means satisfactory, and I shall consider the rate of wages to be eighteen dollars a month, for the first six months, that is, to the 8th May, 1838, and to be, for the rest of the voyage, twelve dollars a month. This will make the total amount of wages, for the whole voyage, $216. The captain has rendered an account, in which he allows the libellant eighteen dollars a month to the 1st May, instead of to the 8th. On the second voyage he allows him twelve dollars a month, but terminates it on the 24th October, when the libellant was taken from the vessel by a police officer, by order of the captain, put into prison, and never after rejoined the ship, as she came away and left him there, the captain having previously sent his clothes on shore. I have no doubt that this whole proceeding, on the part of the captain, was altogether illegal and unjustifiable. I have repeatedly expressed my disapprobation of putting our seamen into foreign gaols and dungeons, at the mercy of the local police officers, for offences by no means requiring such severity. For ordinary misconduct, or insubordination, the power of the master, on board of his vessel, is amply sufficient for all the purposes of discipline and subordination, and it is only in cases of extraordinary violence, where the safety of the vessel or of those on board, requires that the offender should not be suffered to remain there, that he should be taken and imprisoned on shore. Every act of passion or indiscretion is called by the name of mutiny, and the seaman is hurried off to the unwholesome confinement and dirt of a prison, perhaps in a climate dangerous to life. In this case the man had been many months on board the ship, without any misconduct that called even for slight punishment, although it is said he was sulky and no seaman. He had a quarrel with the mate, about which different accounts are given, so that it is hard to say which was most wrong. On the second day after, when it might be supposed the matter was all over and forgotten, and nothing had occurred. in the meantime to show any danger from it, a boat is sent to the ship with a police officer, and the man carried off to prison, without a hearing, or any examination of the circumstances of the case, except such as the captain chose to give to the consul. And here I would again correct an error into which captains are continually falling. They seem to believe that if they can get the consent or co-operation of the consul to their proceedings, it will be a full justification for them, when they come home. I wish them to understand that I will judge for myself, after hearing both parties and their evidence, of the necessity and propriety of these summary incarcerations; and the part the consul may have taken in it, will have very little weight with me. In all my experience, I have never known a consul refuse the application of a captain to imprison a seaman, nor to furnish a certificate, duly ornamented with his official seal, of the offence committed, of which he generally knows nothing but from the representations of the captain or officers of the vessel. I never suffer these certificates to be read: they are infinitely weaker than ex parte depositions. Our consuls, unfortunately, are merchants also; their profits and their living depend upon the business they can do, especially by the consignments of cargoes to them. It is, therefore, very important to them to have the good will of the captains of vessels, who may make a good report of them to their owners. Considering that this man was taken from the vessel, without any legal and justifiable cause, I have no hesitation in giving him his wages for the whole voyage. For the same reason I reject the credit claimed by the captain, for hiring another man in his place, amounting to $42; and for the additional reason that no evidence of any such hiring or payment was given.

In deciding upon the credits to be allowed, I shall take them as stated in the captain's book, which, although not strictly regular, has satisfied me of their truth. In the manner in which this case has been referred to me, I think a latitude is given to do what I truly think to be just between the parties.

The account will stand thus:

| | |
|---|---|
| Whole amount of wages..... | $216 00 |
| Credits allowed ..... | 78 40 |
| | $137 60 |

As to the claim of the libellant William Johnson, the administrator of George Adams, the facts are these: Adams died on board the ship, on the voyage from Marseilles to Rio, on the 10th August, 1838. It is the settled law of this court that the representatives of a seaman dying on the voyage, in the service of the ship, are entitled to his wages for the whole voyage. This is the only difference between the captain's account and the libellant's. The account stands thus:

| | |
|---|---|
| Whole amount of wages..... | $216 00 |
| Credits allowed ..... | 65 75 |
| | $150 25 |

Decree for the libellants, for the amounts due on their accounts respectively, and costs.

An appeal was taken by the respondent, upon this decree, to the circuit court of the United States for the Third circuit.

On the 6th May, 1839, the decree was affirmed, with costs. HOPKINSON, District Judge, made the following note of this affirmance, on the back of his manuscript opinion.

BALDWIN, Circuit Justice, agrees with the opinion of the district court, on all the points, and especially on the subject of im-

prisoning seamen by the authority of a captain. Seamen should be imprisoned, in foreign ports, only in a clear case of extreme necessity. He said he would probably have gone further in this case than the district judge had done, if it had come originally before him, and would have given the mariner not only his wages for the whole voyage, but have made him compensation for the imprisonment. Decree affirmed, with costs.

JOHNSON (COUSE v.). See Case No. 3,288.

JOHNSON (CRAWFORD v.). See Case No. 3,369.

## Case No. 7,381.

JOHNSON v. The CYANE.

[1 Sawy. 150; [1] 4 Am. Law Rev. 769.]

District Court, D. California. April 21, 1870.

SUNDAY—DUTY OF SEAMAN—RIGHTS OF MASTER.

A seaman has no right to refuse duty required of him on a Sunday, by our calendar, it appearing that at the port of Ounalaska, the day owing to a difference in the calendar, was not observed as a holiday; but the master had no right to expel him from the ship for such refusal.

[Cited in Pearson v. The Alsalfa, 44 Fed. 358.]

[This was a libel for wages by John Johnson against the bark Cyane.]

Sullivan & Ellsworth, for libellant.

Pixley & Harrison, for claimant.

HOFFMAN, District Judge. The facts in this case are not disputed, and the question presented to the court for decision is whether a seaman who had shipped for a voyage from this port to Ounalaska, in the territory of Alaska and back, had a right to refuse to perform his ordinary duty, on the ground that such duty was required of him on a Sunday, notwithstanding that the day in question was not, by the custom and usage of the port of Ounalaska, where the vessel lay, observed as a Sunday or holiday. It is not disputed that according to our calendar the day was Sunday, but according to the calendar in use in the late Russian possessions on this continent, the day previous had been observed as a Sunday or holiday.

The duty required of the seaman was to assist in discharging the cargo. The contract of the libellant was in the ordinary form of shipping articles. These articles contain no agreement for exemption from labor on the part of the crew on Sunday, or any other sacred day. But it is admitted that by usage and custom no labor is on that day exacted of seamen, except such as is necessary for the navigation, and care of the ship, or such as may be rendered necessary by extraordinary circumstances.

Admitting, therefore, that this usage enters into, and forms a part of the contract, it is nevertheless apparent that from its very nature it can only give to the seaman the right to exemption from duty, subject to the discretion of the master. It is for the latter to determine what work is necessary, and when the labor of the crew or of any member of it is required.

In cases of emergency, growing out of disaster or danger to the ship, the necessity for the labor of the crew may be apparent to all. But there are many occasions when the necessity or expediency of requiring their services may depend on circumstances known only to the master, and as to the force of which he alone can judge.

The right of a seaman to rest on Sunday from the labors of the week, cannot be more sacred than his right to rest during a portion of each twenty-four hours from the labors of the day; and yet the master's right to call all hands on deck, and, if in his judgment necessary, to deprive the crew of their watch below, cannot be questioned.

In all cases, obedience is the first duty of the seaman; and it is only when the command is clearly unlawful, or the duty exacted is plainly unreasonable and unnecessary, that a refusal to obey can be for a moment countenanced. In the case of Ulary v. The Washington [Case No. 14,323], Judge Hopkinson says: "The libellant contends that he was not bound to work on Sunday. There is no law for this position. The nature of the service requires that the men should do so, and they must not be allowed to set themselves up as judges, and refuse to do their duty on such excuses."

In the case at bar, the order of the master seems to have been reasonable and proper. By the usage of the port where the vessel lay, the day was a secular day, devoted to ordinary business and labor; and of this the seaman may be considered to have had notice when he entered into his contract. If by the law, or perhaps by the established usage of the port, labor had been prohibited on that day, he would have been entitled to the exemption. But certainly the master cannot be bound to accord to him all the privileges secured by the law or the usage of the port where the vessel is lying, and also all those allowed by the law and usage of the port from which she sailed. The contract for the seaman's service contemplates its performance in part at the port of Ounalaska, and as to that part it must be performed according to the law and usage there prevailing.

It did not distinctly appear at the hearing whether the previous day observed at Ounalaska as a holiday had been allowed to the seaman as a day of rest. It probably was; for the master would be unlikely to offend the sentiments of the inhabitants by a desecration of the day, and when all business and labor on shore were suspended, the dis-

[1] [Reported by L. S. B. Sawyer, Esq., and here reprinted by permission.]

charge of the cargo by the crew would almost necessarily be interrupted.

The motives of the libellant in refusing to work are not shown. It does not appear what religion he professes, or even that he is a Christian. His refusal, therefore, cannot be attributed to scruples of conscience. He has chosen to stand on the purely legal ground that no work could be required of him on Sunday, except such as was clearly indispensable and necessary; and of this he constituted himself the judge.

My opinion is that the master had the right, under the circumstances, to require of him the performance of his duty. As the seaman, when the alternative was distinctly presented to him, chose to leave the vessel rather than go to work, he must be regarded as having abandoned the service, and he can have no claim for wages which by his own act he was prevented from earning. But, at the same time, I consider that the master's command to the seaman to go to work or to go ashore, was virtually an expulsion from the ship as a penalty or punishment for his refusal to do duty. Had the vessel been in a foreign port, this would have been clearly unlawful. It might even have exposed the master to a criminal prosecution. Ounalaska, though within our own territory, is remote and not much frequented. The seaman's refusal may have arisen from an honest mistake as to his rights and duties. I cannot affirm that conscientious scruples may not also have influenced him. His previous conduct had been good. He made no objection to performing his duty on any other day.

The master could have compelled him to work by appropriate punishment, or the threat of it, or he might have hired a man in his place, the expense of which, together with such deductions from his wages as the nature of his fault justified, could have been charged to the seaman. I think he had no right to expel him from the vessel, certainly he had none to inflict that mode of punishment which is only allowable in extreme cases, and to impose in addition a forfeiture of the wages already earned. I think, therefore, that the libellant is entitled to recover the wages due him at the time he left the vessel.

## Case No. 7,382.

JOHNSON v. DAWS.

[5 Cranch, C. C. 283.] [1]

District Court, District of Columbia. March Term, 1837.

MALICIOUS PROSECUTION—DEFENCE TO.

In an action for maliciously causing the plaintiff to be arrested, it is no defence that the defendant's oath did not, in law, authorize the magistrate to grant the warrant, if the defendant availed himself of it, and delivered it to the constable to be executed, unless the oath and arrest were made ignorantly, and without malice.

Action upon the case, for maliciously causing the plaintiff [William Johnson] to be arrested and imprisoned for ten days, without probable cause, upon a charge of felony. It appeared in evidence, that Mr. Coote, a justice of the peace, issued his warrant, reciting that it appeared to him by the information and oath of Frederick Daws, the defendant, that his property, namely, three mares, had, within two days last past, strayed from the commons of the city of Washington, or been feloniously stolen, taken, and carried away out of the city of Washington; and that the said Frederick Daws had probable cause to suspect, and did suspect, that the said mares were confined in the premises of a certain William Johnson, (the plaintiff,) in the said county; therefore, the constable, Madison Jeffers, was thereby required, with proper assistance, to enter, in the daytime, into the said premises of the said William Johnson, and there diligently search for the said mares; and if the same or any part thereof should be found, upon such search, to bring the said mares so found, and also the body of the said William Johnson, before the said justice or some other justice of the peace of the said county, to be disposed of and dealt with according to law. The warrant was executed, and the plaintiff arrested on the 3d of October, 1835. It appeared, also, that the case was dismissed by the justice, with the consent of the complainant, (the present defendant,) on the 13th of October, 1835. This suit was commenced on the 17th of the same month. The warrant, when issued, was delivered to the constable, and the defendant went with him to show and identify the mares.

Mr. Bradley, for defendant, prayed the court to instruct the jury, that the oath, as stated in the warrant, did not authorize the justice to issue it; and therefore the defendant is not liable, which instruction THE COURT (THRUSTON, Circuit Judge, doubting) refused to give; but, upon the prayer of Mr. Bradley, (the defendant's counsel,) THE COURT (nem. con.) instructed the jury, that if, from the evidence, they should be of opinion that the defendant's horses strayed, or were stolen, from the commons of the city of Washington; that they were found by him on the premises of the plaintiff, and by him there confined; that the defendant demanded them, and the plaintiff refused to deliver them; that thereupon the defendant applied to the justice of the peace for advice and direction to regain his said property, by a civil remedy; that the justice advised him to make the affidavit; and that, thereupon, he did make the affidavit upon which the warrant was issued, under which the horses were retaken and delivered to the defendant; and the defendant, upon being called upon, said he did not mean, and never

[1] [Reported by Hon. William Cranch, Chief Judge.]

did mean, to prosecute the plaintiff criminally, then the plaintiff is not entitled to recover in this action. See Cohen v. Morgan, 6 Dowl. & R. 8; 1 Har. S. C. Dig. 295.

Verdict for plaintiff, $25. Motion in arrest of judgment, and for a new trial, refused.

## Case No. 7,383.

JOHNSON v. The ELIZA.

District Court, D. Massachusetts. Nov. Term, 1807.

SEAMEN—WAGES—REVOLT—REINSTATEMENT—FORFEITURE.

[Cited in Abb. Shipp. 652, note, as an instance in which seamen who had endeavored to commit a revolt were, upon repenting and tendering amends, *held* entitled to be forgiven, received into service again, and the forfeiture of their wages remitted.]

[Cited in The Mentor, Case No. 9,427.]

[Nowhere reported; opinion not now accessible.]

## Case No. 7,384.

JOHNSON et al. v. FLUSHING & N. S. R. CO.

[15 Blatchf. 192; 3 Ban. & A. 428.] [1]

Circuit Court, E. D. New York. Aug. 27, 1878.[2]

PATENTS—IMPROVEMENT IN FASTENING SHEET METAL TO ROOFS.

1. The second claim of the reissued letters patent granted to Asa Johnson and Thomas S. Sandford, April 16th, 1872, for "an improvement in fastening sheet metal to roofs," namely, "in combination with the adjusting bolt and slotted side plates, suitably connected to, and combined with, the materials to be fastened together, for the purpose of accommodating the expansion and contraction of such materials with reference to each other, substantially as specified," is invalid, because the essential elements of the combination claimed are different from the essential elements described in the original patent, and the result produced by the combination described in the reissue is different from that produced by the combination described in the original patent.

[Cited in Smith v. Merriam, 6 Fed. 718.]

2. The cases of Gill v. Wells, 22 Wall. [89 U. S.] 24, and Herring v. Nelson [Case No. 6,424], commented on.

[See note at end of case.]

In equity.

Frederic H. Betts, for plaintiffs.

Hinsdale & Sprague, for defendants.

BENEDICT, District Judge. This action is brought to restrain the Flushing and North Side Railroad Company from using a certain fastening for their railroad rails, commonly known as the "fish-plate joint," upon the ground that the plaintiffs have the exclusive right to the use of such fastening, by virtue of a patent for an "improvement in fastening sheet metal to roofs," reissued to Asa Johnson and Thomas S. Sandford April 16th, 1872, and marked reissue No. 4,870.[3] The fastening complained of consists of two plates fastened one on each side of the two rails to be connected together, and bolted by means of bolts passing through the rails and through slots in the plates. The two rails are thus securely fastened together, all change of their relative position, except in the single direction of the slots in which the bolts can slide, being prevented, while, thus, the expansion and contraction of the rails in that direction is accommodated.

In order to a proper understanding of the question to be discussed, it is necessary to call attention to the language of the reissued patent, upon which the plaintiffs' rights depend. In the title of the patent, the invention is designated as "an improvement in fastening sheet metal to roofs." In the specification, the invention is called, sometimes, "an adjustable fastening," and, sometimes, "an adjustable fastener." The only description of the invention given is in connection with its use in fastening metallic roofs to buildings, but it is stated that the fastener may be used wherever it is necessary to allow for the contraction or expansion of materials to be fastened together. The specification states, that the "principle of my invention consists in connecting the metal to be fastened with a bolt or pin arranged to slide in slotted bearings in the direction of expansion or contraction, said adjustable bolt and its bearings being combined with materials to be fastened." In connection with the description, drawings are referred to, in which, as the specification says, are indicated the screws for attaching the metallic roof to the stud—the stud—the adjusting bolt or pin, to which the metallic roof is connected by the stud and screw, said bolt passing through the stud and through the slots of the side plates or flanges—the side plates or flanges, provided with slots, which form the bearings of the adjusting bolts—the bottom plate, used as a convenient means of attaching the side plates to the wooden sheathing of the building—an india rubber cord, which may be used in applying the adjustable fastener to buildings—the screws for attaching the bottom plate, and, with it, the side plates, to the sheathing—the sheathing, greatly enlarged in thickness in proportion, to illustrate the details of the connection of the adjustable fastener to buildings—the metallic roofing. The specification, after explaining the method of using the invention, in attaching metallic roofing to buildings, goes on to say: "Both the wooden sheathing and the metallic roof are thus connected to the self-adjusting mechanism, consisting of the slotted side plates and

[1] [Reported by Hon. Samuel Blatchford, Circuit Judge; reprinted in 3 Ban. & A. 428, and here republished by permission.]

[2] [Affirmed in 105 U. S. 539.]

[3] [The original patent, No. 17,331, was granted to plaintiffs, May 19, 1857.]

the bolt which slides in them." Two claims are set forth in this patent, the second of which is the only one requiring attention, and is as follows: "(2) I claim, in combination with the adjusting bolt and slotted side plates, suitably connected to, and combined with, the materials to be fastened together, for the purpose of accommodating the expansion and contraction of such materials, with reference to each other, substantially as specified." The word "with," in the first sentence of this claim, is, by the plaintiffs, treated as a clerical mistake, and the claim read as if that word were absent. It is so treated here.

Some difference of opinion has been expressed as to what is the proper construction to be put upon this patent. According to the plaintiffs, it is to be understood as covering a combination of old devices adapted for use in connecting materials to be fastened together, in all cases where it is necessary to allow contraction or expansion of the materials, the elements of which combination are two pieces of material to be fastened together—two slotted side plates to furnish bearings for the adjustable bolt, and also to serve as clamps on opposite sides of the materials to be fastened together—an adjusting bolt to hold said clamping plates in position thereon. This construction of the reissue is necessary for the plaintiffs' case, as, otherwise, the case would fail upon the question of infringement, and, if such construction be the true one, the question of infringement is disposed of, it being conceded that the use of the fish plate joint would be an infringement of the plaintiffs' patent, so construed. Under such circumstances, it may properly be assumed, for the purposes of this decision, that the plaintiffs' understanding of his patent is correct.

The inquiry then turns to the question of the validity of the reissue. Its validity is denied by the defendants, upon the ground, that, if construed according to the plaintiffs' understanding, and, as it must be, in order to bring the defendants within its scope, it is for an invention different from any described in the original patent, and is, therefore, void. The proper construction of the original patent becomes, therefore, a decisive question in this case. That patent is for a combination. The word combination is, indeed, not to be found in the instrument, but the specification is devoted to a description of the inventor's mode of combining certain simple and well-known devices, in order to produce a specified result. Certain simple devices appear in the description, but as elements of a combination, and the language nowhere conveys the idea that the inventor has discovered anything but a method of using old devices, combined in a certain way, to produce a certain result. Whether the claim, as constructed, is for a combination or not, is immaterial here; as that claim, although forming the first claim of the reissue, is not relied upon by the plaintiffs. What is described is alone material, and that is nothing unless it be a combination. The elements of the combination which, in the original patent, is set forth as having been first invented by the patentee, are plainly designated in the description given, and are, the stud—the flanges—the bottom plate—the adjusting bolt, "passing through the stud," and capable of moving in the slots of the flanges.

It has been earnestly contended, in behalf of the plaintiffs, that the specification does not declare either the stud or the bottom plate to be elements of the combination, and mentions them simply as means of applying the invention in the particular case, taken as an illustration. But, the language of the description is plain. The stud is described as not only connecting but adjustable. It is designated "the adjustable connecting stud." It is spoken of as distinct from the metal to be connected, and it will, as it is said, "accommodate itself to any direction required by the metal." In the drawings which are furnished to represent the fastener, the stud appears, and without any intimation that it is not an essential part of the invention; nor is there, throughout the whole patent, any language capable of suggesting that the stud is not as essential a part of the invention as any other portion described.

Equally specific is the original patent in declaring the bottom plate to be an element of the combination. The bottom plate appears in all the drawings, and nowhere is there an intimation that it is not an essential feature of the invention. The constant and necessary presence of the bottom plate as an element of the combination is also implied in the designation given to the bearings of the bolt, which, in the original patent, are always designated as flanges and never as side plates.

In this connection, it will be useful to notice, that, in the reissued patent, a change of phraseology has been adopted in speaking of the stud as well as of the bottom plate; and explicit language, not found in the original, is inserted for the plain purpose of eliminating the stud and the bottom plate from the combination. Thus, where, in the original, the language is, "Fig. 3 is an end elevation of the self-adjusting fastener," in the reissue the language is, "Fig. 3 is an elevation, in section, of my adjustable fastenings and the device for connecting the same to the metal roof, detached." Where, in the original, the language is, "Fig. 5 is a plan view of the bottom plate," in the reissue the language is, "Fig. 5 is a plan view of the bottom plate, to which the bearings of the adjusting bolt are attached, in this instance." What in the original are in all cases termed flanges, in the reissue are sometimes termed side plates, and sometimes "flanges or side plates." The original

says: "I may find, in using my adjustable fastener, it necessary to make some of them —those that are in the parallel lines with the flanges—to fit up close to the sides of the stud." In the reissue the statement is: "Where, however, the movement is only sensible in the direction of the slots, the side plates are made to fit up close." These changes and additions made in the reissue, as understood by the plaintiffs, are not mere corrections whose effect is to render accurate and specific what was before uncertain, but they work an essential alteration of the specification, and effect the elimination from the combination of two elements—the stud and the bottom plate—which before that were described as essential elements of the combination secured. The character of these changes tends to confirm the conclusion, that the original patent is correctly interpreted when it is held to include the stud and the bottom plate as essential elements of the invention secured. The invention intended to be described and secured by the original patent, is a combined device, constructed in two members, so connected together, by means of the bolt and its slotted bearings, as to permit a change to a limited extent in the relative position of the two members with reference to each other. This device is to be inserted between the two materials to be fastened together, a connection of those materials being formed by fastening the adjusting stud to one, and the flanged bottom plate to the other. In the reissue, as it must be understood in order to sustain the charge of infringement, the stud forms no part of the fastener, but has become a part of the materials to be fastened, and the side plates not only furnish bearings for the bolt, but perform the additional important and essential function of furnishing a strong lateral support to the materials, by clamping the same between them. In the original, the language, plainly importing, as it does, that the stud is an essential part of the fastener and not a part of the materials to be fastened, excludes the idea that the flanges are in any case to furnish lateral support to the materials to be fastened or to clamp the same. It is thus seen, that the essential elements of the combination described and sought to be secured by the reissue are different from the essential elements of the combination described in the original, and that the result produced by the combination described in the reissue is different from that produced by the combination described in the original patent.

By these changes a substantial change in the subject-matter has been accomplished, and, upon established principles, the conclusion must follow, that the reissue is void. It is unnecessary, therefore, for me to go further; but it is proper, before dismissing the bill, to notice two adjudged cases cited by the opposing counsel as conclusive authority in favor of their respective views.

On the part of the defendants, the case of Gill v. Wells, 22 Wall. [89 U. S.] 24, has been cited as being on all-fours with this case, and an authority adverse to the position of the plaintiffs. If I am correct in my understanding of the patents under consideration, the case in hand is not precisely like the case of Gill v. Wells, because, there, not only was there an omission of one well described ingredient of the patented combination, but there were substituted in its place several other devices, not equivalents for the omitted element. Here, no new device has been substituted in place of the stud, but, by removing the stud from the combination, and describing it as part of the material to be fastened, a new function has been given to the flanges, viz.: that of clamping between them the material to be fastened. Nevertheless, the reasoning of the court in Gill v. Wells affords support to the conclusion which I have reached in this case.

On the part of the plaintiffs, the case of Herring v. Nelson [Case No. 6,424] has been cited as being in opposition to the case of Gill v. Wells, and an authority in support of the plaintiffs' case, binding upon this court. A reference to this opinion in Herring v. Nelson—one of the latest of the opinions of Judge Johnson, whose recent death is so greatly deplored—is sufficient to show that it was not understood to be in conflict with the decision in Gill v. Wells. Nor do I understand it to be in conflict with my conclusion in this case. The case of Herring v. Nelson was one where there was described in the original patent two results capable of being conceived of as independent of each other, and shown to contribute to a common result. These two results the original patent showed to be capable of being attained by separate and independent elements, combined in a manner described. The common result of the complete combination of all the elements described, was the cooling without waste of meal, in the process of converting grain to flour. But, as the opinion is careful to state, the specification and drawings could not fail to disclose to any intelligent examiner, that, while the combined action of all the parts described produced the complete result of cooling and saving the waste, there was described a sub-combination, producing a separate and independent result, viz.: the cooling only. It was, therefore, held, that the inventor, having omitted in the original patent to claim the sub-combination thus described, might do so by a new claim in a reissue.

The present is no such case. Here, it is impossible to gather, from the original patent, a hint that the slotted flanges and sliding bolt, without the stud and bottom plate, will produce an independent result, capable of being separated from the complete result sought to be attained by the use of the complete combination, nor is there any language capable of suggesting that the invention se-

cured will not only connect the materials together, but also prevent their lateral movements by securely clamping them between its flanges. The views I have thus expressed are fatal to the plaintiffs' claim, and render it unnecessary to consider the other questions discussed by counsel. There remains, therefore, but to direct that the bill be dismissed, with costs.

[NOTE. An appeal was then taken by the complainants to the supreme court, where the decree was affirmed in an opinion by Mr. Justice Woods, who said "that in the reissued patent several of the devices essential to the combination described in the original patent are left out and a separate claim made for the parts which remain, and to these parts a new and essential function is given, which they could not perform under the original patent." The reissue is therefore broader than the original patent, and consequently void. 105 U. S. 539.]

JOHNSON (FRIEDLAND v.). See Case No. 5,117.

JOHNSON (GAREY v.). See Case No. 5,240.

JOHNSON (GATES v.). See Case No. 5,268.

JOHNSON (GAYLORD v.). See Case No. 5,285.

JOHNSON (GIBSON v.). See Case No. 5,397.

## Case No. 7,385.

JOHNSON v. GLOVER et al.

RIGGS et al. v. BARRON.

[2 Cranch, C. C. 678.] [1]

Circuit Court, District of Columbia. May Term, 1826.

JUDGMENT—REVIVAL—WHEN NECESSARY.

1. A scire facias is not necessary to revive a judgment, if a fi. fa. has been issued and returned.

[Cited in Ott v. Murray, Case No. 10,615.]

2. But if executions are taken out to lie in the office, they must be renewed every year.

[Cited in Ott v. Murray, Case No. 10,615.]

Upon the return of a fieri facias issued on the 25th of October, 1823, Mr. Morfit, for defendant, in the case of Riggs & Gaither against [William H.] Barron, moved to quash the writ because more than a year had elapsed since the last preceding writ of execution had been issued, which was in April, 1822, and there had been no scire facias to revive the judgment. The judgment was rendered on the 14th of January, 1820, upon which a fieri facias was issued on the 11th of December, 1820, which was returned nulla bona. An alias fi. fa. was issued on the ——— of October, 1821, also returned nulla bona. A pluries fi. fa. was issued in April, 1822, which was not returned; and the present fi. fa. was issued, as before stated, on the 25th of October, 1823, and returned levied on a slave, "and injoined."

[1] [Reported by Hon. William Cranch, Chief Judge.]

Mr. Morfit, for defendant, cited Booth v. Booth, 1 Salk. 322; Aires v. Hardress, 1 Strange, 100; Belloes v. Hanford, 1 Rolle, 104; Cooke v. Batthurst, 2 Show. 235; Vincent's Case, Comb. 346; 2 Tidd, Prac. 1004; Dacy v. Clinch, 1 Sid. 53; Bac. Abr. "Execution," H.

Mr. Redin and Mr. R. P. Dunlop, for plaintiff, cited Blayer v. Baldwin, 2 Wils. 82, Barnes, Notes Cas. 213; Lewis v. Smith, 2 Serg. & R. 142, 154; 2 Tidd, Prac. 1054; 2 Saund. 68, E.; Id. 72, F.

Mr. Jones, for defendant, in the case of Johnson v. Glover et al., contended, that, as the execution which was issued in that case in April, 1823, had been returned "countermanded," and no further proceeding until the issuing of the present writ, returnable to December term, 1824, this writ was issued irregularly, without scire facias, and ought to be quashed.

The Court, having taken time to consider, until May term, 1826, CRANCH, Chief Judge, delivered the opinion of the court (THRUSTON, Circuit Judge, absent).

The question is, whether the omission to renew the execution within a year after April, 1822, without, in fact, entering up the continuances upon the roll, made it necessary to sue out a scire facias to revive the judgment. It is clear that by the English practice for three centuries, if a fi. fa. be taken out within a year after judgment and returned, the plaintiff may at any time afterwards have a new execution without a scire facias. And that an elegit may be taken out at any time, and the continuances entered up. 2 Inst. 469-471; Co. Litt. 290b; Harbert's Case, 3 Coke, 12a; Welden v. Greg, 1 Sid. 59; Dacy v. Clinch, Id. 53; Blayer v. Baldwin, 2 Wils. 82; Vincent's Case, Comb. 346; Brown, Parl. Cas. 29; Booth v. Booth, 6 Mod. 288, 1 Salk. 322; Molins v. Welden, 1 Keb. 159; Clift. Ent. 840; Officina Brevium, 96; Aires v. Hardress, 1 Strange, 100; Michell v. Cue, 2 Burrows, 660; 3 Salk. 321, pl. 8; Withers v. Harris, 2 Ld. Raym. 806; Seymour v. Greenvill, Carth. 283; Harris v. Woolford, 6 Term R. 617; Doe v. Dolman, 7 Term R. 618; Belloes v. Hanford, 1 Rolle, 104; Cooke v. Batthurst, 2 Show. 235; Low v. Beart, Barnes, Notes Cas. 210; 1 Tidd, Prac. 165; Hardisty v. Barny, 2 Salk. 598; Atwood v. Burr, 7 Mod. 5; Brown v. Babbington, 2 Ld. Raym. 883; Mellor v. Walker, 2 Saund. 1; Blayer v. Baldwin, Barnes, Notes Cas. 213; Waller's Case, 3 Leon. 240; 2 Tidd, Prac. (Ed. 1812) 1051; Gonnigol v. Smith, 6 Johns. 106; Lewis v. Smith, 2 Serg. & R. 142; Craig v. Johnson, Hardin, 529. This practice, so long established in England (even before the first emigration to this country), and so convenient, is opposed only by the letter of Mr. Harris, the clerk of the court of appeals in Maryland,

to Mr. Key, dated February 3d, 1825, as follows: "The practice in the late general court always was, and it is so in the present court of appeals, that, in order to keep a judgment alive (where an execution has issued thereon), to renew it, if not to every term, at least within a year and a day of the former execution. There are no continuances entered on the roll, as in England. If no execution has issued within a year and a day of the preceding execution, a scire facias must be issued; the judgment being considered out of date." If there are not reported cases in Maryland upon this point, the long-settled practice in England, before the first settlement of Maryland, and perhaps the universal practice in the other states, would induce a belief that the law was otherwise. Mr. Harris, however, does not put the case of a fi. fa. returned "nulla bona."

THE COURT, therefore (THRUSTON, Circuit Judge, absent), said: That where an execution has been issued within the year and day, and shall have been returned by the marshal, it is not necessary to renew the execution, from year to year, to keep alive the judgment, but the plaintiff may have a new execution at any time without a scire facias. But where an execution is ordered to be made out and lie in the clerk's office, and shall not have been delivered to the marshal, and returned, the order for the renewal of the execution must be made within the year and day after the last order for renewal; or the judgment must be revived by scire facias.

## Case No. 7,386.

JOHNSON v. GRIFFITH.

[2 Cranch, C. C. 199.] [1]

Circuit Court, District of Columbia. April Term, 1820.

ATTACHMENT—PRIORITY.

The attachment first served is entitled to priority of payment.

THE COURT (THRUSTON, Circuit Judge, absent) said the attachment first served was entitled to priority of payment.

## Case No. 7,387.

JOHNSON v. HARRIS.

[1 Cranch, C. C. 35.] [1]

Circuit Court, District of Columbia. July Term, 1801.

BAIL—WHEN REQUIRED.

Bail will not be required to be given by the defendant in an action by his immediate indorsee, while another action is depending against him by a more remote indorsee; especially if the name of the plaintiff has been stricken from the note by the subsequent indorsee.

[1] [Reported by Hon. William Cranch, Chief Judge.]

Motion for the defendant to appear without bail. Appearance bail had been ruled by one of the judges out of court upon an affidavit. The suit was brought upon a note given by Clingman and McGan to Towers, and indorsed by Towers to Harris, by Harris to Johnson, and by Johnson to Dunlop. Dunlop had sued Harris, as indorser of this note, in the court of hustings of Alexandria. Harris appealed to the district court at Dumfries, where the judgment was reversed, and Dunlop appealed to the court of appeals, where the suit is still pending. At the trial of the cause of Dunlop v. Harris [5 Call. (Va.) 16], the name of Johnson, the intermediate indorser, was struck out.

The defendant was allowed by KILTY, Chief Judge, and CRANCH, Circuit Judge, to appear without bail. MARSHALL, Circuit Judge, contrà.

## Case No. 7,388.

JOHNSON v. HARRIS.

[1 Cranch, C. C. 257.] [1]

Circuit Court, District of Columbia. Nov. Term, 1805.[2]

JOINT BILL OF PARCELS — EVIDENCE OF JOINT SALE — ARGUING POINT OF LAW TO JURY—NEW TRIAL—WEIGHT OF EVIDENCE.

1. A joint bill of parcels, is not conclusive evidence of a joint sale. The court will not permit a point of law which the court has decided, to be argued to the jury.

[See note at end of case.]

2. A new trial will not be granted, because the verdict is against the weight of evidence, if substantial justice has been done.

Assumpsit for goods sold and delivered. Upon the trial of the general issue, the defendant offered in evidence a bill of parcels of the same goods rendered by and in the handwriting of the plaintiff, beginning with these words: "Mr. Theophilus Harris, bought of Dunlap and Johnston," and containing a particular account of rum and sugar; at the foot of which, was the following receipt, signed by the plaintiff: "Received Messrs. Clingman & Magaw's note for the above sum, payable to the order of John Towers and Theophilus Harris, payable the 2d of April, 1798; when paid, received in full." This note, with the blank indorsements of Towers and Harris and Johnston, was delivered by Johnston to Dunlap, who brought suit upon it in Virginia, against Harris, but failed to recover, because an indorsee cannot, in Virginia, recover at law against a remote indorser. Dunlap then brought suit against Towers, on the same note in this court, which suit was still pending. The defendant, upon these facts, prayed the court to instruct the jury, that the plaintiff could not recover in this action for the goods sold; and that from the bill of parcels and receipt aforesaid, the

[1] [Reported by Hon. William Cranch, Chief Judge.]

[2] [Reversed in 3 Cranch (7 U. S.) 311.]

transaction must be considered as a joint contract. Which instruction, the court refused to give, as prayed, but directed the jury that the bill of parcels was evidence (but not conclusive) of a joint contract of sale; and that the plaintiff may explain the transaction by parol, or other evidence to prove that he was the sole owner of the sugar, and that Dunlap was the sole owner of the rum, and that the contract was made with the plaintiff in his own right for the sugar, and with him as agent of Dunlap for the rum. But if the plaintiff should produce no explanatory evidence, he could not maintain the present action. And the court further instructed the jury that if they should be satisfied, by the evidence, that the contract of sale was made with the plaintiff alone, and that part of the goods was the sole property of the plaintiff, and that the residue was the sole property of Dunlap, and that the plaintiff had authority from Dunlap to sell such residue; then the plaintiff had a right to recover judgment in this action against the defendant for the whole amount of the goods so sold and delivered, and that the other facts stated are not sufficient to bar the plaintiff.

Mr. Swann, for plaintiff, was then going on to argue to the jury from the face of the bill of parcels, that it did not purport a joint contract; but the court stopped him, and would not suffer him to argue the question of law to the jury after it had been decided by the court. Verdict for the plaintiff.

Mr. Jones and Mr. C. Lee, for defendant, moved for a new trial: (1) Because the verdict was against evidence. (2) Because the plaintiff's brother in law was on the jury. (3) Because the note was outstanding, and had been passed away by Johnston, who had received its value from Dunlap. Kearslake v. Morgan, 5 Term R. 513; Tapley v. Martens, 8 Term R. 453.

CRANCH, Circuit Judge. This was an action of assumpsit, for goods sold and delivered by the plaintiff to the defendant. The plaintiff proved the sale and delivery of the goods, and that defendant gave the note of Clingman & Magaw, indorsed by Towers and the defendant for the amount of the goods, payable in five months. Dunlap, to whom Johnston had indorsed the note, brought suit in Virginia against the present defendant as indorser, and failed to support his action on the note, upon the ground that an indorsee in Virginia has not a remedy upon the note against a remote indorser. The defendant then produced a bill of parcels, made out in the name of Dunlap and Johnston, with a receipt given by Johnston alone for the note of Clingman & Magaw, which, when paid, was to be in full satisfaction for the goods sold. The defendant contended that this was evidence of a joint sale, and that the promise was made to Dunlap and Johnston jointly, and therefore the form of the action had been mistaken. The court instructed the jury, that the bill of parcels was evidence, but not conclusive evidence of a joint sale, and that the plaintiff might produce parol or other evidence, to show that part of the goods sold was the separate property of Johnston, and that Johnston had authority from Dunlap to sell his part; and that if the jury were satisfied by the evidence that this was the real transaction, the plaintiff had a right to recover the whole amount of the goods. The plaintiff produced evidence to show that no general partnership existed between Dunlap and Johnston. That Dunlap never claimed any ownership of the sugar, and that Johnston never claimed any ownership of the rum; and that Dunlap did not deny the right of Johnston to sell the rum. Upon this evidence and instruction of the court, the jury found a verdict for the plaintiff, for the whole claim, and the defendant has moved for a new trial, on the ground that the verdict is contrary to evidence. It is the office of the court to decide what is evidence. But it is the province of the jury to ascertain its weight. Some evidence was offered to the jury, from which they had a right to infer a separate property in the goods, and an authority from Dunlap to Johnston to sell Dunlap's part. It was for the jury to judge of its effect, upon a consideration of all the circumstances which were proved. They have drawn the inference, and the court cannot say it has been drawn improperly.

On a motion for a new trial, grounded on a defect of evidence, the court will consider the justice and equity of the case, and if they find these to be in favor of the verdict, and if there was any evidence which could reasonably justify the inference which the jury has drawn, they will support the verdict. The objection which the defendant made, and which was grounded on the bill of parcels, did not go to the substantial merits of the case. It did not show that the defendant had discharged the debt; while it contained, in itself, the evidence that he had received the goods. The plaintiff has parted with his property; the defendant has received it, and has not paid for it. The note, unless it produced the money, was no payment. It has not produced the money, and no negligence is imputed to plaintiff. The justice and equity of the case, therefore, are on the side of the verdict; and the court thinks that the jury had reasonable ground to presume the facts necessary to support it. In refusing to grant the new trial, however, the court will annex a condition that the plaintiff shall produce and deliver to the defendant the note of Clingman & Magaw, mentioned in the receipt upon the bill of parcels, and that Mr. Dunlap shall give the defendant a release of all demands on account of the rum, for the price of which this action is brought. Upon these terms the court will refuse to grant a new trial.

[NOTE. The case was then taken by writ of error to the supreme court, where the judgment was reversed in an opinion by Mr. Chief Justice Marshall, who said that an action on an original contract for goods sold and delivered cannot be maintained by a person who has received a note as a conditional payment, and has passed away that note. There was no error, however, in holding that the bill of parcels was not conclusive evidence of joint property in the goods sold and delivered. It was proper to allow explanatory evidence to go to the jury. 3 Cranch (7 U. S.) 311.]

## Case No. 7,389.

JOHNSON et al. v. HEALY et al.

[9 Ben. 318.] [1]

District Court, S. D. New York. Feb., 1878.

SUIT AT LAW—PROCESS—FORM OF SUMMONS.

1. In a suit at law, a writ in the form of a capias, issued to the marshal, as process for the commencement of the suit, in December, 1877, and served on the defendants, was held to be substantially a compliance with the requirements of the Code of Procedure of New York, in regard to a summons and its contents and service, and to be valid, under section 914 of the Revised Statutes of the United States.

2. A form of summons set forth which is regarded as proper for commencing a suit at law in the federal courts in New York, without holding that it is necessarily the only proper form.

[This was an action by Francis M. Johnson and others against Aaron Healy and Aaron A. Healy.]

Hamilton Cole, for plaintiffs.

Roger M. Sherman, for defendants.

BLATCHFORD, District Judge. This is an action at law, in which there was filed in the office of the clerk of this court, on the 28th of December, 1877, a pleading, endorsed as a "Complaint," and there was issued thereon, on the same day, a writ to the marshal, endorsed as a "Capias." The complaint states, at its end, that the plaintiffs demand judgment against the defendants for the sum of $100,000. It sets forth allegations which, it is claimed, constitute a cause of action at law as distinguished from one in equity. The capias commands the marshal to take the defendants and have their bodies before the judge of this court, at the court room thereof, on a day specified, to answer unto the plaintiffs in a plea of trespass, and also to a certain bill of the plaintiffs against the defendants for the recovery of $100,000 damages. It is tested in the name of the judge of this court, and bears the signature of the clerk and the seal of the court, and is dated the 28th of December, 1877. The return of the marshal is on it, certifying that, within his district, he served it on Aaron Healy personally, on December 29th, 1877, and on Aaron A. Healy personally, on December 31st, 1877. The writ and return were filed in the office of the clerk of this court, January 2d, 1878. Subsequently, and before the return day of the capias, the defendants, appearing solely for the purpose of the motion, and without entering a general appearance, moved the court to vacate and set aside the capias. The ground of the motion is that the capias, as process for commencing the suit and bringing the defendants into court, is process not authorized by any law of the United States; and that this court has not obtained jurisdiction, in this suit, of the persons of the defendants, by the service which has been made on them of such capias.

Section 914 of the Revised Statutes provides that "the practice, pleadings, and forms and modes of proceeding in civil causes, other than equity and admiralty causes, in the circuit and district courts, shall conform, as near as may be, to the practice, pleadings, and forms and modes of proceeding existing at the time in like causes in the courts of record of the state within which such circuit or district courts are held, any rule of court to the contrary notwithstanding." Under this provision, this being a civil cause and not an equity or admiralty cause, it is contended that the process for commencing the suit should have been the form of summons prescribed by section 418 of the New York Code of Civil Procedure in force when the capias was issued and served, and that the capias is not valid as a summons. Section 416 of such Code provides that "a civil action is commenced by the service of a summons." Section 417 of such Code provides that "the summons must contain the title of the action, specifying the court in which the action is brought, and the names of the parties to the action"; and that it must be subscribed by the plaintiff's attorney, with his office address and post-office address within the state, and, if in a city, the street and street number. Section 418 of such Code provides that the summons, exclusive of the title of the action and the subscription, must be substantially in the following form, the blanks being properly filled: "To the above named defendant: You are hereby summoned to answer the complaint in this action, and to serve a copy of your answer on the plaintiff's attorney, within twenty days after the service of this summons, exclusive of the day of service, and, in case of your failure to appear or answer, judgment will be taken against you by default, for the relief demanded in the complaint. Dated,——." The same section provides that "the summons is deemed the mandate of the court." Section 419 of such Code provides that "a copy of the complaint may be served with the summons," but that, "if a copy of the complaint is not served with the summons, the plaintiff cannot take judgment by default without application to the court, unless a notice is served with the summons, stating the sum of money for which judgment will be taken, and the case is one embraced in" section 420 of such Code.

[1] [Reported by Robert D. Benedict, Esq., and Benj. Lincoln Benedict, Esq., and here reprinted by permission.]

The supreme court of the United States, in construing the provision of section 914 of the Revised Statutes,—section 5, Act June 1, 1872 (17 Stat. 197),—in Indianapolis R. Co. v. Horst, 93 U. S. 291, say that the conformity required by the statute "is required to be 'as near as may be,' not as 'near as may be possible,' or as 'near as may be practicable' "; and that "this indefiniteness" devolves on the judges the duty of construing and deciding, and gives them the power to reject any subordinate provision in the state statutes "which, in their judgment, would unwisely encumber the administration of the law, or tend to defeat the ends of justice in their tribunals." Unquestionably, where a process or pleading is substantially a compliance with the requirements of the Code of the state, especially where to set it aside would tend to defeat the ends of justice, it ought to be upheld. Lewis v. Gould [Case No. 8,324].

The petition of the defendants, on which this motion is founded, was filed in this court on the 16th of January, 1878, and sets forth that the exigency of the capias is such that, if it be effectual to commence an action, the defendants must enter their appearance on the first Tuesday in February, 1878. Section 421 of the Code of New York provides that "the defendant's appearance must be made by serving upon the plaintiff's attorney, within twenty days after service of the summons, exclusive of the day of service, a notice of appearance, or a copy of a demurrer, or of an answer." Section 422 of such Code provides that "a defendant upon whom the plaintiff has served, with the summons, a copy of the complaint, must serve a copy of his demurrer or answer upon the plaintiff's attorney, before the expiration of the time within which the summons requires him to answer." But, under such Code, if a copy of the complaint is not served with the summons, the defendant is not required to serve, within the twenty days, anything but a notice of appearance, and, if that be done, he is not required to serve a copy of a demurrer, or of an answer, until after his attorney has been served with a copy of the complaint.

The process in this case has been served on the defendants personally within this district, in sufficient time before its return day for them to properly enter their appearance before that day. Their petition to the court shows that they understand it, if valid, as requiring them to enter their appearance in the suit, which means an appearance by an attorney, and to enter such appearance on the first Tuesday in February, 1878. It contains the title of the action sufficiently, by containing the designation of the court, and the names of the parties who are plaintiffs and defendants in the suit. It is subscribed by the plaintiffs' attorney, and he has been found to be served with notice of this motion. The capias is, in form, the mandate of the court. By the provisions of the Code of New York, above referred to, the exigency of a summons, in a case where a copy of the complaint is not served with the summons, is solely to require the defendant to appear by attorney within a specified limit of time. In the present case no copy of the complaint was served with the capias, nor was any notice served with it stating the sum of money for which judgment would be taken, nor is this suit, which is, in substance, an action for the wrongful conversion of personal property, one embraced in section 420 of the Code of New York. Therefore, the exigency of the capias, in this case, is solely to require the defendants to appear by attorney within the specified limit of time prescribed by the capias. The defendants so understand it and so state. There is no surprise and no misleading. Under the circumstances of this case, the capias and its contents and service are substantially a compliance with the requirements of the Code of New York in regard to a summons and its contents and service. If, as is alleged by the plaintiffs, the statute of limitations may have run against the cause of action, if they should be driven to a new suit, that is a reason why the capias should be upheld, if that can properly be done.

The clerical error in the year, in the body of the capias, is corrected by the true statement of it on the back of the capias, and the defendants show that they were not misled.

In the case of Martin v. Criscuola [Case No. 9,159] it was held that a summons not issued by the court, but merely issued by the plaintiff's attorney, was not a proper summons. That decision was made on the view that the summons is process, and must, under the statutes of the United States, and notwithstanding the provisions of the act of 1872, and of section 914 of the Revised Statutes, be issued by the court, and have the authentication of the court.

But the question whether, in any given case, the process issued in a common-law suit, to commence it, was substantially the form of summons of the state practice, was left to be determined in such case when the question should arise. In October last the circuit judge of this circuit placed in the hands of the clerk of the circuit court for this district a form of summons for commencing a common-law suit in that court, with instructions to inform attorneys commencing such a suit that such a form of summons was one which the court regarded as authorized by law. It is, in form, the summons prescribed by section 418 of the New York Code, with the addition of a teste in the name of the chief justice of the supreme court of the United States. The clerk was advised that, when he issued it, he was to sign it as clerk, and put upon it the seal of the court. It contains a blank for complying with the provisions of section 417 of the New York Code, as to the name and address of the plaintiff's attorney, and on the back a form of notice

under section 419 of such Code, and a form indicating that it is process to be served by the marshal. A like form of summons was placed at the same time in the hands of the clerk of this court by the district judge, with like instructions and like advice. This was done with the concurrence of Mr. Justice Hunt. But no order was entered in either court in respect to such summons. The judges endeavored, by such means, to prevent the raising of questions as to the form of the process, but it was designed to leave open the question, in any given case, as to the substantial conformity of the process to the state practice. In the present case it is shown that the capias was issued through a subordinate of the clerk, who had been accustomed to issue such form of process, and who was not advised that any other form would be proper. The motion is denied.

JOHNSON (HOBSON v.). See Case No. 6,553.

## Case No. 7,390.

JOHNSON v. HUCKINS.

[1 Spr. 67; [1] 6 Law Rep. 311.]

District Court, D. Massachusetts. Oct., 1843.

SEAMEN—WAGES—SICKNESS—SUBSTITUTE.

1. A seaman, during illness occasioned by his own fault, is not entitled to wages, and is liable for the expenses of his subsistence; but not for the wages paid another man in his place.

[Cited in The Ben Flint, Case No. 1,299.]

2. If the amount necessarily paid to a substitute during the seaman's illness, exceed the latter's wages for the same time, quaere, whether the excess can be charged to the seaman?

3. In such case a seaman cannot be charged with the detention of the vessel for want of his services, it being in the power of the master to obtain a substitute, and thus prevent delay.

[Cited in Patten v. Darling, Case No. 10,812.]

This was a libel for wages, promoted by a seaman of the bark Bevis against the owner. The main question was, what deduction should be made from the wages of a seaman, in consequence of an illness incurred by his own fault. The libellant admitted such an illness, and that he was not entitled to wages during the fourteen days he was off duty, on that account; claiming a balance of $71. He produced evidence to show that the medical expenses were paid by himself, that his diet during sickness was by preference mainly furnished by himself, and that he had no especial attendant. The respondent claimed, by way of set-off to the wages due, board and attendance on board the vessel; cash paid for services of an extra man hired during part of the fourteen days the libellant was off duty; loss of time by the vessel during the remainder of those days, and delay in consequence, estimated according to what would be the per diem of a substitute at Bordeaux, where the vessel then was; [thirty days' wages of an additional man shipped at Bordeaux on the ground that he was so shipped in apprehension of the libellant's continued inability to do duty; and that the libellant, after being put upon duty, was not in a condition to do it fully, for that length of time;] [2] making a balance of $46.69. He produced evidence to show that the libellant might have had his diet from the ship-stores, and sometimes did; that he received some attendance; that for about thirty days after he was again put on duty, full duty was not always required of him.

E. T. Dana, for libellant.

W. I. Bowditch, for respondent.

SPRAGUE, District Judge. In case of illness by his own fault, a seaman is not entitled to his wages during the time he does not do duty; and subsistence, during the same time, may be charged to him. The libellant has deducted the former. As to the subsistence, he was lodged on board, and was furnished with some attendance and diet, and it is admitted there was no disposition to withhold them. Something should be allowed therefor. The money paid a substitute, during a part of the time the libellant was off duty, cannot be charged to him—his wages for the same period being already deducted. Neither can the claim for delay, by reason of the loss of his services, during the remainder of that time. No actual detention is shown, and it would be the duty of a master to prevent such delay, by a supply of the requisite services. If the cost of a substitute should amount to more than the deducted wages of the sick seaman, whether the excess could be charged to him, is a point not necessary to be decided.

[In regard to the charge to the libellant of the additional seaman's wages, (that is, deducting his own, in effect,) for the thirty days after he was again on duty, on the ground that this duty was not required of him to the full, the court is not prepared to sustain that charge. The evidence too, of the fact, does not go far, and there is counter evidence.] [2]

Decree for the libellant, $66.84 with costs.

## Case No. 7,391.

JOHNSON v. The INDUSTRY.

[Hoff. Op. 488.]

District Court, D. California. July 6, 1868.

SALVAGE—COMPENSATION—COSTS.

[1. During the prevalence of a violent and extraordinary gale in San Francisco Harbor, a ship dragged her anchors, and brought up within

[1] [Reported by F. E. Parker, Esq., assisted by Charles Francis Adams, Jr., Esq., and here reprinted by permission.]

[2] [From 6 Law Rep. 311.]

one or two hundred yards of Alcatraz Island. A tug seeing her apparent danger approached, and, after some parley, gave her a line, and towed her five or six hundred fathoms, to a place of comparative safety. *Held* that, although possibly the vessel was not in actual peril, yet the tug performed a valuable service in rescuing the vessel with arduous risk from apparent immediate danger.]

[2. The tug being valued at $60,000, gold, and the ship and freight at $160,000 legal tender, $10,000 in legal tender should be allowed as salvage.]

[3. Respondents having made no offer of compensation, but denied the service or that any compensation was due therefor, should be charged with costs, although libellant exorbitantly claimed $60,000 for the service.]

[This was a libel by William B. Johnson and others against the British ship Industry for salvage service rendered by the tug Rescue.]

H. & C. McAllister, for libellant.

W. H. L. Barnes, for claimants.

HOFFMAN, District Judge. The account given by the libellant's witnesses of the alleged salvage service for which this suit is brought is in substance as follows: On the afternoon of Dec. 23, 1867, the British ship Industry was observed by the steamtug Rescue to be rapidly drifting before a violent southeast gale upon Alcatraz Island. The Rescue, after ascertaining that the ship Imperial, which had also been dragging her anchors, required no assistance, proceeded at her utmost speed to the relief of the Industry, and, passing between her and the Island, rounded to under her stern and came up on her starboard or weather bow. The ship lay nearly parallel to the island, and abreast of a point a little to the eastward of its center. Her distance from it is variously stated, but a majority of libellant's witnesses, including the master of the tug, suppose her to have been from two to three ships' lengths from the shore. They also state that she was still drifting, and that the distance between her and the island perceptibly diminished while the tug was passing round her stern. The master of the tug expresses a strong belief that she was drifting when he came alongside. He declines to swear positively to the fact, but he states, and in this he is corroborated by his crew, that his reason for not coming up on her leeward side after rounding to, as would under ordinary circumstances have been most convenient, was the fear that he might be driven on the island. They also state that when the ship was hailed, and inquiry made if she was dragging, it was answered that she was, and that she had two anchors out, with 60 fathoms chain on one, and 75 on the other. The master of the tug then held up his hawser as a sign to the men on the Industry to send one on board, and having learnt from their gestures that they had none, or that it was below, a heaving line was thrown from the tug, and a hawser from the latter drawn on board by the persons on the Industry, four in number, with great eagerness and extraordinary rapidity. The tug then commenced towing the ship, but so difficult and doubtful was the operation that the master frequently expressed his despair of success, and an axe was brought up and placed near the towing post, in readiness to cut the hawser at a moment's notice. The gale which had for some hours been blowing was of almost unprecedented violence. Its force was so great that it was at times difficult, if not impossible, to stand upright on the deck of the tug, unprotected except by a log gunwale about eighteen inches in height. The motion of the small vessel in the rough sea exposed the crew to the danger of losing their balance and falling overboard; and on one occasion, the master, and on another, one of the men, would have gone overboard, had they not been seized and drawn in.

Under these circumstances the tug succeeded in towing the vessel, with both anchors down, around the easterly end of the island, and slightly under its lee, a distance of from four to six hundred yards, when the hawser parted, and the vessel swung to the flood tide. The master of the tug then ordered up a large hawser from below, and endeavored to induce the Industry's men to take the heaving line and haul the hawser on board. This they persistently refused to do, telling him to go to the city and see the master, as the mates on board were unwilling to take further responsibility. After endeavoring for a considerable time to induce the Industry to accept her assistance, the tug left her and proceeded to town. The Industry was at this time, according to the libellant, in no immediate danger. The island had ceased to be under her lee, and the gale had somewhat abated, Her men had therefore, as the master of the tug expresses it, "got over their scare," and were unwilling, in the absence of the master, to take the responsibility of allowing the tug to tow her to the city. It is alleged, however, that the ship was still so near the island that on the turn of the tide she would have been in imminent danger of going ashore on its easterly end. On reaching the city, the master of the tug immediately drove to the residence of one of his owners, and thence to that of Mr. Walker, agent for Lloyd's underwriters. Accompanied by this gentleman, his brother-in-law, and an additional force of twenty men hired for the occasion, the master of the tug returned with her to the Industry. The night was so dark, and the ship lay so near the island, that she was not immediately seen as the tug approached, and apprehensions were felt and expressed that she had gone down. Upon coming alongside, inquiry was made from the Industry if the captain of the latter was on board, and it was replied that he was not, but that the agent for Lloyd's was. A crew

was then put on board the ship, a hawser attached to her foremast, the chain of the port anchor slipped, and a party put on the windlass to heave up her starboard anchor. The tug then took her in tow, and for some hours dragged her in various directions around the harbor while the men were endeavoring to heave in the starboard anchor. Finding this to be impracticable, the starboard chain was slipped at a point about midway between Alcatraz and Meigg's wharf, or about eight hundred yards from the former, and the ship taken to a wharf in the city. The time employed in this last service was about nine hours.

On the part of the claimants it is denied that any salvage service, even of the lowest degree of merit, was rendered. They allege that when the tug arrived, the Industry, though she had previously dragged, had brought up to her starboard anchor, and been riding in safety for more than an hour; that she neither required nor wished any assistance; that it was accepted after much hesitation and delay, and after the heaving line had been thrown to her three times, and then, because her officers, deceived by the false and fraudulent assurances of the master of the tug, supposed that there might be sunken rocks or other unknown danger near, and not because they considered there was any risk of their being driven ashore by the gale. It is also strenuously asserted that the tug at no time broke out the anchor of the ship; that she merely hauled her up to her anchors and to windward of them as far as the chains would permit, and that when brought up by the chains, the ship swung to the flood tide, thus bringing the hawser across her stem, and causing it to part; that her position was in no respect improved, as she had brought up, not abreast the middle, but off the east end of the island; and that in any event she could not have gone ashore upon it on an ebb tide. It is further alleged that on the return of the tug, her aid was accepted and her crew allowed to take charge of the ship, in consequence of the statement of Captain Griffiths that Lloyd's agent was on board and assumed all the responsibility; and, finally, that she was berthed so unskillfully as to cause her some, though not considerable, damage. A great number of witnesses have been produced in support of the allegations of the parties, and the cause has been argued with earnestness and apparent confidence on each side. The testimony is conflicting, not only on points such as estimates of time and distance, where discrepancies might be expected, but as to matters of fact on which it is difficult to believe that either party could be honestly in error, and the determination of which by the court is a task more than usually embarrassing.

Into every salvage service two ingredients necessarily enter, viz.: First, danger to the property salved; and, second, rescue from that danger by the salvors. As it is denied that either of these ingredients existed in the present case, it becomes necessary to ascertain—First, whether at the time the alleged service was rendered the Industry was in peril, and if so to endeavor to appreciate its degree; and, secondly, whether she was saved from the peril by the tug.

I. Was the Industry in any peril at the time the tug reached her; and if so, what was its degree? That the gale was of extraordinary and almost unparalleled violence is beyond dispute. It is so testified by all the witnesses examined on the subject, and it is proved by circumstances. The steamer Orizaba was unable to go to her wharf, but lay to an anchor off Black Point with steam up during the day. The Stockton steamboat broached to, and was obliged to return to the city, and the MacPherson was unable to make her usual landing on the leeward side of Alcatraz. Even the captain of the Industry states that nearly all the vessels he saw dragged their anchors. That the service performed by the tug was arduous and difficult, and not wholly unattended with danger both to the tug and those on board, is also apparent. That the ship had brought up to her anchor when the tug came alongside is also, I think, shown beyond any reasonable doubt. It is so testified by the two mates and carpenter of the Industry being all on board who were examined, by all the numerous witnesses who watched her from Alcatraz, including the commanding officer and Lieutenant Campbell, witnesses for the libellant. The fact may also be gathered from the testimony of the surveyors on board the French transport Euryale, also witnesses for the libellant. They state that they supposed the ship was ashore upon the island from her evident close proximity to it and from the spray that broke over her. Orders were given on the transport to send boats to her assistance, but, before the boats were made ready, the tug was seen making for the vessel, and the orders were countermanded. It is evident from the testimony of these witnesses that they did not suppose the ship was still dragging. Opposed to this is the evidence of the crew of the tug. That of the engineer is too extravagant to merit attention, and the captain is unable to swear positively that the ship continued to drag while he went round her stern. That he thought she was dragging, or liable to drag, may be inferred from his conduct. He came up on her weather instead of her lee bow, unwilling, as he states, to run the risk of placing his vessel between the ship and the island, and he made ready to cut his hawser at a moment's notice. That the reason he assigns was his only motive for going on the weather side may perhaps be doubted, for the situation of the ship required that she should be dragged

off the island and, in some degree, to windward. But, unless we suppose that his frequent expressions of doubts of his ability to save the ship, and his order to bring up the axe, were parts of a comedy he was acting, to be reproduced afterward in court to enhance the merit of his service, we must believe that he thought the vessel in imminent peril of dragging ashore. He also testifies that on coming near the vessel he inquired if she was dragging, and was answered that she was. The fact that he put this inquiry is not easily reconcilable with the statement of some of the men, and particularly the engineer, that she was visibly and rapidly drifting upon the island; and it is possible that the question may have been understood on board the Industry to be whether the ship had been dragging.

I find nothing in the evidence of the crew of the tug, and in the opinion entertained by her master, sufficient to countervail not only the evidence of those on board the Industry, but that of all the numerous witnesses who saw the ship from the island. Both Capt. Fitzgerald and Lieut. Campbell testify that the vessel appeared to have brought up, and they retired to their quarters. Capt. Fitzgerald again came out (but after what interval he does not state), to see if she retained her position. He states that she "probably had drifted a very little," but is not positive of the fact. He remained but a very short time, as he saw the tug approaching. Lieut. Campbell testifies that when he first saw the vessel she was drifting; that she drifted within one hundred or two hundred yards of the island, and brought up. He then returned to his quarters; he was out perhaps ten minutes. He does not mention having seen the tug. It is evident, from the fact that he returned to his quarters, that he supposed the ship had ceased to drift.

Assuming, then, that the vessel had ceased to drift before the tug arrived, the next question is, how long before? The log-book states that the vessel began to drag about 3:30 o'clock, and brought up about 4 o'clock at about a cable's length from the island; that, about 5 o'clock, the Rescue approached, and soon after hove a line on board, which was not accepted. About 6 o'clock, or just before, another line was hove, which was taken for a short tow off until the flood tide made. The protest signed by the master, mates and carpenter is to the same effect. It states very positively that the ship lay to her anchor fully an hour or more before the rescue appeared. If these statements are correct as to the time when the ship brought up, it is, I think, clear, from the evidence, that the tug must have appeared within twenty minutes, or at most, half an hour afterward. That the tug reached the Industry at about twenty minutes after four is established not only by the evidence of Capt. Griffiths and his crew, but by that of Capts. Porter, Wells and Houseman, who were on board the Euryale, and by that of Capt. Clark, of the Goliah. The fact is also either expressly stated or virtually admitted by Sergeant Green, Corporals Frova and Barr, and Privates Reckel, King and Chase, witnesses for the claimants, on whom the defense chiefly relies. The statement, therefore, of the log-book and protest, that the tug did not arrive until five o'clock, is disproved. It is also clearly shown that the statement in the log-book and protest, that the tug was alongside the vessel an hour before the hawser was taken on board, is a gross, and perhaps wilful, exaggeration. Even Capt. Joy, the principal and most zealous witness for the claimants, stated to Capt. Fitzgerald, that the tug took the vessel away between half past four and five o'clock. On the stand he states that half an hour elapsed from the time the tug came on the port bow until the hawser was attached to the weather bow. Dowie, the carpenter of the Industry, swears that the line was on board the Industry fifteen or twenty minutes after the tug came on the weather bow. Corporal Trevor states that they were talking five or ten minutes before the line was put on board the ship. Corporal Barr testifies that the tug lay off her right bow fifteen or twenty minutes. Private Rechel states that he observed the tug making, as he says, ineffectual attempts to tow the ship for fully half an hour before he left the Post. He was relieved at five, or a few minutes after. Private King testifies that he left the city in the steamboat MacPherson, about three o'clock. As he passed Alcatraz, about ten minutes or a quarter of an hour later, he saw the Industry. On his return, about an hour and a half later, at about five o'clock, as he says, the tug had hold of the ship and was endeavoring to tow her.

If to this evidence, furnished by the claimant's own witnesses, we add that of the master and all the crew of the tug, together with that of Capt. Jones, of the MacPherson, and of Capt. Bromley, of the Paul Pry, the former of whom saw the Industry in tow of the tug at about half past four o'clock, and the latter about four and a quarter o'clock, we may safely conclude that the statements in the protest and log-book, that the tug continued to "play off and on" about the ship until six o'clock, when a line was taken, are wholly unworthy of belief. All the witnesses from Alcatraz examined by the claimants agree in stating that the Industry brought up to her anchor about three quarters to one hour before the tug came. They generally concur, too, in stating the time at which she brought up at fifteen or twenty minutes after three, some three quarters of an hour earlier than the time stated in the log-book and protest and by Corporal Barr. Capt. Houseman, also a witness for claimants, testifies that, in his

opinion, from twenty-five minutes to half an hour elapsed from the time the Industry brought up until the Rescue came alongside. Capt. Harrison estimates the time at three quarters of an hour. Capt. Clark, of the Goliah, at about four o'clock, supposed she was still dragging, but he was not certain. Capt. Fitzgerald, commander at Alcatraz, testifies that he was called to look at the ship between three and half past three o'clock. He found she had brought up. He then returned to his quarters. He afterward went out again. She probably had drifted a very little, but he is not positive. He remained but a few minutes, as he saw the tug approaching. It may also be reasonably inferred, from the testimony of the libellant's witnesses who saw the ship from the Euryale, that she had been brought up to her anchor. They all supposed her ashore, and that the lives of her crew were in danger. This was about four o'clock.

From all the testimony, I think it may safely be concluded that the Industry had brought up to her starboard anchor at least twenty minutes or half an hour before the Rescue reached her. Her distance from the shore is variously stated. A majority of witnesses on both sides concur in estimating it about one hundred fathoms, or about two hundred yards. Her position with reference to the island was much controverted at the hearing. The mates allege that after she brought up they took her bearings. Her fore rigging was in a line with the easterly end of the Alcatraz and the point of Angel Island. To all observers from a distance she seemed to be drifting, or ashore on the island. That she lay parallel with and broadside to the island is stated by all who saw her. Even admitting that the mates obtained the bearings they allege, and there are some discrepancies in their testimony, the island lay directly under her lee. I do not understand that the claimants pretend that if she had continued to drag she would have gone clear or to the eastward of the island. On the contrary, they have sought to establish by several witnesses that the ebb tide would have carried her along the island and past its westerly end. But speculations of this sort are too uncertain and conjectural to be relied on. The ebb tide was nearly spent; the gale blew with great violence; the ship had dragged across the ebb tide before the wind and directly across the island for at least half a mile. She had approached within one hundred fathoms of it and was by all who saw her from the island supposed to be coming on shore until she brought up. The idea that the force of the tide would have carried her along and to the northward and westward, is evidently an afterthought which did not occur to any one who witnessed or participated in the courts.

If the foregoing conclusions are just, it is evident that at the time the Rescue came alongside, the peril to the Industry was not as imminent, nor the immediate destruction so inevitable as the master of the tug and those who observed her from a distance supposed. The fact that she was not reported to the officer of the day at Alcatraz, as the regulations of the post require, and that no preparations were made to save the lives of her crew, shows that she was not considered in immediate and imminent danger. They continued to watch her, however, from the island, evidently with great interest, and the approach of the tug probably dispelled all fears that she might again drag her anchors and go ashore. But, though the degree of peril was not as great as supposed by the libellants, I am unable to believe that the officers of the Industry had the serene sense of entire security which they would now have us believe. They had dragged with forty fathoms on the port chain; they had paid out twenty fathoms more without effect; they had then let go the starboard anchor and given it forty-five fathoms. The vessel continued to drag. They then paid out starboard chain until the 75 fathom shackle was abaft the windlass. The vessel was then brought up. To the last 25 fathoms of her chain her safety was due; and on this was her sole reliance. The vessel was within one hundred fathoms of a lee shore; a storm of unparalleled and as yet unabated violence was raging. It is impossible under such circumstances to say that the vessel was in no danger; and equally impossible to believe that no anxiety for her safety was felt. The officers of the Industry state that the heaving line was thrown three times before it was accepted; and then only through fears inspired by the false representations of Captain Griffiths. In this statement they are contradicted by all the crew of the tug, and by necessary inference, by her captain, although the question was not directly put to him. It is not pretended that Capt. Griffiths spoke of sunken rocks, or expressly mentioned any other form of danger than that which was obvious to all. If he believed the vessel was dragging, or liable to drag, he had no need to invent sunken rocks to inspire apprehensions. The mates now declare that the hawser was taken through fear of hidden danger suggested by the master of the tug, but the protest makes no mention of any such suggestions. From that account it would seem that the aid of the tug was accepted through fear that "a change of tide might be unfavorable to the ship." The evident falsehood of the mates' statement that the tug played around the ship for an hour before the hawser was taken on board, justifies us in discrediting their testimony in other respects. And we have, in addition, the positive testimony of Mr. Walker and Mr. Hewett, gentlemen of unimpeachable character, that the mate, on the morning after the occurrence, admit-

ted that the vessel "was in a precarious position." The mate, unable to deny this admission, attempts an unsatisfactory explanation of his language, by attributing to it a sense improbable in itself and contrary to that in which it was understood by the persons who heard him. Similar declarations of the carpenter are sworn to by several witnesses, and not denied; and all the circumstances of the case render it highly improbable that the aid of the tug was not readily and gladly accepted.

The situation of the ship is described in the protest as follows: "The ship now rode favorably, holding on securely, simply surging with the current and force of sudden increase of the wind, and at times appearing to be nearer the island, and still as she surged back as well off as when she brought up at her anchor." When we consider the violence of the gale, the fact that one anchor was foul, and that she had continued to drag with forty-five fathoms of the chain of the other, that she was within one hundred fathoms of a lee shore, and that night was approaching, it is impossible to believe that a ship in the situation described in the protest, could have been, or have been supposed to be, in the condition of absolute safety now pretended by the claimants.

II. It is denied on the part of the claimants that the services of the tug were of any value whatever to the ship. They contend that she was only towed so far as the chains would permit; that her anchors were not broken out either on the first occasion, or subsequently when the tug returned; and that no steamtug would have power to do so. In some of these assertions the claimants are clearly in error. The port anchor is admitted by the second mate to have been foul; that the ship was not held by it is also admitted. When taken up it was foul, not only with the starboard but with its own chain. The seventy-five fathom shackle of the starboard chain was abaft the windlass. From the water she had therefore about seventy fathoms out. The depth of water was about twenty-one fathoms. Supposing the chain to be hauled taut, the ship could describe a circle of about sixty-six fathoms radius, or one hundred and thirty-two fathoms diameter. Both anchors were found by the lighter man sent to pick them up, at a point distant not less than eight hundred yards from Alcatraz,—the starboard anchor with only thirty fathoms chain. It is evident that this anchor must have been broken out and dragged by the tug to a point distant at least 500 or 600 fathoms from its position when the vessel first brought up. Whether the tug broke out the anchor at the time her first service was rendered can be known with certainty, if the distance between the position of the Industry when the tug took hold of her and her position when the tug left her be ascertained. Captain Fitzgerald testified that he measured on the chart the distance traversed by the Industry in going from her first to her second position. He found it to be five hundred yards. This estimate, he adds, might be fifty or possibly one hundred yards out of the way. Lieutenant Campbell thinks the distance between the two points was over three hundred yards. Boswell, the first mate, says he might have been two or three hundred fathoms off the island when the tug left. Tremble, second mate, says the ship was one or two hundred fathoms from the island when the tug left, and that the distance from where the tug first took hold to the place where the hawser parted was one hundred and fifty fathoms. Captain Joy estimates the distance at from four hundred to five hundred feet. Dowie, the carpenter, estimates the change of position at "one hundred and fifty fathoms, perhaps more—over one hundred fathoms, nearly two hundred." When the ship brought up, it may reasonably be supposed that her anchors were directly to windward, and in the direction (towards Meiggs' wharf) in which she had been dragging. The greatest change of position which could occur without moving her anchors would be, as has been shown, twice sixty-six, or one hundred and thirty-two fathoms. This could only take place provided the ship were hauled directly to windward and up to her anchors, and in the same straight line beyond them. But it is clearly established that the ship was hauled around the end of the island and to leeward; and unless Captain Fitzgerald is wholly in error as to her second position, and as to the point on the island from which he observed her, she could not have reached it unless her anchor had been dragged a considerable distance. In this inquiry I have assumed that seventy fathoms had been paid out on the starboard chain, that is, that the seventy-fifth fathom shackle was abaft the windlass. It is not disputed that when the anchor was taken up only thirty fathoms were attached to it. Forty-five fathoms must, therefore, have been hove in. The witnesses who were at work at the windlass all testify to the great difficulty in getting in the chain. They estimate the number of fathoms obtained at from ten to twenty fathoms. If this be so, there could not have been more than forty-five fathoms on the chain, and such, one or two of them swear, was the carpenter's statement to them at the time.

I think the fair conclusion from all the testimony is, that as it is certain that on her return the tug dragged both anchors of the Industry to a considerable distance, it is in the highest degree probable that she also dragged them when she first took hold; that the position in which she left her was much safer than that in which she found her, the island being no longer directly under her lee, but affording her a partial protection; and that in so doing she performed a meritorious service. The assertions of the officers of the

Industry, that the master of the tug stated on his return, that the agent of Lloyd's would take all further responsibility, do not seem to be sustained by the proofs. They are denied by Capt. Griffiths, and were not heard by Mr. Walker or Mr. Hewett. The former testifies that if any such statement had been made, he would not have suffered it to remain uncontradicted. The merit of the second towage of the vessel it is not easy to estimate. The only peril from which it can be supposed to have extricated the vessel was the danger of swinging ashore on the turn of the tide. But the degree or the existence of this danger depended on the distance of the vessel from the shore, of which it is impossible to form an accurate estimate. It is evident that the mates thought themselves in temporary safety at least, when the tug left, for they finally refused all offers of further assistance. The weather moderated during the night, and it cannot now be known whether on the turn of the tide the vessel would or would not have swung clear of the shore.

On a very attentive examination of the whole case my opinion is that the tug performed a meritorious salvage service; that her master hastened with great alacrity to the relief of a vessel supposed by himself and all who observed her from a distance to be in imminent and extreme peril, both to herself and those on board; that the service was arduous, and not unattended by risk to property and person; and that the master believed then, and probably still believes, that his services were necessary to save the ship from impending and inevitable destruction. On the other hand, I consider it proved that the vessel was not in so great danger as the master of the tug supposed; that her anchors had brought her up twenty minutes or half an hour before the tug arrived; and that it cannot now be affirmed with certainty that she would not have ridden out the gale, which had almost spent its force, with safety; that, by the aid of the tug, she was rescued from all immediate danger, and that, under the circumstances, no prudent master would have declined, and the court should not refuse to compensate, the services of the tug; and that this compensation should be in some degree proportioned, not to the actual peril of the vessel as shown by subsequent events, but to her apparent danger, and the arduousness and risk of the service. The value of the tug was about $60,000 in gold; that of the ship, cargo, and freight about $160,000 in legal tenders. The claim of $60,000 made by the libellant is extravagant and inadmissible. If a reasonable offer of compensation had been made by the claimants, the court would have been justified in rebuking such an exaggerated demand by refusing costs, and perhaps by diminishing the compensation to which the salvors would otherwise have been entitled. But no such offer has been made; on the contrary, the claimants have strenuously denied that any compensation whatever is due. They have asserted that their property was in no danger, and that the salvors have in no way contributed to its preservation. They have accused the salvors of being solely animated by a rapacious desire to profit by the distress of others, and of causing their services to be reluctantly accepted through fears inspired by their own fraudulent representations. If one side therefore has sought to exaggerate, the other has in at least an equal degree attempted to belittle the merit of the service, and I see no reason for withholding or reducing the compensation to which the salvors are entitled. I think the sum of $10,000 in legal tenders is, under all the circumstances, a just allowance. For that sum, with costs, a decree will be entered.

JOHNSON (JENKINS v.). See Case No. 7,271.

## Case No. 7,392.

JOHNSON v. JUMEL.

[3 Woods, 69.] [1]

Circuit Court, D. Louisiana. April Term, 1877.

DENIAL OF RIGHT TO VOTE — EJECTION FROM OFFICE—JURISDICTION OF FEDERAL COURTS —REV. ST. § 2010.

1. The jurisdiction of the United States circuit courts under section 2010, Rev. St., is limited to those actions in which the sole question touching the title to office arises out of the denial to citizens of the right to vote on account of their race, color or previous condition of servitude.

2. That section gives no jurisdiction over a case brought to enable a party physically to regain an office to which he had a title established by the election, into which he had been inducted, but from which he had subsequently been ejected.

Heard on demurrer to the petition. This action was brought by George B. Johnson to recover possession of the office of auditor of public accounts of the state of Louisiana. The plaintiff alleged that on November 7, 1876, he was a candidate for said office, at which time an election was held therefor, according to the constitution and laws of the state of Louisiana, and that at said election he was duly elected to said office; that on the 6th day of December, 1876, he was in due course and process of law returned elected by the returning officers of election of said state, in manner and form as provided by law; that in December, 1876, he was, in consequence of his said election and return, and according to law, duly commissioned by Wm. P. Kellogg, governor of the state of Louisiana; that he then took the oath of office, gave bond as required by law, and entered upon the full and undisputed discharge of the duties of said office of au-

[1] [Reported by Hon. William B. Woods, Circuit Judge, and here reprinted by permission.]

ditor of public accounts for the state of Louisiana, and continued in the actual undisturbed and undisputed possession thereof, with the full and free exercise of all the duties, powers and prerogatives of said office up to the 25th day of April, 1877; that on or about the 25th day of April, 1877, he was forcibly and fraudulently deprived of his election to said office by the defendant, claiming to be auditor of public accounts of said state, and Francis T. Nicholls, acting governor of said state, in the manner following, to wit: That the said Francis T. Nicholls, claiming to represent the state of Louisiana as governor, and Allen Jumel, claiming to be auditor of public accounts of said state, wrongfully, unlawfully, by violence and force of arms, and against the will and consent of the petitioner, took forcible possession of said office, and that said Jumel had ever since been in control and possession thereof; that the claim of authority set up by the said Francis T. Nicholls and Allen Jumel so to act in their said capacities rested upon a pretended count of the vote cast at said election, which count excluded the votes of nearly ten thousand citizens, legal voters, who offered, but were denied, the right to vote at said election, on account of race, color or previous condition of servitude, who, if they had not been so denied the right to vote at said election, would have voted for the petitioner and against said Jumel, which denial was in violation of the rights secured by the amendments to the constitution, etc. Petitioner then alleged that he had been deprived of his election to said office by reason of the denial of the right to vote at said election to a large number of qualified electors, who offered to vote thereat, on account of race, color or previous condition of servitude, to the number of at least ten thousand; that according to the laws of Louisiana under which the returns of said election were made a power is vested in returning officers of election to determine, whether citizens, legally qualified voters, had been excluded from the right to vote on account of race, color or previous condition of servitude; that the returning officers of election did exercise that power so vested in them by the laws of Louisiana; that in the exercise of that power they returned petitioner duly elected auditor of public accounts of the state of Louisiana, on account of the denial of citizens who offered to vote at said election of the right to vote on account of race, color or previous condition of servitude; that the said Francis T. Nicholls, acting as governor, and Allen Jumel, pretending to act as auditor, were attempting forcibly and unlawfully, for the reasons aforesaid, to deprive petitioner of his election as aforesaid. The petitioner then set out in detail the number of voters whom he alleged were denied the right to vote at said election on account of race, color or previous condition of servitude. The petitioner then averred that the means by which said denial was accomplished were intimidation and a wide-spread feeling of uncertainty and terror throughout the parishes on the part of citizens so denied the right to vote; that by the laws and constitution of said state the pretended vote purporting to have been cast under the aforesaid conditions in the parishes so affected was null and void on the ground thereof; that the returning officers of said election were by law commanded to reject and refuse to count the same, because of said nullity; that by the returns of said election, made in obedience to said law, the petitioner was duly elected auditor, and that the claim of said Jumel to have been elected auditor was founded on the wrongful and unlawful count of the votes so made null and void, whereby the said Jumel received in the count of the votes the full benefit of the votes cast in the parishes in which there was this denial of the right to vote to 10,000 citizens aforesaid; that the lawfully elected state government, of which petitioner was one of the officers, had been overthrown by violence, domestic insurrection and revolution as above set forth; that the government thus set up and established was the government of which Francis T. Nicholls was head; that the state of Louisiana, as represented by its said pretended government, through its pretended officers thus installed, had deprived the petitioner of his election, but that said revolution had in no wise altered or impaired the right of the petitioner as auditor. Then followed the averment as to the salary and legal perquisites of the office of auditor. The petition concluded with the prayer for citation, and for judgment decreeing that the petitioner was the legal auditor for the full term of four years, and for an injunction restraining the defendant from interfering in any manner with the exercise on the part of the petitioner of the duties of said office; that the said Jumel be ordered to deliver over to petitioner the keys, books, etc., of said office, and for damages in the sum of $5,000.

John Ray and H. J. Campbell, for petitioner.

J. C. Egan, Asst. Atty. Gen., of Louisiana, for defendant.

BILLINGS, District Judge. The substance of the petition is, that the petitioner was a candidate for the office of auditor of public accounts of the state of Louisiana at the election held on the 7th of November, 1876; that voters in various parishes who were entitled to vote were denied the right to vote at said election on account of race, color or previous condition of servitude, to the number of 10,000; that the officers known as the returning board were by law vested with complete jurisdiction to correct the errors and wrongs which had then arisen in these various parishes, and that they did

make such corrections and returned the petitioner elected to said office; that he was duly commissioned and entered upon and enjoyed the possession of said office for the period of four months, when he was forcibly ejected by a government established by domestic violence, insurrection and revolution; that the claim or pretense upon which they have ousted him from his office is that the petitioner was not elected, and that the votes which were cast in the parishes in which the right to vote was denied should be counted against him. According to the allegations of this petition, petitioner has not been defeated or deprived of any election; but, on the contrary, was elected and was declared elected by the competent state authority, was duly commissioned, and retained his office for the period of four months. True, there had been an unsuccessful attempt to defeat petitioner by an exclusion of votes in the various parishes, but he avers that that attempt had been completely thwarted by the tribunal which had the final revision of the returns. Every vote that was cast, or was attempted to be cast, for the petitioner and against the defendant had, according to his allegations, full effect given to it, and was finally and effectively counted by the board of returning officers. He has thus, so far from having been defeated, succeeded in an election, and instead of having been deprived of an election, has secured an election, and four months after the election has been deprived, not of an election, but of an office, to which he has been elected and authoritatively declared elected; and he has been deprived of an office, not by the exclusion of votes for any reason, but by force, which took the proportions of a revolution. The statute under which jurisdiction is given to the circuit court is set forth in the act of May 31, 1870, § 23 (16 Stat. 146; Rev. St. § 2010), as follows: "That whenever any person shall be defeated or deprived of his election to any office, except elector of president or vice-president, representative or delegate in congress, or member of a state legislature, by reason of the denial to any citizen or citizens, who shall offer to vote, of the right to vote, on account of race, color or previous condition of servitude, his right to hold and enjoy such office and the emoluments thereof shall not be impaired by such denial, and such person may bring any appropriate suit or proceeding to recover possession of such office, and in cases where it shall appear that the sole question touching the title to such office arises out of the denial of the right to vote to citizens who so offered to vote on account of race, color or previous condition of servitude, such suit or proceeding may be instituted in the circuit or district court of the United States of the circuit or district in which such person resides."

From this it appears that the cases in which the circuit courts have jurisdiction of such actions as this are limited to those in which it shall appear that the sole question touching the title to such office arises out of the denial of the right to vote, to citizens who so offered to vote, on account of race, color or previous condition of servitude, and that the jurisdiction of the circuit court is only given to the extent of determining the rights of the parties to such office, by reason of the denial of the right guaranteed by the fifteenth article of amendment to the constitution of the United States.

There is no doubt that the scope of this statute, under the limitations which it contains, extends from the first act required to be done in the matter of an election down to and including the final and effective canvass of the votes by the officers who are charged with the duty of determining and certifying the result. If, in any of the stages of an election, in registration, in the receipt of votes, the certificates of the votes by the local authorities, or the final canvass of the votes or the certificate of election by the returning board, there had been such a denial of the right to vote as the statute contemplates, on account of race, color or previous condition of servitude, that matter this court would have had, under the act of congress, jurisdiction to inquire into and adjudicate upon, and it could determine the rights of the parties to office, so far as they depended upon the denial of the right guaranteed by the fifteenth article of the amendment to the constitution. But the jurisdiction of the court begins and ends with the denial of the right to vote.

If, therefore, there is a preliminary exclusion or an exclusion at the polls, and that error is corrected by the proper state authorities and there is no final and effective exclusion of votes or discrimination, or if after an election has been held and the result reached and declared without discrimination or exclusion from any cause, the person elected is deprived of his office, then the statute closes the doorway upon the jurisdiction of this court. The defeat of a candidate at an election or his deprivation of an election, must be accomplished by the machinery of the election, in one of its stages, and must be contained in the result. If the election terminates in the success of the candidate, the essential ground of jurisdiction on the part of this court is wanting. The wrong which the petitioner sets forth is, that after being elected and installed, he has not been retained in the office. The object of the statute was to secure an election free from all possible exclusion on any of the specific grounds. It secured this object by giving to this court jurisdiction to correct, through this form of action, such exclusion effected by the machinery or practices attending the election. When, as the petitioner alleges, all this has been accomplished, and the very result aimed at by the statute has been worked out

and declared, the statute gives no jurisdiction over a cause merely to enable a party to physically retain or regain an office to which he had a title established by an election, and from which he has subsequently been ejected. In this case the question by virtue of which the court could take jurisdiction, and by the terms of the statute it must be unmixed with any other question, is not presented. According to the allegations of the petition, the election had been completed for four months when the ouster took place, and his loss of office is as independent of any denial of the right to vote as if he had been ejected by a government set up by a foreign invasion, claiming authority by the right of conquest.

Let the demurrer be sustained and the petition dismissed.

JOHNSON (KELLY v.). See Case No. 7,672.

## Case No. 7,393.

JOHNSON v. LAFLIN et al.

[5 Dill. 65; 17 Alb. Law J. 117, 146; 1 Thomp. Nat. Bank Cas. 331; 6 N. Y. Wkly. Dig. 181; 6 Cent. Law J. 124; 25 Pittsb. Leg. J. 119.] [1]

Circuit Court, E. D. Missouri. Feb. 8, 1878.[2]

NATIONAL BANKS — RIGHTS AND LIABILITIES OF SHAREHOLDERS—ELEMENTS OF COMPLETE TRANSFER.

1. Under the national banking act, a shareholder has the right to make an actual and bona fide sale and transfer of his shares to any person capable in law of taking and holding the same, and of assuming the transferrer's liabilities in respect thereto; and, in the absence of fraud, this right is not subject to a veto by the directors or the other shareholders.

[See note at end of case.]

2. Where such a sale of shares is made, and the transfer entered on the books of the bank, the transferrer ceases to be a shareholder, and is freed from liability in respect of such shares.

3. The provision of the national banking act (Rev. St. § 5139), that shares shall be "transferable on the books of the association," construed, and *held* not to give the directors the power to refuse to register a bona fide transfer of stock without some valid and sufficient reason for such refusal.

[See note at end of case.]

4. As between the seller and purchaser of shares in a national bank, the sale is complete when the certificate of the shares, duly assigned, with power to transfer the same on the books of the bank, is delivered to the buyer, and payment therefor is received by the seller; and either the purchaser or seller may compel a registration of the transfer on the books of the bank, unless the bank has some valid and sufficient ground for refusing to register the transfer.

[See note at end of case.]

5. The defendant, Laflin, owning full-paid shares of stock in a national bank of which his co-defendant, Britton, was the president, employed a broker to sell the same in the market. The broker, without Laflin's direction or knowledge at the time, sold the same at the market value to Britton, individually, and received in payment his individual check on the bank for the purchase price, and delivered to the purchaser the share certificates assigned in blank, with blank powers of attorney thereon endorsed, authorizing the transfer of the shares on the books of the bank. Subsequently, after the amount of the check had been collected, but on the same day, the president, without the knowledge of Laflin or the broker, directed the book-keeper of the bank to credit his individual account with the amount of the check which he had given for the shares, and to transfer the shares (the book-keeper inserting his own name in the blank power of attorney as attorney to make the transfer) to Britton, "trustee," not specifying for whom he was trustee, and charging the sum to the "sundry stocks account" of the bank, all of which was done. The bank, although it had not committed any act of insolvency, was then insolvent; but this fact was not known by Laflin or the broker: *Held*, that, although the bank, or its officers for it, were prohibited from purchasing its own shares (Rev. St. § 5201), yet that Laflin, having sold in good faith, without notice of the illegal purpose of Britton in buying the stock, or of his intended misappropriation of the funds of the bank in paying therefor, was not liable to pay back to the receiver the money received in payment for the shares.

[Cited in Russell v. Bristol, 49 Conn. 261.]

[See note at end of case.]

[6. Cited in Welles v. Larrabee, 36 Fed. 868, and in Germania Nat. Bank v. Case, 99 U. S. 632, to the point that a transfer of shares in a failing corporation, made by the transferer with the purpose of escaping his liability as a shareholder, to a person who, from any cause, is incapable of responding in respect to such liability, is void as to the creditors of the company and as to other shareholders, although as between the transferer and the transferee it was out and out.]

The plaintiff is the receiver of the National Bank of the State of Missouri, appointed June 23d, 1877, by the comptroller of the currency. That bank suspended payment and closed its doors June 20th, 1877. The defendant Laflin had for some years prior to May 16th, 1877, been the owner of eighty-five shares of full-paid stock in that bank, but was not a director. The defendant Britton was the president of the bank. On the 10th day of May, 1877, Mr. Burr, the president of another bank, in which Laflin was a director, wrote a letter to a correspondent who was the owner of stock in the National Bank of the State of Missouri, stating (without giving the grounds of his advice), "you had better sell your stock in that bank, because you can buy it back again at a profit if you wish to do so." Mr. Burr casually showed Laflin this letter and said, "go and do likewise." An election was to be held for directors on the 29th day of May, 1877, which it was supposed would give the stock a greater value in the market before the election than it would have after that event. Acting upon this general advice of Mr. Burr, and without personal knowledge of the actual financial condition of the bank, Laflin, on the 16th day of May, 1877, authorized one Keleher, a broker, to

[1] [Reported by Hon. John F. Dillon, Circuit Judge, and here reprinted by permission. 17 Alb. Law J. 117, 6 N. Y. Wkly. Dig. 181, and 25 Pittsb. Leg. J. 119, contain only partial reports.]

[2] [Affirmed in 103 U. S. 800.]

sell in the market his eighty-five shares of stock. Keleher sold the same at private sale for $5,037.50 to James H. Britton, who then was, and for some years had been, the president of the bank. Mr. Britton gave Keleher to understand that he was buying either for himself or a party whose name he did not disclose. Britton paid Keleher the $5,037.50 by his individual check on the bank of which he was the president, and Keleher thereupon delivered Britton the certificates for the eighty-five shares of stock, assigned in blank, together with a blank power of attorney endorsed thereon, signed by Laflin, authorizing the transfer of the stock on the books of the bank. The stock certificates contained this provision: "Transferable only on the books of said bank, in person or by attorney, on the return of this certificate, and in conformity with the provisions of the laws of congress and the by-laws which may be in force at the time of such transfer." There were no by-laws on the subject of the transfer of stock. Keleher immediately presented Britton's check at the counter of the bank, and received thereon the $5,037.50, and deposited the amount in his own name with his own bankers, the Messrs. Bartholow, Lewis & Co., upon whom he gave Laflin his own check for $4,995—being the proceeds of the sale to Britton less his commission of fifty cents per share. Keleher did not inform Laflin to whom he had sold the stock, and even declined to do so. Laflin did not actually know that it had been sold to Britton until some time afterwards. Keleher supposed Britton was making the purchase for himself or some other person, and did not know that he was buying it as "trustee for the bank." After Keleher had delivered the stock certificates for the eighty-five shares, with the blank power to transfer endorsed thereon, and had collected the check and had left the bank, but on the same day, Britton delivered the stock certificates, assigned in blank, together with the blank powers of attorney signed by Laflin, to one E. Girault, the general bookkeeper of the bank, with instructions to credit from the general funds of the bank Britton's individual account with the amount paid for the stock, viz., $5,037.50, which was done, and to charge the like amount in the books of the bank to "sundry stocks account," and to transfer the eighty-five shares on the stock transfer book to "James H. Britton, trustee." Girault obeyed these directions. The transfer of the stock on the transfer book was accordingly made to "James H. Britton, trustee," not stating for whom he was trustee. But in the stock ledger the transaction was entered in an account entitled "James H. Britton, trustee for bank," meaning Britton's own bank. Girault, in making the transfer of the shares, filled in his own name as attorney in the blank powers of attorney signed by Laflin, and signed the transfer to Britton as trustee thus: "S. H. Laflin, by E. Girault, Attorney." Girault had actual knowledge at the time that this stock had been paid for in the manner hereinbefore stated. No new certificates of stock for the eighty-five shares were ever issued to Britton or any one else. Neither Keleher nor Laflin knew of the foregoing direction of Britton to Girault, nor what Girault did in respect thereto. Other stock to a very large amount was from time to time purchased from other persons by Britton, and paid for in the same way, and transferred and entered in the same manner. No formal resolution of the directors appears authorizing this to be done, but the directors knew of, and assented to, Britton's acts in this regard. At the time of the suspension of the bank, June 20th, 1877, there were, it seems, forty-five hundred and ninety-nine shares of its own stock standing in the name of "James H. Britton, trustee," which had been purchased by him with the funds of the bank, under circumstances more or less similar to the purchase from the defendant, Laflin. All of the stock thus standing in the name of Britton, trustee, including that purchased from Laflin, was voted by him at the election of directors held May 29th, 1877. Britton had been for years the owner of a large amount of stock in the bank in his own name and right, and thus owned fifteen hundred and forty-two shares when the bank suspended. Britton's credit was good at the time of this transaction, and there was nothing in the nature of the transaction—in the fact of the purchase, the amount or mode of payment, or the price paid—calculated to awaken suspicion on the part of Keleher that it was not a regular transaction on Britton's own account. Laflin did not receive more than the stock was then considered to be worth in the market. Laflin did not know that the bank was insolvent, and his firm continued to deposit money with it until it closed. Keleher testifies that he considered the bank "sound in all respects" when he made the sale to Britton. The bank had not at that time committed any act of insolvency. This is a bill in equity by the receiver against Laflin and Britton to compel Laflin to pay back the $5,037.50; to set aside the transfer of the eighty-five shares of stock; to have Laflin declared to be still a stockholder in the said bank in respect of said shares, and to have Britton ordered to re-transfer the shares to Laflin on the books of the bank. The bill as to Britton stands confessed. Laflin answered, denying the material charges in the bill. Replication was filed and proofs taken. The cause is before the court on final hearing.

The following provisions of the national banking act, taken from the Revised Statutes, are those which more directly relate to the questions arising in this case:

"Sec. 5139. The capital stock of each association shall be divided into shares of $100 each, and be deemed personal property, and be transferable on the books of the association in such manner as may be prescribed in the by-laws or articles of the association. Every person becoming a shareholder by such transfer shall, in proportion to his shares, succeed to all the rights and liabilities of the prior holder of such shares, and no change shall be made in the articles of association by which the rights, remedies, or securities of the existing creditors of the association shall be impaired.

"Sec. 5151. The shareholders of every national banking association shall be held individually responsible, equally and ratably, and not one for the other, for all contracts, debts, and engagements of such association to the extent of the amount of their stock therein at the par value, in addition to the amount invested in such shares. * * *

"Sec. 5152. Persons holding stock as ex ecutors * * * or trustees shall not be personally subject to any liabilities as stockholders; but the estates and funds in their hands shall be liable in like manner and to the same extent as the testator * * * or person interested in such trust funds would be if living and competent to act and hold the stock in his own name.

"Sec. 5201. No association shall make any loan or discount on the security of the shares of its own capital stock, nor be the purchaser or holder of any such shares, unless such security or purchase shall be necessary to prevent loss upon a debt previously contracted in good faith; and stock so purchased or acquired shall, within six months from the time of its purchase, be sold or disposed of at public or private sale, or, in default thereof, a receiver may be appointed to close up the business of the association, according to section 5234.

"Sec. 5204. No association or member thereof shall, during the time it shall continue its banking operations, withdraw, or permit to be withdrawn, either in the form of dividends or otherwise, any portion of its capital. * * * But nothing in this section shall prevent the reduction of the capital stock of the association under section 5143.

"Sec. 5210. Requires a full and correct list of all the shareholders to be kept, subject to inspection of all the shareholders and creditors, and a verified copy of such list to be sent annually to the comptroller of the currency."

Henderson & Shields, for plaintiff.
A. W. Slayback, for defendant.

DILLON, Circuit Judge. The plaintiff is the receiver of the National Bank of the State of Missouri, appointed by the comptroller of the currency June 23d, 1877, the bank having suspended payment three days before. Rev. St. § 5234. The defendant Laflin had for some years prior to May 16th, 1877, been the holder of eighty-five full-paid shares in that bank. At the date of the suspension of the bank the defendant, James H. Britton, was its president, and had been such for years prior to that event. On the 16th day of May, 1877, Laflin sold, through one Keleher, a broker, the eighty-five shares of stock to Britton, and delivered to him the share certificates, duly assigned in blank, with powers of attorney in blank thereon endorsed to transfer the shares on the books of the bank. Laflin's broker, who effected the sale, understood that he sold to Britton individually, or to some unknown person for whom Britton acted, and he received in payment for the shares the personal check of Mr. Britton on the bank for $5,037.50, which was immediately presented and paid. Laflin did not know until some time after the transaction who had become the purchaser of his shares. After the shares had been thus delivered and paid for by Britton's check, and the money received, but on the same day, they were transferred, in pursuance of Mr. Britton's directions, by Mr. Girault, the book-keeper of the bank (by virtue of the powers of attorney from Laflin), to "James H. Britton, trustee," and at the same time the book-keeper credited Britton's individual account at the bank with the amount of his check given in payment for the shares, and charged the same amount to the "sundry stocks account" on the books of the bank. On the official stock register the shares were thus made to stand in the name of "James H. Britton, trustee," without stating for whom he was trustee. On the stock ledger of the bank the transaction was entered in an account entitled "James H. Britton, trustee for the bank." Neither Laflin's agent who negotiated the sale of the shares nor Laflin himself had any actual notice of the manner in which the transfer of the stock had been registered, nor that the funds of the bank had been thus used to pay for it, nor of the entries in respect thereto on the books of the bank. But of all these facts Mr. Girault, the book-keeper of the bank, who made the entries, and who had inserted his name in Laflin's blank powers of attorney to transfer the stock, had actual knowledge at the time.

This is a bill in equity by the plaintiff, as the receiver of the bank, against Laflin and Britton, to compel Laflin to repay the $5,037.50 (the amount of Britton's check for the shares paid by the bank), and to set aside the registered transfer of the eighty-five shares on the stock transfer book of the bank. The case presents questions of grave moment concerning the rights of stockholders and creditors in national banking associations. And if the insolvency of the bank here in question is such as shall make it necessary to enforce the individual liability of the shareholders (Rev. St. § 5151),

it is important to those shareholders who made no sale of their stock to know who are shareholders with them, liable to contribute to meet "the contracts, debts, and engagements of the association." These questions principally depend upon the true construction of certain provisions in the national banking act, to which we shall refer as we proceed.

Inasmuch as this act in express terms prohibits a national bank from thus becoming a "purchaser of the shares of its own capital stock" (Rev. St. § 5201), if Laflin had made a contract to sell his shares to the bank, or to its president for the bank, it is plain that such a contract would have been ultra vires and illegal, both as respects creditors and other shareholders, and the transaction could have been impeached by the bank in its corporate capacity, or by its other shareholders, even if the bank were still solvent and going on, or by the receiver as the officer appointed to wind up its affairs. In re London, etc., Exchange Bank, 5 Ch. App. 444, 452; Great Eastern Ry. Co. v. Turner, 8 Ch. App. 149; Currier v. Lebanon Slate Co., 56 N. H. 262. And although Laflin did not contract to sell his shares directly to the bank, or to the president for the bank, still, if, before the transaction was completed as to him, he had notice, actual or constructive, that the purchase was, in fact, a purchase for the bank, and paid for by the money of the bank, the transaction cannot stand, and the receiver may compel him to pay back the money thus received, and have him declared still to be a shareholder.

It would be easy to support these propositions by argument and by the authority of adjudged cases, but they are so plain that it is not necessary to do so. But Laflin, or his agent, Keleher, did not deal with the bank, or with the president, with knowledge that the latter in fact intended to pay for the shares out of the moneys of the bank. Laflin was acting in good faith. Neither he nor his agent, Keleher, had any actual knowledge of Britton's purpose to turn these shares over to the bank, and to pay for them out of the funds of the bank. If Laflin can be charged with notice, it must be constructive notice, arising either, first, from the mere fact that he was a shareholder in the bank, or, second, from the law imputing to him all the knowledge in this behalf which was possessed at the time by Mr. Girault, the book-keeper, who made the transfer of the shares on the transfer book of the bank under Laflin's blank powers of attorney, and who contemporaneously made the entries on the private books of the bank, which showed that Britton had been paid for the shares out of the general funds of the bank, and had acknowledged that he held the shares as the trustee of the bank.

The controlling question in the case is whether Mr. Laflin is affected with constructive notice in one or the other of these modes. The solution of this question, in its turn, depends upon the nature and extent of the right of a shareholder in a national banking association to transfer his shares, and also upon the elements or requisites of a completed transfer, by which is meant such a transfer as shall release the transferrer from liability to the bank, its stockholders, and creditors.

In considering these questions, our first proposition is that, under the national banking act, a shareholder has the unrestricted right to make an out-and-out bona fide and valid sale and transfer of his shares to any person or corporation capable in law of taking and holding the same, and of assuming the transferrer's liability in respect thereto.

The right to transfer shares in a corporation is usually recognized or given in express terms in the charter or constituent act, which also, not unfrequently, prescribes the manner in which the transfer shall be made. The capital stock of a corporation is invariably divided into shares of a fixed amount, for the purpose, among others, of allowing it to be readily transferred. In an ordinary partnership the consent of all the partners to the admission or retirement of a member is necessary, and every such change involves the dissolution of the old and the formation of a new partnership. But in incorporated companies this is different. Indeed, it is one of the leading objects of an incorporated body to avoid the operation and effect of this doctrine of the law of partnership. Accordingly, in this country shares in corporations are universally bought and sold without reference to the consent of the other shareholders.

The restrictions on the right bona fide to sell and transfer shares must be found in express legislative enactments or in authorized by-laws. The national banking act (Rev. St. § 5139), by providing that shares shall "be transferable on the books of the association in such manner as may be prescribed in the by-laws or articles of the association," recognizes the right of the shareholder to transfer his shares. There is nothing peculiar in this provision. A similar provision is found in nearly all the incorporating acts and charters in this country. The right to transfer is given or implied in the section just referred to (Rev. St. § 5139), and that right the association cannot take away or defeat. It contemplates a transfer on the books of the association, and all that the association is authorized to do is to prescribe the manner in which the transfer shall be made on its books. There is here no limitation whatever upon the right of transfer, and none exists except such as is implied from the nature of the transaction or from other provisions of the act. Another section (Id. § 5201) prohibits the bank from dealing in its own shares. This implies a restriction

on the shareholder in selling his shares to the bank itself, or to a known trustee for the bank. And a shareholder cannot transfer his shares colorably, and thereby cease to be a shareholder as respects creditors and other shareholders who would be injured by the transfer. There may also be an implied prohibition against the right to transfer shares to an infant or person not capable in law of assuming the liabilities, as well as enjoying the rights, of the transferrer of the shares in respect thereto, but we have no occasion to determine this point. Id. § 5139; compare Id. § 5152; Weston's Case, 5 Ch. App. 614, 620. And, on general principles, there may also be an implied prohibition against the transfer of shares to a pauper or man of straw or insolvent person, for the fraudulent purpose of escaping liability—but this is a matter that need not now be considered.

Subject, however, to such prohibitions and limitations, the right of the share-owner to make an actual and bona fide sale and transfer of his shares to any person capable in law of taking and holding the same and of assuming the liabilities of the transferrer in respect thereto, is plainly deducible from the national banking act itself. But if any doubt could exist on this subject, it would be removed by the judicial decisions construing the provisions of the banking act in this regard and similar provisions in other legislative enactments.

In Bank v. Lanier, 11 Wall. [78 U. S.] 369, arising under the national banking act, it was expressly held by the supreme court of the United States that the owner of shares in a national bank may transfer the same by an assignment and delivery of the certificates, and the transferee may compel the bank to register the transfer on its books. The learned justice who delivered the opinion of the court in that case, after speaking of the additional value given to this species of property by reason of its transferable quality, says: "Whoever in good faith buys the stock and produces to the corporation the certificates, regularly assigned, with power to transfer, is entitled to have the stock transferred," even if the transferrer is the debtor of the bank. The duty of the bank to make the transfer in such a case is held to be a corporate duty, in respect of which the bank is liable for the wrongful acts and omissions of its officers.

It was urged in the argument at the bar in the present case that the provision that the shares should "be transferable on the books of the bank" gave the directors of the bank the power to approve or disapprove of any given transfer of shares, and to register or refuse to register the same, as in their judgment the interests of the bank or of the other stockholders might require. Such, however, is not the object of this very common provision in charters and acts of incorporation. The purpose of requiring a transfer on the books of the bank is that the bank may know who are the shareholders, and as such entitled to vote, receive dividends, etc., and for the protection of bona fide purchasers of the shares, and of creditors and persons dealing with the bank. That such is the meaning of the provision in question, and that it does not restrict the right of the owner to transfer his stock or clothe the corporation with the power to refuse to register bona fide transfers, is settled beyond all question by numerous decisions in the English and the federal and state courts. Black v. Zacharie, 3 How. [44 U. S.] 483; Union Bank v. Laird, 2 Wheat. [15 U. S.] 390; Webster v. Upton, 91 U. S. 65, 71; Bank v. Lanier, 11 Wall. [78 U. S.] 369; St. Louis Perpetual Ins. Co. v. Goodfellow, 9 Mo. 149; Chouteau Spring Co. v. Harris, 20 Mo. 382; Moore v. Bank of Commerce, 52 Mo. 377; Hill v. Pine River Bank, 45 N. H. 300; In re London, etc., Telegraph Co., L. R. 9 Eq. 653.

The general subject of the right to transfer shares has been much discussed in the cases in England arising under the various companies acts. Some of these acts give the directors express power to refuse to assent to or register transfers of shares, and some do not. The result of the English cases is that the directors cannot refuse to register a bona fide transfer of stock unless the power to do so is expressly given in the act of parliament or the articles of association. The leading authority on this point is Weston's Case, 4 Ch. App. 20. See, also, Gilbert's Case, 5 Ch. App. 559. In Weston's Case, 4 Ch. App. 20, Lord Justice Page Wood, in considering this subject, said:

"I have always understood that many persons enter these companies for the very reason that they are not like ordinary partnerships, but that they are partnerships from which members can retire at once, and free themselves from responsibility at any time they please, by going into the market and disposing of and transferring their shares, without the consent of directors or shareholders, or anybody, provided only it is a bona fide transaction; by which I mean an out-and-out disposal of the property, without retaining any interest in them. But if it is desired by a company that such unlimited power of assignment shall not exist, then a clause is inserted in the articles, by which the directors have powers of rejection of members. Shortridge v. Bosanquet, 16 Beav. 84, which went to the house of lords, was a case of that kind. In the absence of any such restriction, I think it is perfectly plain that the companies act of 1862, in the twenty-second section, gives a power of transferring shares. I think there is no such power given to the shareholders, and that the shares are at once transferable under the statute, unless something is found to the contrary in the articles of association. * * * It would be a very serious thing for the shareholders in one of these companies to be told that their shares, the whole value of which consists in their being marketable and

passing freely from hand to hand, are to be subject to a clause of restriction which they do not find in the articles. And, I may add, that if we were to hold that such powers were vested in the directors, it would be a very serious thing for them, and would impose upon them much more onerous duties than any which are really imposed upon them by this clause."

In Gilbert's Case, 5 Ch. App. 559, 565, Lord Justice Giffard said: "I agree that, according to Weston's Case, and according to what I have always considered to be the law, there is no inherent power in the directors, apart from the provisions of the articles of association, to refuse to register a proper and valid transfer, if that proper and valid transfer is submitted to them."

And although there is express power to the directors to refuse to assent to or register a transfer, this power must be exercised in a reasonable manner and bona fide, and they must have some valid and lawful reason for refusing to register. Ex parte Penney, 8 Ch. App. 446; Nation's Case, L. R. 3 Eq. 77; Fyfe's Case, 4 Ch. App. 768, L. R. 9. Eq. 589; Allin's Case, L. R. 16 Eq. 449; Id. 559; Weston's Case, 5 Ch. App. 614, 620; Ex parte Elliott, 2 Ch. Div. 104. In a case where the directors had power to approve or reject the transfer of shares, one of the vice-chancellors, speaking of the right of a share-owner to dispose of his shares, said: "One of the incidents (of this class of property) is the right to transfer it—a right to make a present and complete transfer of it. It is the duty of the directors to receive and register the transfer, or to furnish some (valid and sufficient) reason for refusing to transfer." In re Stranton, etc., Co., L. R. 16 Eq. 559, per Bacon, vice-chancellor. . Similar observations are made by the supreme court of the United States in Bank v. Lanier, supra. Mr. Justice Davis there said: "The power to transfer their stock is one of the most valuable franchises conferred by congress. * * * It enhances the value of the stock. Although neither in form nor character negotiable paper, they (the share certificates) approximate to it as nearly as possible."

It would be a new, and, I apprehend, a startling, doctrine to proclaim that the holder of shares in a corporation, where the only provision on the subject of transfers was one requiring them to be made on its books, had no right to make a complete and effectual disposition of them without the consent of the directors or other shareholders. No such power over the right of transfer has been given in the national banking act. Such a power is so capable of abuse, and so foreign to all received notions and the universal practice and mode of dealing in these stocks, that it cannot, in the absence of legislative expression, be held to exist.

For these reasons, and upon these authorities, the proposition must be considered as established that a share-owner in a national bank, while it is a going concern, has the absolute right, in the absence of fraud, to make a bona fide and actual sale and transfer of his shares at any time to any person capable in law of purchasing and holding the same and of assuming the transferrer's liabilities in respect thereto, and that this is right is not, in such cases, subject to the control of the directors or other stockholders.

Our second proposition is that Laflin did make a complete and effectual sale and transfer of his shares to James H. Britton individually, and that, as to Laflin, it was not a sale and transfer of the stock to the bank. Laflin sold through the broker or agent, Keleher, and the latter dealt with Britton as an individual, without knowledge that Britton intended to turn over the shares to the bank, and he received in payment for the shares the personal check of Mr. Britton, and delivered to him at the same time the certificates of stock assigned in blank, with powers of attorney in blank thereon endorsed, authorizing the transfer of the shares on the books of the bank.

As between Laflin and Britton, the transfer was complete by the sale, assignment, delivery, and payment, without registration, and this, whether it gave Britton before the registration the legal title to the shares as against Laflin, or only a complete equitable title. Union Bank v. Laird, 2 Wheat. [15 U. S.] 390; Webster v. Upton, 91 U. S. 65, 71; Black v. Zacharie, 3 How. [44 U. S.] 483; Bank v. Lanier, 11 Wall. [78 U. S.] 369, 377; Chouteau Spring Co. v. Harris, 20 Mo. 382: Moore v. Bank of Commerce, 52 Mo. 377; New York & N. H. R. Co. v. Schuyler, 34 N. Y. 80; McNeil v. Tenth Nat. Bank, 46 N. Y. 325; Grymes v. Hone, 49 N. Y. 17, 22; Bank of Utica v. Smalley, 2 Cow. 778; Bank of Commerce's Appeal, 73 Pa. St. 59; Ross v. Southwestern Railroad Co., 53 Ga. 514; Hoppin v. Buffum, 9 R. I. 513; Bank of America v. McNeil, 10 Bush, 54; Davis v. Lee, 26 Miss. 505; German Union Bldg. & Sav. Fund Ass'n v. Sendmeyer, 50 Pa. St. 67; Leavitt v. Fisher, 4 Duer, 1.

That the transaction is complete as between seller and purchaser of stock by the assignment and delivery of the certificate assigned, with the power to transfer and the receipt of payment, is fully shown by these cases, and is also evident from the fact that thereupon each of them has the legal right to have a transfer of the shares made on the books of the bank. The seller of the shares, for his protection against creditors of the bank in case of insolvency, may transfer the same on the books to the vendee, the purchase being the authority to the seller to do this. Webster v. Upton, 91 U. S. 65, 71. And, for the like reason, the seller of shares who has done all that is necessary to enable the purchaser to transfer the shares on the books, may file a bill to compel the vendee to record the transfer. Shaw v. Fisher, 2 De Gex & S. 11; Cheale v. Kenward, 3 De Gex & J.

27; Wynne v. Price, 3 De Gex & S. 310; Webster v. Upton, 91 U. S. 65, 71. So, also, the vendee of the shares, where the vendor has done all that is necessary to enable the transfer to be registered, may for his own protection compel the bank to register the transfer, or hold it liable in damages for a wrongful refusal. Bank v. Lanier, 11 Wall. [78 U. S.] 369; Hill v. Pine River Bank, 45 N. H. 300; Bank of Utica v. Smalley, 2 Cow. 778; Commercial Bank of Buffalo v. Kortright, 22 Wend. 348.

The delivery of the share certificates as signed in blank and blank transfers will entitle the bona fide vendee to have the transfer registered. "Whoever in good faith buys the stock and produces to the corporation the certificates regularly assigned, with power to transfer, is entitled to have the stock transferred" (Bank v. Lanier, 11 Wall. [78 U. S.] 369, per Davis, J.), unless there exists some valid and legal reason in favor of the bank for refusing to register the transfer, as in the case of the Union Bank v. Laird, 2 Wheat. [15 U. S.] 390. In that case the charter gave the bank a lien for the shareholder's debt to it, and provided that "stock shall be transferable only on the books of the bank." Under these circumstances the bank was held to have a lien on the shares to secure the share-owner's indebtedness to it, which was superior to the right of the unregistered transferee of the stock. Black v. Zacharie, 3 How. [44 U. S.] 483.

If the foregoing propositions are sound, Britton, as against Laflin, had the right immediately on delivery and payment to register the transfer of the shares, and had the power to fill up the blank transfers and have the transfer registered. In re Tahiti Cotton Co., L. R. 17 Eq. 273; German Union Bldg. & Sav. Fund Ass'n v. Sendmeyer, 50 Pa. St. 67; Leavitt v. Fisher, 4 Duer, 1; Commercial Bank of Buffalo v. Kortright, 22 Wend. 348. Nothing more was required to be done by Laflin or needed to enable Britton to make his title complete. And Laflin could have compelled Britton to register the transfer. If Laflin had proceeded against Britton, he could have forced him to have accepted a transfer of the stock in his own name or in the name of some person capable of taking and holding the same. Maxted v. Paine, L. R. 6 Exch. 132. It would have been no answer to Laflin for Britton to have said, "I bought this stock, not for myself, but for the bank." Laflin could have rejoined, "You purported to act for yourself; I supposed you were so acting, and you had no authority, and could have had none, to act for the bank."

It is held in England, under the companies act, that the transferrer of shares is liable to be treated as a stockholder until he transfers to one who is in law capable of holding and liable in respect of the shares, and whose purchase is registered, unless, perhaps, where the neglect to register is entirely the fault of the corporation or its officers. Fyfe's Case, 4 Ch. App. 768; Lowe's Case, L. R. 9 Eq. 589; Shropshire Union Railways & Canal Co. v. Queen, L. R. 7 H. L. 496, 513; McEuen v. West London Wharves, etc., Co., 6 Ch. App. 655; Weston's Case, 5 Ch. App. 614, 620; Gooch's Case, 8 Ch. App. 266; Gilbert's Case, 5 Ch. App. 559; Master's Case, 7 Ch. App. 292; Nickalls v. Merry, L. R. 7 H. L. 530; Symons' Case, 5 Ch. App. 298; Heritage's Case, L. R. 9 Eq. 5.

Assuming, without deciding, that this principle applies in all its force under the national banking act, if Laflin had sold to an infant, his liability would remain, notwithstanding the transfer was registered. Nickalls v. Merry, L. R. 7 H. L. 530; Symons' Case, 5 Ch. App. 298. If he had sold to the bank, he would remain prima facie, if not actually, liable, if the bank should so elect. And if the seller of shares remains liable under the national banking act until there is a registered valid transfer—that is, until some person succeeds to the stock who is capable of holding it and liable in respect to it—this principle will not make Laflin liable under the facts of the present case. Here the transfer was registered, but Britton, instead of registering it in his own name, as it was his duty towards Laflin to do, registered it in his name as "trustee," without Laflin's knowledge. But the act (Rev. St. § 5152), authorizes the holding of stock by a trustee. If Laflin, in order to relieve himself of liability, is bound to see the transfer of the stock registered, the registry actually made would not charge him with constructive notice that the bank was in reality the cestui que trust.

Britton is responsible personally, inasmuch as he had no authority to act for the bank, and as there is no cestui que trust who is liable. He is liable for the unauthorized investment and use of the trust money of the bank, and can be compelled to refund it. Great Eastern Railway Co. v. Turner, 8 Ch. App. 149. If it becomes necessary to assess the stockholders, he will be estopped to say that he is not individually responsible, since he was not acting by authority of any cestui que trust capable of taking and holding the shares. If the sale of this stock had been registered to Britton individually, it is clear that Laflin would not have been liable to the bank or its creditors; and, as the matter now stands, the bank and its creditors have every right and remedy against Britton which they would have had if the shares had been transferred to him individually instead of to him as "trustee."

Our third proposition is that Laflin is not liable because the money received for the stock was unlawfully taken by Britton from the bank. The reason for this conclusion is that Laflin parted with value—with his shares, with his power of control over them, and the right to sell them to others—and had no notice at or prior to the consummation of

the transaction that Britton was acting ultra vires, and intended to misappropriate the funds of the bank. If he had dealt directly with the bank, or if he or his agent had known what took place inside the counter before the transaction with Britton had been completed, he would have been liable.

It is urged by the receiver's counsel that Laflin had constructive notice. Mr. Shields, in his argument, bases Laflin's liability on the proposition that, being a shareholder in the bank, he is charged with constructive notice of the condition of the bank, and of what was done by the president in violation of law and of his official duty in respect of these shares. I admit that if, in a transaction directly with the bank, he had received moneys to which he was not entitled, he could be made to pay back the same, irrespective of the question of knowledge on his part. Curran v. Arkansas, 15 How. [56 U. S.] 304; Railroad Co. v. Howard, 7 Wall. [74 U. S.] 392. But it is to be remembered in this case that Laflin is sought to be made liable in respect of the sale and transfer of his shares, which sale and transfer he had the perfect right to make, if he acted bona fide; and he has the same right to sell his shares to another shareholder that he would have to sell them to a person not a shareholder. Even directors have the right to make a bona fide sale of their shares, and thus get rid of liability, if they pursue the articles or charter, and take no advantage of their position and commit no fraud. Gilbert's Case, 5 Ch. App. 559; Ex parte Littledale, 9 Ch. App. 257. And shareholders, in the exercise of their right to transfer shares, are not bound, it seems, to take notice of irregularities on the part of the directors in respect to the transfer of shares. Bargate v. Shortridge, 5 H. L. Cas. 297, 323; Taylor v. Hughes, 2 Jones & L. 24; Ex parte Bagge (In re Northern Coal Min. Co.) 13 Beav. 162. Nor are directors, it seems, much less shareholders, in the transfer of their stock, bound to take notice of the books of account of the company. Cartmell's Case, 9 Ch. App. 691; Hill v. Manchester & S. Waterworks Co., 2 Nev. & M. 573; 5 Barn. & Adol. 874; Haynes v. Brown, 36 N. H. 568.

We are of opinion, therefore, that the sale and transfer of the stock, as between Laflin and Britton, was complete as soon as the stock was delivered, assigned in blank, with the power to transfer, and payment received; and that what Britton, without Laflin's knowledge, afterwards did, although on the same day, in transferring the shares to himself as trustee for the bank, and in reimbursing himself out of the funds of the bank, could not retroact upon Laflin, whose status had already been fixed, and whose rights had already been acquired. Bank of America v. McNeil, 10 Bush, 54, 58.

Mr. Henderson's argument for the receiver went mainly upon the ground that Laflin was chargeable, through Mr. Girault, with constructive notice of Britton's wrongful acts in the purchase of these shares, and in the use of the bank's money to reimburse himself therefor.

This argument rests upon these propositions: That the sale was not complete until the transfer was registered; that, in making the transfer, Girault, although acting under Britton's directions, was solely Laflin's agent (by virtue of his inserting his name in the blank power of attorney); and that, inasmuch as Girault knew of Britton's acts in directing the transfer for the benefit of the bank, and in paying himself for the purchase money out of the general means of the bank, the law imputes this knowledge to Mr. Laflin. The first branch of this proposition is inconsistent with the one which we have above attempted to maintain, viz., that the transaction between Laflin and Britton was complete without registration of the transfer, and that it is equally complete as to the bank, unless the bank had some valid reason for refusing to register the transfer. Britton had the right to register the purchase in his own name. He was in good credit with the bank, and in the community. He was not then known to be insolvent—indeed, it is not shown by the proofs that he is now insolvent. Laflin could have compelled him to register the transfer in his own name. In the eye of the law, the transfer to Britton as "trustee" is a transfer to Britton individually; for, as above shown, Britton could not set up his ultra vires acts to defeat his personal responsibility. Ashhurst v. Mason, L. R. 20 Eq. 225; Ex parte Littledale, 9 Ch. App. 257. If Laflin had a completed right, immediately on receiving payment for the shares, to have Britton register the transfer of the shares, and if, immediately on such payment, Britton had the right to register the transfer to himself, and if the bank could not have resisted Laflin's application to compel a registration of the transfer to Britton, it is obvious that notice subsequently received by Laflin personally, or through an agent, would be immaterial.

If this view is sound, it is unnecessary to decide the further question, whether Girault, in consequence of his relations to Britton, and the fact that he acted as his servant, and implicitly obeyed his directions, is to be regarded, in making the formal act of transfer on the books, as the agent of Laflin, in such sense that knowledge acquired by him from Britton is to be imputed to Laflin. It deserves consideration, whether, under the circumstances, Girault was Laflin's agent, so as constructively to affect Laflin with notice of what was being done, not in the necessary or lawful execution of his authority, but in violation of that authority, and in hostility to his rights, as well as those of the bank. These are the positions taken by Mr. Slayback, in Mr. Laflin's behalf, and

they certainly have great force. For, in this view, if the name of some one outside the bank, having no knowledge of what was going on inside the bank, had been filled in by Britton as the attorney to make the transfer, or if Britton had filled in his own name, Laflin would not be liable. It is certainly extremely narrow ground to make Laflin's liability depend upon the accident whose name shall be used to make the formal transfer, and upon what knowledge of the interior working of the bank such person may happen to possess, especially in view of the custom to transfer stock in blank through many hands before any registry is made.

It is strongly urged at the bar by Mr. Henderson, for the receiver, that the foregoing views of the right of the shareholder to transfer his shares will have the effect to permit transfer to persons not able to respond to the double liability imposed on shareholders, and thus work an injury to the solvent shareholders and to creditors. But we must hold to the absolute right of the share-owner to transfer his stock in good faith, or the alternative that the directors may have the right to refuse their assent to such transfer, thus putting a shareholder in their power. Not a syllable can be found in the banking act giving the directors such a power; while, on the other hand, the right to transfer shares is expressly recognized. If it is desirable for the security of the shareholders or creditors that the existing members should, through the directors, have a veto on the right of a shareholder to transfer his shares, such a power must be plainly conferred. It has not been given, and cannot, therefore, be held to exist.

It is proper to remark, in order to preclude erroneous inferences from the views here maintained, that it is probable that the unrestricted right of transfer has reference to transfers in solvent and going concerns, and is not intended to enable shareholders to escape from liability where the association has committed an act of insolvency, or has ceased to be a going concern. Allin's Case, L. R. 16 Eq. 449, per Lord Chancellor Selborne; Chappell's Case, 6 Ch. App. 902. While we maintain the right of a shareholder dispose of his shares absolutely, by an out-and-out sale and registered transfer, and thus escape liability, provided the sale is made bona fide, and the purchaser is in law capable of assuming the liabilities of the transferrer, yet this does not involve the right to transfer shares for a fraudulent purpose, or under circumstances which the transferrer knows will make the transfer, if it is sustained, work a fraud upon the other shareholders, or upon the creditors of the bank.

The result is, that there must be a decree dismissing the bill as to Laflin, and as the bill is not framed for separate relief against Britton, dismissing the same as to him also, but without prejudice. Bill dismissed.

[NOTE. An appeal was then taken by the complainant to the supreme court, where the decree was affirmed in an opinion by Mr. Justice Field, who said that shares in a national bank are salable and transferable at the will of the owner, and are in that respect like other personal property. The bank can only prescribe rules for its own protection against fraudulent transfers, or such as may be designed to evade the just responsibility of a stockholder. No rules can be enforced which clog the transfer with useless restrictions, or make it dependent upon the consent of the directors or other stockholders. As between Laflin and the broker, the sale was consummated when the certificate, with the blank power of attorney indorsed, was delivered to the latter, and the money received from him. Laflin acted in perfect good faith, and the whole transaction, as far as he was concerned, was free from any imputation of fraud. The book-keeper, Girault, was not the agent of Laflin, and his knowledge cannot be imputed to the latter. 103 U. S. 800.]

NOTE. How far receiver of an insolvent corporation represents both creditors and stockholders: Gillet v. Moody, 3 Comst. [3 N. Y.] 479, 488; Talmage v. Pell, 7 N. Y. 328; Ex parte Ginger, 5 Ir. Ch. 174. The assets of an insolvent corporation are a fund for the payment of its debts. If they are held by the corporation itself, and so invested as to be subject to legal process, they may be levied on by such process. If they have been distributed among stockholders, or gone into the hands of others than bona fide creditors or purchasers, leaving debts of the corporation unpaid, such holders take the property charged with the trust in favor of creditors which a court of equity will enforce, and compel the application of the property to the satisfaction of their debts. This has been often decided, and rests upon plain principles. Curran v. Arkansas, 15 How. [56 U. S.] 304; Wood v. Dummer [Case No. 17,944]; Hightower v. Dozier, 8 Ga. 487; New Albany v. Burke, 11 Wall. [78 U. S.] 96; Burke v. Smith, 16 Wall. [83 U. S.] 390; Sawyer v. Hoag, 17 Wall. [84 U. S.] 610; Upton v. Tribilcock, 91 U. S. 45; Sanger v. Upton, Id. 56; Martin v. Zellerbach, 38 Cal. 301; Railroad Co. v. Howard, 7 Wall. [74 U. S.] 392. Mr. Justice Story says: "On the principle that the capital stock was a trust fund, it is clear that it might be followed by the creditors into the hands of any person having notice of the trust attached to it; that as to the stockholders themselves there can be no pretence to say that both in law and in fact they were not affected by the most ample notice." Wood v. Dummer, supra.

"A purchase by a company of their own shares is not a legal transaction (it is ultra vires), unless there is a clear, distinct, undoubted, and special authority (in the articles of association) authorizing them to do so." Giffard, lord justice, in Re London, etc., Exch. Bank (1870) 5 Ch. App. 444, 452; Id. 707; Great Eastern Railway Co. v. Turner, 8 Ch. App. 149; Hope v. International Financial Society, 4 Ch. Div. 327. See, also, Currier v. Lebanon Slate Co., 56 N. H. 262, where it is said by the court: "The funds of an insolvent corporation cannot be taken to buy in a portion of its capital stock, at the expense of its remaining stockholders. It would be grossly inequitable to the other stockholders, and a fraud upon the creditors. * * * But, assuming that this corporation, on March 17th, 1869 (the date when the stockholders voted to release a stockholder from his subscription) was solvent, it becomes material to inquire whether the corporation could lawfully purchase of Liscomb one hundred shares of its capital stock, the assessments upon which he had been unable to meet. In Salem Mill Dam v. Ropes, 6 Pick. 23, it is laid down that 'no vote or act of a corporation can enlarge its chartered authority, either as to the subject on which it is intended to operate, or the persons or property of the corporators. If created with a fund lim-

ited by the act, it cannot enlarge or diminish that fund but by license from the legislature; and, if the capital stock is parcelled out into a fixed number of shares, this number cannot be changed by the corporation itself.'" Compare with the foregoing, the following: Ex parte Holmes, 5 Cow. 426, 434; Taylor v. Miami Exporting Co., 6 Ohio, 218; Robison v. Beall, 26 Ga. 17; Hartridge v. Rockwell, R. M. Charlt. 260; Cooper v. Frederick, 9 Ala. 738; Williams v. Savage Manuf'g Co., 3 Md. Ch. 418, 452; Chillicothe Branch of State Bank of Ohio v. Fox [Case No. 2,683]; City Bank of Columbus v. Bruce, 17 N. Y. 507; Ang. & A. Corp. § 159; Schouler, Per. Prop. (1st Ed.) p. 622; Green's Brice, Ultra Vires, p. 99, note.

If the officers of a corporation illegally and ultra vires invest its money in stock in the name of a trustee, this is an unauthorized investment of trust moneys, but the cestui que trust may have the benefit of the purchase if he elects, or may repudiate it. Great Eastern Ry. Co. v. Turner, 8 Ch. App. 149; Ashhurst v. Mason, L. R. 20 Eq. 225.

Sale and transfer of shares by a "trustee" or executor: Duncan v. Jaudon, 15 Wall. [82 U. S.] 165; Brewster v. Sime, 42 Cal. 139; Bayard v. Farmers', etc., Bank, 52 Pa. St. 232; Albert v. Mayor, etc., 2 Md. 159; Shaw v. Spencer, 100 Mass. 382; Sturtevant v. Jaques, 14 Allen, 525. The provisions in the companies acts as to transfer of stock, have reference to the transfer in solvent and "going concerns," and are not intended to enable shareholders to escape from liability when the company has ceased to be a going concern. Allin's Case, L. R. 16 Eq. 449, per Lord Chancellor Selborne; Chappell's Case, 6 Ch. App. 902.

A bona fide out-and-out registered transfer—no trust for transferrer existing—relieves transferrer, if no fraud is committed and the articles are pursued. Master's Case, 7 Ch. App. 292; Gilbert's Case, 5 Ch. App. 559; Weston's Case, 4 Ch. App. 20. Must be a complete and valid transfer and registration of transfer, where required by charter or articles of association, to vest the shares in the transferee so as to release the transferrer. McEuen v. West London Wharves, etc., Co., 6 Ch. App. 655. When the sale is complete and the transfer is left with the officer of the company for registration, but never registered through the laches of the company's officers, the transferrer is not liable. Fyfe's Case, 4 Ch. App. 768; Lowe's Case, L. R. 9 Eq. 589. Duty to register valid transfer: Gilbert's Case, supra; Weston's Case, supra; Bank v. Lanier, 11 Wall. [78 U. S.] 369.

A director may transfer his shares. If he transfers when a call is due, contrary to statute, and the transfer is registered, it is not invalid—the transferee becomes the shareholder, and the director is liable to the company for any loss occasioned by the transfer. Ex parte Littledale, 9 Ch. App. 257. Where the charter provides that "stock shall be transferable only on the books of the bank," an assignment and delivery of shares vests an equitable title only until the stock is transferred on the books of the bank, and an equitable assignment is subject to the rights of the bank under its charter; and where the charter gives the bank a lien for the debt of the owner of the shares, the right of the bank is superior to the rights of the unregistered transferee of the stock. Union Bank v. Laird, 2 Wheat. [15 U. S.] 390; Webster v. Upton, 91 U. S. 65, 71; s. p. Black v. Zacharie, 3 How. [44 U. S.] 483, where the question arose between equitable assignee and attaching creditor of the seller. The provision requiring transfers on the books of the bank is for the benefit of the bank and bona fide purchasers. An assignment without transfer on books of bank is good between the parties and attaching creditors of the vendor with notice. Black v. Zacharie, 3 How. [44 U. S.] 483, 513; Bank of Commerce's Appeal, 73 Pa. St. 59; State v. New Orleans Gaslight Co., 25 La. Ann. 413; Ross v. Southwestern R. Co., 53 Ga. 514; Brown v. Adams [Case No. 1,986]; Smith v. American Coal Co., 7 Lans. 317; Grymes v. Hone, 49 N. Y. 17; Bank of America v. McNeil, 10 Bush. 54; Fisher v. Essex Bank, 5 Gray, 373; Boyd v. Rockport Steam Cotton Mills, 7 Gray, 406; Williams v. Mechanics' Bank [Case No. 17,727]; Turnpike Co. v. Bulla, 45 Ind. 1; Moore v. Bank of Commerce, 52 Mo. 377; Ang. & A, Corp. (10th Ed.) §§ 534, 535.

In Bank v. Lanier, 11 Wall. [78 U. S.] 369, it was held that the owner of shares in a national bank may transfer the same by a delivery of the certificates, and the transferee may compel the bank to transfer and enter the shares on the books. The duty of the bank to make transfer is a corporate duty, and it is liable if it refuses to perform it. Where the certificates provided that the shares were transferable on the books of the bank, in person or by attorney, only on surrender of the certificates, if the bank transfers the stock without the surrender of the certificates, it is liable to a subsequent purchaser of the stock who obtained and held the certificates, and who bought without notice of the previous sale, and who, if he had examined the books of the bank, would have seen that his vendor had previously sold and transferred the stock on the books of the bank. "Whoever in good faith buys the stock and produces to the corporation the certificates, regularly assigned, with power to transfer, is entitled to have the stock transferred"—even if the transferrer is the debtor of the bank. Id.

Transferee must be liable.—Mr. Heritage owned one hundred shares of stock in the Merchants' Company, which he directed his broker to sell, and the shares were sold in the ordinary way to a firm of stock jobbers on the stock exchange, as to whose liability see Maxted v. Paine, L. R. 6 Exch. 132. The jobbers reported one Hankey as the purchaser. Heritage executed a transfer of the shares to Hankey, and the company registered the transfer. On the ground that Hankey had not accepted the shares, the court removed his name from the register of shareholders, and subsequently held that Heritage was liable as a stockholder. Lord Romilly, master of the rolls, said: "If shares are once taken properly and bona fide by a person, those shares remain the shares of the person who took them from the company, and cannot be altered, except by a declared forfeiture, or by some valid transfer from the person who took them to some other person. * * * It is no doubt a very hard matter for a man not to have got rid of his shares when he has taken every step that depended on him for the purpose; but it necessarily follows that if he has not duly transferred the shares, they remain in him. * * * The court has determined that no valid transfer was made from Mr. Heritage, and, therefore, Mr. Heritage remains the shareholder. His name is, therefore, properly on the list of contributories, and I cannot remove it. * * * But I am asked to strike off the name of Mr. Heritage, the result of which would be simply to cancel the shares. I do not find any case in which anything of the kind has ever been done, and I am at a loss to understand on what principle it could be done." In re Merchants' Co. (Heritage's Case, 1869) L. R. 9 Eq. 5; s. p. Symons' Case, 5 Ch. App. 298, 300.

Mode of transfer.—Mere delivery, without assignment of certificates of stock, by one in whose name the stock stands, though for value, will not give a legal title. Title can only be obtained by a transfer of the shares into the name of the transferee; "and, perhaps, also," says Lord Hatherley, "but I think that has not been quite decided, it may be necessary that he should obtain a registry" on the books of the corporation. Shropshire Union Railways & Canal Co. v. The Queen, L. R. 7 H. L. 496, 513. But delivery of stock certificates with blank transfers will entitle bona fide vendee to have the transfer registered. In re Tahiti Cotton Co. (Ex parte Sargent) L. R. 17 Eq. 273; German Union Bldg. & Sav. Fund Ass'n v. Sendmeyer, 50 Pa. St.

67; Leavitt v. Fisher, 4 Duer, 1. The directors cannot refuse to register a bona fide transfer of stock unless power to do so is given them in the articles of association. Weston's Case, 4 Ch. App. 20. Although there is a provision requiring directors' assent to a transfer of the shares, this discretion must be exercised in a reasonable manner, and they must have some valid reason for refusing to register a transfer. Nation's Case, L. R. 3 Eq. 77; Fyfe's Case, 4 Ch. App. 768, 769, note; Lowe's Case, L. R. 9 Eq. 589; Allin's Case, L. R. 16 Eq. 449; Ex parte Penney, 8 Ch. App. 446. And even where the directors have express authority to refuse to register a transfer, if the transfer is colorable and the transferrer procures the registration of the transfer by deceiving the directors, he may, notwithstanding the sale and registry, be treated as the owner of the shares when the corporation is wound up. In re Imperial, etc., Ass'n, L. R. 9 Eq. 223; Kintrea's Case, 5 Ch. App. 95.

An infant cannot become purchaser and transferee of shares so as to relieve transferrer of liability as a shareholder (Nickalls v. Merry, L. R. 7 H. L. 530), even although the transfer to the infant be registered (Symons' Case, 5 Ch. App. 298; Weston's Case, Id. 614); but if the infant does not repudiate the transfer on coming of age, he may become liable though holding as trustee for another (Mitchell's Case, L. R. 9 Eq. 363). "The original shareholder remains a shareholder, even in cases where he is entirely innocent of the transaction, and not aware that the shares were being transferred to an infant." Lord Chancellor Hatherley, Weston's Case, 5 Ch. App. 614, 620. But a subsequent registered transfer by the infant to an adult may relieve the original seller. Gooch's Case, 8 Ch. App. 266. A director who took stock in the name of his infant children held liable as a contributory: Ex parte Wilson, Id. 45. Transfer of shares to a pauper, or man of straw: In re Imperial, etc., Ass'n, L. R. 9 Eq. 223; Maxted v. Paine, L. R. 6 Exch. 132. Liability under the English companies act of 1862 (section 38) of past members to contribute on the winding up of the company: Helbert v. Banner, L. R. 5 H. L. 28.

See reference to principal case and criticism upon it in Thompson on Liability of Stockholders—a valuable essay on the subject treated—published since the foregoing was written.

JOHNSON (LITCHFIELD v.). See Case No. 8,387.

## Case No. 7,394.

JOHNSON v. McCULLOUGH et al.

[The case reported under above title in 4 Fish. Pat. Cas. 170, is the same as Case No. 7,401.]

## Case No. 7,395.

JOHNSON v. The M'DONOUGH.

[Gilp. 101.] [1]

District Court, E. D. Pennsylvania. Oct. 2, 1829.

LIEN FOR WHARFAGE—REMOVAL OF VESSEL.

1. A wharfinger has a lien on a vessel for wharfage.

[Cited in Packard v. The Louisa, Case No. 10,652; The Kate Tremaine, Id. 7,622; Ex parte Easton, 95 U. S. 76; Hubbard v. Roach, 2 Fed. 394.]

[Cited in Brookman v. Hamill, 43 N. Y. 563.]

2. If a vessel is removed from a wharf secretly or wrongfully, and afterwards brought back without fraud or force, the lien of the wharfinger is revived.

3. Where the marshal levies on, but does not keep actual possession of a vessel, which had been removed from a wharf without the knowledge of the wharfinger, and she is subsequently returned to the same wharf, the wharfinger is to be paid his previous wharfage, out of the proceeds of a sale under the execution, made subsequent to her return.

On the 1st May, 1829, suit was brought by the United States of America, against James Coulter and John Coulter on a custom house bond for the payment of duties. On the 18th of May, judgment was rendered for the United States, and on the 21st May, a writ of fieri facias issued. On the 2d October, the marshal returned the writ, and brought into court the proceeds of the sale of the schooner M'Donough, which he had levied upon as the property of James and John Coulter. On the same day Joseph Johnson filed his petition, praying that the sum, due to him for the wharfage of the schooner, might be paid out of the funds brought into court by the marshal.

HOPKINSON, District Judge. The facts of this case appear by the evidence to be these. On the 3d December, 1828, the schooner M'Donough was put at the wharf of Joseph Johnson, the petitioner, by her owner James Coulter, and remained there until the 15th April, 1829, when she was removed to another wharf by Israel Coulter the brother of James. This removal was made without the consent or knowledge of Johnson, and at dinner time, when the persons usually about the wharf were absent. Johnson, on being informed of the removal, immediately complained of it to James Coulter, who had before assured him that the vessel should not be removed, until the wharfage was paid. James Coulter replied to his complaint, that Israel Coulter had no right to take her away, and that he would have her brought back. She was brought back on the 2d June, 1829. On the 21st May, 1829, a writ of fieri facias, issued on a judgment against John and James Coulter, at the suit of the United States, was delivered to the marshal, who proceeded with it to the schooner, then lying at the wharf to which she had been removed; he went on board the schooner, and, as he says, executed his writ by a levy on her. The schooner was at this time stripped of her rigging, which had been done after her removal from Johnson's wharf; she was entirely shut up, and had nobody on board of her. The marshal put no person in charge of her, but left her as he found her, though he says a Mr. Burton told him he had a person to watch other vessels, who should also take charge of this schooner. Whether Mr. Burton performed this promise or not, the marshal never inquired, nor do we know. From other facts in the case we should infer that he did not. The marshal made no further proceeding on his writ, in consequence of his being inform-

[1] [Reported by Henry D. Gilpin, Esq.]

ed that Coulter had sold her before the writ issued, but he further says, that he did not abandon his levy. Did he, however, preserve his possession? I think he did not. On the 2d June, nearly two weeks after this proceeding under the fieri facias, the schooner was brought back to Johnson's wharf, without any prevention or objection on the part of the marshal, or of any person he may have supposed had charge of her. She was afterwards sold by the marshal at Johnson's wharf; the proceeds of the sale are now in court; and Joseph Johnson claims to be paid out of them for his wharfage from December, 1828, to April, 1829; that which was due for the second lying at his wharf being satisfied. On the other hand the United States claim the whole of the proceeds towards the satisfaction of their judgment.

It was long since decided in this court by Judge Peters, that wharfage is allowed out of proceeds, as the wharfinger might detain the ship until payment; in other words, that a wharfinger has a lien on the vessel for his wharfage. Judge Story, in the case of Ex parte Lewis [Case No. 8,310], has recognized and affirmed this principle. In this case it has not been questioned, but it has been insisted by the district attorney that the lien was lost, by the loss of the possession of the schooner. It is certainly true that when the possession of a chattel is voluntarily given up, or other security is taken for the debt, the lien is abandoned. But this act, like every other, must be coupled with the will and intention of the party. Can I be said to part with an article which is wrongfully taken from me, without my knowledge or consent? And if I afterwards regain my possession, without any wrong to another, am I not restored to my original rights? Whether I may retake the possession by my own authority is another question, and even that seems to have been allowed in the case of Rosse v. Bramsteed, 2 Rolle, 438, provided it be done on fresh pursuit. I admit that the consent to the change of possession may be given, and will be as effectual after as before the removal; and further that such consent may be inferred from the conduct of the party, as well as by direct evidence. If, in this case, Joseph Johnson had made no complaint of the taking away of the schooner, until she was levied upon, it would have warranted a belief that he acquiesced in it; but, on the contrary, he made immediate complaint, and received a promise from James Coulter, not of the payment of the wharfage, but of the return of the vessel to his wharf. What more could he do to repel the presumption of his assent to the act, or to show that he held to the body of the schooner as the security for his debt, and looked to no other? He could not take forcible possession of her; nor do I know of any legal process, by which he could have had her restored to him. If a possession is gained wrongfully or fraudulently it gives no lien; so if it be given for a special purpose, it cannot be applied to another. The same equity requires that if the possession be lost wrongfully or fraudulently, and be afterwards regained without fraud or wrong, the lien shall be in force. In the case of Spring v. South Carolina Ins. Co., 8 Wheat. [21 U. S.] 268, it is expressly said by the court, that an insurance broker is entitled to a lien on the policy for premiums paid for his principal: and though he parts with the possession, if the policy afterwards comes into his hands again, his lien is revived and will be protected, unless the manner of his parting with it had manifested an intention in him altogether to abandon such lien. The parting with possession was voluntary. In the case of U. S. v. Barney [Case No. 14,525], Judge Winchester says, a lien is a tie, hold, or security upon goods or other things which a man has in his custody, till he is paid what is due on them. From this definition, he adds, it is apparent that there can be no lien where the property is annihilated, or the possession parted with voluntarily and without fraud. He quotes Chapman v. Derby, 2 Vern. 117, and Ex parte Ockenden, 1 Atk. 234. In Montagu on Liens (page 19), it is said if an innkeeper suffer the horse of his customer to be taken away, and the horse is, on some future occasion, brought to the inn, the lien does not revive. In the same book and page it is said, that if an insurance broker parts with the possession of a policy upon which he has a lien, and afterwards, upon hearing reports not favourable to the circumstances of his principal, he obtains from him the policy under pretence of receiving the average, it has been decided that his lien revives. This is going very far indeed beyond the decision in the case of Spring v. South Carolina Ins. Co. [supra], and beyond what is necessary for our case. In the case of Levy v. Barnard, 2 Moore, 34, it is said: "It seems that if a broker part with a policy, his lien revives upon its being returned to him."

Such is the uniform doctrine of the decisions upon this point, and no case has been produced or found on my examination, in which a wrongful or fraudulent dispossession of the article would so destroy the lien, as that it would not revive on a subsequent honest regaining of the possession. The loss of the possession in this case was certainly not by the consent or intention of Joseph Johnson; nor did he, by any subsequent agreement or act, acquiesce in it. The only circumstance relied on to prove his assent is the length of time; but what could he do, in that period, to show his dissent, more than he did? It was returned to him without any wrong or fraud on his part; and by the same person who had taken it away, and probably for the very purpose of making it liable to his claim. I am therefore of opinion he is entitled to the payment of the wharfage due to him, out of the proceeds

of the sale of the schooner. It is proper to add, that there is much uncertainty and obscurity about this levy; or, at least, about any actual possession of the property by the marshal, or what his intentions were in respect to it, after he was informed that Coulter had sold it. He suspended all further proceedings, and seems to have had no custody or care of it afterwards; until he actually sold it at Joseph Johnson's wharf. If the marshal had taken a clear possession of the vessel, and thereby divested Coulter of the possession; and the latter had afterwards fraudulently and wrongfully taken her and returned her to Johnson's wharf, in violation of the right and possession obtained in her by the marshal, it would have presented a different question, on which I give no opinion. The case of Spring v. South Carolina Ins. Co., 8 Wheat. [21 U. S.] 268, will be found to bear, even on such a case, favourably to the claim of wharfage.

## Case No. 7,395a.

JOHNSON v. McLAIN.

[Hempst. 59.] [1]

Superior Court, Territory of Arkansas. May, 1828.

ERROR.

Where errors are committed, but the judgment on the whole record is right, it will not be disturbed.

[This was an action by Thomas McLain against Thomas W. Johnson.]

Before JOHNSON, ESKRIDGE, and TRIMBLE, JJ.

OPINION OF THE COURT. This is a motion for a writ of error, with a supersedeas to a judgment obtained by McLain against Johnson in the Pulaski circuit court. It appears from the record of the proceedings in the court below, that Johnson, to an action of debt brought against him by McLain, appeared at the May term of said circuit court, and filed three pleas of payment. In two of the pleas he avers that he paid the debt one day before it became due, and in the third plea he avers that he paid it on the day it became due. An issue was made up and tried by a jury, who returned a verdict for the plaintiff. The defendant in the court below then moved the court to arrest the judgment on the following grounds: first, that the issue was immaterial; secondly, that the time from which the interest is to be paid, is not expressed in the verdict; thirdly, that the whole proceeding is irregular, informal, and illegal. The court sustained the motion and arrested the judgment. We cannot see the ground upon which the court arrested the judgment. The issue was not immaterial, for there was at least one good plea filed, upon which issue was taken, namely, the plea of solvit ad diem. From an inspection of the record, it is manifest that this plea was filed at the May term, before the jury rendered their verdict, and no parol averment can be received to contradict the record.

The second ground is equally untenable, for we are clearly of opinion that the verdict of the jury is substantially good. They find for the plaintiff the debt in the declaration, with interest and costs. It is evident that the jury intend to find interest from the time the note became due. After arresting the judgment, the court awarded a repleader, and at the subsequent term of the court the following proceedings took place: "This day, appeared the parties by their attorneys, and the plaintiff's attorney moved the court for a judgment by default, which motion the court overruled, whereupon the plaintiff's attorney withdrew his demurrer filed to the defendant's plea, and moved the court to strike out the plea as for want of a plea, which motion the court sustained, and proceeded to render judgment for the plaintiff for the debt in the declaration, and the interest then due in damages and costs of the suit." We are here again at a loss to perceive the ground on which the court rejected the plea of the defendant. But as the plea does not appear on the record, we are bound to presume that it was not such an one as the court should have received. But, admitting the court to have erred in the latter case in rejecting the defendant's plea, we are still of opinion it can have no influence in the decision of this case. The court at the previous term should have rendered judgment on the verdict of the jury, and not have arrested the judgment; by rendering judgment at the subsequent term, that only was done which ought to have been done at the previous term.

It is not material to the ends of justice whether the acts of the court proceed from good or bad reasons. The judgment, it is true, is erroneous in not allowing to McLain interest on the debt at the rate of ten per cent. per annum from the time the note became due until paid, but only giving interest up to the time of rendering the judgment. But this is an error of which the defendant in the court below has no right to complain. Motion overruled.

[1] [Reported by Samuel H. Hempstead, Esq.]

JOHNSON (McLEAN v.). See Case No. 8,883.

JOHNSON v. MARTIN. See Case No. 9,194.

JOHNSON v. The MARY ANN. See Case No. 9,194.

## Case No. 7,396.

JOHNSON v. MASON.

[3 Cranch, C. C. 294.] [1]

Circuit Court, District of Columbia. May Term, 1828.

SLAVE — BRINGING INTO DISTRICT OF COLUMBIA — FREEDOM.

If a slave be not brought into the county of Washington for sale, nor to reside permanently, he is not entitled to freedom under the Maryland act of 1796 (chapter 67).

[This was a petition for freedom by the negro Louisa Johnson against Milo Mason.]

THE COURT (nem. con.) was of opinion that if the petitioner was not brought into this county for sale or to reside, she is not entitled to freedom under the Maryland act of 1796 (chapter 67), and that the act meant a permanent residence, a residence without expectation of change.

See the case of Jordan v. Sawyer [Case No. 7,521], in this court at April term, 1823.

## Case No. 7,397.

JOHNSON v. MAY et ux.

[16 N. B. R. 425.] [2]

Circuit Court, D. Vermont. Nov. 7, 1877.

BANKRUPTCY—HOMESTEAD—FRAUD ON CREDITORS.

1. Where a certain sum is allowed by statute to be invested in a homestead, such sum may be put into an undivided part interest in a homestead, and into premises to which others hold the legal title.

[Cited in Re McKenna, 9 Fed. 35.]

2. An insolvent, more than four months before the commencement of proceedings in bankruptcy against him, furnished from his own property, towards building a homestead upon premises which his wife had contracted to purchase, and which were subsequently conveyed to her, the sum of fourteen hundred dollars; *Held*, that such transaction was a fraud upon his creditors, and that the assignee was entitled to a conveyance of the husband's interest in such homestead, less the amount he was authorized by law to invest in a homestead, and also to a conveyance of the balance of his interest for the benefit of creditors existing at the time of the investment.

[Cited in Re Melvin, Case No. 9,406; Brecher v. Fox, 1 Fed. 274.]

[Appeal from the district court of the United States for the district of Vermont.]

[This was a suit by Nathan M. Johnson, assignee, against Dennis E. May and Emily B. May, his wife, to recover certain property interests.]

WHEELER, District Judge. This is an appeal from a decree of the district court in bankruptcy, and has been heard by express request of the parties in the necessary absence of the circuit justice and the circuit judge, with the approval of the circuit justice, on bill, answers, replication, proofs, and argument of counsel. The defendants, husband and wife, built a house on land she had bargained for, at the price of four hundred and twenty-five dollars, and paid for in part from her separate means, and moved into it and occupied the premises for a homestead. Soon afterwards she paid the balance due for the land, and took a deed of it to herself. From a careful examination of the items of the cost of the house shown in evidence, which amount to three thousand and eighty-three dollars and thirty-eight cents, and having regard to the testimony of witnesses who have examined it since it was built, and estimated its cost and testified to the estimates, and to the liability to overlook items, probably nearly five hundred dollars should be added to which, in arriving at the true amount, the whole cost of the land and house is found to be four thousand dollars. Of this cost she furnished, including the payment for the land, from her separate property that came to her from her father's estate, directly about nine hundred and eighty dollars. He had received from her two hundred dollars of her separate property, under an agreement to return it to her, for which he had given her his note, and which he had in his hands at the time. He borrowed two hundred and twenty-five dollars, and secured payment of it by a pledge of a note that was her separate property, which has been paid by the maker of the note in part payment of it, which was used about building the house. And they raised, for the purpose of putting into the house, by a mortgage on the premises still outstanding, seven hundred dollars, and on a note of five hundred and fifty dollars, signed by both and a surety, about five hundred dollars, which note is still outstanding. These sums were used about building the house. The balance of the cost of the house, about one thousand four hundred dollars, he furnished from his own property that had no connection with hers.

The placing that property in the house on that land, and the conveyance of the land to her afterwards with his consent, operated to convey so much of his property to her. Bent v. Bent, 44 Vt. 555. When he placed the property there, he was so far insolvent that he had no right to convey any of the property that could be reached by his creditors away from them to her. He did not fully realize his condition, and she was not aware of it, but as a reasonably prudent man, he ought to have known that his property could not rightfully be taken for that purpose. The making it over to her in that manner was a fraud upon the rights of his creditors, and the title to it that she has got by it she holds as trustee for the benefit of the creditors. Bank of U. S. v. Lee, 13 Pet. [38 U. S.] 107; McLane v. Johnson, 43 Vt. 48. She did not, however, lose any right she had to what was otherwise her own property by the transaction. Bank of U. S. v. Lee, supra. He has since gone into bankruptcy, individually, and as a partner with

[1] [Reported by Hon. William Cranch, Chief Judge.]

[2] [Reprinted by permission.]

another, and the orator is the assignee. A claim for the two hundred dollars she let him have has been proved against his estate by her, and one for the two hundred and twenty-five dollars by the maker of the note who paid it, for her benefit. This bill is brought to reach his property that went into the house, to recover it for the benefit of the estate.

It is objected in his behalf that he is not a proper party, because he has no interest, and that the bill should be dismissed as to him with costs. But the wife could not properly be sued alone. When the husband is not an adverse party, he should be joined with the wife in suits for or against her; when he is, a next friend should be. Porter v. Bank of Rutland, 19 Vt. 410. Here the wife is none the less a wife, nor he any less a husband, because he is in bankruptcy, and he is not an adverse party to her, and was therefore necessarily and properly joined with her. So much of the house and land as she paid for directly with her separate property according to the laws of the state, as administered in courts of equity, which must govern as to his property in this court as a court of equity, belongs to her as against the husband and his creditors, and of course as against the orator representing merely his creditors. Barron v. Barron, 24 Vt. 375; Clark v. Peck, 41 Vt. 145. The two hundred and twenty-five dollars came indirectly, but not less actually from her separate property, and so much of the house as that paid for belongs to her in the same way and for the same reasons. The letting him have the two hundred dollars by her did not create a debt that was like ordinary debts. After she let him have it, he had so much of her property in his hands with the mass of his. The note he gave her had no validity whatever as a note. Sweat v. Hall, 8 Vt. 187; 2 Story, Eq. Jur. § 1370. It was merely some evidence of the transaction, which created a trust rather than a debt. When he had put an equal or greater amount of property into the house and it had been conveyed to her, he had in effect returned the property, and if more, more with it, to her. If not, he had so much of her property in his hands, and she as much and more of his in hers, which would make like claims in favor of each against the other, that could, and under the bankrupt law should be set off against each other. Rev. St. U. S. § 5073. The claims of the orator rest upon the rights of the creditors under that law. The transaction was more than four months before the proceedings in bankruptcy, and not in fraud of that law, nor was it as to that amount of the property that he put into the house fraudulent in fact as to the creditors. But it extinguished her claim against him, and of course against the estate in the hands of the assignee, on account of this money or the note given for it, and that, and the one proved for her benefit on account of the two hundred and twenty-five dollars also, should be released. These two sums make the amount of her separate property put into the house about one thousand four hundred dollars, and substantially equal in amount to his that he put in. The mortgage of seven hundred dollars is unquestionably a charge upon the premises. The loan on her note, signed by him also with surety, having been made for the purpose of being put into the house as her property, may be made so in favor of the holder of the note. Frary v. Booth, 37 Vt. 78. And probably in favor of the surety or the orator, if either should be compelled to pay it, or any part of it. The husband being in bankruptcy is not likely to pay it, but is likely to be discharged from it, and as between her and the orator it is just and equitable that it should stand as if actually made a charge upon the property, to be borne by the property. In this view, independently of any homestead right, she would hold the legal title to the premises, subject to the mortgage and this quasi charge, one-half for herself and the other half in trust for the orator, which half he would be entitled to have conveyed to him. But the husband had a lawful right, except as to existing creditors, to put not exceeding five hundred dollars in value into a homestead, that could not be reached by subsequent creditors. Gen. St. Vt. p. 451, § 1; Id. p. 452, § 7. And he had the same right to put not exceeding that value into an undivided part interest in homestead premises, that he had to put it into a whole interest. McClary v. Bixby, 36 Vt. 254; Danforth v. Beattie, 43 Vt. 138. And into premises to which others held the legal title, as well as into those to which he held it. Morgan v. Stearns, 41 Vt. 398. And especially into these premises belonging to his wife, in which he would have a life estate by the curtesy, issue of the marriage being born alive. Gen. St. Vt. p. 414, § 15. When he put his property into these premises he and his wife had the equitable, and the man afterwards her grantor, the legal title to them. There was no deed to him of his interest, the record of which could govern as to the time of acquiring it. The deed to his wife was not a deed of it towards him, for he rather parted with his rights than acquired any title by that deed. The premises became impressed with the character of a homestead when he moved into the house, for then they began to be used or kept by him as such. Gen. St. Vt. p. 451, § 1; Spaulding v. Crane, 46 Vt. 292. He then acquired a homestead right in the premises to the value of five hundred dollars, valid against subsequent creditors, but subject to the right to hold it of existing ones. Perrin v. Sargeant, 33 Vt. 84. The conveyance of this homestead interest to his wife, by letting it pass by the deed to her, was not fraudulent as to the subsequent creditors, for they could never have reached it if it had remained his. Keyes v. Rines, 37

Vt. 263; Morgan v. Stearns, 41 Vt. 398. Nor would it have passed to the orator by the deed of assignment to him, for their benefit. Rev. St. U. S. § 5045. But the transaction by which the property passed to the wife was inoperative as to the homestead right as against existing creditors, and the orator is entitled to recover it for them, if any there are that have claims against that estate in his hands; the whole right if the claims of such creditors amounted to five hundred dollars at the time he acquired the homestead right. If not, to recover such part of it as the amount of such claims at that time is a part of five hundred dollars. The rest of the property that he put into the house, and which passed to the wife, having been put there and so passed in fraud of the rights of creditors generally, can be reached for the benefit of them generally, subsequent as well as then existing ones, there being no special exemption to apply to it. McLane v. Johnson, 43 Vt. 48. The orator is entitled to a decree for a conveyance in the right of the wife by her and her husband, according to the statute of the state, of an undivided one-half interest in the premises, leaving the whole subject to the mortgage and to the payment of the note of five hundred and fifty dollars, to be lessened by the amount of the homestead right that is exempt from the claims of the then existing creditors. He represents all the creditors interested in the estate, and is entitled to recover whatever any of them are entitled to have administered by him, and the only question here is as to what he is entitled to recover of the defendants, and not at all as to how it shall be distributed after it is recovered. It does not appear how many, if any, nor to what, if to any, amount there are creditors whose claims existed at the time the premises became a homestead, and have been or are to be proved against the estate, therefore an account of them must be taken before a final decree can be fully made up. The bill does not pray for any account, but it is framed for the recovery of the estate in the hands of the wife defendant, and as an account is necessary to ascertain how much she is entitled to retain, it may properly be had under these pleadings, although, ordinarily, there should be a special prayer for an accounting. Davis v. Smith, 43 Vt. 269, 48 Vt. 52.

These views as to the main question involved in the case have been submitted to the circuit justice and are approved of by him. The decree of the district court is reversed, and let a decree be entered that the cause be referred to John L. Edwards, Esquire, special master, to take an account of the debts, if any, proved or to be proved against the estate of Dennis E. May, in the hands of the orator as assignee thereof in bankruptcy, that existed when he commenced to occupy the premises in question as a homestead, and make report thereof; and on the coming in of his report, if it shall appear therefrom that such debts then amounted to five hundred dollars, that then the defendants in the right of the wife defendant, within thirty days, convey to the orator an undivided half of the premises, leaving the whole subject to the payment of the mortgage thereon and the note of five hundred and fifty dollars signed by the defendants, with surety, as if the whole payment thereof were charged thereon; and in case such debts amounted to less than five hundred dollars, that the defendants likewise convey that same interest, lessened by such proportion thereof as the deficiency bears to fourteen hundred dollars; and that they release all claims against said estate in favor or for the benefit of the wife defendant on account of the sum of two hundred dollars she let the husband have, and payment of the sum of two hundred and twenty-five dollars borrowed by him out of her note. With costs of this suit to the time of the decree in the district court to the orator, and costs of the appeal there and in this court to the defendants.

## Case No. 7,398.

JOHNSON v. MERCHAND.

[Nowhere reported; opinion not now accessible.]

JOHNSON v. The MERCHANT. See Case No. 9,434.

## Case No. 7,399.

JOHNSON v. MONELL.

[1 Woolw. 390.] [1]

Circuit Court, D. Nebraska. May Term, 1869.

REMOVAL OF CAUSES — TWELFTH SECTION OF THE JUDICIARY ACT—CITIZENSHIP—ACT MARCH 2, 1867—CONSTITUTIONALITY—CONSTRUCTION.

1. Under the provisions of the 12th section of the judiciary act (1 Stat. 79), the right of removal was granted only to a defendant who was an alien, or a citizen of a state other than that in which the suit was brought.

2. It was incumbent on the defendant to claim the right at the time of entering his appearance in the state court.

3. The act of March 2, 1867 (14 Stat. 558), allows to a plaintiff as well as to a defendant the right of removal, and he may exercise it at any time in the course of the litigation prior to final hearing or trial.

[Followed in Kellogg v. Hughes, Case No. 7,662. Cited in McCallon v. Waterman, Id. 8,675. Quoted in McLean v. St. Paul & C. Ry. Co., Id. 8,892.]

[Cited in Whittier v. Hartford Ins. Co., 55 N. H. 143; Sharp v. Gutcher, 74 Ind. 363; Bryant v. Rich, 106 Mass. 193; Galpin v. Critchlow, 112 Mass. 345.]

4. The only conditions on which the right depends are: (1) That the controversy shall be between a citizen of the state in which the suit is brought, and a citizen of another state; (2)

[1] [Reported by James M. Woolworth, Esq., and here reprinted by permission.]

that the matter in dispute exceeds $500, exclusive of costs; (3) that the non-resident citizen shall file an affidavit stating that he believes, and has reason to believe that from prejudice or local influence, he will not be able to obtain justice in the state courts; (4) that he give the requisite security for his appearance and filing copy of the record in the federal court at the proper time.

[Cited in Sands v. Smith, Case No. 12,305; Grover & B. Sewing Mach. Co. v. Florence Sewing Mach. Co., 18 Wall. (85 U. S.) 587; Farmers' Loan & Trust Co. v. Maquillan, Case No. 4,668; Cook v. Whitney, Id. 3,166; Jackson v. Mutual Life Ins. Co., Id. 7,141; Curtin v. Decker, 5 Fed. 387; Glover v. Shepperd, 15 Fed. 835; Miller v. Chicago, B. & Q. R. Co., 17 Fed. 97; Hancock v. Holbrook, 27 Fed. 402; Hone v. Dillon, 29 Fed. 467; McDermott v. Chicago & N. W. Ry. Co., 38 Fed. 533; La Montagne v. T. W. Harvey Lumber Co., 44 Fed. 648.]

5. The sentence in the constitution which confers on the federal courts jurisdiction over causes arising under the constitution and laws of the United States, confers on the same courts jurisdiction over causes between citizens of different states. The terms are as broad in one case as in the other.

6. Under the 25th section of the judiciary act, ever since the organization of the federal judiciary system, jurisdiction has been exercised over the former class of cases, after the final judgment in the highest courts of the state.

7. If that has been rightful, then the right of removal at any stage of a cause must be rightful.

8. A voluntary change of residence by a party, so that jurisdiction on account of citizenship arises, even if made after the suit was brought, does not affect the right of removal.

[Cited in Rawle v. Phelps, Case No. 11,588.]

9. It is only a question of costs, as a plaintiff, after his voluntary change of residence, might discontinue in the state court, and bring his action in the federal court.

10. The intent with which a person removes from the state, in the courts of which a suit is pending to which he is a party, so that by reason of citizenship the federal courts may have jurisdiction, and he be enabled to remove the cause thereto, is not an objection to the removal, provided his citizenship in another state be real.

[Cited in McGinnity v. White, Case No. 8,802. Quoted in McLean v. St. Paul & C. Ry. Co., Id. 8,892. Cited in The Garland, 16 Fed. 288.]

On the 14th day of February, 1868, the plaintiff brought his suit in the district court of the state of Nebraska against Gilbert C. Monell, who was a citizen of that state, and John J. Monell, who was a citizen of the state of New York, claiming $37,500, for his damages by reason of the non-performance by the defendants of a contract entered into between the parties. At that time the plaintiff was a citizen of Iowa, but during the litigation he became a citizen of Nebraska. Afterwards he again voluntarily changed his residence and citizenship from Nebraska to Iowa. He continued to prosecute his cause in the state court. Gilbert C. Monell was duly served with process, and appeared and answered. But John J. Monell was never served, and never appeared. At the July term, 1868, in the state court, the cause was tried by a jury, who rendered a verdict for the plaintiff for $14,700. The defendant then moved for a new trial, on the ground that the verdict was not supported by the evidence. The motion was granted, and a new trial awarded. The cause being in this attitude, the plaintiff filed his petition in the state court for a removal of the cause into the United States circuit court. The petition for the removal shows that the plaintiff was a citizen of Iowa when the suit was brought in the state court; that he became a citizen of Nebraska while it was pending, and was so when it was tried; and that, after this, by a voluntary change of residence, he became, and at the time he made his application for a transfer of the case to this court, was again a citizen of the state of Iowa. The defendant G. C. Monell is, and during the pendency of the suit has been, a citizen of Nebraska, and the other defendant has never been served with process, nor appeared, and is a citizen of New York. The affidavit of the plaintiff, on which the motion of the state court was founded, further states, that the amount in controversy exceeds $500, and that he has reason to believe, and does believe, that, from prejudice or local influences, he will not be able to obtain justice in that court. This petition is based on the act of March 2, 1867 (14 Stat. 558), which provides, "That where a suit is now pending, or may hereafter be brought, in any state court, in which there is a controversy between the citizen of a state in which the suit is brought, and a citizen of another state, and the matter in dispute exceeds the sum of $500, exclusive of costs, such citizen of another state, whether he be plaintiff or defendant, if he will make and file in such state court an affidavit stating that he has reason to and does believe that, from prejudice or local influence, he will not be able to obtain justice in such state court, may, at any time before the final hearing or trial of the suit, file a petition in such state court," and have the suit removed to the federal court.

Mr. Doane for the motion.

Mr. Wakely, contra.

MILLER, Circuit Justice. This case is transferred to this court by an order of the state court in which it was originally brought, on motion of the plaintiff, made after a verdict of the jury in his favor had been set aside by the court. The defendant G. C. Monell now moves to dismiss the case, or to send it back to the state court, on the ground that this court has no jurisdiction in the premises.

Removals of suits from the state courts, on the ground of citizenship of the parties, were until recently governed exclusively by the 12th section of the judiciary act (1 Stat. 79). By the provisions of that act, the right of removal was limited to a defendant who was an alien, or a citizen of a state other than that in which the suit was brought, and who asserted his right at the time of entering his appearance in the state court. Here the plaintiff claims the removal, and he does so

after the parties have, as citizens of the state in which the suit was first brought, litigated it to a jury trial, a verdict, and an order of the court setting aside the verdict and granting a new trial. The citizenship on which this right is founded is obtained by his voluntary change of residence after all this is done. This is such a wide departure from the restrictions by which congress had heretofore guarded the right of removal, and the proposition that a party instituting the litigation in the state court, and pressing it to the point here mentioned, can, by his own voluntary change of residence, acquire a right to remove the case from the forum of his own selection, is so startling, that nothing short of the clearest evidence that congress had both the power and the intention to grant such a right, will justify this procedure.

The act of March 2, 1867, which is relied on in support of our jurisdiction, works very important changes in the principles heretofore governing the rights of parties to remove causes from the state courts into the federal courts. For the first time, it allows a plaintiff to remove the suit from the tribunal of his own selection. It also allows this to be done either by plaintiff or defendant, in a certain event, in any stage of the litigation prior to the final hearing or trial. The only conditions necessary to the exercise of the right of removal are: (1) That the controversy shall be between a citizen of the state in which the suit is brought, and a citizen of another state. (2) That the matter in dispute shall exceed the sum of $500, exclusive of costs. (3) That the party, citizen of such other state, shall file an affidavit stating that he believes, and has reason to believe, that, from prejudice or local influence, he will not be able to obtain justice in the state court. (4) That he give the requisite surety for appearing in the federal court at the proper time, with copies of the papers.

The first question is, had congress the competency to enact such a statute? The judicial power of the United States, as defined by the constitution, extends to controversies between citizens of different states, as well as to all cases in law or equity arising under the constitution and laws of the United States; and the former is given by the same section, and in the same sentence with the latter. The jurisdiction of cases arising under the constitution and laws of the United States has, under the 25th section of the judiciary act, been exercised after final judgment in the highest courts of the states, ever since the government was organized. The constitutionality of that act was drawn in question in Martin v. Hunter [1 Wheat. (14 U. S.) 104]. The cause had been brought up to the supreme court under the act, and the judgment of the court of appeals of the state of Virginia reversed. A mandate being sent to the latter court, it refused to carry into execution the judgment of the supreme court, on the ground that its appellate power did not extend to the judgments of the state court; and that, so far as the act attempted to confer the jurisdiction, it was unconstitutional. The question was thus precisely made, and in a most serious exigency. The determination was in favor of the constitutionality of the act, and the jurisdiction of the court. From that time to the present, at every term of the court, cases have been heard and determined under the authority of the 25th section of the judiciary act without question.

If a case of that character can be removed by a party who has submitted, without objection, to the jurisdiction of the state court, and after final judgment against him, I do not see why the jurisdiction of the federal courts dependent on citizenship may not be asserted at any time before final judgment. The power, as conferred by the constitution, is as full in one case as in the other. The case presented by the act is a controversy between a citizen of the state where the suit is brought and a citizen of another state. The jurisdiction conferred by the constitution is even broader than this, for it extends to controversies between citizens of different states, while by the act it is limited to a controversy in which one of the parties is a citizen of the state in which the suit is brought. The act is therefore within the constitutional power of congress.

The next question is, whether the fact that, pending the litigation in the state court, the plaintiff changed his citizenship from Nebraska to Iowa, stands in the way of the removal of the cause?

The act does not in terms prescribe the time at which the citizenship of the moving party must be acquired. Nor is there anything from which to imply that a time was intended to be limited in that regard. Had congress intended to confine the privileges of the act to parties who were citizens of different states at the commencement of the suit, it would have been very easy so to have provided. It did not see fit so to do. On the other hand, in express terms, or at least by the strongest implication, it provided otherwise. The language is, "Where a suit is now pending, or may hereafter be brought, in any such court in which there is a controversy between a citizen," &c., which is as much as to say, whenever a controversy shall arise in a suit pending in a state court, the parties to which shall at any time be citizens of different states, the cause may be removed. No time at which the citizenship shall be acquired is limited. So the inference is that it may be acquired at any time.

Nor is the case changed by the circumstance that the citizenship in Nebraska was abandoned, and that in Iowa acquired voluntarily, or even for the purpose of securing the right of removal. It has been repeatedly held that the fact that a party had removed from one state to another in order to be able to bring his suit in the federal court, did not affect the jurisdiction.

Thus, in Briggs v. French [Case No. 1,871], Mr. Justice Story says: "It is every day's practice for a citizen of one state to remove to another state, to become a citizen of the latter in order to enable him to prosecute suits and assert interests in the courts of the United States. And provided the removal be real, and not merely nominal, and he has truly become a citizen of another state, I have never understood that his motive for the act is inquirable into, or, if his motive is to prosecute a suit in the courts of the United States, that such a motive would defeat his right so to sue. It might be a circumstance to call in question the bona fides and reality of the removal or change of domicile. But if the new citizenship be really and truly acquired, his right to sue is a legitimate, constitutional, and legal consequence, not to be impeached by the motive of his removal."

So here the fact that this plaintiff changed his citizenship voluntarily, and in order to be able to effect a removal of his cause while it was pending in the state court, does not affect his legal right. With all our preconceptions on the subject of the limited circumstances in which the right of removal has been heretofore exercised, we are not at liberty to say that congress has, under the act of 1867, annexed any other conditions to its exercise than those mentioned. If it be said that it is extraordinary to allow the plaintiff to remove the cause in an emergency created by his own voluntary act, it may be replied, that it is only a question of costs, for he can discontinue his case in the state court, and bring a new suit for the same cause of action in this court.

It may be further said, that his right of removal is not wholly dependent on his own volition, for he must make oath to a condition of things which, in his belief, prevents him from having a fair trial in the state court. And in this respect the act gives him, on account of his citizenship, only the same right to remove the trial to the federal courts which plaintiffs have in the state courts to change the venue from one county or district to another.

I am therefore forced to conclude that congress intended, in reference both to plaintiffs and to defendants, to confer the right of removal from the state courts, in all cases where the amount in controversy exceeds $500, at any stage of the proceedings before the final trial is begun, and when the requisite citizenship is found to exist, on the applicants making the proper affidavit as to prejudice and local influence, and giving the required bond. The case before us comes within this rule, and was properly transferred to this court by the order of the state court. The motion is therefore overruled. Motion overruled.

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JOHNSON (NEVINS v.). See Case No. 10,136.

## Case No. 7,400.

### JOHNSON v. NORTH BRITISH, ETC., INS. CO.

[Holmes, 117.] [1]

Circuit Court, D. Massachusetts. March, 1872.

POLICY OF FIRE INSURANCE—RIGHTS OF MORTGAGEE—APPORTIONMENT OF LOSS—OTHER INSURANCE.

The right of a mortgagee, whose interest in the mortgaged property has been insured by a policy, payable to him as mortgagee, containing a provision for apportionment of the loss in case of other insurance on the property, to recover the amount of the policy, is not affected by insurance of the mortgagor's interest in the same property, effected and made payable to the mortgagee without his knowledge or request.

[Cited in Sias v. Roger Williams Ins. Co., 8 Fed. 188.]

[Cited in Moulthrop v. Farmers' Mut. Fire Ins. Co., 52 Vt. 129; Carpenter v. Continental Ins. Co., 61 Mich. 643, 28 N. W. 749; Niagara Fire Ins. Co. v. Scammon, 144 Ill. 494, 28 N. E. 919, and 32 N. E. 914.]

Action at law upon a policy of insurance. The case was submitted to the court upon an agreed statement of facts, the material parts of which were as follows: The policy was issued by the defendants [the North British & Mercantile Insurance Company] to the plaintiff [Sylvander Johnson], as mortgagee of certain specified personal property. It contained the following provision: "Nor shall the assured be entitled to recover of this company any greater proportion of the loss or damage than the amount hereby insured bears to the whole sum insured on said property, whether such other insurance be by specific or by general or floating policies, and without reference to the solvency or the liability of other insurers." On the day of the date of the policy, the mortgagors caused a policy previously taken out by them on their interest in this and other property of theirs to be made payable to the plaintiff, "as his interest appears," and subsequently took out two other policies on their interest in other property of theirs and the mortgaged property. These were also made payable to the plaintiff, "as his interest appears." The plaintiff had previously requested them to secure him for a debt due him from them, other than the mortgage debt, by policies of insurance payable to him on property other than the mortgaged property; but he did not know till after the loss that any of these policies had been taken out, except the one in suit. After the loss, he received in settlement of these three policies some fifty-five hundred dollars, which he applied in part payment of a debt of sixty-two hundred dollars due him from the mortgagors, in addition to the mortgage debt. The defendants contended, that, under the above-quoted provision in the policy, the plaintiff could recover only such amount of the sum insured by the policy as that amount bore to the whole sum insured by all the policies.

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[1] [Reported by Jabez S. Holmes, Esq., and here reprinted by permission.]

Charles Allen, for plaintiff.
N. A. Leonard, for defendants.

SHEPLEY, Circuit Judge. A mortgagee may insure his interest in the property without regard to the mortgagor, and, in case of loss, he may recover the amount without any liability to account to the mortgagor. Different mortgagees of the same property have independent interests, which each may insure for his own benefit, to the full amount.

The policy in this case contains the following provision: "Nor shall the assured be entitled to recover of this company any greater proportion of the loss or damage than the amount hereby insured bears to the whole sum insured on said property, whether such other insurance be by specific or by general or floating policies, and without reference to the solvency or the liability of other insurers." Similar provisions are usually inserted in policies of insurance against fire. The object of such provisions is to guard against a double insurance of the same interest, and to prevent the insured, if he has more than one policy upon the same interest, from recovering upon any one policy more than a proportional part of the loss. This provision refers to other insurance by the same person, or to other insurance of the same interest. It does not apply to the case of separate insurance by mortgagor or mortgagee, or by different mortgagees upon the same property. The phrase "property hereby insured" refers to the interest of the assured. Parties to the contract could not have contemplated or intended a construction by which the contract could have been affected or avoided by the acts of third persons over which they could have no control. Fox v. Phoenix Fire Ins. Co., 52 Me. 333; Tyler v. Aetna Fire Ins. Co., 12 Wend. 507, 16 Wend. 386; Carpenter v. Providence Wash. Ins. Co., 16 Pet. [41 U. S.] 501. The other insurances which were effected by the mortgagors in other companies were not upon the plaintiff's interest as mortgagee. They were upon the mortgagor's interest in other property, and also covered the mortgagor's interest in the property mortgaged and covered by the policy now in suit. These policies were made payable in case of loss to S. Johnson, as his interest may appear. Johnson had requested the mortgagors to have some insurance policies upon other property made payable to him, to secure him for an additional sum other than the mortgage debt, and for which he held no security. Johnson did not know until after the fire that Whitaker & Co. had taken out the other policies, or that they had been made payable to him in case of loss, or that they covered the mortgagors' interest in the mortgaged property. After the fire, the plaintiff received in settlement of the amounts due on the policies from three other companies the sum of $5,567.31, which he applied in part payment of the amount of $6,200 due him from Whitaker & Co., other than the mortgage debt. As these policies were not upon his interest as mortgagee; as they were not taken upon the mortgaged property with his knowledge or by his request; as, in fact, if the subsequent policies were not invalid, they applied only to the separate interest of the mortgagor,—they do not furnish any defence to the suit upon this policy. If a mortgagor procures a policy on the mortgaged property against fire, and afterwards assigns the policy to the mortgagee as collateral security, that assignment operates solely as an equitable transfer of the policy so as to enable the mortgagee to recover the amount due in case of loss; but it does not displace the interest of the mortgagor in the premises insured. On the contrary, the insurance is still his insurance, and on his property, and for his account. Carpenter v. Providence Wash. Ins. Co., 16 Pet. [41 U. S.] 501. Judgment for plaintiff for the amount due upon the policy; amount to be assessed.

## Case No. 7,401.

JOHNSON v. ONION et al.

[3 Hughes, 290; [1] 4 Fish. Pat. Cas. 170; 3 Am. Law T. 285.]

Circuit Court, D. Maryland. April, 1870.

PATENTS—EXPIRATION—APPLICATION FOR EXTENSION—WHEN FILED IN TIME.

1. When a patent would expire on the 15th May, and the application for an extension of it was filed on the 15th February preceding, held that the application was within ninety days, as required by law, and valid, the day of the filing being included.

2. The validity of Conover's patent for a movable bed or carriage for carrying, advancing, and splitting blocks of wood, affirmed.

[This was a bill in equity, filed [by James H. Johnson], to restrain the infringement of letters patent for an "improved machine for splitting wood," granted to Jacob A. Conover, May 15, 1855 [No. 12,857], extended for seven years from May 15, 1869, and assigned, for the state of Maryland, to complainant. The nature of the invention and the claims are fully set forth in the report of the case of Conover v. Roach [Case No. 3,125]. [2]

R. Mason, Wm. Pinkney Whyte, and Chas. M. Keller, for complainant.

F. Nevitt Steele and F. H. B. Latrobe, for defendants.

GILES, District Judge. The bill is filed in this cause for an injunction and an account, etc. It sets forth that on the 15th May, 1855, Jacob A. Conover, a citizen of the United States, obtained letters patent of the United States, granting to him for the term of four-

[1] [Reported by Hon. Robert W. Hughes, District Judge, and by Samuel S. Fisher, Esq., and here compiled and reprinted by permission. The syllabus and opinion are from 3 Hughes, 290, and the statement is from 4 Fish. Pat. Cas. 170.]

[2] [From 4 Fish. Pat. Cas. 170.]

teen years the full and exclusive right of making, etc., the invention and improvement set forth and described in the specifications annexed to said patent, and that by assignments duly executed and recorded, all the rights under said patent in and for the state of Maryland have become vested in the complainant, and that he has full authority to sue for and recover for all infringements thereof in the state. That the said patent has been sustained as a valid patent in several suits in New York; one, a suit at law for damages brought by the patentee against one John H. Rapp, in which Conover recovered a verdict, and in which suit it was determined that Conover was the first and original inventor of the improved wood-splitting machine described in said patent. That said patentee subsequently obtained an injunction against John R. Dohrman and John H. Peipho, to restrain them from infringing said patent. And by the supplemental bill, it appears that since the filing of the original bill in this cause the term of fourteen years for which the said patent was granted has expired; and that the commissioner of patents, upon due application made, and a hearing before him, granted an extension of said patent for seven years; and that since the said extension the said patentee has duly assigned to complainant the same rights which he, complainant, held under the original patent in and for this state.

The answer sets up several defences: 1st. They deny that Conover was the first and original inventor of the machine described in his patent. 2d. That the verdict of Conover v. Rapp [Case No. 3,124] was a collusive one; that the principal question discussed by Judge Shipman, in the case against Dohrman & Peipho was the question of infringement; and they also, to show that Conover was not the first and original inventor of the machine described in his patent, gave notice of several patents previously granted, which they will rely on in the trial of this case. During this litigation, as I have before stated, the patent expired and the extension was granted; and in the answer of the defendants to the amended and supplemental bill, the defence set up is that the extension of the said patent is void, as the application for the same was not filed ninety days before the expiration of the said patent.

Now, the first question that presents itself in the consideration of this cause is, was the extension of the patent by the commissioner legally granted? or, in other words, was the application for the extension filed "at least ninety days before the expiration of the patent?" Upon this question I have had no difficulty. The patent expired on the last hour of the 15th May, 1869, and the application for the extension was filed on the 15th February, 1869. The day on which the application is filed is included, and you have therefore ninety days before the expiration of the patent. In support of the propriety of counting the day upon which the application is filed in the calculation of the ninety days, I refer to the cases of Griffith v. Bogerts, 18 How. [59 U. S.] 163; Sheets v. Selden's Lessee, 2 Wall. [69 U. S.] 190; State v. Schnierle, 5 Rich. Law, 299; Thomas v. Affick, 16 Pa. St. 14; Chiles v. Smith, 13 B. Mon. 461. In [Griffith v. Bogerts] 18 How. [59 U. S.] 165, the supreme court say: "Where the construction of the language is doubtful, courts will always prefer that which will confirm rather than destroy any bona fide transaction or title." It is clear to me, therefore, that this application for extension of the letters was in time, under the act of 1861, § 12 [12 Stat. 248].

The next question is, what is the true construction of Conover's patent? He makes three claims; they are all for combinations. He does not claim, as new, any of the constituent elements of his combinations. His first claim is in these words: "What I claim as my invention, and desire to secure by letters patent, is the movable bed or carriage for carrying and advancing the blocks of wood in combination with the reciprocating cutters operating at right angles with the surface of the bed or carriage, substantially as and for the purpose specified."

Now the counsel for the defendants contend that the movable bed or carriage, named in said claim, can only mean a movable bed with flanges on the side, as described in said patent. It is true that Judge Hall, in his able charge to the jury in the case of Conover v. Roach [Case No. 3,125], held that it meant a movable bed or carriage as described in patentee's specifications—that is, having flanges on its side to keep the wood firm and in place. Judge Ingersoll does not touch this question in his decision in the case of Conover v. Rapp [supra], and in that case there does not appear to have been any argument made upon the flanges at all. Judge Shipman is very clear in his construction of the patent in the case against Dohrman & Peipho. He says: "The construction and operation of the machine described in the patent are substantially as follows: a bed or carriage composed of sections, linked together in the form of an endless chain, which is made to travel over a table and around drivers or wheels placed at each end. Blocks of wood of required length of material for fuel are placed upright on this bed. Over the bed, at the point where the block is to receive the blow which splits it, is a cutter, made in the form of a cross, so that the block may be split into small sticks instead of slabs or boards, as would be the case if the cutter was composed of only one straight blade. The bed, with the block thereon, is put in motion by an intermittent feed, and the block advanced under the cutter at every throw of the feed mechanism, measured by the range at which the feed mechanism is set. The cutter firmly fastened above to a stock, as the block passes

under it, works up and down with a reciprocating motion, splitting the block as it descends, and then raising from it so that it may be carried by the bed a step forward, when it descends and splits again. As the blades of the cutter rise they are cleared of any pieces of wood that may be clinging to them, by a clearing plate fixed above, and into which the cutter plays freely as it rises or falls through apertures or mortices in the plate. When the machine is in motion the bed not only carries the blocks to the point where they are split by the cutters, but it also carries off the wood after it is split." It must be seen that he says nothing about flanges. I incline to the construction which claims a movable bed, with or without flanges. While in his specifications the patentee describes his movable bed with flanges, yet he assigns to them no specific function. Other parts have their functions assigned, but these flanges have not. No doubt the bed is better with the flanges, and that may be his preferred mode of making it, but it is no part of his patent. Had it been intended by him to make the flanges a part of his patent he would have referred to them and made them a part of his claims. But he makes no mention of the flanges in his several claims at the close of his specifications, his claim being only "for the movable bed or carriage for carrying and advancing the block of wood in combination," etc. But the wood is held under the knives by the clearing plate as described in the patent. I should therefore think that if the wood could be split without the flanges, and I see no reason why it could not, the flanges were not essential parts of the Conover patent, although they would no doubt be an improvement on it. I admit this is a doubtful point, but it makes no difficulty in this case, because I hold that the machine used by the defendants is an infringement of the plaintiff's patent even in this particular. In this case the machine used by the defendants, represented in the model J. H. J., No. 6, clearly infringes the Conover patent. Never was there a clearer case of infringement. Here is the movable bed or carriage, substantially the same as that described in the patent, the reciprocating cutters operating at right angles with the surface of the bed or carriage substantially as described in the patent, and these devices operate substantially in the same way as described in the patent. In the machines of the defendants, as it is alleged they are now used, the outside slab or bar of wood has been removed, and a V knife is used instead of a knife cruciform in shape, but in my opinion the machine so modified would have in substance the same means of supporting the blocks laterally, as the machine described in the patent, for the slab or inner bar of wood, next to the frame, affords the effective lateral support to the block of wood at the moment when such support is most needed. The proof, however, shows that the outer side or slab of wood was upon the machines when this bill was filed, but I hold that, with or without the sides, it is a clear infringement to use such a machine. Nor is it necessary to resort to the doctrine of equivalents in this case, for the matter is too clear for dispute. See Winans v. Denmead, 15 How. [56 U. S.] 342.

It is maintained also by the counsel for the defendants that George Page invented and made a machine which antedates the Conover patent.

[The judge here reviewed all the testimony of Page, Sturtevant, and others, and concluded that there was no such machine constructed by Page prior to date of Conover's patent.][3] He also examined all the testimony relating to the Shaw model, and said that all of it merely showed the making of a model, and not of any practical working machine, which was necessary to overthrow a patent. He therefore held that the complainant was entitled to a perpetual injunction, notwithstanding the suggestion of the counsel for defendants, that his right to an injunction had been lost by the laches of the complainant. The court held that there was no such laches or abandonment as would justify a court of equity in withholding an injunction, and referred for authority to Wyeth v. Stone [Case No. 18,107]. The court then passed a decree directing a perpetual injunction to issue against the defendants, and referring the case to the master in chancery to state accounts, reserving his decision as to the precise mode of adjusting them for a future order of the court, and decreed the costs to be paid by the defendants.

[For other cases involving this patent, see note to Conover v. Roach, Case No. 3,125.]

## Case No. 7,402.

JOHNSON v. OWENS.

[2 Cranch, C. C. 160.][1]

Circuit Court, District of Columbia. Dec. Term, 1818.

DISTRESS—RENT.

A distress for rent, laid on the last day of the term, at noon, is too soon.

[This was an action of replevin by George Johnson against Isaac Owens.] Distress for rent, laid on the last day of the term, at noon.

Mr. Key, for defendant, contended, that although the original taking might be unlawful, yet that the distress must be considered as made on the next day, when the goods were appraised.

THE COURT (nem. con.) said it was to be considered as one act; the distress was in fact made on the 19th, the last day of the term, which was too soon.

[3] [From 3 Am. Law T. 285.]

[1] [Reported by Hon. William Cranch, Chief Judge.]

## Case No. 7,403.

JOHNSON v. PATTERSON.

[2 Woods, 443.] [1]

Circuit Court, N. D. Georgia. Sept. Term, 1875.

CHATTEL MORTGAGE—POSSESSION OF PROPERTY BY MORTGAGOR—VALIDITY—RECORDING.

1. A mortgage of chattels with possession and power of sale in the mortgagor is absolutely void.

2. This rule has been changed in Georgia by a statute which provides that a mortgage "may cover a stock of goods or other things in bulk, but changing in specifics; in which case the lien is lost on all articles disposed of by the mortgagor up to the time of foreclosure, and attaches upon the purchases made to supply their place." The same statute declares that mortgages "must be recorded within three months from their date," but "mortgages not recorded within the time required remain valid as to the mortgagor, and are only postponed to all other liens created or obtained or purchases made prior to the actual record of the mortgage." Under these enactments, it was *held*, that when a mortgage was given on a stock of goods, and was not recorded for more than seven months, and the mortgagor remained in possession, and continued to sell off the stock and replenish it with new purchases, the mortgage was good as against general creditors of the mortgagor who had no notice of the mortgage, even though their claims were for goods sold to the mortgagor since the date of the mortgage, and before its registration, and the goods so sold formed a part of the mortgagor's stock.

[Cited in Brown v. Brabb, 67 Mich. 22, 34 N. W. 403.]

This was a petition, filed under the second section of the bankrupt act [of 1867 (14 Stat. 518)] to review and reverse an order of the district court sitting in bankruptcy.

Benj. F. Abbott and E. W. Beck, for petitioner.

C. Peeples and E. P. Howell, for defendant.

WOODS, Circuit Judge. The facts are as follows: On February 13, 1873, Patterson made and delivered to Johnson his two promissory notes of that date for $3,000 each, due respectively on the first days of October and November next following, and at the same time placed in the hands of Johnson planters' bonds to an amount exceeding $6,000, with the promise that afterwards the bonds were to be returned, and a mortgage of his stock of goods was to be made by Patterson to Johnson, to secure the notes. This agreement was carried out by the execution and delivery by Patterson to Johnson, on March 27, 1873, of a chattel mortgage of that date, upon all the goods, wares, merchandise, accounts, notes and other effects belonging to the store of Patterson, conditioned for the payment of said two notes for $3,000 each. Patterson retained possession of the stock of goods and the notes and accounts, and continued to sell the goods and collect the notes and accounts just as if no mortgage had been made. As he made sales of goods, he replenished his stock with other goods. In short, he continued his business precisely as he had done before the mortgage was executed. No record was made of the mortgage until November 12, 1873. On December 4, 1873, Patterson was adjudged a bankrupt. After the execution of the mortgage, and before its record, Patterson contracted debts to the amount of $11,171. These debts were for goods to replenish his stock. After all this, Johnson, the payee of the notes made by Patterson, also went into bankruptcy. The assignee of Patterson sold the goods and other property covered by the mortgage, and the money is now in the registry of the court. The contest in this case is between the assignee of Johnson, who claims that this fund should be first applied to the payment of the notes for $3,000 each held by him; and the assignee of Patterson who claims that the mortgage was ineffectual and that the proceeds of the mortgaged property should be distributed among all the creditors of Patterson pro rata.

To one unacquainted with the statute law of this state, this case would present no difficulty whatever. The general rule is, that a chattel mortgage, with possession left in the mortgagor, and power of sale, is fraudulent and void. In re Kahley [Case No. 7,593]; Harvey v. Crane [Id. 6,178]; Hawkins v. First Nat. Bank of Hastings [Id. 6,244]; In re Manly [Id. 9,031]. The Code of Georgia, however, has this provision: "Sec. 1954. A mortgage in this state * * * may embrace all property in possession, or to which the mortgagor has the right of possession at the time, or may cover a stock of goods or other things in bulk, but changing in specifics, in which case, the lien is lost on all articles disposed of by the mortgagor up to the time of foreclosure, and attaches upon the purchases made to supply their place." In the case of Goodrich v. Williams, 50 Ga. 425, the supreme court of this state construed this statute, and declared that "a mortgage upon a stock of goods then on hand, and upon the additional purchases as they should be made, is a good lien under our laws to the amount of the goods on hand at the time, and is good upon future purchases to that extent, even if those purchases be unpaid for, except as against any legal liens or title that may be against the goods in the hands of a third person." Therefore, if the mortgage had been recorded according to law, we should, under this provision, be constrained to hold it good, notwithstanding the mortgagor was allowed the power of sale. But the mortgage was not recorded according to law. Section 1955 of the Code of Georgia declares that a mortgage must be "recorded within three months from its date." This mortgage was not recorded till seven months and a half after its date, and in the meantime, Patterson contracted the debts which are now represented by his assignee, who claims that, as to these debts, the mortgage is void. But the assignee of Johnson claims that under section 1953 of the

[1] [Reported by Hon. William B. Woods, Circuit Judge, and here reprinted by permission.]

Code of Georgia, "mortgages not recorded within the time required remain valid as to the mortgagor," and are only "postponed to all other liens created or obtained, or purchases made prior to the actual record of the mortgage;" and as the general creditors of Patterson have no lien and are not purchasers, the mortgage is good as against them. Such seems to be the law of this state. It is so positively enacted, and has been so construed by the supreme court of the state as to give it this effect.

In Hardaway v. Semmes, 24 Ga. 305, it was held that "if a mortgagee does not record his mortgage in three months, he risks having it postponed to after made mortgages, and to judgments obtained before he foreclosed it, but that is all he risks." The same doctrine, substantially, has been held elsewhere. In Cragin v. Carmichael [Case No. 3,319], it was held that under the laws of Iowa, the assignee in bankruptcy, in assailing a mortgage which was recorded at the time of the commencement of proceedings in bankruptcy, must show something more than that debts were created without notice of it before it was recorded.

It seems to me that there can be no doubt that under the law of this state, this mortgage, although unrecorded, was valid as against all persons except those who had obtained liens upon or become purchasers of the mortgaged property prior to the actual record of the mortgage. There are no such persons. All the creditors represented by Johnson's assignee are general creditors, without lien. If the mortgage is valid under the state law, it is valid to the same extent under the bankrupt act. Ex parte Dalby [Case No. 3,540]; Potter v. Coggeshall [Id. 11,322]; Coggeshall v. Potter [Id. 2,955]; In re Wynne [Id. 18,117].

Section 14 of the bankrupt act (Rev. St. § 5052) declares that "no mortgage of any vessel or of any other goods or chattels, made as a security for any debt in good faith, and for a present consideration, and otherwise valid, and duly recorded pursuant to any statute of the United States or of any state, shall be invalidated or affected by any assignment in bankruptcy." This section has uniformly been construed not to affect any mortgage good under the laws of the state where executed. "This provision cannot enlarge the rights or title of the assignee, or make a mortgage invalid against him which but for the provision would have been valid. It appears to have been inserted out of greater caution, lest it should be supposed that valid chattel mortgages would be affected by the assignment, and not with any view of construing the laws regarding record; and so if the mortgage be one that requires no record, or if it be executed in a state having no record, or if record is not required between the parties, the provision will not defeat it." In re Dalby, supra.

In my judgment, therefore, as the mortgage in question in this case is good by the law of Georgia as against the mortgagor and against all others who had not acquired liens or become purchasers before the actual record, in spite of the fact that the mortgage was not recorded and that the mortgagor remained in possession with power of sale, I must hold it to be good as against the assignee of the mortgagor and the general creditors whom he represents. Decree of district court reversed.

## Case No. 7,404.

JOHNSON v. PECK.

[1 Woodb. & M. 334.] [1]

Circuit Court, D. Rhode Island. June Term, 1846.

SALE OF GOODS — MISREPRESENTATIONS BY PURCHASER—RIGHTS OF VENDOR—THIRD PARTY.

1. If a purchaser of goods make at the time material statements as to his debts and means, which are relied on and turn out to have been false, the sale is voidable.

[Cited in Work v. Jacobs, 35 Neb. 772, 53 N. W. 995.]

2. In such case, the articles may be recovered back by the vendor, though mortgaged to a third person to secure an existing debt, if the mortgage has not been foreclosed, or the third person has advanced no new consideration, and will not be placed in a worse position than he occupied before the mortgage, by his security, anticipated from it, failing. But if the title has absolutely passed to a third person without notice, and for a new consideration, the goods cannot be recovered back by the original vendor.

[Cited in People's Sav. Bank v. Bates, 7 Sup. Ct. 683, 120 U. S. 567; The Alfred J. Murray, 11 C. C. A. 177, 63 Fed. 272.]

[Cited in Oswego Starch Factory v. Lendrum, 57 Iowa, 573, 10 N. W. 903; Wallace v. Cohen, 111 N. C. 103, 15 S. E. 892.]

This was an action of trover for a certain quantity of merchandise, mostly English goods, valued at $722, and alleged to have been converted March 28th, 1846. The defendant pleaded not guilty. It appeared in evidence, that the plaintiffs were merchants in Boston, (Mass.) and early in March last, were applied to by one Wheelock, of Bristol, Rhode Island, to purchase of them a quantity of goods. Wheelock alleged that he was then worth $1,200 surplus after paying all debts, and owed nobody except one Briggs, for some goods he had lately purchased of him. The plaintiffs caused Wheelock to sign a written statement containing the above representations, and, relying on their truth, made sale to him of about $750 worth of merchandise, which Wheelock took and carried to Rhode Island. In a few days after, viz., April 17th, 1846, he gave a mortgage of them and his other goods to Briggs, to secure him for the purchase money of his stock, that had been sold to Wheelock in the January previous, and a mortgage of them then taken by Briggs from Wheelock, dated January 28th, 1846. On the 20th of

[1] [Reported by Charles L. Woodbury, Esq., and George Minot, Esq.]

April, 1846, Wheelock executed another mortgage of them to Hutchins & Anthony, to secure a debt to them; and 22d April, 1846, assigned the whole to the defendant Peck, in trust, to be sold, and first pay Briggs, then Hutchins & Co., then other creditors, and the surplus to Wheelock. It further appeared in evidence, that $300 of the purchase money had been paid to Briggs in January, and some $200 or $300 since, by sales of the goods; and that in the assignment were contained sundry book accounts, to the amount of $700, a part of which had been collected by the defendant. It was now contended by the defendant, that all the property assigned would not more than pay the two original mortgages; and it was not shown that Wheelock in fact had any other estate, though his wife was reported to be worth some money. It was further shown, that when Wheelock bought of the plaintiffs, he owed other persons than Briggs, as follows, viz., Hutchins & Anthony, about $459; John A. Corey, $396; and Whitcomb, $185.

Waters & Carpenter, for plaintiff.
Mr. Bullock, for defendant.

WOODBURY, Circuit Justice, instructed the jury, that if the representations made by Wheelock to the plaintiffs, at the time of the purchase, were false and fraudulent, and were relied on by the plaintiffs, and were so material, that the sale would not probably have been made without them, the sale was voidable as between the parties to it. One party had obtained credit by means not justifiable, and the other had parted with his property under false pretences and averments, which were material and untrue. It was right, then, in law as well as equity, that such a purchaser should not profit by his own wrong, and that the seller and purchaser should in such case stand as if nothing had occurred between them. But when rights of third persons intervene in this class of cases, they are to be upheld, if those persons purchased the property absolutely, and parted with a new and valuable consideration for it, without notice of any fraud. Because, unlike the case of theft, the vendor here voluntarily parts with the possession of his property, and thus enables the purchaser to gain a credit, or to appear to be the owner, and thus be bought of honestly. And though in the case of theft, it is otherwise, and the owner may recover the property of third persons, yet he cannot in cases of fraudulent sales, else the community would be deceived and defrauded as much as the vendor. Parker v. Patrick, 5 Durn. & E. [5 Term R.] 175; Somes v. Brewer, 2 Pick. 184; Rowley v. Bigelow, 12 Pick. 307; Story, Bailm. §§ 124, 125; 8 Cow. 238; Lloyd v. Brewster, 4 Paige, 537.

The true tests, then, as to third persons, are these. If they buy absolutely, and for a new and full consideration, and without notice of the fraud in procuring the goods, they are to be protected in holding them. But if they have notice of the fraud, or give no new valuable consideration, or are mere mortgagees, pawnees, or assignees in trust for the debtor, or for him and others, such third persons are to be regarded as holding the goods open to the same equities and exceptions as to title, as they were open to in the hands of the mortgager, pawner, or assigner. The latter is still interested in them; has a residuary title; has taken no new consideration for them; and his assignee or mortgagee has parted with nothing new for the goods; has not bought them; and, if he loses them, is in no worse condition than he stood before they were purchased and assigned or mortgaged him. If the defendant then stood in this attitude, or the mortgagees for whom he acted, the plaintiffs should recover against him. He would lose nothing by such a recovery, as he held other goods sufficient to defray his expenses, and had no debt against Wheelock to be secured or paid. Nor would the mortgagees lose any thing, looking to this transaction as a whole. They stood better than before it took place, as they had been partly paid by sales of some of these goods before a demand on the defendant, and these last sales are not to be computed in the damages recovered against him. They could stand no worse, as neither of them had given any new credit, or parted with any new consideration, on account of the mortgages or assignment of this property.

The court then called the attention of the jury to the evidence which bore upon the facts, that the representations made were not true, and were at the same time material in the trade.

The jury returned a verdict for the plaintiffs.

## Case No. 7,405.

JOHNSON v. PHOENIX INS. CO.

[1 Wash. C. C. 378.] [1]

Circuit Court, D. Pennsylvania. April Term, 1806.

MARINE INSURANCE — CONCEALMENT OF MATERIAL FACT.

It may be a material concealment from the underwriters, if a letter communicating the period when the voyage insured commenced, was not exhibited at the time the contract of assurance was entered into. This would certainly be so, if the vessel was out of time when the insurance was ordered.

Action on a policy on the Polly & Sally, at and from Richmond, in Virginia, to Philadelphia. The vessel sailed on the 1st of November, 1804; and was lost on the passage, about

[1] [Originally published from the MSS. of Hon. Bushrod Washington, Associate Justice of the Supreme Court of the United States, under the supervision of Richard Peters, Jr., Esq.]

the 16th. The captain and crew were picked up, and brought to New York; where they arrived on the 18th. It appeared, that a letter from plaintiff to his agent in Philadelphia, ordering insurance, and stating that the vessel was loaded on the 1st of November, was dated the 19th of November. The order of insurance, containing this information, was dated on the 24th of November, on which day the policy was effected. The captain states in his deposition, that on the 6th of November, he wrote to the plaintiff, from Hampton Roads. The defence was: 1st. That the plaintiff did not inform the defendants, that the vessel was to sail from Richmond on the 1st of November, and that he had received a letter from the captain, dated in Hampton Roads; all of which were material to the risk. 1 Marsh. 349; 1 Durn. & E. [Term R.] 12; Park., Ins. 20, 9, 11. 2d. That plaintiff knew of the loss, before he ordered the insurance. Upon this point, the evidence was as follows: That the plaintiff seemed very apprehensive as to the fate of the vessel. A messenger was sent off, in great haste, near night, with a letter for Philadelphia. The messenger arrived; called on the person to whom the letter was addressed, who desired the messenger to call in the afternoon, which he did, and received an answer, which he carried back to the plaintiff. The precise time, when all this happened, was not fixed. Also one witness swore, that before the return of the messenger, the plaintiff stated that he had received information of the loss from the captain; that he had sent a messenger to Philadelphia, to get the vessel insured; and that he should fail, if the news of the loss should arrive before the policy was effected. Another witness proved, that the plaintiff informed him of the loss, and stated that he had received information of it from the captain, before he sent off the messenger. Against this, was opposed the evidence of the captain; who swears he never wrote to the plaintiff, or to his wife, the sister of the plaintiff, informing them of the loss. To support the witnesses who proved that the plaintiff acknowledged he had received notice of the loss from the captain, evidence was given, that a letter put into the post office at New York, on the 19th, would arrive at Philadelphia on the 20th, in time to go off in the mail, at three in the afternoon of the same day, to the plaintiff's residence. That the plaintiff was the postmaster at that place. That on the 20th, a letter arrived at the Philadelphia post office, and was sent free to the post office kept by the plaintiff; but the witness did not recollect, to whom it was directed, or from whence it came; but it was proved, that the plaintiff, being a postmaster, was the only person in that part of the country, entitled to have his letters free. That the mail left the post office of the plaintiff for Philadelphia, on the 21st of November. That the distance is sixty-five miles; and that a messenger might ride it in fourteen hours. Testimony, as to the character of the plaintiff, was given by his counsel, with the assent of defendant's counsel; and as to that of the two witnesses, who swore positively to the fact of the plaintiff's knowledge of the loss.

Mr. Tod, for plaintiff.
Smith & Hallowell, for defendants.

WASHINGTON, Circuit Justice, charged the jury; and after stating the importance and necessity of good faith in contracts of this kind, he observed, that if the plaintiff had concealed material facts within his knowledge, or knew, or had heard of the loss, before he ordered the insurance, either would avoid the policy. That if the jury should be of opinion, that the captain, in his letter to the plaintiff of the 1st of November, informed him of his intention to sail that day, it might be very material to the risk, that he should have disclosed this information to the defendants; and if so, the defendants would be exonerated. The time of a vessel's sailing is always important; particularly, if, at the time the insurance is effected, the vessel is out of time. The average voyage from Richmond to Philadelphia, is ten or twelve days. This vessel was insured, twenty-four days after she had sailed, and of course it was important for the underwriters to know, that she had been twenty-four days out. But it does not appear, that the captain informed his owner when he should sail. The order of insurance mentions, that, on the 1st of November, she was loaded; and we must presume, that this was the information communicated to the owner by the captain, as the contrary does not appear. It would seem, as if the underwriters understood, from the expressions used, that she had sailed on that day; as no reason for detention, beyond it, appeared, by their demanding ten per cent. premium, whereas the common premium, on such a risk, is provided to be from two to four per cent. As to the letter from Hampton Roads, it does not appear that it ever came to hand.

The next point is the most serious; because, if the jury believe the defendants' witnesses, they fix upon the plaintiff a knowledge of the loss, before he ordered insurance. Against these witnesses, is opposed the testimony of the captain. The evidence cannot be reconciled: one, or other, has sworn to an untruth; and therefore, as is common in such cases, circumstances to prop the positive evidence have been resorted to, and the characters of the witnesses have been attacked on the one side, and supported on the other. The circumstances are the following: The captain arrived at New York, on the 18th; might have written on the 19th; his letter would have got to Philadelphia on the 20th, and would have reached the plaintiff on the 22d. The messenger, we find, was sent off to Philadelphia in great haste, which might be

the night of the 22d; would reach Philadelphia in the evening of the 23d, so as to cause the insurance to be effected the day it was. A free letter did go on the 20th, to the office kept by the plaintiff; and he was the only person there, or in the neighborhood, entitled to this privilege. The hurry of the plaintiff, just about the time, when the mail, in the regular course, would arrive, in sending off a messenger, and the time necessary for the journey, which would bring him here, on the day, or preceding evening, when the insurance was effected. But if the letter, ordering the insurance, was truly dated, when it was written, and was immediately sent off; then it is almost impossible that the plaintiff could have heard from the captain after his arrival at New York. In answer to this, it is contended, by the defendants, that the letter must have been antedated, because, if written on that day, it might have been sent off by mail on the 21st, so as to have got here before the 24th, and therefore there could have been no reason for sending a special messenger. If the letter was antedated, then this itself is strong evidence of fraud, and gives to the whole transaction the appearance of unfairness. But if not antedated, still, if the plaintiff knew of the loss, before it was sent away, the consequence is the same, and he cannot recover. You are the proper judges, of the credit, and of the weight of evidence; and you must decide, upon an impartial consideration of all the circumstances and facts, whether the fraud, imputed to the plaintiff, is proved, or not.

The plaintiff suffered a nonsuit, after the jury had returned, and were ready to give in their verdict.

JOHNSON (PONSFORD v.). See Case No. 11,266.

JOHNSON v. PONSONBY. See Case No. 12,772.

## Case No. 7,406.

JOHNSON v. POTOMAC BLDG. ASS'N.

[14 Leg. Int. 393; 2 Quart. Law J. 347.]

Circuit Court, District of Columbia. 1857.

BUILDING FUND ASSOCIATION—USURY.

[1. Loans made to their members by building loan associations, conducted in accordance with the ordinary and well-known methods adopted by such societies, are not usurious.]

[2. Building loan associations are partnerships, and loans made by them to their members are dealings with partnership funds, in which the borrower has the same interest before and after the loan as the other members of the partnership.]

[3. The contracts made by building loan associations with such of their members as become borrowers, made upon the well-known and usual terms of such contracts, are not such as equity will relieve from on account of their being unconscionable and oppressive.]

This was a bill for an injunction [by John Johnson against the trustees of the Potomac Building Association] to restrain a sale of property, on the ground of usury in the contract of parties.

Before DUNLOP, Chief Judge, and MERRICK and MORSELL, Circuit Judges.

MERRICK, Circuit Judge. The complainant is a member of one of those voluntary associations, with the principles and modes of operation of which the public has long been familiar, under the denomination of "building associations," and brings his bill into this court against the trustees of the association to restrain the enforcement of the stipulations he has entered into with them in the usual conduct of the business of the association, and in furtherance of the objects for which he and all its members enter into the co-partnership, upon the ground that those stipulations are usurious, unconscionable, and oppressive. This case is understood to raise the question, presented by several of like character on the docket, of the lawfulness of the operations of this class of associations, and of a large number of kindred societies which are known as "benefit societies," and have as their ostensible object the accumulation of a fund for each of their members by the periodical contribution of small savings, which are made productive by being advanced in certain amounts to individual members in the form of composition sales of their interests. All these societies combine two leading features, viz. hoarding savings and making profits by compounding interest on savings, on substantially the same principles as savings banks and mutual insurance companies, by the following simple process: A number of persons enter into mutual agreement to subscribe and pay into a common fund by regular installments, say of one dollar per month for each share the member may take, until the fund shall have accumulated so as to divide two hundred dollars or any other given amount to each share, at which period the partnership is to cease, and the share of each member thus accumulated will be a fund for him to purchase a small freehold tenement, or to be applied to any other prudential use he may determine; and to secure punctuality, each member neglecting his monthly payments is subjected to a fine, say of ten cents upon every dollar he fails to pay at the regular monthly meetings. The period of distribution is hastened, and the common fund made productive by authorizing any member to make a composition sale of his interest in the ultimate distribution to the other members of the association. Thus, whenever there are funds enough in the treasury for the purchase of one or more shares at any regular meeting of the association, the member who bids the highest premium, or, in other words, agrees to take the lowest price, is paid the price so bid by him for his ultimate share. He remains, however, a member of the society until the close, paying thenceforth a double monthly instal-

ment on his shares, two dollars per month on each, instead of one dollar, and subject to all the regulations of the society, liable to attend its meetings, and to do any duties which might be devolved upon any other member, and liable to the regulated fines, in default of punctual payment of monthly contributions, or any other default under the rules. Whenever a sale of this kind is effected, it is manifest that, unless some arrangement is made, the society has no security that the member who has been advanced by this sale his ultimate share of profits, will continue to bear his proportion of the burden of mutual contribution; therefore a bond in the penalty of the ultimate value of the shares sold, and a deed of trust upon real estate is executed to the society, conditioned for his faithful payment of the monthly dues thereafter to accrue, and all fines and forfeitures which may, under the rules, be imposed on him for any defaults. There is in the bond and deed no stipulation for the return of the principal sum advanced to the member, nor is it at all in the power of the society to compel its return if he fulfil the conditions of the bond and deed of trust. Should the member fail to comply, the bond and deed of trust become forfeit, and the society may direct a sale of the property conveyed by the deed, to raise the amount of damages which are ascertained and liquidated by the deed of trust, and which are usually the return to the society of the advance paid upon the bid of the member, with interest thereon, all the monthly dues and fines which may be in arrear; and the member is then and thereby reinstated in the condition of a member who has had no advance, and has paid all his dues and fines, &c.

The facts in the present case conform to the general scheme I have mentioned. John Johnson is a member of the Potomac Building Association, consisting of one hundred and seventy-six members. On the 5th of May, 1851, he received from the society $260, bid on two shares, of the ultimate value of $400. In other words, he sold to the other members at 35 per cent. discount, and gave bond and deed of trust for the payment of double monthly dues thenceforth, or $4 per month, and for such fines and forfeitures as he might incur; and, falling in arrear for dues and fines in December, 1856, the trustees under the deed of trust advertised the property for sale, and he has filed his bill, charging that the stipulations he entered into were only a device to cover an usurious loan, and praying to be discharged from his contract on payment of the principal sum of $260, with interest from May 5, 1851, and to be released from the fines incurred by him as a member of the society, and to enjoin a sale of the property by the trustees. The answer denies that there was any corrupt intent or secret agreement to effect an usurious loan under the forms of stipulations entered into by parties, and sets out the bond, deed of trust, articles of association, &c., and avers that the contract was bona fide entered into and made and intended to be what it appears on the face of the papers, and none other. In the present stage of the cause, the answer must be taken as true, that the contract between the parties was whatever it appears to be, and that there was no other and different agreement behind the ostensible arrangement. Were there other secret agreement to make an usurious loan, to which the stipulations here shown were but an outward covering, and it were so charged in the bill by proper averments, it would become necessary, before a final hearing, to send down a case to a jury to ascertain whether there be in fact a secret corrupt usurious agreement for a loan; for whatever form parties adopt to hide usury, if they have secretly made a corrupt loan, the law will drag away the veil and penetrate the motive. But I do not understand the bill to charge any different agreement from that disclosed by the answer, and the question before us is therefore not one of intention, but one of construction upon the face of the articles of association, bond, and deed of trust exhibited with the answer. As a question of construction, it seems to me, both upon principle and authority, that stipulations like those we are considering are not usurious. To constitute usury, there must be a loan of money, in which the principal sum is not hazarded, and is to be repaid at all events, with more than legal interest. There was a time in the history of the law when the taking of any interest for the use of money was an heinous offence; but "usury has long since lost that deep moral stain which was formerly attached to it, and is now generally considered only as an illegal or immoral act, because it is prohibited by law." Supreme court, in Lloyd v. Scott, 4 Pet. [29 U. S.] 224. With this high warrant for a lenient construction of a penal law, no court should pronounce a contract usurious in which any of the elements of the definition are wanting, or which is within the exemption of adjudicated cases, but, on the contrary, should seek to enforce the principle that every man has a right to make what contracts he pleases, if not restrained by some law, and that justice and equity require that such contracts should be executed if fairly made. The very point involved in the present case was decided in Silver v. Barnes, 6 Bing. N. C. 186. Tindal, C. J., says the question was whether the transaction was a loan of money, or a dealing with the partnership funds. If it was a loan, it was usurious. We think it was a dealing with the partnership funds, in which the defendant had an interest in common with the other members of the society, and that it was not a loan; the defendant was

interested in the money when it was advanced, and when it was repaid. The rules of the society are in effect a mere agreement by the partners that their joint contributions shall be advanced for the use of one or other, as occasion requires, and the transaction was not a borrowing by the maker of a note from the payees.

In a later case, Burbridge v. Cotton, 8 Eng. Law & Eq. 62, Sir J. Parker says: "The case of Silver v. Barnes [supra] was a direct authority, that an advance out of the funds of an association of this kind, made pursuant to its rules, to one of its members, having in common with other members, an interest in the fund out of which the advances were made, and in the money to be repaid by him, was not a loan of money, but a dealing with the partnership funds, and was not usurious. He was not aware that the authority of that case had ever been doubted. It had been approved by Parker, Baron, in Cutbill v. Kingdom [1 Exch. 494], and he considered that a decision of a court of law on such a subject was binding in this court." To the same effect are the cases of Seagrave v. Pope, 15 Eng. Law & Eq. 480; Mosley v. Baker, 6 Hare, 87, and other cases. It has been supposed that the cases of Silver v. Barnes, Burbridge v. Cotton, and all others, rest the principles of their decision upon the late English statutes of 7 Wm. IV., and 7 & 8 Vict., and also a previous statute (Geo. IV.) for the regulation of certain joint stock associations. But this is a total mistake, as may be found by consulting Wordsworth on Joint Stock Companies, as well as the cases themselves. They do not profess to rest upon a statutory privilege, but upon common law principles. These statutes had their origin with the statute of 6 Geo. I. c. 18, passed in 1719, which was made to restrain the creation of associations with shares transferable at pleasure, which, after the introduction of the South Sea Bubble, were used as means for the wildest forms of stock gambling, and indulged to such a mad and ruinous extent as to require the check of legislative prohibition. When mutual benefit and aid societies, having funds accumulated from small monthly subscriptions, were adopted about the beginning of the present century, it was much doubted whether they did not all fall within the prohibitions of the stock-gambling statutes, the provisions of which are numerous and very complicated. To remove these doubts, and to reduce into a system the manner of conducting these and other joint-stock associations having legitimate and beneficial objects, and to give greater facilities for the management and enforcement of the rights of these companies, the statutes of Geo. IV., superceded by 7 Wm. IV. and 7 & 8 Vict., were passed. These statutes are in no sense enabling statutes, but are in the nature of restraining enactments, requiring certain formalities, not at common law necessary, to give vitality to the association coming within their purview, and subjecting them to a certain inquisitorial control by boards of justices, &c. But these statutes, although none of them in force in this district, may be invoked for one purpose, viz.: to show the sense of the people and parliament of Great Britain that associations of this sort are of most beneficial tendency; and, pruned of abuses to which some of them are liable, are of great utility to the public, especially to the poorer classes, by encouraging thrift and supplying them with advantageous agencies for the accumulation and management of the savings of their daily labor.

But, altogether outside of any decisions touching joint-stock associations, it is well settled that if profit be derived through a bona fide partnership, the dealing with money is not usurious. Gilpin v. Enderley, 5 Barn. & Ald. 954; Fereday v. Hordern, 1 Jac. 144. The reason running through all these cases is that the principal sum is in hazard by the liability of the partners for the debts of the concern to third persons; and the principle is not varied by the fact that, under the particular arrangements of the business, any loss is highly improbable. An inspection of the scheme in this case will make apparent to any one, without pausing to illustrate it, that each member is interested in every dollar belonging to the concern; the greater the profits, the less will be the amount of his weekly contribution to raise the common fund to the distributive amount; and, if no profit is made, he will contribute all that he ultimately withdraws, and will only derive the benefit, a substantial one indeed, of the saving process. On the other hand, in payment of officer's salaries, rent, and other expenses, he is liable individually for all the debts of the concern, and therefore, to all legal intents and purposes, is a partner.

Independent of the partnership view of the case, as was argued at the bar, the contract may be likened to the purchase by the society from its member of an annuity. For the amount advanced or paid to him he agrees to pay double the monthly instalment on the shares represented during the life of the association. The duration of the society is altogether uncertain. It may, and probably will, expire before the monthly payments amount in the aggregate to the price he receives with simple interest, or it may continue until these exceed that amount. The purchase and sale of annuities and rent charges differ from a loan at interest in this: that, in case of a loan, the principal sum, as such, is to be repaid at all events. In the case of annuities and rent charges, redeemable, it may be repaid at the will of the purchaser; nor does it make any difference that the annuity is dependent upon a contingency other than the duration of a human life. Both in annuities and rent charges purchased, the stated payments may amount

to much more than the interest upon the price paid, and be so great as in all human probability, before the termination of the annuity, largely to exceed both principal and interest; yet the validity of the purchase is not thereby affected. The case of Lloyd v. Scott, decided in 4 Pet. [29 U. S.] 224, and afterwards tried in this court upon procedendo [Case No. 8,434], on an issue of usury before the jury, was the purchase of an annuity or rent charge, very like in its practical results to the present case; and in that case the court held that the covenant that a party might repurchase within a given period at the same price, and upon repayment of that price, with all arrears of instalments of the annuity which was equivalent to 10 per cent. per annum, to be entitled to re-conveyance of the premises charged, did not give the transaction in law the character of a loan, so as to taint it with usury, provided the original purchase was in good faith.

But it is further said that, although the sale of the shares upon a discount, coupled with an agreement to pay the double monthly instalments, may not be usurious, considered in the light of a partnership dealing, or an annuity sale, or a contract in which the principal sum is not, at all events, returnable, together with more than legal interest, yet the imposition of fines of ten cents for each dollar of monthly dues not punctually paid is usurious interest upon the monthly dues. This does not appear to me to be either a just construction of that part of the regulations of the society; nor if it were meant to be a reservation of interest, as interest, would it be usurious. The cases of Roberts v. Trenayne, Cro. Jac. 509, Floyer v. Edwards, Cowp. 113, and Wells v. Girling, 4 Moore, 78, 1 Brod. & B. 447, all deciding that, where the party may relieve himself from any interest at all by payment at a day certain, the reservation of more than legal interest in case of default is not usurious within the statute. But the fair construction of this part of the regulations of these societies seems to be that, inasmuch as punctuality and exactitude are essential to the just and profitable conduct of the business of the concern, the reservation of legal interest on non-payment of monthly dues being so inconsiderable, hard to compute, and next to impossible to collect and account for, it would be no compensation to the society for these defaults, nor any security against their frequent recurrence. Hence their rules fix as a measure of liquidated damages for each default, under the name of a fine, a certain small sum, in this and most other societies 10 cents on every dollar. The 16th rule of the articles in the case of Silver v. Barnes, already cited, calls these fines by the name of "liquidated damages."

Now, if the contract in this case was not usurious, was it an unconscionable and oppressive bargain, which a court of equity ought to relieve against? By reference to the tables of calculation which are published in the explanatory treatices on these subjects, or which, with a little trouble, may be calculated by any person for himself, it will appear that the average duration of these societies is from eight to nine years, dependent upon the range of premium which their advances command. A society with an average premium of thirty-five per cent., which the complainant in this case paid, will wind up in eight years and a fraction. What does an advance at thirty-five per cent. discount cost the member during eight years, as compared with the admitted standard of moderation,—a loan at six per cent.:

| | |
|---|---|
| $400 at thirty-five per cent. discount is | $260 00 |
| Interest at six per cent. for 8 years is | 124 80 |
| | $384 80 |
| Double monthly dues for 8 years, at $2.00 per share | 384 00 |
| Balance in favor of an advance over an ordinary loan at six per cent. is | $ 0 80 |

Thus, it appears, in point of fact, that if the complainant were faithfully to comply with the terms of his contract, and to be in no default for monthly dues, instead of paying more than legal interest, he would get the advance and use of $260 for eighty cents less than simple interest, while the profit to the copartnership would be the active employment of his and other weekly dues in the interval.

Suppose the contract be terminated, and the complainant released from his connexion with the society, and he claims in his bill:

| | |
|---|---|
| By payment of the advance | $260 00 |
| Legal interest thereon for five years and seven months | 87 10 |
| | $347 10 |
| Crediting the account with dues paid as per answer | 209 00 |
| Balance due to the society | $138 10 |

Suppose, on the other hand, the complainant be released upon the terms offered by respondents in their answer, the account will stand:

| | |
|---|---|
| Debtor to amount advanced | $260 00 |
| To amount of fines, as per detail statement | 14 00 |
| Whole amount of dues prior to and after advance | 282 00 |
| | $556 00 |
| Crediting him by estimated value of his shares | 200 00 |
| By monthly dues already paid | 209 00 |
| | $409 00 |

The balance claimed by them is $147.00, or $8.90 more than by calculation of simple interest.

Suppose, on the other hand that the advance be restored to the society, and the complainant restored to the condition of a member having received no advance, which under

the terms of the articles of association is all that the society can insist upon without his consent to a dissolution of their relations, the account would be stated thus:

| | |
|---|---|
| Debtor to advance | $260 00 |
| To amount of fines incurred | 14 00 |
| Total dues prior to and since his advance | 282 00 |
| | $556 00 |
| And crediting the dues already paid in | 209 00 |
| Leaving an apparent balance of | $347 00 |

But, to show the true attitude of the parties, it will be remembered that this balance of $347.00 represents within itself his remaining interest in the association, and the value of his ultimate distributive share. This share he may sell to any third person, or to the society, as they offer, by their answer, at its market value of $200, and the balance against him will be exactly as before, $147, or less than $9 above legal interest for the use of the advance for five years and upwards. Suppose the member resorts to the other alternative of voluntarily quitting the society after having enjoyed the benefit of his advance for five years and seven months. He has a right to do it without the assent of the association, as provided in their constitution, by returning the money advanced, with interest thereon, paying all fines incurred, and being credited with the dues already paid in. The account would then be:

| | |
|---|---|
| Advance | $260 00 |
| Interest for five years and seven months | 87 10 |
| Fines incurred | 14 00 |
| | $361 10 |
| Amount of dues paid in | 209 00 |
| Balance due association | $152 10 |

—Or $14 more than simple interest for the use of the advance during five years and seven months.

No man who will give a thought to the subject can call a contract voluntarily entered into which presents these results unconscionable or oppressive.

But suppose that the forfeitures and fines imposed upon a defaulting member were much larger than those claimed in the present case. Would it be the province of this court, upon the bill of the defaulter, to relieve him from the consequences of his own contract and his voluntary acts? The distinction must always be remembered between calling upon a court of equity to relieve against a forfeiture or to enforce a forfeiture. In the latter case they may refuse to interfere. But the doctrine of relief has been restored from the confusion of the oldest decisions and narrowed to this: that unless the court can clearly see that full compensation can be made, and the forfeiture was not voluntarily and persistently incurred, it will not relieve, but let the party abide by the contract he has formed. In 2 Story, Eq. Jur. § 1323, it is thus summed up: "The doctrine seems now to be asserted in England, that in all cases of forfeiture for breach of any covenant, other than a covenant to pay rent, no relief ought to be granted in equity, unless upon the ground of accident, mistake, fraud, or surprise, although the breach is capable of a just compensation." And in section 1325 he gives the special phase of reasoning which fits the present and like cases, viz.: "It is upon grounds somewhat similar, aided by considerations of public policy, and the necessity of a prompt performance in order to accomplish public or corporate objects, that courts of equity, in cases of non-compliance by stock-holders with the terms of payment of their instalments of stock at the times prescribed by which a forfeiture of their share is incurred under the by-laws of the institution, have refused to interfere by granting relief against such forfeiture." In the case of Sparks v. Liverpool Waterworks, 13 Ves. 433, which was a case of purely accidental forfeiture of stock in a corporation, under one of its by-laws requiring instalments to be paid at a certain time, the master of the rolls uses language precisely adapted to the business and objects of societies organized upon the principles we are considering. He says: "It is essential that the money should be paid, and that they should know their situation. Interest is not an adequate compensation even among individuals, much less in these undertakings. In particular cases interest might be a compensation, but in a majority of cases it is no compensation from the uncertainty in which they may be left. The effect is the same whether money has been paid or not. They know the consequence."

I agree with those enlightened judges and chancellors of England, Lord Eldon, and a host of others, who have always regretted that courts of equity had ever undertaken to relieve against forfeiture breaches of private contract. They have all admitted it to be "delicate and dangerous," and some have denounced it as "mischievous and arbitrary." See Eaton v. Lyon, 3 Ves. 693; cases of Sanders v. Pope, 12 Ves., at page 291; Hill v. Barclay, 16 Ves. 403, 18 Ves. 58; Bracebridge v. Buckley, 2 Price, 206; Rolfe v. Harris, Id., note page 210, and other cases cited in 2 Story, Eq. Jur. §§ 1320, 1325. For myself, I adopt the maxim laid down by Cranch, C. J., in Lloyd v. Scott [Case No. 8,434]: "Every man has a right to make what contracts he pleases, if not restrained by some law; and justice and equity require that such contract should be executed, if fairly made."

I am of opinion that upon the case made by the answer, the special injunction should be refused.

MORSELL, Circuit Judge, concurred in the foregoing opinion. DUNLOP, Chief Judge, dissented, and delivered a separate opinion.

DUNLOP, Chief Judge. A voluntary, unincorporated association, called the Potomac Building Association, was formed in Washington, in the year 1850, by the complainant Johnson and others. The constitution of the society provided that a monthly subscription of one dollar should be paid by the members in respect of each share held by them, until the joint contributions were of an amount to enable each member to receive two hundred dollars in respect of each share. Power was given to the society to advance to any member his shares at a discount, such member paying an additional dollar monthly on each share, as aforesaid, and executing a bond and deed of trust to defendants to secure the due payment of his future subscriptions. The complainant took an advance upon his two shares at a discount of thirty-five per cent. per share; that is to say, on his two shares, estimated as worth $400, $140 was deducted for discount, and he received in cash from the company $260, and executed to the defendants, the trustees of the building society, the bond and deed of trust set out in the proceedings in this cause for securing the payment of his future subscriptions. The deed of trust contained no covenant for the repayment of the advance. The complainant having failed to pay his monthly dues, &c., for more than sixty days, the defendants, as trustees, advertised to sell for the amount claimed by the building society in their account filed, which is in the following terms:

Jno. Johnson to Potomac Building Association.

Dr.

| | | |
|---|---|---|
| 1851. May 5. To cash advanced on two shares of stock | | $260 00 |
| Monthly dues for two shares of stock for seven months, prior to taking advances, at $1 per share | $ 14 00 | |
| Dues from May, 1851, to December, 1856, five years and seven months, at $2 per month each | 268 00 | |
| | | 282 00 |
| Fines to December, 1856, as per statement in detail | | 14 00 |
| | | $556 00 |

Cr.

| | | |
|---|---|---|
| By amount of dues paid in, as per statement in detail herewith | $209 00 | |
| By estimated value of his two shares of stock, by actual sales made December 1, 1856 | 200 00 | |
| | | 409 00 |
| Balance due by Johnson | | $147 00 |

Johnson, the complainant, filed his bill in this case, charging usury in the contract, and claiming to set it aside and to avoid the deed of trust on payment of principal and interest on the advance, and for an injunction to stay the sale by the trustees. The defendants, in their answer, deny usury, and assert their right to sell for the balance claimed by them in the foregoing account.

The complainant was a stockholder in the company to the amount of two shares, and had signed the constitution. The shares at the winding up were to be made worth $200 each. Johnson's shares $400, less $140, the premium bid by him for the advance, would be worth $260 at the winding up of the association, and to be accounted for to him in his settlement with the company at that value. The articles of the constitution of the building company which bear on this case, are as follows:

"Art. 2, § 3. Each and every stockholder, for each and every share of stock that they hold in this association, shall pay the sum of one dollar, in bankable funds, on the first Monday of each and every month, to the treasurer, or such other person or persons as shall from time to time, by the laws or regulations of the association, be authorized to receive the same, until the value of the whole stock shall be sufficient to divide to each share of stock the sum of two hundred dollars, at which time the association shall determine and close."

Article 8, "Advances," §§ 1, 2, 3, 7:

"Sec. 1. Every stockholder, for each share, entitled to purchase an advance of stock of $200, to be paid from the funds of the association," &c.

"Sec. 2. When the funds of the association warrant it, one or more advances shall be disposed of by the secretary to the highest bidder, at regular meetings of stockholders, not under par," &c.

"Sec. 3. Whenever a stockholder shall purchase an advance he shall pay, or cause to be deducted, the premium offered by him or them for the same, and shall secure the association by bond, deed of trust, and policy of insurance, the policy to be assigned to the trustees upon the trust for such amount as the board of directors may deem sufficient to cover the amount advanced, with all fines, costs, and charges which may accrue thereon."

"Sec. 7. Stockholders taking an advance from the funds of the association shall, from the time of purchasing such advance, pay to the treasurer two dollars per month for every share of stock on which such advance may have been made, (instead of one dollar, as hereinbefore provided, for those who have received no advance,) and if the same shall be suffered to remain unpaid more than two months, the board of directors may compel payment by ordering proceedings on the bond and deed of trust according to law."

This additional dollar per month on each share to a stockholder buying an advance is $12 per year, or six per cent., the legal rate of interest, valuing the share at $200, which is its computed value on the close of the concern. Johnson bought an advance on his two shares at thirty-five per cent. premium, received $260 in money, paid or had deducted $140 premium, gave his bond to the treasurer for $400, conditioned to pay

monthly dues of $2 per share on each share, and all fines, until the value of the whole stock shall be sufficient to divide to each share of stock $200; and also a deed of trust to Messrs. Ratcliffe and Clarke to secure these dues and fines, &c. The condition of the bond is worthy of special notice, and shows plainly the nature of the contract, and, together with the trusts of the deed, makes apparent the rights of the association and the duties and obligations of the borrower, and, as I construe them, are designed to carry into effect the true meaning of the constitution of the building company. The bond of date 15th May, 1851, is in the sum of $400. The condition of the bond is in these words: "Whereas, the said John Johnson, a stockholder to the extent of two shares in said association, has, by virtue of and in accordance with the provisions of the constitution and obligation attached thereto of the said association or joint-stock company, received advances from the funds of the said association, advances on said stock; now if the said John Johnson, or his heirs, executors and administrators, shall well and truly pay, or cause to be paid, unto the said Ephraim Wheeler, treasurer, as aforesaid, or to his successor in office, the sum of two dollars on each of the shares of stock on which he has received advances, as aforesaid, monthly, and every month, commencing with the first Monday in June, 1851, and continues to pay the same on the first Monday of each and every month thereafter, together with any fines and forfeitures for the nonpayment of said monthly dues, as is provided in said constitution and obligation, as aforesaid, until the funds of the said association shall divide to each share of stock the sum of two hundred dollars, then this obligation to be void, or else to remain in full force and virtue in law." And the deed of trust to Messrs. Ratcliffe and Clarke, of date the 2d of June, 1851, under which they now claim to sell complainant's house and lot, after reciting said bond and its condition, in substance, as above set forth, and that said deed was to secure the said monthly dues, fines, and forfeitures, conveyed to them the property described in said deed upon the following trusts; that is to say: "If the said Johnson, his heirs, executors and administrators, shall fail to pay the said monthly payments, and the fines and forfeitures aforesaid, so that any one or more of the same shall be due and unpaid for the space of sixty days, then the said writing obligatory shall be deemed and taken as forfeited, and, upon request in writing, &c., the trustees shall sell, &c., and convey to the purchaser, &c.; and, out of the proceeds of the sale, pay first the costs and charges attending said sale; secondly, pay to the treasurer whatever sum or sums of money shall then be found due by the said John Johnson to the said association, on an account to be stated by the said treasurer; in which the said Johnson shall be charged with the sum of money received by him from the said association, and the monthly payments, fines, and forfeitures intended to be secured by these presents and the said writing obligatory, and credited with the amount of dues paid by him, and the residue, if any, pay over to the said Johnson, his heirs and assigns, &c. It is evident that the account here to be stated, and the whole terms of the bond and deed of trust, contemplate Johnson, to whom the advance has been made on the two shares, as still a partner, and to continue to be so till the final close of the association, when the two shares will be of the value of $200 each, and so to be estimated in the final settlement between him and his copartners, less the premium bid by him at the time of the advance; and it is on the assumption only that he is so to continue a partner that he can be made to pay dues up to the close of the concern, when each share is to be made of the value of $200. As such partner and contributor he is to share in the profits, present and to come, of the partnership.

The English cases referred to in the argument, clearing the transaction of usury, are based upon the assumption that the party to whom the advance is made is a partner at the time of the advance and when the advance is repaid, and so a sharer in the profits then and to the close of the concern. It can in no other sense be said to be a dealing in partnership effects by the partners inter se. In the case of Silver v. Barnes, 6 Bing. N. C. 180, Tindal, C. J., says: "A motion has been made for a new trial, on the ground of misdirection, but we think the case was properly left to the jury. The question was whether the transaction was a loan of money or a dealing with the partnership. If it was a loan it was usurious. We think it was a dealing with the partnership fund, in which the defendant had an interest in common with the other members of the society, and that it was not a loan. The defendant was interested in the fund when the money was advanced and when it was repaid. The rules of the society are, in effect, a mere agreement by partners that their joint contributions shall be advanced for the use of the one or the other, as occasion requires, and the transaction in question was not a borrowing by the maker of the note from the payees. In a case before Alexander, Chief Baron, in the year 1828, he held an advance, from a similar society to one of its members, to be a partnership transaction and not a loan." If the partner receiving the advance is turned out of the concern, and dispossessed of his profits by an arbitrary valuation of the two shares, as is claimed in the account presented in the defendant's answer, who value and take the shares to the use of the association at $100 each, when they are to be made worth $200 each, less the premium bid on them in

part by the complainant's monthly contributions to the end and winding up of the association, then he is no longer a dealer in partnership effects, having a common interest with his copartners in all profits to the close, but an outsider and a borrower of funds owned by strangers, and in that light the contract is clearly usurious. I refer to the case of Bechtold v. Brehm [26 Pa. St. 269], decided by the supreme court of Pennsylvania in 1856. The additional monthly payments of $12 a year on a computed $200 share, greatly exceed the legal rate of interest on the advance of $130 on that share, deducting $35 per cent. premium bid by the complainant and retained by the association when the advance was made. If the complainant is not a partner, and is subject to be ousted before the concern closes, he is not receiving his share by anticipation; he is not a sharer of profits present and to come. In that sense, by whatever name the transaction is called, it is a mere loan of money. It is a loan at a higher rate of interest than the law allows, for the forbearance; or giving day of payment, and the bond and deed, to secure the repayment of the principal, in which aspect the defendants treat said bond and deed in their account rendered, (as I think wrongfully,) being securities tainted with usury, are both void by the statute.

I entertain some doubt whether the contracts of this building association, as to advances, even when executed in good faith, according to the terms of their written constitution, are free from usury. Some of the English cases certainly go to that extent. The doubts there have been removed by statutory provisions which legalize these advances, and provide for the imposition of fines on members for failure to pay monthly dues within prescribed limits, the legislature of that country thinking such societies of beneficial tendency, and calculated to elevate the social condition of men having no other means than the fruits of their daily labor. Their expediency and utility is not so certain here, where any laboring man, with the high rate of wages prevailing in this country, can, with the exercise of ordinary prudence and carefulness, soon secure a homestead without involving himself in the expensive machinery of a building association, the articles of which are not easily understood by unlearned people, and very liable to be perverted to their oppression. These considerations, however, belong to the legislature and not to the courts of justice, and, if such associations are deemed beneficial they ought to be regulated and protected by statute, as has been done, it is believed, in some of our states. The fines which, by their constitution, the members agree to pay, in default of punctuality in the monthly dues, are in the nature of forfeitures, and are in fact sometimes so called by the society itself. If they were called liquidated damages their nature would not be changed. All the courts in this country, as I understand Kent, Story, and Marshall, both at law and in equity, are unwilling to enforce forfeitures, and lean against them. In England they have been sanctioned by the statutes to which I have referred. In the absence of any statute here, I think we ought only to enforce the payment of the dues by directing our auditor to allow interest on them from the periods when they accrued and fell due. As the trustees in this case claim to sell the complainant's property upon an account stated, and for a sum not warranted by law, nor even by the constitution of the building society itself, I think the injunction prayed ought to be granted, and to have effect till the cause is finally heard.

As to fines, penalties, and forfeitures, the following cases are in point: In Skinner v. Dayton, 2 Johns. Ch. 535, Kent, Ch., says: "It is no doubt a general principle of the court that equity will relieve where a penalty is forfeited, if the case admits of a certain compensation; and the true foundation of the relief is, that when penalties are designed only to secure money or damages really incurred, if the party obtains his money or damages he gets all that he expected or required." See, also, Livingston v. Tompkins, 4 Johns. Ch. 431.

"If the penalty is to secure the mere payment of money, courts of equity will relieve the party upon paying the principal and interest." 2 Story, Eq. Jur. § 1314. See, also, sections 1313, 1315. Section 1315: "The same doctrine has been applied by courts of equity to cases of leases, where a forfeiture of the estate and an entry for the forfeiture is stipulated for in the lease, in case of the nonpayment of the rent at regular days of payment; for the right of entry is deemed to be intended to be a mere security for the payment of the rent." And in note 2 to this section Story says: "In Hill v. Barclay, 18 Ves. 58, Lord Eldon, speaking of the relief given in cases of nonpayment of rent, said: 'It was upon a principle long acknowledged in this court, but wholly without foundation. Why without foundation? It proceeds upon the intelligible principle that the right of re-entry is intended as a mere security. It is so intended. There is the same ground of relief as in the case of a forfeiture by nonpayment of the money due upon a mortgage at the day appointed. No body doubts the justice and conscientiousness of interfering in the latter case. Why is it not equally proper in the former?'" Section 1316: "The true foundation of the relief in equity in all these cases is, that as the penalty is designed as a mere security, if the party obtains his money or his damages he gets all that he expected, and all that in justice he is entitled to; and, notwithstanding the objections which have been sometimes urged against it, this seems a sufficient foundation for the jurisdiction. In reason, in conscience, in natural equity there is no ground to say, because a man has

stipulated for a penalty in case of his omission to do a particular act, (the real object of the parties being the performance of the act,) that if he omits to do the act he shall suffer an enormous loss wholly disproportionate to the injury to the other party." (In this case a loss of ten per cent. a month, which I think oppressive.) "If it be said that it is his own folly to have made such a stipulation, it may equally well be said that the folly of one man cannot authorize gross oppression on the other side. And law, as a science, would be unworthy of the name if it did not to some extent provide the means of preventing the mischiefs of improvidence, rashness, blind confidence, and credulity on one side, and of skill, avarice, cunning, and a gross violation of the principles of morals and conscience on the other. There are many cases in which courts of equity interfere upon mixed grounds of this sort. There is no more intrinsic sanctity in stipulations by contract than in other solemn acts of parties, which are constantly interfered with by courts of equity upon the broad ground of public policy, or the pure principles of natural justice. Where a penalty or forfeiture is designed merely as a security to enforce the principal obligation, it is as much against conscience to allow any party to pervert it to a different and oppressive purpose as it would be to allow him to substitute another for the principal obligation. The whole system of equity jurisprudence proceeds upon the ground that a party having a legal right shall not be permitted to avail himself of it for the purpose of injustice, or fraud, or oppression, or harsh or vindictive injury." And in a note to the same section Judge Story says: "Lord Eldon has taken uncommon pains to express his dissatisfaction with the principle of allowing relief in equity against penalties and forfeitures, and also of the dispensation, with a punctilious performance of contracts by courts of equity. In Hill v. Barclay, 18 Ves. 59, 60, he used the following language: 'The original cases upon this subject are of different sorts. The court has very long held in a great variety of classes of cases that, in the instance of a covenant to pay a sum of money, the court so clearly sees or rather fancies the amount of damages arising from the nonpayment at the time stipulated that it takes upon itself to act, as if it was certain that, giving the money five years afterwards with interest, it gives a complete compensation. That doctrine has been recognized, without any doubt, upon leases with reference to nonpayment of rent upon conditions precedent as to acts to be done, payment of money, in cases of specific performance, and various other instances. But the court has certainly affected to justify that right, which it has assumed, to set aside the legal contracts of men, dispensing with the actual specific performance, upon the notion that it places them, as near as can be, in the same situation as if the contract had been with the utmost precision specifically performed. Yet the result of experience is, that where a man having contracted to sell his estate is placed in this situation, that he cannot know whether he is to receive the price when it ought to be paid, the very circumstance that the condition is not performed at the time stipulated may prove his ruin, notwithstanding all the court can offer as compensation.'" See, also, 16 Ves. 403, 405. "The whole argument of Lord Eldon is that courts of equity decree what they presume is compensation, but what in a given case may be no just compensation. Now, in the first place (says Story), this is no objection to an interference in all cases where a complete and adequate compensation can be given, but only to an interference where the facts establish that there cannot be such a complete and adequate compensation. And this is the very exception which, theoretically at least, courts of equity adopt. In the next place, it is supposed by Lord Eldon (Reynolds v. Pitt, 19 Ves. 140) that interest for the delay of payment of money is not or may not be an adequate compensation for the omission to pay at the time appointed. The objection equally applies to the allowance of interest at law as a compensation. It may in a given case be inadequate to the particular loss sustained by the creditor. Yet it is uniformly acted upon without hesitation, and the creditor will not be permitted to recover a greater compensation. The reason is that interest is a certain and general rule adapted to ordinary circumstances. And it would be inconvenient to go into a particular examination of all the circumstances of each case in order to ascertain the loss or injury. The general rule of interest is adopted because it meets the ordinary grievance and compensates for it. All general rules must work occasional mischiefs; besides, there would be an injustice in compelling a debtor to pay losses of a collateral nature not embraced in or connected with his own contract, over which he could have no control, and which might be imputed to the rashness or improvidence or want of skill of his creditor. No system of laws could provide for all the remote consequences of the nonperformance of any act. Human justice must stop, as it ought, at the direct and immediate and necessary consequences of acts and omissions, and not aim beyond a reasonable indemnification for them; at least the common law of England, equally with equity, has adopted this as the basis of its usual remedial justice."

Section 1326: "Where any penalty or forfeiture is imposed by statute upon the doing or omission of a certain act, there courts of equity will not interfere to mitigate the penalty or forfeiture if incurred, for it would be in contravention of the direct expression of the legislative will."

In the case of Sparks v. Liverpool Waterworks, 13 Ves. 428, the company was chartered by act of parliament, and it was enact-

ed: "That the property in and the profits of the undertaking were vested in the company in such shares and subject to such condition as had been or should be agreed upon." And by agreement the stockholders stipulated for forfeiture, &c. The statute, therefore, authorized the forfeitures. In Tayloe v. Sandiford, 7 Wheat. [20 U. S.] 13, Judge Marshall says: "In general a sum of money in gross, to be paid for the nonperformance of an agreement, is considered as a penalty, and not as liquidated damages; a fortiori, when it is expressly reserved as a penalty," not a set off. The cases of Mosley v. Baker, Burbridge v. Cotton, Cutbill v. Kingdom, and Seagrave v. Pope [supra], all arose under statutes legalizing fines, &c. Silver v. Barnes [6 Bing. N. C. 180] was decided in 1839, after the act of George IV.

JOHNSON (POWDEN v.). See Case No. 11,353.

## Case No. 7,407.

JOHNSON et al. v. PRICE.

[13 N. B. R. (1876) 523.] [1]

Circuit Court, E. D. Michigan.

BILL IN EQUITY BY CREDITORS OF BANKRUPT—JURISDICTION OF CIRCUIT COURT.

1. The circuit court has no jurisdiction of a bill of equity filed by creditors before the appointment of an assignee to restrain a chattel mortgagee in possession, from disposing of the goods of an alleged bankrupt.

2. It would appear that the district court has such jurisdiction.

This was a bill filed by complainants [Waldo M. Johnson and others], as trustees of John M. Potter, a bankrupt, against the defendant [James E. Price], to restrain him from selling a stock of goods of the bankrupt, claimed to be held under a chattel mortgage; and also praying that he be decreed to account for the goods to the assignee, when appointed. The defendant demurred to the bill for want of jurisdiction.

H. E. Bowen, for complainant.
Don M. Dickinson, for defendant.

BROWN, District Judge. If there is any jurisdiction in the circuit court to entertain this bill, it is conferred by section 4979 of the Revised Statutes, which provides "that the several circuit courts shall have, within each district, concurrent jurisdiction with the district court, * * * of all suits at law and in equity, brought by an assignee in bankruptcy, against any person claiming an adverse interest, or by any such person against an assignee, touching any property or rights of the bankrupt, transferable to, or vested in, such assignee." This bill being brought by creditors of the bankrupt, and not by the assignee, is clearly not within the letter of the section. Although bills of this kind have, in a few cases, been entertained by the circuit court, I find no case where the question of jurisdiction was raised and decided in favor of such jurisdiction. The question was not alluded to by the court, in the case of Hood v. Karper [Case No. 6,664], relied upon by complainants' counsel in this case. On the other hand, the intimations of the supreme court, in two or three cases, have been decidedly adverse to such jurisdiction. In the case of Morgan v. Thornhill, 11 Wall. [78 U. S.] 65, the supreme court observed: "Controversies, in order that they may be cognizable, under that clause of section 4979, either in the circuit court or district court, must have respect to some property or rights of property of the bankrupt, transferable to, or vested in, such assignee; and the suit, whether it be a suit at law or in equity, must be in the name of one of the two parties described in that clause, and against the other." Similar language is used by the same court in Smith v. Mason, 14 Wall. [81 U. S.] 419, 431; and also by the judge who delivered the opinions in these cases in Knight v. Cheney [Case No. 7,883].

As suits of this nature have been frequently entertained by creditors before the appointment of the assignee; and as it has been held, in at least two cases, by the supreme court that such suits must be plenary in their character, I had at first some doubt as to whether a denial of jurisdiction in this case would not virtually deprive the creditors of the power of instituting any suit of this kind. Upon careful examination of the statute, however, I am satisfied that section 4979 was not intended to limit the jurisdiction of the district court, and that such jurisdiction is conferred by section 4972. This section is very general in its character, and provides that the jurisdiction conferred upon the district courts as courts of bankruptcy, shall extend to almost every controversy respecting the collection, distribution, and settlement of the bankrupt's estate. No method is pointed out how this jurisdiction shall be exercised; and although it is more frequently, perhaps, exercised in a summary way, I see no objection whatever to a plenary suit at law or in equity. In the case of In re Alexander [Case No. 160], Mr. Chief Justice Chase intimates that, although no jurisdiction of cases at law or in equity is expressly given to the district court elsewhere than in the third clause of the second section, it may well enough be held to be included in the general grant of the first section (4972). See, also, In re Kerosene Oil Co. [Case No. 7,726]; Jones v. Leach [Id. 7,475]; In re Fendley [Id. 4,728]. In this last case, the petitioning creditors filed a bill to restrain the disposal of property, on the ground of fraudulent transfer by the alleged bankrupt; and it was held that, under the provisions of the act, the district court had jurisdiction both in law and in equity, and the motion to

[1] [Reprinted by permission.]

dismiss was denied. Sherman v. Bingham [Id. 12,762]; Goodall v. Tuttle [Id. 5,533]. In this case, the court remarks: "The second section does not profess or attempt to confer or regulate the jurisdiction of district courts. That relates exclusively to circuit courts; but it may with propriety be said to assume the existence of this jurisdiction in the district courts."

I think the proceedings in this case should have been taken by bill in the district court, and the demurrer must be sustained, and the bill dismissed for want of jurisdiction.

## Case No. 7,408.

JOHNSON v. ROGERS et al.

[15 N. B. R. 1;[1] 5 Am. Law Rec. 536; 14 Alb. Law J. 427.]

District Court, N. D. New York. Oct., 1876.

BANKRUPTCY—PRIOR ASSIGNMENT—IMPEACHMENT FOR FRAUD—ASSENTING CREDITORS—PROPERTY OF DEBTOR — LIEN — RIGHTS OF CREDITORS — TRANSFER OF CLAIMS—CREDITORS' BILL—EFFECT THEREOF—FIRM REAL ESTATE.

1. If an assignment is fraudulent, a creditor may obtain a lien upon the real estate by getting a judgment against the debtor, and upon the personal property by the levy of an execution thereon, and such liens will be valid as against the assignee in bankruptcy, if they are obtained before the commencement of the proceedings.

[Cited in Re Walker, Case No. 17,063; Re Steele, Id. 13,345.]

2. If there are several judgments, the priority of the lien on the real estate depends on the order in which the judgments are obtained, and the priority of the lien on the personal property is determined by the order of the levy.

3. A creditor who is precluded from assailing an assignment as fraudulent cannot obtain a lien on the property which will be valid as against the assignee in bankruptcy.

[Cited in Re Beisenthal, Case No. 1,236.]

4. A creditor who, with full knowledge of the facts that constitute the fraud, concurs with other creditors in assenting to its execution, cannot impeach it as fraudulent.

[Cited in Re Kraft, 3 Fed. 893; Judson v. Courier Co., 8 Fed. 426.]

5. A party who takes a colorable transfer of a claim from a trustee who has accepted the trust with full knowledge of all the facts that constitute the fraud, cannot impeach the assignment.

6. A creditor who has assented to an assignment may purchase a claim from another creditor who has not done so, and as to that claim may impeach the assignment.

7. A creditor who purchases property from the trustee in ignorance of the fraud, is not precluded from impeaching the assignment.

8. A judgment against a partner individually is a lien upon real estate held by the firm, subject, however, to the payment of the firm debts, and the equities of his co-partners.

9. A party who purchases a judgment has no higher right to impeach a fraudulent assignment than his assignor had.

10. The lien acquired by filing a creditor's bill extends only to property which cannot be reached on execution.

11. Until a receiver is appointed in the creditors' action, there is no lien, as against chattels that are subject to levy and sale on execution, which can be upheld as against the assignee.

[Cited in Re Pitts, 9 Fed. 544; Olney v Tanner, 10 Fed. 114.]

[This was a bill by Gilbert B. Johnson, assignee in bankruptcy of John W. Wright, and Asa D. Wright, against John Rogers and others.]

WALLACE, District Judge. The bankrupts were partners, and executed a general assignment of all their property, joint and individual, for the benefit of creditors, without preference, on the 5th of March, 1873. At this time they were solvent, as is conceded by the bill and the answers of the several defendants, and the assignment was void as to their creditors, because executed with intent to delay creditors. The proofs show that actions had been brought against the assignors by some of their creditors, and thereupon the assignors called their creditors together and explained their financial situation, and after consultation, and with the advice and concurrence of many of the creditors, it was concluded that a general assignment without preferences should be made to three assignees; two of whom were to be selected by the creditors, and one by the assignors. The purpose of the parties to this arrangement seems to have been to save the assignors the costs and vexation of actions which would otherwise be prosecuted, and to enable them to save a larger surplus for themselves than would remain if creditors should sell their property on execution; the creditors thus consenting believing that their interests would be safe. Pursuant to this understanding, the assignment was executed and the assignees entered upon their trust. Subsequently, various creditors became dissatisfied, and actions were commenced, and judgments were recovered against the assignors in favor of several of the defendants in this action. The assignee in bankruptcy has brought this action to set aside the assignment, and to ascertain and determine what if any liens exist upon the property under the judgments of the several defendants, and the proceedings thereon taken. The defendants, the judgment creditors, insist that their several judgments are liens upon the real estate transferred by the general assignment, their position being that as the assignment was void as to creditors, it was void as to their judgments, and the complainant, the assignee in bankruptcy, takes the title to the real estate subject to their judgments. The complainant controverts the legal proposition thus advanced by the defendants, and insists even if it is sound that, by reason of the participation of the defendants in the execution of the assignment, they are precluded from assailing its validity, and stand as though it was valid.

[1] [Reprinted from 15 N. B. R. 1, by permission.]

The issue thus presented raises several interesting questions, as to which the position of some of the defendants differs from that of other defendants, by reason of circumstances which will hereafter appear. Certain controlling principles which apply to the controversy, as between the complainant and all the defendants, may properly be stated at the outset. The assignment being void as intended to hinder and delay creditors, was void as to all existing creditors of the assignors. This being so, any existing creditor had the right to commence an action against the assignors, and upon the recovery of judgment would acquire a lien upon the real estate in the hands of the assignees at the time of the docketing of the judgment, and would, by a levy under an execution upon any of the personal property then in the hands of the assignees, acquire a lien upon that to the same extent as though such property had never been transferred by the assignors. As to the real estate, such creditors could sell it on execution, and at the expiration of the time for redemption, would acquire absolute title, and could maintain ejectment. And if several judgments are recovered, the liens of each attach in the order of their priority; and though a creditors' bill be instituted upon a junior judgment, and the assignment be declared fraudulent and void as to that judgment, the creditor by the decree obtains no priority as against the earlier judgment; such decree only operates upon the title of the assignors, and transfers no greater interest than the assignors would have had if no assignment had been made. Chautauque Co. Bank v. Risley, 19 N. Y. 369. As against the personal property, the priority is determined by the order of the levies under execution. If, however, a creditor by reason of exceptional circumstances is precluded from assailing the assignment, as to him it is as valid as it is to the assignors, and to the assignees who have accepted it. If such a creditor cannot be heard to allege that the assignment is fraudulent, he acquires no lien upon the real estate in the hands of the assignee, because a conveyance valid as to him has divested the title of the assignors, and as to him there is nothing upon which the lien can fasten. And the result is the same as to the personal property upon which he levies. He would be defeated in an action brought for its conversion by the assignees if he sold it on his execution. And if he brought an action in the nature of a creditors' bill to reach the proceeds of the property transferred, it would be ineffectual and no equitable lien would result from it.

The assignee in bankruptcy, though he represents all the creditors of the bankrupts, acquires only the title of the bankrupts, except as he is also invested with the right of creditors to assail fraudulent transfers, and with title to property conveyed by the bankrupts contrary to the provisions of the bankrupt act [of 1867 (14 Stat. 517)]. With these exceptions his title is subject to all liens existing upon the the property, legal or equitable, at the time of the commencement of the proceedings in bankruptcy. If the assignment had been void, only because contrary to the provisions of the bankrupt act, and the assignee in bankruptcy had obtained a decree setting it aside upon this ground, the judgment of the several creditors would not have been liens upon the real estate; as against these judgments the assignment would have been effectual to transfer the title to the original assignees. If these creditors had no liens prior to the commencement of the proceedings in bankruptcy, they would acquire none thereafter, and the assignee in bankruptcy would take the property, as it was at the commencement of the proceedings, for distribution to all the creditors of the bankrupts, in conformity with the terms of the bankrupt act.

[A creditor does not acquire a lien by levying upon property which is not in fact or in law the property of his debtor. A lien is simply the legal right to seize and hold the property. The creditor gains nothing by seizing property which he cannot hold, and loses nothing by yielding it up. The efficacy and validity of his lien depends upon his right to reduce the property to his possession. After the assignment is set aside, the creditor acquires no new rights. It is set aside only as against the assignee in bankruptcy; for all other purposes it stands. The judgments and executions upon the property are not liens because they do not attach upon any property which is, in fact or in law, the property of the judgment debtors.] [2]

Applying these principles, so far as they are applicable to the rights of all the parties here, it remains to ascertain how far they are decisive upon the facts as they exist in respect of the several defendants. The defendants Babcock and Clark recovered three several judgments against the assignors, which they claim are liens upon the real estate in the hands of the original assignees, which is now part of the estate of the complainant. It appears, satisfactorily, that they were consulted by the assignors before the assignment was executed; were cognizant of financial condition of the assignors, and assented to the plan of making a general assignment; and after it was executed, discontinued actions which they were prosecuting against the assignors for the recovery of their debts, in conformity to an understanding between the assignors, other creditors, and themselves, that they would thus discontinue if the assignment should be made. Having concurred in the execution of the assignment, they cannot now be heard

[2] [From 14 Alb. Law J. 427.]

to allege that it was fraudulent, because of facts of which they were fully informed when they gave assent; they cannot impeach a transaction for fraud in which they participated as parties. Steel v. Brown, 1 Taunt. 381; Phillips v. Wooster, 36 N. Y. 412. Inasmuch as they could not assail the assignment, it is valid as to them; if they had sold the real estate transferred by it they could not have maintained ejectment, because the assignees would have prevailed upon proof of the facts; if they had sought to make their judgments liens by an action to set aside the assignment, they would have been defeated. They are to be treated here as though the assignment were good, and divested the assignors of all real estate upon which judgments could attach. The complainant takes title to the real estate unincumbered by any lien existing by virtue of the judgments of these defendants.

The defendant Sawyer recovered a judgment for one thousand three hundred and thirty-five dollars against the assignors upon a demand against them assigned to him by Hooker, one of the original assignees, who accepted the trust under the general assignment, with knowledge of the facts which render the assignment fraudulent. The demand existed when the assignment was made; and after it was made, and Hooker accepted the trust, he transferred his demand to Sawyer. I am satisfied this transfer was colorable merely, and made in order that Sawyer could obtain judgment, and assail the assignment in the interest of Hooker, which the latter, as a party to the instrument, could not himself assail. Under these circumstances Sawyer is in no better position than Hooker would have occupied; as to Hooker, the assignment was valid. An assignee cannot attack the trust he assumed to execute and defend. The judgment cannot be used to assail the instrument or to protect Hooker from the consequences of his own acts. No lien can be predicated upon it in the interest of Hooker. The defendants Rogers and Strickland recovered a judgment against Asa D. Wright, upon a demand transferred to them by William D. Parsons after the assignment was made. At the time of the assignment they were creditors of the assignors, and assented, with the other creditors, to its execution, with information of the facts. By the purchase of Parsons' claim they acquired all his rights. The purchaser of an equity or of a chose in action is invested with all the rights of the vendor. A purchaser, for a valuable consideration, can prevail upon the title purchased, although he had notice, at the time of the purchase, of facts which, if known to the vendor, would defeat the title. Story, Eq. Jur. § 1503, A; Alexander v. Pendleton, 8 Cranch [12 U. S.] 462; Jackson v. Given, 8 Johns. 107; Bumpus v. Platner, 1 Johns. Ch. 219. It does not appear that Parsons assented to the assignment. It is claimed, however, that after it was made he purchased property of the assignees, and thereby recognized their title, and is therefore precluded from assailing the assignment. It is not shown that he was aware of any of the facts which rendered the assignment fraudulent.

The mere fact that a creditor deals with the assignees of his debtor does not preclude him from maintaining an action to declare the assignment fraudulent; he does not thereby accept any benefit as a creditor under the assignment. It has been held that a creditor who has accepted a benefit under an assignment, or who has claimed such benefit, is thereby precluded from attacking the assignment afterwards. Where this has occurred, with knowledge on the part of the creditor of the fraud which vitiates the assignment, the doctrine rests on clear principle; but I cannot concur in the proposition that a creditor who believes the assignment honest, and acts on that assumption, estops himself from questioning it if he afterwards ascertains it was a fraud. Whether the theory is that the creditor assents to the assignment, or ratifies it by accepting a benefit under it, or that he thereby estops himself from assailing it, there is neither assent, ratification, nor estoppel if he acted in ignorance of the fraud, for each is vitiated by the fraud. Even where he has accepted a dividend under the assignment, he has a right to disaffirm the act, on the discovery of the fraud, by tendering back what he has received. Babcock v. Dill, 43 Barb. 577. Here Parsons received no benefit under the assignment. He merely purchased property of the assignees. If he had done this with knowledge of the fraudulent character of the assignment, he would be estopped from disputing the title he acquired in an action to recover the price, to the same extent as would any other purchaser; and this, I think, is the extent of the estoppel. His act was that of a purchaser, and not that of a creditor, and cannot affect his rights as a creditor. In conclusion, both from the character of the act, and from the absence of evidence that Parsons knew the assignment to be fraudulent, there is nothing in the transaction which precludes Rogers and Strickland from assailing the assignment upon the demand bought by them of Parsons.

The judgment is against Asa D. Wright alone. It does not appear that any of the property included in the assignment was his individually. But, conceding all the property transferred was partnership property, his creditors were entitled to sell his interest as a partner in the real estate on their judgment; their judgments are liens on the real estate as though he were a tenant in common, subject to the payment of the firm debts, and subject to the equities of his partners. It is probable, after the adjustment of the partnership accounts, there will

be no property from which the judgment can be satisfied; but that question does not arise, and is not to be disposed of here. As to the real estate conveyed, the judgment is adjudged to be a lien subject to the adjustment of the partnership accounts.

The defendants the Van Ambers own two judgments against Asa D. Wright. They did not participate in the assignment, but they have purchased property of the assignees. It is not shown that they had knowledge of the fraudulent character of the assignment. One of their judgments is in favor of Rogers and Strickland, by whom it was assigned to the Van Ambers. As to the latter judgment, these defendants acquire no better rights for its enforcement than Rogers and Strickland possessed; and as Rogers and Strickland assented to the assignment, and could not therefore assail it, these defendants cannot, and they have no liens under the judgment. As to the other judgment, they have a lien upon the real estate, subject to the adjustment of the accounts of the firm of which Asa D. Wright was a member. It only remains to ascertain whether or not, to the amount of this judgment, they have a lien upon the personal property attempted to be transferred by the assignment, or upon the proceeds of the sales of property by the original assignees. It appears in proof that the Van Ambers commenced an action, in the nature of a creditors' bill predicated on their judgments, to set aside the assignment and reach the assets in the hands of the assignees. The action was pending at the time the petition in bankruptcy was filed, but had not proceeded to trial or judgment. It is urged for these defendants that, by the filing of their creditors' bill, they acquired an equitable lien upon all the assets in the hands of the original assignees, which lien is not defeated by the proceedings in bankruptcy. If such a lien was acquired it is not defeated by the bankruptcy proceedings, but is to be recognized and enforced by this court; the more difficult inquiry is, as to the nature and extent of the lien.

Where such an action is brought to reach choses in action, or property not subject to sale upon execution, according to the weight of authority the lien is acquired by the mere commencement of the action (Ex parte General Assignee [Case No. 5,305]; Clarke v. Rist [Case No. 2,861]; 2 Denio, 570; 3 Paige, 365); though it is stated in Stewart v. Isidor [5 Abb. Pr. (U. S.) 68] that the rule applies only to strict creditors' bills where, upon filing the bill, an injunction is taken out and served with the subpoena to answer. In Becker v. Torrance, 31 N. Y. 631, the nature and origin of the lien is discussed, and assimilated to that acquired by the commencement of an action against a trustee to enforce a trust; and it is said that the commencement of the action is equivalent to notice to the trustee, and prevents any further dealing with the subject to the prejudice of the plaintiff. If this is the correct theory of the lien, inasmuch as nothing would be gained by obtaining an injunction except the right to punish for contempt, I am unable to see how the lien depends, to any extent, upon obtaining an injunction.

While I am inclined to sustain the lien as to property which cannot be reached on execution, I am of opinion it does not extend further. In Storm v. Waddell, 2 Sandf. Ch. 494, it was held that property which can be seized on execution against the debtor, may be seized and sold by any other creditor, at any time prior to the appointment of a receiver in the creditors' suit. And the same doctrine has been repeatedly held in this state, where proceedings supplementary to execution in the nature of a creditors' bill have been instituted; in which cases the rule is settled that, although upon the appointment of a receiver the lien relates back to the commencement of the proceedings (Edmonston v. McLoud, 16 N. Y. 543; Lynch v. Johnson, 48 N. Y. 27), a creditor who levies intermediate the commencement and the appointment of the receiver, obtains a lien which supplants that under the supplementary proceedings (Becker v. Torrance, 31 N. Y. 631). That there should be a distinction in the nature of the lien as regards leviable property, and as regards equitable assets and choses in action, seems implied from the nature of the action under which the lien arises; it is brought to reach assets which cannot be taken upon execution. Strong practical reasons favor the rule then indicated. The creditor who proceeds by bill to reach such property may obtain the appointment of a receiver at any time; and that diligence which the law always enjoins upon creditors, as well as a fair regard for the rights of other creditors, should prompt him to adopt this practice. Other creditors may not be cognizant that a creditors' action has been instituted, and may subject themselves to the hazard of delay and loss by being led to pursue their remedy by execution against leviable chattels.

Equity favors and rewards diligence, and discountenances delay. The creditor who neglects to pursue, as far as practicable, any remedy which he possesses, should be deferred to another whose rights may be injured by such delay. Again, the uncertain and somewhat speculative character of the lien, depending as it does upon the result of the suit, and liable to be defeated by a disposition of the subject-matter, should induce courts to lean against its extension to property which can be placed in the corporeal possession of an officer of the courts. If, as would seem upon reason and upon precedent to be the case, chattels which may be seized on execution are not affected by the lien, as against a creditor who takes them on his execution, they should not be as against an assignee in bankruptcy who represents all

the creditors of the debtor. The same considerations which require diligence in the prosecution of the creditors' action, as against an execution creditor, apply in favor of the assignee. This leads me to the conclusion that until a receiver is appointed in the creditors' action, the lien does not become so far fixed, definite, and notorious as to authorize it to be upheld, as against the chattels of the debtor, which are subject to levy and sale on execution, as against the assignee in bankruptcy. The Van Ambers are adjudged to have an equitable lien upon the interest of Asa D. Wright in the property, not the subject of levy, which came to the hands of the complainant, to the amount of their judgment, together with the costs which had accrued on their action in the state court.

The question of costs in this action is reserved until the coming in of the report of the master, to whom it is referred to ascertain the interest of Asa D. Wright in the assets in the hands of the complainant.

## Case No. 7,409.

JOHNSON v. ROOT.

[2 Fish. Pat. Cas. 291; 2 Cliff. 108; Merw. Pat. Inv. 704.] [1]

Circuit Court, D. Massachusetts. Oct. Term, 1862.

PATENT — APPLICATION — EVIDENCE OF WHAT — ABANDONMENT—NEW TRIAL—IRREGULARITY ON PART OF JURY AND PARTIES.

1. The patent is prima facie evidence that the patentee is the original and first inventor of what he has described therein as his invention, and when taken in connection with his original application is prima facie evidence that the invention was made at the time the application was filed.

[Cited in Jones v. Sewall, Case No. 7,495.]

2. When the patentee proposes to show that his invention was of a date prior to his original application, he takes the burden upon himself, and must prove by competent and sufficient evidence that he made the invention at the period suggested, and that he reduced the same to practice in the form of an operative machine.

[Cited in Front Rank Steel Furnace Co. v. Wrought Iron Range Co., 63 Fed. 999.]

3. If the patentee having invented a needle feed in 1848, and put it into a machine, afterward took the parts out and laid them aside as something incomplete and requiring more thought and experiment, before constructing an operative machine, although not with a definite intention of abandoning what he had accomplished, and did nothing to restore the invention in the form of an operative machine, or to mature the needle feed until 1852, when he commenced to make a model with a view to apply for a patent, and in the mean time, another inventor without knowledge of what the patentee had accomplished, invented the same thing, reduced it to practice in the form of an operative machine, filed his application for a patent, obtained letters patent for the same, and manufactured machines under that patent for practical use containing the same feed, and the machines so manufactured were sold in the market and went into use before the patentee commenced to restore his invention or make his model, then the plaintiff can not carry back his invention to any period prior to the date of such attempted restoration.

[Cited in Dornan v. Keefer, 49 Fed. 463.]

4. The patentee having taken the machine apart and laid the parts aside as something incomplete, and requiring more thought and experiment; and never intending to reconstruct the machine, or to restore the needle feed in the form of an operative sewing machine without material modifications or alterations, but only to preserve the parts to be used in other inventions as circumstances might arise, the jury would be warranted in finding that he deserted and abandoned the invention of the needle feed, if he did nothing to restore it in the form of an operative machine from November 7, 1848, to January 1, 1853.

[Cited in Seymour v. Osborne, 11 Wall. (78 U. S.) 552.]

5. When the court instructed the jury that their verdict, if for the plaintiff, must be for nominal damages, and they returned a verdict for five hundred dollars—*Held*, that, while errors of this description may sometimes be obviated, by allowing the prevailing party to remit the excess, when the court is satisfied that the error has resulted from oversight or mere inadvertence; yet, when the finding is not only contrary to the evidence, but in direct contravention of the charge of the court, the difficulty can not, in general, be so remedied. Parties have a right to an impartial trial according to law, and, when it appears to the court that they have not had it, the verdict must be set aside and a new trial granted.

6. Irregularity on the part of the party charged, or of the jury, must be satisfactorily proved, in order to lay the foundation for the interposition of the court; but, when the irregular conduct is established, it is not necessary that it should certainly appear that it influenced the jury. It is sufficient that the irregularity appears to be of such a character that it might have affected the impartiality of the proceedings.

[Cited in Vose v. Mayo, Case No. 17,009; U. S. v. Salentine, Id. 16,213; Kansas City, M. & B. R. Co. v. Phillips (Ala.) 13 South. 68.]

This was a motion for a new trial. Suit had been brought against the defendant [James E. Root] to recover damages for the infringement of letters patent [No. 10,597] granted to plaintiff [William H. Johnson] for an "improvement in sewing machines," March 7, 1854, and reissued February 26, 1856. [No. 355.] Upon a former trial, reported in [Case No. 7,411], the jury disagreed, but at a subsequent trial, lasting nearly two months, a verdict was rendered for the plaintiff with $500 damages. [Id. 7,410.] The grounds upon which the motion for a new trial were predicated, are sufficiently stated in the opinion of the court.

[2] [B. R. Curtis and C. B. Potter, for the defence and in behalf of the motion.

[In a motion for new trial, the court is not called upon to pass upon any question of fact, for that in a court of law is the province of the jury, but it is simply to revise the evidence in the case, and to ascertain whether it is fit and proper that there should be another trial. The authority vest-

[1] [Reported by Samuel S. Fisher, Esq., and by William Henry Clifford, Esq., and here compiled and reprinted by permission.]

[2] [From 2 Cliff. 108.]

ed in courts of law to order new trials was not intended to be a mere formal, barren, and inoperative power; it was intended, on the contrary, to supply a salutary guard against the mistakes, passions, prejudices, and ignorance of juries. The judge was not designed to be a mere automaton to record the verdict of juries, but the law supposes that he will exercise an effective scrutinizing and controlling judgment; nor does the fact that there has been evidence submitted to the jury on both sides of the point at issue effect the exercise of this beneficial power of supervision. 3 Grah. New Trials, 1240. If the court is convinced that the weight of the evidence is against the verdict of the jury, it is its duty to grant a new trial. In a case where the time occupied in the trial, and the mass of evidence put into the case, are such that the jury can probably retain it in their minds, in order to weigh it, the court will be less ready to suppose that the jury have fallen into a mistake; but in a case like this, where the issues are numerous, where they are complicated of law and fact, where they are subtle, complex, and difficult of apprehension, where the length of the trial is very great, where the jury learn nothing of the law of the case until the last stage, i. e. the instructions of the court,—in a case of this character, trial by jury is liable to many mistakes. If parties choose to adopt this mode of trial, in such a case they must take it with its infirmities. The burden of proof was upon the plaintiff to show by competent and sufficient evidence that the old red machine was a practical and working sewing-machine, and that in it and by it the plaintiff reduced to practice the same method of feeding patented in the third claim; and if he failed to do this, the verdict should have been for the defendant. It was not enough that he did something in 1848, or that the old red machine amounted to something; it must have been a reduction to practice of the same method of feeding that is found in the patent. It was not enough that that method of feeding was merely experimental, to test the operation of other parts of the machine, and then laid aside and never resumed. The verdict of the jury was against the instructions of the court. Under the instructions of the court the jury ought to have found that the plaintiff so conducted in regard to this invention that his patent was not valid against Mr. Wilson. The verdict affords sufficient evidence that the jury which tried this case were either culpably inattentive to the instructions of the court, or regardless of them. It is unnecessary for the defence to show to a demonstration either of these things. Com. v. Roby, 12 Pick. 496. Where there can be no certainty that the verdict has not been improperly influenced, the mode of correction is by undoing what is thus improperly and may have been corruptly done. The intention of the court is to protect its own proceedings; and if the court cannot see that it would be safe to assume that the verdict has proceeded upon right principles, it is its duty to set it aside. The jury were instructed to award nominal damages, and they awarded $500. As against the defendant the plaintiff was only able to show the sale of one machine, and the court instructed the jury that the plaintiff could recover damages for the sale of one machine only. Improper communications to and from jurors, and improper conduct upon their part, are shown by the evidence.

[W. Whiting and A. C. Washburn, for plaintiff and against the motion.

[As to damages: If by the evidence the amount of damages was left undeterminate, the jury were authorized to draw fair and proper inferences. The ad damnum was $10,000; no particular sum as damages was agreed to by the counsel, or suggested by the court. This omission should not be allowed to prejudice the plaintiff, since he offers to remit so much as the court shall deem excessive. A verdict will not be set aside and a new trial granted if the prevailing party offers to remit the excess of damages. 3 Grah. New Trials, 1162, and cases there cited; Leeson v. Smith, 4 Nev. & M. 304; King v. Howard, 1 Cush. 137; Diblin v. Murphy, 3 Sandf. 19; Howard v. Grover, 28 Me. 97; Jewell v. Gage, 42 Me. 247; New Jersey Flax Cotton Wool Co. v. Mills, 2 Dutch. [26 N. J. Law,] 60. Wrong motives will not be imputed to a jury, if there is not proof other than that arising from the proposition. 3 Grah. New Trials, 1164, 1362, 1863; Brewer v. Tyringham, 12 Pick. 547; Reed v. Davis, 4 Pick. 216; Clark v. Binney, 2 Pick. 113. The verdict of the jury does not show that they neglected to apply the instructions of the court. As to granting new trials, Wood v. Gunston, Style, 466; 1 Grah. New Trials, 3–7; 3 Grah. New Trials, 1213, 1238. Where the evidence is conflicting, the verdict will not in general be disturbed. 3 Grah. New Trials, 1261, 1267, 1275, 1283; 27 Barb. 527; Milo v. Gardiner, 41 Me. 549; Lindsay v. Wayland, 17 Ark. 385; Abernethy v. Branch State Bank, 5 Ohio St. 266; People v. Goodrich, 3 Parker, Cr. R. 518; Gibson v. State, 9 Ind. 264; Hall v. Henline, Id. 256; Roberts v. Nodwift, 8 Ind. 339. Upon the question whether the change in the mode of holding so far modified the feeding apparatus as to make it essentially different in the machines compared, there was a great body of conflicting testimony, and as a question of fact it was left to the jury. The plaintiff reduced his invention to practice in 1848, and did not abandon it. The proof of improper conduct in the jury, if any exists, comes from a single witness. There is nothing improper in the communication concerning what the jury thought. Witnesses, in narrating conversations, are apt, by the change of only a single word, to alter very

materially the sense and meaning of what was imparted to them in such conversations. Such testimony is received with caution. A verdict must be presumed to have been honestly and fairly rendered till the contrary is shown. 3 Grah. New Trials, 1362.] [3]

CLIFFORD, Circuit Justice. This was an action of trespass on the case for an alleged infringement of certain letters patent. Letters patent were granted to the plaintiff on March 7, 1854, for a new and useful improvement in sewing machines; but the original patent was subsequently surrendered and canceled, and on February 26, 1856, a new patent was issued to him on an amended specification, to continue for the term of fourteen years from the date of the original patent. Suit was commenced on April 28, 1856, and the plaintiff alleged that the defendant, on March 4, in the same year, and at divers other times before the date of the writ, did unlawfully and wrongfully, and without the consent of the plaintiff, make, use, and vend to others to be used, the improvement secured to him in his reissued letters patent. Defendant pleaded that he was not guilty, and filed, under the act of congress [5 Stat. 117], certain specifications of defense, denying that the machine he sold infringed the plaintiff's patent, or that the plaintiff was the original and first inventor of any thing embodied in his, the defendant's machine, and on that issue the parties, on March 26, 1861, went to trial. Testimony was introduced on both sides, and under the instruction of the court the jury returned their verdict in favor of the plaintiff, assessing damages in the sum of five hundred dollars. [Case No. 7,410.] Motion for new trial was duly filed by the defendant, for the following reasons: First. Because the verdict is against the law and the evidence. Second. That the verdict is against the evidence and the weight of the evidence. Third. That the jury have neglected and refused to apply the instructions given them by the court, respecting the thing patented, in the third claim of the patent declared on in the case; as well upon the question, whether the plaintiff was the original and first inventor of the thing patented, as upon the question, whether the defendant had infringed thereon. Fourth. That the damages found by the jury are grossly excessive, and in plain contravention of the explicit and repeated instructions of the court to allow nominal damages. Another reason assigned, is the refusal of the court to instruct the jury as requested by the defendant; but in the view taken of the case it will not be necessary to consider it, and it is therefore omitted. Representations in writing, and under oath, were subsequently made to the court by the defendant, as a foundation for a further motion for new trial. Those representations were in substance and effect as follows: 1. That the plaintiff, during the progress of the trial, and before the verdict had been rendered, and while the court was not in session, and out of the presence and hearing of the defendant and of his counsel, by himself and his agents, made communications to, and received communications from, jurors impaneled in the case, touching the merits thereof. 2. That the plaintiff, by himself and his agents, did unduly and unlawfully influence and bias the minds of jurors impaneled to try said cause, by acts, conduct, and declarations, done and made with that unlawful intent, while the court was not in session, and out of the presence and hearing of the defendant and his counsel. 3. That jurors impaneled to try the cause, privately declared, and made known to the plaintiff and his agents, that they had determined to render a verdict in favor of the plaintiff, and so declared and made known such determination, before the testimony on the part of the defendant had been all exhibited, and before the counsel of the defendant had been heard, and before the jury had received the instruction of the court, and before the case had been committed to them. 4. That the trial was not by an impartial jury, such as the defendant had a constitutional and lawful right to have. Leave was granted to the defendant to make proper proofs of the respective representations, upon giving due notice to the plaintiff or his counsel, it appearing that all the matters set forth had come to the knowledge of the defendant and his counsel since the last adjournment of the court. Testimony was accordingly taken by both parties in open court, on October 17, 1861, and the same by agreement, was duly reported for the consideration of the court. Parties were duly heard during the same term, upon the several matters involved in the respective motions, and the case has been held under advisement to the present time. Some brief reference to the positions assumed by the respective parties at the trial will be indispensable, in order that the precise nature of the questions presented under the first motion, may be clearly and fully understood. When the case came on for trial, the plaintiff proposed to open his whole case to the jury, as well such matters as were in reply to the defenses stated in the specifications of defense, as those which were immediately necessary to make out a prima facie case, and no objection being made by the defendant, the parties were allowed, perhaps unadvisedly, to proceed in that way.

Application for a patent was filed by the plaintiff on March 31, 1853, but his original patent was not issued until March 7 in the following year. His charge against the defendant was that he had infringed the third

[3] [From 2 Cliff. 108.]

claim of the reissued patent as already explained. Omitting the first and second claims as unimportant in this investigation, it reads as follows: "What I claim as my invention and desire to secure by letters patent is: Third. The feeding of the material to be sewn, by means of a vibrating piercing instrument, whether said instrument be the needle itself, or an independent instrument in the immediate vicinity thereof, substantially as herein described." To maintain the issue on his part, he introduced his reissued letters patent, together with the model of the patented machine furnished to the patent office. He also introduced the machine which he alleged the defendant sold, and which he claimed was a violation of the exclusive right secured to him, and upon the introduction of the machine, the defendant admitted that he sold the machine at the time and place alleged in the declaration, but denied that the machine infringes the third claim of the plaintiff, or that the plaintiff was the original and first inventor of any thing embodied in that machine. Two questions, therefore, were presented: First. Whether the plaintiff was the original and first inventor of any thing embodied in the machine sold by the defendant, called machine K. Second. Whether the machine sold by the defendant, and given in evidence by the plaintiff, infringed the third claim of the plaintiff's reissued letters patent. Defendant set up that the machine sold by him was constructed under certain patents granted to A. B. Wilson, or to his assigns, and that the invention of Wilson was prior to that of the plaintiff's, which was one of the important questions in the case. Wilson made the application for his first patent on March 18, 1850, and the patent was issued on November 12, in the same year. His second application was on July 8, 1851, and the second patent was issued August 12, in the following year. Patentee assigned his interest to Wheeler, Wilson, Warren, and Woodruff, before the date of the third application, which was made on February 7, 1852, and the third patent was issued on June 15, in the same year. Other patents subsequently issued to A. B. Wilson, or his assigns were also admitted, as showing that the three inventions already mentioned, were still under the protection of subsisting patents, and had not become public property. Letters patent to Grover & Baker, dated June 22, 1852, together with the disclaimer accompanying the same, dated December 11, 1854, were also admitted as showing that the claim of Wilson to the four-motion feed, in his application of June 15, 1852, was withdrawn by mistake as to the date of the invention. Two of the patents, to wit: the first and the third, were reissued, but it is unnecessary to describe the new patents, or to refer to the assignments under which they were reissued, except to say that the machine introduced by the plaintiff, as the machine sold by the defendant, was constructed under the patent reissued to W. P. N. Fitzgerald, dated December 19, 1854, and it is admitted that it was sold by the defendant, as the agent of the Wheeler & Wilson Manufacturing Company, to which the patent had previously been assigned. Assuming the facts to be so, then it clearly appeared that the machine of the defendant was constructed under an invention made and patented prior to the application of the plaintiff for his original patent. Unless, therefore, he could overcome those facts, he could not prevail in any view of the case, because if the machine sold was substantially the same as that described in the plaintiff's patent, then the inference was a clear one that the plaintiff was not the original and first inventor of his supposed improvement. And if the two machines were not substantially the same in principle and mode of operation, then there was no infringement, and the verdict must be for the defendant. Such formidable difficulties could not be evaded, but they must be met and overcome by proof, and consequently it became of vital importance, on the part of the plaintiff, to show that his invention was actually made and reduced to practice as an operative machine, at some time prior to the invention by A. B. Wilson, to which reference has already been made. Full proof was exhibited that machines like that of the defendant, and not distinguishable from it in any respect, material to this investigation, were constructed, and in the market for sale, before the time when the plaintiff completed his model for the patent office, and several months before he made his application for his original patent. Undeniable proof to that effect was introduced by the defendant, and both parties, it is believed, so understood it, and it was so understood by the court, and must have been so understood by the jury. Evidence to repel this inference was introduced by the plaintiff in the opening, and it was upon that evidence that he relied in his close to overcome the difficulty. Beyond question, his patent was prima facie evidence that he is the original and first inventor of what he has described therein as his invention, and when taken in connection with his original application is prima facie evidence that the invention was made at the time the application was filed. Presumptions were in favor of the plaintiff to that extent; but when he proposed to show that his invention was of a date prior to his original application, he took the burden upon himself; and to maintain that theory, it was incumbent upon him to prove by competent and sufficient evidence that he made the invention at the period suggested, and that he reduced the same to practice in the form of an operative machine, and if he failed to prove either of the elements of the proposition, then the verdict should have been for the defendant. Judge Story said, in Bedford v. Hunt [Case No. 1,217], that "the intent of the statute was to guard against defeating patents,

by the setting up of a prior invention which had never been reduced to practice. If it were the mere speculation of a philosopher or mechanician, which had never been tried by the test of experience, and never put in actual operation by him, the law would not deprive a subsequent inventor, who had employed his labor and his talents in putting it into practice, of the reward due to his ingenuity and enterprise." Language equally explicit is employed by Mr. Justice Nelson, in the case of Parkhurst v. Kinsman [Id. 10,757], wherein he says, "it is not enough to defeat a patent already issued, that another conceived the possibility of effecting what the patentee accomplished. To constitute a prior invention, the party alleged to have produced it must have proceeded so far as to have reduced his idea to practice, and embodied it in some distinct form." "It must," says the learned judge, "have been carried into practical operation; for he is entitled to a patent, who, being an original inventor, has first perfected the invention and adapted it to practical use. Crude and imperfect experiments, equivocal in their results, and then given up for years, can not be permitted to prevail against an original inventor, who has perfected his improvement and obtained his patent." Plaintiff claimed at the trial that the feeding apparatus described by him, in the third claim of his patent, was invented by him, and reduced to practice in the form of an operative machine, as early as October 27, 1848, and that the same feeding apparatus was embodied in his original letters patent. Every branch of the proposition was controverted by the defendant. He denied that the plaintiff invented any such feeding apparatus at so early a period, or at any time prior to the date of the application for his original patent, or that he ever reduced the same to practice in the form of an operative machine, or that the feeding apparatus which he alleges he invented and reduced to practice at that period of time, is now embodied in the third claim of his reissued letters patent. Reference to the third claim of the patent will show what the feeding apparatus is in the reissued letters patent on which the suit is brought, and it may be well to refer briefly to the instructions given by the court to the jury upon that subject, before stating the evidence introduced by the plaintiff to prove that he invented the apparatus, and reduced it to practice, before the application for his original patent. Such brief portions only of the instructions will be referred to as appear to be material to the point under consideration. After reciting the claim, the jury were instructed that the third claim of the plaintiff's patent was for his described means of feeding the cloth, or other material, to be sewed in a sewing machine. Feeding the cloth, or material, was defined as signifying such a regular, progressive advance of the material as would space the stitches of the seam regularly, so that the stitches would be of equal length. Responsive to the argument of the plaintiff, that the feeding instrument was distinct from the devices for holding the cloth or material to be sewed, the jury were told that there was included in the claim, as part of his mode of operation, not only the vibrating, piercing instrument, substantially as described, but also whatever parts necessarily act in connection therewith, to feed the material to be sewed in a sewing machine, so far as any function they performed modified the action of the feeding instrument. As explanatory of that instruction, the jury were told that there must be a table, or some equivalent mechanical device, to keep the cloth in position, so that it would resist the thrust of the piercing instrument while it was making the perforation, after the pressure of the holder upon it was relieved to permit the needle, as it vibrated, to move forward the cloth a sufficient distance for the succeeding perforation. In this connection, the jury were also told that the vertical bar, or holder, when held down upon the cloth by the spring, was quite necessary to the proper operation of the feeding arrangement, and were accordingly instructed to the effect that the surface below the material, called the table, which supported the cloth when it was pressed by the vertical bar, or holder, so as to keep the cloth from slipping as the needle descended and perforated it, and also the cloth holder, which exerted its pressure for that purpose, were included in the claim as necessary to the plaintiff's mode of operation in feeding the material to be sewn, so far as the functions performed by those devices modified the action of the feeding instrument. To show that he invented this feeding apparatus, and reduced it to practice within the meaning of those terms, the plaintiff introduced the "old red" machine, as it was called throughout the trial. Parties are competent witnesses by the local law, and accordingly the plaintiff was very fully examined upon this subject. According to the testimony of the plaintiff, his first step toward constructing a sewing machine was taken in July, 1848, when he made certain patterns for needle bars, and he states that needle bars were subsequently made from the patterns by his directions. He arranged them in a temporary frame, and got some gearings made, but they proved not to be of a character to answer any purpose, except as a basis of calculation for another set of patterns, and he states that he did not attempt to sew with the machine. Having made his calculations, he constructed a new set of patterns and sketches, and employed a mechanic to make another set of needle holders and apparatus for a machine. They were made in August, 1848, and after they were completed, the plaintiff took them, together with the shafting and gearing which he had provided, to a cabinet maker, and employed him to make the frame. That machine had the straight clamp, or what was called the

"wooden holder," during the trial, and the witness states that he did sewing enough with the machine to satisfy himself that it "was going to be a good practical thing." Intending to reconstruct the machine more thoroughly, with a view to apply for a patent, he took the needle holders out of the frame and carried them back to the machinist, in order to have another set made with certain additions and alterations. After the needle holders were completed, and the shafting and gearing had been somewhat improved, he then had a new frame made for the machine, and put the whole in working order, using for that purpose the third set of needle holders. About the same time he also had a ratchet clamp made, but as it was not fully completed, and the arrangement to receive it was not finished, except on one side of the machine, it could not be used. Castings were also made by the plaintiff for a rotary clamp holder, but they proved to be too heavy and were never finished, so that the only device ever used by him, before he went to Washington with the machine, was a straight clamp, or wooden holder, like the one produced at the trial, but that was not carried to Washington, and the identical device was not produced at the trial.

On cross-examination the witness testified in substance and effect that he used the straight clamp to try the machine and see what the effect would be as a feeder, and that he afterward arranged the wheel or circular clamp to make the machine automatic, and that the other was given up, adding, in the same connection, that he did not consider that the straight clamp was very curious or patentable. Short pieces of canvas and padding were sewed by the plaintiff in the machine before he went to Washington, and he states that he used the straight clamp or wooden holder for that purpose, and that he sometimes sewed the length of the piece, and then around the edge, and back again in various forms. He started for Washington on October 27, 1848, having completed the machine a few days before, taking with him the patterns for the rotary clamp, but leaving behind the castings and the wooden holder. After his arrival in Washington, he employed a patent solicitor, and soon learned that some parts of his invention had been anticipated by others, and that his model was too large, and would not be received at the patent office on account of its size. Forwarded as this machine was, by the merchandise train, he arrived in Washington several days before the machine came to hand, and during that period he constructed a rotary clamp, which was made of mahogany. Injury had been done to the machine on the route, but he repaired it and fitted in the rotary clamp for the first time. Up to that period of time he had never used any other than the straight clamp or wooden holder, and, in point of fact, could not do so because he had not constructed any rotary clamp, and one of the necessary arrangements for the ratchet clamp had not been completed. Having fitted in the rotary clamp, he says he operated the machine in the presence of his patent solicitor, but he does not state that he used it to sew seams. When he found he could not patent the machine, he decided, under the advice of his solicitor, to file a caveat, and his solicitor also prepared another paper, in the nature of a petition for a patent, but it was never presented at the patent office. His patent solicitor prepared the caveat, and it was duly executed and filed on November 7, 1848, and was accompanied with a drawing to illustrate the invention. Nothing further was done by him toward procuring a patent. On the contrary, having executed those papers, and filed the caveat, he took the machine out of the frame, leaving the frame there, put the parts of the machine into a trunk, which he purchased for the purpose, and on the same afternoon left Washington to return to his home. All those parts of the machine remained in the trunk, in his house at New Hartford, until he removed to Granville, when he put them into a box, and, with the exception of some few parts, which he afterward used in other machines, they remained in the box until the first part of January, 1853. During the period, from November 7, 1848, when he left Washington, to the last of December, 1852, or the first part of January, 1853, he did nothing to perfect or construct any needle-feed apparatus for feeding the material to be sewn in a sewing machine. Taking his own statement as true, he commenced soon after he returned from Washington to make the preparatory investigation to accomplish what is called the Grover & Baker stitch, and, in the course of that month, or the month following, he made a model. While he was at work on the model, and within eight or ten days after he returned, he wrote to his patent solicitor respecting the same, stating, among other things, that "the needles cross each other and catch the thread from each needle, in the same manner as they do when both pass through the cloth, the object being to have all the looping on one side, and on the other side leave but one thread the same as in common back stitching by hand." In the same letter he also stated that "the only disadvantage (if it may be called a disadvantage) in this arrangement of the needles, will be in the necessity of moving the wheel, on which the work is placed, by means of a feeder, as I had designed to move the bar, which is very easily done." Some time in January following he sent a rough model of that machine to his patent solicitor, and it remained in his possession till October or November, 1852. Little or nothing was done by him after that toward constructing any model or machine, except to make some patterns, till June or July, 1852, when he went to Springfield and had some gearings, castings, and shafting

made for a sewing machine, and shortly afterward went to Granville and employed a mechanic to help him make the machine. Both parties conceded that these were models of what is called the Grover & Baker stitch, with a rotary clamp, and the witness stated that he completed the invention in September, 1852, and carried the model to Washington and filed an application in the patent office, with a view to patent the invention. But a patent had been issued to Grover & Baker for the same stitch, on February 11, 1851, and they had an application pending, or one was shortly afterward presented, for a reissue of the patent. Upon the presentation of the application an interference was declared by the patent office, and notice was given to the applicants. Whereupon they sent their agent to adjust the controversy with the plaintiff. They first met at Hartford, and there the plaintiff saw and examined the Grover & Baker machine. Two or three other interviews were had, and an arrangement was made whereby the plaintiff assigned to the agent of the other parties all his interest and claim in the stitch, and perhaps in the needles. Under the arrangement, the patent for the stitch, etc., was to issue in the name of Mr. Bates, and it was accordingly granted to him on February 22, 1853, and on the twelfth day of April following, a patent issued to the plaintiff for the rotary clamp. None of these transactions had any relation to any apparatus for feeding the material to be sewn in a sewing machine, and they are of but little importance in the case, except as showing the nature of the plaintiff's employment, and that he had an opportunity to examine the Grover & Baker machine. Drawings for a needle feed were commenced by the plaintiff about January 3, 1853, and in the spring of that year he had the frame of the old red machine constructed, as it was exhibited at the trial. Some changes, however, were made in the parts of the machinery, as, for example, the cams are not the same, and other needles have been supplied. Most of the parts, as the plaintiff states, are the ones that he brought back from Washington, but the crank and one pulley he had used in getting up one of the other models, and the rotary clamp and the fly wheel are also new. His application for a patent was filed March 31, 1853, and on March 7, of the following year, the original patent was issued. To account for the delay, from November 7, 1848, when he left Washington, until January 3, 1853, when he commenced to restore the machine, he introduced testimony tending to show that during a part, or all of that time, he was in poor health, and that he was somewhat embarrassed in his circumstances. On the other hand, the defendant introduced testimony tending to show that his general health was not seriously impaired, and that his pecuniary circumstances were such that he was able to purchase a farm worth some fifteen hundred dollars, and that he had about the usual amount of stock on the farm. Nothing need be said respecting the caveat, as the statement of the case already exhibited, shows that it expired without any thing being done to restore the machine. On this state of the case the jury were instructed, that if the plaintiff did not make any such invention as is described in the third claim of his reissued letters patent in 1848, or if he did, that he did not reduce the same to practice, in the form of an operative sewing machine, then they were not authorized to find that his patented invention takes date prior to the time when he filed his application for his original patent. Two other instructions, applicable to this state of the case, were also given by the court, which it becomes important to notice. Of these the first was, that if the jury find that the plaintiff invented the needle feed, which is in the old red machine, in 1848, embodying the same in a machine, of which the old red is a true representation (excluding the rotary clamp), and operated it with the stationary holder, as he has described in his testimony, and carried it to Washington, leaving the stationary holder at home, and there constructed, and fitted in the rotary clamp, and operated it there, as he has stated in his testimony, and on November 7, 1848, filed his caveat in the patent office, still, if they also find that the plaintiff, on the same day that he filed the caveat, took the machinery out of the frame in Washington, and brought the parts home, leaving the frame there, and laid them aside as something incomplete, and requiring more thought and experiment before he restored the invention in the form of an operative machine, although not with a definite intention of abandoning what he had accomplished, yet not with any determinate intention of resuming the same, but really for the purpose of preserving the parts, to be used by him, or not, as he might thereafter determine, and suffered his caveat to expire, and did nothing to restore the invention in the form of an operative machine, or to mature the needle feed, from the time he left Washington to the last of December, 1852, when he commenced to make a model with a view to apply for a patent, and, in the mean time, A. B. Wilson, without knowledge of what the plaintiff had accomplished, invented the same thing, and reduced the same to practice, in the form of an operative machine, filed his application for a patent after the plaintiff's caveat had expired, and then obtained letters patent for the same, and that A. B. Wilson, or his assigns, manufactured machines under that patent for practical use as sewing machines containing the same feed, and that the machines so manufactured were sold in the market and went into practical use before the plaintiff commenced to restore his invention, or to make his model with a view of obtaining his original patent, then the jury are instructed.

that if the defendant's machine was made under the Wilson patent, and the defendant sold the same by the authority of Wilson or his assigns, the plaintiff cannot carry back his invention to any period prior to the time he commenced to make the model for his original patent, provided the jury also find that the Wilson patent embodies the same needle feed as that of the plaintiff's patented invention. Secondly, they were also instructed that if they found that the plaintiff, after having taken the machinery out of the frame, in Washington, and brought it home, leaving the frame there, laid the machinery aside as something incomplete, and requiring more thought and experiment, and never intending to reconstruct the machine, or to restore the needle feed in the form of an operative sewing machine, without material modifications or alterations, but only to preserve the parts to be used in other inventions as circumstances might arise, then the jury were instructed that they would be fully warranted in finding that he deserted and abandoned the invention so far as respects the needle feed, provided they also found that he did nothing to restore the needle feed in the form of an operative machine, from November 7, 1848, to the last of December, 1852, or the first of January, 1853.

I. Extended argument upon the several propositions, arising out of the proper application of these instructions to the evidence in the case, will not be attempted; as I am of the opinion that the jury erred in respect to them all; and that if they had properly applied any one of them to the evidence, their verdict must have been for the defendant. They were told, in addition to the first instruction referred to, that it was necessary for them to inquire and determine what if any thing, the plaintiff invented and reduced to practice in the form of an operative sewing machine, so far as respected the feeding apparatus, prior to his application for his original patent, and if any thing, whether the same, or a substantial and material part of the same, was embodied in the reissued letters patent, as construed and defined by the court. As already appears, the court had construed the third claim of the reissued letters patent, and instructed the jury that there was included in it, not only the vibrating piercing instrument, substantially as described, but, also, whatever other parts necessarily acted in connection therewith, to feed the material to be sewed in a sewing machine, so far as the functions performed by such other parts modified the action of the feeding instrument. Applying those instructions to the evidence, it is obvious that the jury must have found as follows: First. That the plaintiff invented and reduced to practice in 1848, an operative sewing machine, which contained embodied therein a needle feed, which is the same, or substantially the same, as that described in the third claim of his reissued letters patent. Second. That the old red machine, made in 1848, was an operative sewing machine, and that it contained the needle feed described in the third claim of the plaintiff's reissued patent as construed and defined by the court, including the pressure foot and table, or equivalent devices. Third. They must have found that the plaintiff, on his return from Washington, did not lay aside the parts of the machine brought home as something incomplete, and requiring more thought and experiment, before he attempted to restore the invention in the form of an operative machine, as that element of the instruction, in the main aspect of the case, was the only one that properly admitted of any dispute. Fourth. They must have found that the plaintiff did not desert and abandon the invention, so far as respects the needle feed, and, consequently, that after having taken the machinery out of the frame and brought the parts home, leaving the frame in Washington, he did not lay the machinery aside as something incomplete, and requiring more thought and experiment, but that he laid it aside without any intention of abandoning the same, and with the intention of constructing a new frame, and of restoring the invention, including the needle feed, in the form of an operative machine. 1. Giving full effect to all the testimony of the plaintiff, it does not show, and in the judment of the court does not tend to show, that he invented in 1848, and reduced to practice in the form of an operative machine, any needle feed which included a pressure foot and table, or any equivalent devices, and unless the needle feed included these devices, the jury were not authorized, under the instructions of the court, to find a verdict in favor of the plaintiff. His own testimony shows indubitably, that the straight clamp or wooden holder was a mere experiment, and as such, was left at home, when he went to Washington, with a view to apply for a patent; and in point of fact, the clamp was never restored until near the close of the first trial to the jury. Argument upon that subject is unnecessary, as the testimony of the plaintiff upon the point is full and explicit. He never completed the ratchet clamp, and it will hardly be pretended that the rotary clamp is, or can be to any practical extent, an equivalent for the pressure foot and table, to be found in the patented invention. Unfinished and incomplete as the machine was, it is impossible to hold, on the evidence exhibited, that it was reduced to practice in the form of an operative machine, without departing from the well settled rules of law, uniformly recognized and approved in all the courts of the United States. Gayler v. Wilder, 10 How. [51 U. S.] 498; Reed v. Cutter [Case No. 11,645]; Curt. Pat. § 43; Woodcock v. Parker [Case No. 17,971]; Washburn v. Gould [Id. 17,214].

II. Further explanations are not necessary to show that the verdict could not have been

for the plaintiff, unless the jury found that the old red machine was an operative sewing-machine, and that it included the equivalents of the pressure foot and table, so far as those devices in the patented machine modified the action of the feeding instrument. Evidently the finding of the jury on that point is against the evidence, as already explained, or it is entirely opposed to the charge of the court.

III. Taking the uncontradicted testimony of the plaintiff as true, he did nothing during the period, from the seventh day of November, 1848, to the last day of December, 1852, or the first part of January, 1853, to construct or perfect any needle feed apparatus, for feeding the material to be sewn in a sewing machine. Evidence explanatory of the delay was wholly wanting at the time, except that offered as to the health of the plaintiff and his pecuniary condition, and the evidence on that point was conflicting, and the plaintiff's own testimony showed that he was able, and found the means to work at other inventions within that period. Considering all the circumstances, and giving them all due weight, still the inference was a clear one that the plaintiff, on his return from Washington, had laid aside the materials as something incomplete, and which required more thought and experiment before he attempted to restore the invention. Regarding the inference to that effect as a clear one, and wholly unopposed by other evidence of any importance, I am of the opinion that the verdict, in this view of the case, was clearly against the evidence. Wilkinson v. Greely [Case No. 17,671].

IV. When the plaintiff returned from Washington, he laid the parts of the machine, brought home, aside, as before explained, and never attempted to restore the invention until an opportunity was afforded him to examine the Grover & Baker machine.

Prior to that time, there is not, in the view of the court, a circumstance in the case that does not appear to indicate that he had utterly deserted and abandoned the old red machine. He had devoted all of his time and attention to the construction of models for other inventions; and as circumstances had rendered it convenient and useful, he had appropriated a certain portion of those materials to other machines. Except the fact that he did ultimately reproduce the machine, or a representation of it, there does not appear to be the slightest evidence to warrant the conclusion, that when he laid the materials aside, he had any expectations whatever that he would ever attempt to restore the invention. For these reasons, I am of the opinion that the finding of the jury on this point was undeniably against the weight of the evidence.

V. Nominal damages only were claimed by the plaintiff in the opening of his case, and the evidence showed that the defendant sold but one machine, and that was admitted by the defendant at an early stage of the trial. When the subject of damages was alluded to in the closing argument, it was again stated that the plaintiff only claimed nominal damages. Such damages only being claimed, and there being no sufficient evidence to show that more than one machine was sold, the court instructed the jury if their verdict was in favor of the plaintiff, to find nominal damages; but they returned a verdict in his favor assessing damages in the sum of five hundred dollars. Errors of this description may sometimes be obviated by allowing the prevailing party to remit the excess, and that course is frequently adopted in cases where the court is satisfied that the error has resulted from oversight or mere inadvertence; but where, as in this case, the finding is not only contrary to the evidence, but in direct contravention of the charge of the court, the difficulty can not in general be remedied in that way. Parties have a right to an impartial trial according to law; and where it appears to the court that the requirement of the law in that behalf has not been fulfilled, it is the duty of the court, on motion to that effect, to set the verdict aside and grant a new trial.

VI. Misconduct of the party and of the jury is also alleged; but having already reached the conclusion, upon grounds connected with the merits of the controversy, that a new trial must be granted, it is not deemed necessary to reproduce the evidence offered by the defendant in support of the motion. Irregularity on the part of the party charged, or of the jury, must be satisfactorily proved in order to lay the foundation for the interposition of the court; but when the irregular conduct is established, it is not necessary that it should certainly appear that it influenced the jury. In that state of the case, it is sufficient that the irregularity appears to be of such a character that it might have affected the impartiality of the proceedings. Such was the rule laid down in Com. v. Roby, 12 Pick. 520, and it appears to be correct. In that case the court says that "where there is an irregularity which may affect the impartiality of the proceedings, as where meat and drink, or other refreshments have been furnished by a party, or where the jury have been exposed to the effect of such influence, as where they have improperly separated themselves, or have had communications not authorized, there, inasmuch as there can be no certainty that the verdict has not been improperly influenced, the proper and appropriate mode of correction or relief is by undoing what is thus improperly and may have been corruptly done." Text writers usually state the rule as follows: "That whenever it is made satisfactorily to appear that the jury were influenced by improper motives, or that they acted corruptly or under a mistake, or it clearly appears that a fair trial has not

been had, the verdict will be set aside and a new trial granted." Any improper interference with the jurors may afford sufficient ground for granting such a motion, and it is not necessary that the attempt to influence the jurors should be made by one of the parties, nor even by his agent. It is sufficient if it clearly appear that it was done in his behalf, and it is never necessary to show that the misconduct controlled or determined the verdict, provided it was of a character that it might have had an undue influence. Taken as a whole the evidence shows very unusual and, in the opinion of the court, culpable conduct on the part of Thomas J. Herring, which can not but be regarded as an irregularity, and which, in point of fact, affords strong grounds to conclude, that he must have learned from some one of the jury the result of their deliberations, before that result was announced in court. Strong ground to conclude, also, that the plaintiff knew what the result would be several days before the verdict was rendered, is also furnished by the testimony taken in the motion.

Those facts and circumstances must be weighed, in connection with the conduct of the jury, in disregarding the instructions of the court in respect to the merits of the controversy; and when viewed in that connection, they produce full conviction, in the mind of the court, that the parties have not had an impartial trial according to law. Courts of the United States have power to grant new trials in cases where there has been a trial by jury, for reasons for which new trials have usually been granted in courts of common law; and where, as in this case, it is fully made to appear that the trial has not been an impartial one, it is the duty of the court to exercise the power conferred by the judiciary act. Verdict set aside and new trial granted.

## Case No. 7,410.

### JOHNSON v. ROOT.

[2 Cliff. 637.] [1]

Circuit Court, D. Massachusetts. 1861.

PATENTS—PRESUMPTIVE EVIDENCE—OPERATION OF CAVEAT—ANTICIPATION AND INFRINGEMENT—ABANDONMENT—SEWING MACHINES.

[1. A patent, together with the application therefor, affords prima facie evidence that the patentee was the original and first inventor of the improvement at the date of the application. This presumption, however, extends no further back than the date of that application, and is not a conclusive one, but may be controlled by other evidence.]

[2. The operation of a caveat is limited by the act of July 4, 1836 (5 Stat. 117), to one year, and it is not competent for courts or juries to extend it further; and if during that period the inventor does nothing to mature and perfect what he described in the caveat, and only files his application after several years, he cannot, by virtue of the caveat, carry back his invention beyond the date of his application.]

[3. In passing upon questions of anticipation and infringement, similarities or differences are not to be determined by the names of things or by apparent similarities or differences in form or shape; but rather the machines or their several devices must be examined in the light of what they do, or what office or function they perform, and how they perform it. Hence they must be considered as substantially the same, when they perform substantially the same function or office, in the same way, and to produce the same result; and as substantially different when they perform different duties, or in a different way, or produce a different result.]

[4. Where an inventor lays the parts of his machine aside as something incomplete, and requiring more thought and experiment, never intending to restore them in the form of an operative machine without material modifications or alterations, and then does nothing more towards perfecting his invention for over four years, this is sufficient to warrant the jury in finding that he had abandoned it to the public, unless there is some fair and reasonable excuse for his delay.]

[5. The Johnson patents (original No. 10,597, and reissue No. 355), for an improvement in sewing machines, construed as to the third claim, by the court; and the same found by the jury to be valid, and infringed by defendant.]

[This was an action of trespass on the case by William H. Johnson against James E. Root, for the infringement of letters patent No. 10,597, granted to plaintiff March 7, 1854, and reissued February 26, 1856 (No. 355), for an improvement in sewing machines. Defendant pleaded the general issue, and filed certain specifications of defense, denying that the machine sold by him infringed the plaintiff's patent, or that plaintiff was the original and first inventor of anything embodied in defendant's machine. Upon trial the jury disagreed (Case No. 7,411), and the cause is now tried the second time.]

CLIFFORD, Circuit Justice (charging jury). According to the uniform practice in this court, it now becomes my duty to direct your attention to the nature of the controversy between these parties as exhibited in the pleadings, and to give you such instructions in matters of law as seem to me to be applicable to the evidence in the case. You are the judges of the credibility of the witnesses and of the force and effect of the testimony; and it is exclusively within your province, under the instructions of the court, to determine all questions of fact involved in the issue. But it is the province of the court to determine all questions of law, and it is your imperative duty in such matters to follow the instructions of the court. Unless the rule were so, it would never appear on what principles of law the jury proceeded in finding their verdict. Every verdict, in contemplation of law, is founded upon the facts of the case as ascertained by the jury, and the law applicable to that state of the case as determined by the court. Under our jurisprudence, the action of the

[1] [Reported by William Henry Clifford, Esq., and here reprinted by permission.]

jury in finding the facts cannot be revised in any appellate tribunal; but very ample provision is made for the correction of any error committed by the court. Such correction may be accomplished in several modes, but the most effectual one is that by bill of exceptions and writ of error to the supreme court of the United States, to revise the rulings and instructions of the court below. That proceeding, however, is based upon the legal presumption that the jury followed the instructions of the circuit judge; and that the error in the instructions of the circuit judge caused the error in the finding of the jury. Now, if it were competent for the jury to depart from the instructions of the court, then no such presumption would arise; and if not, then it could not appear that the error in the instructions caused the error in the finding of the jury, and consequently it would be unsafe to reverse the judgment on that account, which would leave the complaining party without any adequate remedy. Throughout your deliberations, therefore, you will be guided by the rule, that it is your province to ascertain the facts of the case, under the instructions of the court, and that it is the duty of the court to determine all questions of law applicable to the evidence. With these remarks I will proceed to direct your attention to the nature of the controversy.

This is an action of trespass on the case, for an alleged infringement of a supposed new and useful improvement in sewing-machines, secured to the plaintiff by certain letters patent. Among other things, the plaintiff alleges that he was the original and first inventor of the improvement, and that letters-patent for the same were issued to him on the 7th of March, 1854. By recurring to the declaration, however, it will be observed that the letters-patent first issued were subsequently surrendered and cancelled, and that a new patent, on an amended specification issued to him on the 26th of February, 1856, to continue for the term of fourteen years, from the 7th of March, 1854 (which was the date of the original patent). The plaintiff also alleges that the defendant, on the 4th of March, 1856, and at divers other times, before and afterwards, during the term of the patent, and before the purchase of the writ, did unlawfully and wrongfully and without the consent and license of the plaintiff, make, use, and vend to others to be used, his said improvement.

Without further reference to the declaration, it will be sufficient to say that the suit is founded upon the reissued patent of the 26th of February, 1856, and that the writ is dated on the 28th of April of the same year. Of course, the plaintiff can only recover for such infringement of his patent, if any, as the evidence shows the defendant committed within the period embraced between those dates. But there is no controversy on that point, for it is admitted by the defendant that he sold the machine given in evidence by the plaintiff, as his machine, within that period, and it is not claimed by the plaintiff that the evidence shows that the defendant sold any other.

As an answer to the declaration, the defendant pleads that he is not guilty, and has filed certain written notices in the case, setting up two general grounds of defence, to which more particular reference will hereafter be made. To maintain the issue on his part, the plaintiff, amongst other things, introduced the reissued letters-patent described in the declaration. That patent as reissued, bears date on the 26th of February, 1856, and is the one on which the suit is founded. At a later stage of the trial, the plaintiff introduced a model of the patented machine, as furnished to the patent office, which is the one constantly denominated during the trial as "the plaintiff's machine." His patent is accompanied by the specification and drawings, and you are instructed that it is prima facie evidence that the plaintiff is the original and first inventor of what he has described therein as his invention. Your attention, however, will be chiefly directed to the third claim in the specification, because it is that claim only which the plaintiff alleges that the defendant has infringed.

Omitting the first and second claim as comparatively unimportant in this investigation, it reads as follows:—"What I claim as my invention and desire to secure by letters-patent is, 3d. The feeding of the material to be sewn by means of a vibrating piercing instrument, whether said instrument be the needle itself, or an independent instrument, in the immediate vicinity thereof, substantially as herein described."

The plaintiff also introduced the machine, which he alleges the defendant sold, and which he claims to be a violation of the exclusive right secured to the plaintiff by his reissued letters-patent, and the defendant admits that he sold that machine at the time and place alleged in the declaration, but he denies that the machine, as sold, infringes the third claim of the plaintiff's reissued patent; and he also denies that the plaintiff is the original and first inventor of anything that is embodied in his (the defendant's) machine.

These remarks will be sufficient to enable you to understand the foundation of the plaintiff's suit, and the two general grounds of defence set up by the defendant. Two principal questions are presented, which it is your province to determine from the evidence in the case under the instructions of the court, and you will adopt such order in considering them as you may think proper. But in view of the peculiar nature

of the controversy, and the complicated character of the evidence, it is not possible for me to give you a clear statement of the rules of law by which you are to be governed in the performance of your duty, except by pursuing the order of investigation usually adopted in cases of this description.

One of the questions is, whether the plaintiff is the original and first inventor of what he has described in the specification contained in his reissued letters-patent so far as respects the third claim of the patent; and the other is, whether the defendant's machine, as sold by him, and given in evidence by plaintiff, infringes that claim of the patent, when properly construed and understood according to its legal effect.

In considering those questions, and weighing the evidence bearing upon each of these points, it becomes necessary that you should know and carefully observe what the plaintiff's invention is, as he has described it in his patent, specification and drawings, so far as respects that claim. That question it is the duty of the court to determine as a question of law, arising upon the construction of the patent, including, of course, the specifications and drawings accompanying the same. Pursuant to that duty, I instruct you that the third claim of the plaintiff's patent is for his described means of feeding the cloth or other material to be sewed in a sewing-machine. Feeding the cloth or material to be sewed in a sewing-machine may be understood as signifying such a regular, progressive advance of the material as shall space the stitches of the seam regularly, so that they will be of equal length; and the third claim is for the described means to effect that end. It is not for the result attained, but for the means he has invented of attaining it substantially as described in the specification. Detached passages of the specification, if separately considered, might lead to a different conclusion, but the different parts of the instrument must be compared with each other and considered as a whole, and when so construed it leaves no doubt in the mind of the court that the claim must be limited to the means of feeding the material to be sewed in a sewing-machine, substantially as described in the specification and illustrated by the drawings.

It is insisted by the plaintiff that this part of his invention consists in applying power by which the material is fed directly to the cloth or other material to be sewed, and at or near the point where the stitches are being formed; and it is undoubtedly true that the feeding instrument in the modes of operation described in the specification, is to be applied directly to the material to be fed, and when the vibrating piercing instrument for feeding is the needle itself, it is applied to the material at the point where the stitch is being formed, for the specification states that the descent of the needle perforates the cloth and by the action of the described devices the pressure of the holder upon it is relieved, permitting the vibration of the needle to move forward the cloth, a sufficient distance for the succeeding perforation, the described spring acting through the holder as the needle-bar rises, so as to keep the cloth from slipping when the needle descends, and again perforates it. Beyond a question, therefore, the vibration of the needle during its first perforation, as stated in the specification, feeds forward the cloth and permits the needle in its second descent to have the proper position, and during the second descent of the needle, the cloth is fed forward as before, the needle making another hole, or again perforating the cloth as it again descends. These considerations lead necessarily to the conclusion that by the true construction of the patent the feeding action of the machine is performed by the operation of sewing; the vibrating movement of the guide B, and with it the needle-bar, causing the material to be moved forward after it is perforated by the needle, the holder relaxing for that purpose.

Another feeding and perforating arrangement is also suggested in the specification, which as there stated is designed to be used for making the holes in leather and other heavy work, while the needle preceding the awl (as stated in the specification) forms the seam. And upon that subject you are instructed that when an independent instrument in the immediate vicinity of the needle, is used for feeding, it has the same mode of operation as the needle has when used separately in perforating the cloth for sewing, but the needle forms the seam. When an independent instrument in the immediate vicinity of the needle is used for feeding, it is applied directly to the material to be fed, and near the point where the stitches are being formed. But whether the vibrating piercing instrument used be the needle, or an independent instrument in the immediate vicinity of the needle, the third claim of the plaintiff's patent is not for an abstract idea or principle; nor for every means of applying power directly to the cloth at or near the point where the stitches are being formed, for the purpose of feeding it in a sewing-machine, in contradistinction to applying power for that purpose to a plate, clamp, or bar, to which the cloth is attached. On the contrary, it is, as before stated, for such means of applying power to the cloth for the purpose of feeding it in a sewing-machine, as the inventor has substantially described in the specification of his patent.

For the same reason the claim of the patent under consideration is not for the

use of every vibrating piercing instrument in feeding the material to be sewed in a sewing-machine, but only for such a vibrating piercing or perforating instrument as he has described in his specification,—nor is the claim for every use in feeding cloth of such a piercing instrument as he has therein described (for the instrument, to wit: the needle is old, and the plaintiff cannot without more, patent its use for feeding). He can only patent substantially such means or mode of using it as he has described in his specification; and such means or mode of using it as he has described in his specification, he might patent if he was the original and first inventor of the improvement: and by the true construction of the claim it must be limited to his described means of feeding the cloth in a sewing-machine. He describes his means in his specification, and then in legal effect claims the feeding of the cloth or material to be sewed by those means,—substantially, as described in his specification. Undoubtedly the vibrating piercing instrument, whether it be the needle itself or an independent instrument in the immediate vicinity of the needle, constitutes the described feeding instrument to move forward the cloth. It is contended by the plaintiff that those feeding instruments are different and distinct from the instruments or devices described by the patentee for holding the cloth or material to be sewed. They are certainly different from the devices constituting the holding arrangement: for the specification states in effect that the material to be sewed is placed upon the table under the point of the needle, and cloth-holder, which is raised by a stud to admit the "thickness," and the claim is for the feeding of the material to be sewn by means of a vibrating piercing instrument substantially as herein described, evidently referring back to the specification. With this explanation you are instructed that there is included in the claim as part of the mode of operation, not only the vibrating piercing instrument substantially as described, but also whatever parts necessarily act in connection therewith to feed the material to be sewed in a sewing-machine, so far as any function they may perform modifies the action of the feeding instrument. Whatever means are described which are necessary to the control of the cloth to enable the vibrating piercing instrument to perform the function of feeding, and which modify the action of the feeding instrument, are, to the extent they modify it, to be considered and to be deemed parts of the described invention which the plaintiff has claimed.

In this connection you are also instructed that the feeding of the material claimed in the patent as the result to be attained by this part of his invention, is not to be understood to mean every advance of the material, regular or irregular, equal or unequal, but such regular and progressive advance as is essential to the useful action of a sewing-machine, and which the means described in the plaintiff's specification were designed and adapted to effect; and whatever parts in the plaintiff's specification necessarily act in connection with the vibrating piercing instrument in causing or enabling it thus regularly and progressively to advance the material, and without which the action of the vibrating piercing instrument either would not advance the material at all or would advance it so irregularly as to be useless in a sewing-machine, must be deemed essential parts included in the claim to the extent that they modify the action of the vibrating piercing instrument. No one probably would fail to see that in order to feed the material so as to obtain the described result, there must be a table or some equivalent mechanical device to keep the cloth in position, so that it will resist the thrust of the piercing instrument while it is making the perforation and after the pressure of the holder upon it is relieved to permit the needle as it vibrates to move forward the cloth a sufficient distance for the succeeding perforation. For reasons equally obvious it may be assumed that the vertical bar or holder when held down upon the cloth by the spring, is quite necessary to the proper operation of the feeding arrangement, and upon this subject you are instructed that the surface below the material (called the table) which supports the cloth when it is pressed by the vertical bar or holder so as to keep the cloth from slipping as the needle descends and perforates it, and also the "cloth-holder," which exerts its pressure for that purpose, thus causing the material to be regularly spaced (the said means of supporting and holding the material being such that the same can be freely moved by the operator so as to change the direction of the seam at will as the same is advanced) are included in the claim as necessary to the plaintiff's mode of operation in feeding the material to be sewn, so far as the functions performed by them modify the action of the feeding instrument; but in no other respect can they be regarded as included in the feeding apparatus.

Guided by these principles as to the construction of the patent, you will proceed to the consideration of the merits of the controversy, and I shall direct your attention in the first place to the question whether the plaintiff was or was not the original and first inventor of what he has described in his specification as his invention so far as respects the third claim of the patent. Whether he was so or not is a question of fact for your determination under the instructions of the court. Your attention has already been drawn to the fact that the reissued letters-patent are in evidence in the case, but you should bear in mind in this connection that the plaintiff has also introduced the original letters-patent and the application on which

the patent was granted. That application was filed on the 31st of March, 1853; and you are instructed that the reissued and original letters-patent, together with the application for the original patent, afford prima facie evidence that the plaintiff was the original and first inventor of the improvement in question at the date of the application for the original patent. That presumption, however, extends no further back than the date of that application, and is not a conclusive one, but may be controlled by other evidence. To administer justice to the parties it is necessary that you should fully understand and carefully consider the precise positions which the parties respectively assume in this branch of the case.

It is insisted by the plaintiff that the feeding apparatus described by him in the specification of his reissued patent, and set forth in the third claim as the feeding of the material to be sewed by means of a vibrating piercing instrument, whether said instrument be the needle itself or an independent instrument in the immediate vicinity of the needle, substantially as described, was invented by him and reduced to practice in the form of an operative sewing-machine as early as the 27th of October, 1848, and that the same invention, so far as respects the means of feeding the material to be sewed in a sewing-machine, was subsequently embodied in his original letters-patent of the 7th of March, 1854, and is now embodied in the reissued letters-patent on which the present suit is founded. On the part of the defendant, every element of that proposition is denied. He denies that the plaintiff made the invention in question so far as respects the described feeding apparatus at so early a period, or at any other time prior to the date of the application for his original letters-patent; or if he did that he ever as matter of law or in fact reduced it to practice in the form of an operative sewing-machine, prior to the date of that application: and finally, he insists on this branch of the case, that what the plaintiff has embodied in the reissued patent is not the same invention as that described in the caveat, and embodied in the old red machine, but in point of fact is a substantially different invention, so far as respects the described feeding apparatus, and was designed and is adapted to effect the feeding of the material to be sewed in a sewing-machine by substantially different means and by a mode of operation substantially different. Whatever the plaintiff may have invented prior to his application for his patent, is of no consequence in this controversy, unless it appears that the same or some substantial and material part of the same which is new and useful is embodied in his reissued letters-patent, because it is for the infringement of that patent only that the defendant is sued in this case. When I speak of the patent, you will of course understand that I refer to the third claim of the patent, because it is only that claim that the plaintiff charges the defendant with having infringed. It becomes necessary for you to inquire and determine what, if anything, the plaintiff did invent and reduce to practice in the form of an operative sewing-machine, so far as respects the feeding apparatus, prior to the date of his application for the patent; and if anything, whether the same or a substantial and material part of the same is embodied in the reissued letters-patent, as construed and defined by the court. Although he invented a new and useful apparatus for feeding the material to be sewed in a sewing-machine, prior to the date of his application for his original patent, still, if no substantial and material part of the same which is new and useful is embodied in his reissued letters-patent, he cannot rightfully claim for the purposes of this suit, that his invention extends further back than the date of his application for the reissued patent. Differences merely in the form of the machinery or of the devices in the plaintiff's patented apparatus for feeding the material in a sewing-machine, as compared with that exhibited in the old red machine, will not authorize you to find that the former is a new invention as compared with the latter, even though the differences may amount to an improvement, if the old red machine in point of fact was an operative sewing-machine and reduced to practice as assumed by the plaintiff. But if the patented apparatus accomplished a substantially different result by substantially different means, and in a mode of operation substantially different, then there is nothing new and useful in common between the two machines. And if not, then the plaintiff cannot carry back the date of his patented invention to any period prior to the time he filed his application for the original patent. Among other things, it is suggested by the counsel of the plaintiff that the holder used in the old red machine, if the machine be tipped down on its side, will perform, for the purpose of feeding the material, both the function of the table and the presser foot; and that in substance and effect, the old red machine becomes and is the same in principle and in the mode of operation as the patented machine, so far as respects his feeding apparatus. Four experts have been examined in the case, and no one I believe has testified that the machine as constructed was designed to operate in that position. Upon that subject I instruct you that if it would require invention to break up the machine and reconstruct it in that form, and put it into successful operation in that position, the suggestion of the plaintiff is entitled to no weight whatever; but if it would not require invention to make the proposed change in the position of the parts in order to make an operative sewing-machine, in that new position, and to reconstruct it for the purpose, then you will give the suggestion such weight as you may think it deserves, bearing in mind that the plain-

tiff himself has testified that it was never used in that way.

In this connection you will also take into consideration the S. C. Blodgett patent and machine, and all the evidence in the case respecting the same. On the part of the defendant, it is insisted that the Blodgett invention is prior in date to that of the plaintiff, even supposing that the plaintiff can carry back his invention to the time when he constructed the old red machine, and that the two machines, if the latter be turned down upon its side, are substantially the same. Every element of that proposition, however, is denied by the plaintiff, and evidence has been introduced on both sides bearing on the matter. Assuming the theory of the defendant to be correct, then the Blodgett machine would supersede the old red machine to the extent of the suggested change in the position of the working parts of the machine. Unless the witness Blodgett is mistaken, or unworthy of credit, it would seem that his invention was made before the old red machine was constructed by the plaintiff; but the question is one of fact, exclusively within your province, and as the question has been fully argued on both sides, I do not think it necessary to remark further upon the evidence. If the Blodgett invention was not made before the old red machine was constructed and reduced to practice in an operative machine, then the suggestion of the defendant is entitled to no weight; but if it was, then you will proceed to compare the two machines in connection with all the other evidence bearing upon the question, and give it such weight as you think it deserves. But suppose there is something in common between the old red machine and the patented machine of the plaintiff, still the defendant contends that the plaintiff cannot carry back the date of his invention to any period prior to the time he filed his application for the original patent.

To show that the feeding apparatus described in the specification of his reissued letters-patent was invented by him and reduced to practice in the form of an operative sewing-machine as early as the 27th of October, 1848, or certainly as early as the 7th of November of the same year, the plaintiff relies upon the old red machine, together with the parol testimony respecting the invention, and the caveat filed in the patent office, which is also in evidence in the case. Among other witnesses, the plaintiff himself was examined on the point. Reference will be made to certain portions of his testimony, not with any intention of entering into the details of the evidence, but for the purpose of fixing certain dates, and to present a general view of what the plaintiff did prior to his application for the original patent, which issued on the 7th of March, 1854. Irrespective of this statement (if in any respect it is incorrect), it will be your duty to weigh the whole evidence, and to apply the rules of law you receive from the court, to the true state of the facts as you find it from all the evidence in the case. He first constructed and used two needles to carry the thread, putting them into wooden handles, and sewing in the manner described by him in the early part of his testimony. Those wooden needle-holders, he stated, were made in June or July, 1847, and were occasionally used by him till some time in July of the following year. His first step towards constructing a sewing-machine was to prepare some patterns for needle bars, which was done in July, 1848. Needle bars were made from those patterns by his directions, and they are in evidence in the case. Afterwards he arranged them in a frame and got some gearings made, but they were not of a character to answer his purpose, as he stated, except as a basis of calculation for another set of patterns. Without entering into details, it will be sufficient to say that the frame as stated by the witness was a temporary one, and he did not attempt to sew in the machine. Having made his calculations, he constructed or caused to be constructed a new set of patterns and sketches, and employed a machinist to make another set of needle-holders and apparatus for a machine. They were accordingly made in August, 1848, and the plaintiff, after they were completed, took them, together with the shafting and gearing which he had provided, to a cabinet-maker, and employed him to make the frame. That machine had, as the witness stated, what has been called a wooden holder, like the one first introduced by the plaintiff, and he says he did enough sewing with the machine to satisfy himself that it "was going to be a good practical thing." Something like a week or ten days elapsed before he did anything more to perfect the machinery. Intending to reconstruct the machine more thoroughly with a view to apply for a patent, he took the needle-holders out of the frame and carried them back to the machinist, in order to have another set made, with certain alterations and additions.

After the needle-holders were complete and the shafting and gearing had been somewhat improved, he then had a new frame made for his machine and put the whole in working order, using for that purpose the third set of needle-holders. As constructed, the machine had but one arrangement on the sides to receive a ratchet clamp. About the same time he also had a ratchet clamp made which he introduced in evidence; but as it was not completed and the arrangement to receive it was not finished, it could not be used. Certain other differences between this machine and the one previously constructed are also mentioned by the witness, which need not be recapitulated, as you will remember the whole testimony, and give it such weight as you may think it to deserve. Castings were also made by the

plaintiff for a rotary clamp-holder, but they proved to be too heavy and were never finished, so that the only device to hold the cloth ever used by him before he went to Washington, was the holder (or one like it) which has been designated during the trial as the "wooden holder." Short pieces of canvas and padding were sewed, by the plaintiff, in the machine before he left for Washington, and the witness states that he sometimes sewed the length of the piece and then around the edge and back again in various forms. According to the statement of the witness, he commenced to construct the machinery, or the patterns for the same, in July, 1848, and put the last machine in working order a short time before he started for Washington. He left for Washington on the 27th or 28th of October, 1848, carrying the machine with him as far as the city of New York. When he arrived at New York he found it necessary to forward the machine from there by the merchandise train, and it was somewhat injured on the route. In this connection you will recollect that he did not carry with him either the "wooden holder," which he had used in the machine before he started, or the castings for the rotary clamp; but he did carry with him the patterns by which the castings for the latter had been made. Avoiding unnecessary details as much as possible, it will be sufficient to say that after he arrived in Washington he employed a solicitor of patents, and soon learned that some parts of his invention had been anticipated by others, and that his model was too large and would not be received at the patent office on account of its size. He arrived in Washington several days before the machine came to hand; and during that period he constructed or caused to be constructed a rotary clamp. It was made of mahogany; and after the machine arrived, he repaired the machine and fitted in the rotary clamp for the first time. Up to that period of time he had never used any other than the stationary holder, because only one of the necessary arrangements for the ratchet clamp had been completed. After fitting the rotary clamp, he operated the machine in the presence of his patent solicitor. When he found that he could not patent his machine, he decided, under the advice of his solicitor of patents, to file a caveat, which is in evidence in the case. While he was there his solicitor also prepared a paper which has been given in evidence, and which the plaintiff in his testimony designated as a petition and oath for an application for a patent.

As stated by the plaintiff, it was signed and sworn to by him, and left with his solicitor, who, it seems, never presented it to the patent office during his lifetime, and it has remained among his papers until a recent period. On looking at the paper you will see that it contains no description of the invention or of its mode of operation, and is unaccompanied by any drawing, but what is more, it was never filed in the patent office, and, therefore, cannot be regarded as an application for a patent, within the meaning of the patent law. His caveat was duly executed and filed on the 7th of November, 1848, and was accompanied by a drawing to illustrate the invention. Having executed those papers and filed the caveat, he took the machine out of the frame, put it in a trunk which he purchased for the purpose, and on the same afternoon left Washington to return to his home. All those parts of the machine remained in the trunk in his house at New Hartford until he removed to Granville, when he put them into a box, and with the exception of some few parts which he used on other machines, they remained in the box until the first part of January, 1853. During the period from the 7th of November, 1848, to the last of December, 1852, or the first part of January, 1853, he did nothing to perfect any needle-feed apparatus for feeding the material to be sewed in a sewing-machine. Taking his statement as true, he commenced soon after he returned from Washington to make the preparatory investigation to accomplish what is called the Grover & Baker stitch; and in November or December, 1848, he made a model. On the 17th of November, 1848, he wrote to his solicitor of patents the letter which has sometimes during the trial erroneously been designated as a second caveat. In that letter he stated, among other things, that "the needles cross each other and catch the thread from each needle, in the same manner as they do when both pass through the cloth, the object being to have all the looping on one side, and on the other side, leave but one thread, the same as in common back-stitching by hand. The only disadvantage (if it may be called a disadvantage) in this arrangement of the needles will be in the necessity of moving the wheel on which the work is placed by means of a feeder, as I had designed to move the bar, which is very easily done." Looking at the form of the paper, it is obvious that it is not a caveat, and by the true construction of the language employed it is equally clear that it was not designed as such by the writer. On the contrary, it is precisely what it purports to be, a letter from the plaintiff to his solicitor, and the filing of it in the patent office did not give it the force and effect of a caveat, within the meaning of the patent law.

Some time in January, 1849, if the court understood the witness correctly, the plaintiff sent a rough model of this invention described in that letter to his patent solicitor in Washington, and he states that it remained there in the possession of his solicitor till October or November, 1852. Little or nothing was done by him after that towards constructing any model or machine, except to make some patterns, till June or July,

1852. He then went to Springfield and had some gearings, castings, shaftings, &c., made for a sewing-machine, and afterwards went to Granville, and employed one Joel Hall to help him make the machine. That machine was completed in September, 1852, and the plaintiff carried it to Washington in the course of the same month and filed an application in the patent office, with a view to patent the invention. You will bear in mind that this model was for the same invention substantially as that previously sent to his patent solicitor. Both parties concede that these were models of what is called the Grover and Baker stitch, and the rotary clamp.

Grover and Baker, on the 11th of February, 1851, had patented the same stitch, and had an application pending, or afterwards presented one for a reissue of their patent. An interference was declared by the patent office, and notice was given to Grover and Baker. Whereupon the witness Potter went to see the plaintiff to ascertain the nature of his claim, and, if possible, to adjust the controversy. They first met, as you will recollect, at Hartford, and there the plaintiff saw and examined the Grover and Baker machine. Failing to adjust the matter at that time, for reasons that need not be stated, they agreed upon a second interview; and accordingly they met at the office of Mr. Bates, in Westfield, in this state. Prior to these interviews the plaintiff had conveyed one half of the invention to Mr. Goodwin, so that it was necessary that he should be a party to the arrangement, if any should be made. At the first interview at Mr. Bates's office, they agreed upon a second interview at the same place, and accordingly it was had, and Mr. Goodwin was then present and became a party to the written agreement, which, together with the assignment and bond from the plaintiff to Goodwin, is in evidence in the case. After some two or three days' conference, the parties came to an understanding, which was reduced to writing, and the papers were left in the hands of Mr. Bates. Pursuant to that agreement and the arrangement between the parties, the plaintiff's specification was divided, and the patent for the stitch, and perhaps the needles, was taken out in the name of Mr. Bates, and subsequently on the payment of the consideration agreed therefor, was assigned to Mr. Potter, who had acted throughout for the company, of which he was president. By virtue of that transaction, and of the assignment of the patent by Bates, which was subsequently made, the plaintiff parted with all his interest in so much of his invention as was included in the patent to Bates. That patent was granted on the 22d of February, 1853, and on the 12th of April in the same year, a patent was issued to the plaintiff, for the rotary clamp.

As the plaintiff states, he began to make some drawings for a needle-feed about the 3d of January, 1853. He had the frame to the old red machine made as now exhibited in the spring of 1853. It seems the cams have been changed, and I think the needles are not the same. Most of the machinery, as the witness states, is the same that was brought back from Washington in a trunk, and which had been kept either in the trunk or in a box, as before explained.

He had used the crank and one pulley in getting up one of the models he sent to Washington, and the rotary clamp is a new one, and, as I understand the testimony, the fly-wheel was used in another model. On cross-examination the witness stated that he completed the model for the needle-feed so as to take it out of the shop on the 17th of February, 1853. His application for a patent was filed on the 31st of March, of the same year, and on the 7th of March, 1854, the patent issued. To account for the delay from the 7th of November, 1848, when he started from Washington on his return home to the 3d of January, 1853, when he commenced to get up his model for the invention, originally patented on the 7th of March, 1854, the plaintiff has introduced testimony tending to show that during a part or all that time he was in poor health, and that he was somewhat embarrassed in his circumstances. On the other hand, the defendant has introduced testimony tending to show that his general health was not seriously impaired, and that his pecuniary circumstances were such that he was able to purchase a farm worth some $1,500, and had nearly or quite the usual amount of stock on the farm.

Having referred in very general terms to what he did in relation to the machine which he carried to Washington, from the time he commenced to construct it to the time he filed his application for the original patent, I will proceed to state certain rules of law, by which you will be guided in this branch of the case, beginning with the caveat. Two provisions upon the subject of a caveat are to be found in the patent act of July 4, 1836 [5 Stat. 117]. By the eighth section of that act, it is provided, among other things, that "whenever the applicant shall request it, the patent shall take date from the time of filing of the specification and drawings, not, however, exceeding six months prior to the actual issuing of the patent. And on like request, and the payment of the duty herein required by any applicant (which is $30), his specification and drawings shall be filed in the secret archives of the office, until he shall furnish the model, and the patent be issued, not exceeding the term of one year, the applicant being entitled to notice of interfering applications." Reference is made to that provision simply for the purpose of remarking that the caveat in this case was not filed under that section, and I do not think it necessary to give you any instructions upon the subject. But there is another provision in the twelfth sec-

tion of same act (and it is under that provision that the caveat in this case was filed). Omitting such parts of the section as have no application to this case, it provides in effect that any citizen of the United States who shall have invented any machine, or improvement thereof, and shall desire further time to mature the same, may, on paying to the credit of the treasury . . . . the sum of $20, file in the patent office a caveat setting forth the design and purpose thereof, and the principal and distinguishing characteristics, and praying protection of his right, till he shall have matured his invention; . . . . and such caveat shall be filed in the confidential archives of the office, and preserved in secrecy; and if application shall be made by any other person within one year from the time of filing such caveat, for any invention with which it may in any respect interfere, it shall be the duty of the commissioner to deposit the description, specification, drawings, and model in the confidential archives of the office, and to give notice, by mail, to the person filing the caveat, of such application.

Nothing can be more certain than that the protection authorized to be secured by that act is limited to one year from the time of filing the caveat, and I instruct you that after the expiration of one year from the 7th of November, 1848, the caveat filed by the plaintiff in this case ceased to have any legal operation to protect his right, if any he had to his supposed invention. A caveat is allowed with a view to enable the caveator to mature his invention, and the act of congress gives him one year for that purpose, and it is not competent for courts or juries, by virtue of such a proceeding, to enlarge or extend it any further.

It becomes my duty also to give you one other instruction upon this subject, based upon the circumstances of the case.

If you find from the evidence that the plaintiff did nothing to mature what he described or suggested in his caveat, his means of feeding the material to be sewed in a sewing-machine, from the 7th of November, 1848, to the last of December, 1852, then he cannot by virtue of the caveat carry back the date of his patented invention for feeding such material to any period before the date of his application for the original patent.

I am requested by the defendant to instruct you that the method of feeding claimed in the plaintiff's patent is not contained in his caveat, but I do not think it necessary to give that instruction, because there is no evidence in the case, as I understand it, to show that the plaintiff did anything to reconstruct his machine or to mature the needle-feed from the time when he filed his caveat until he commenced to construct the model for his patented machine; and if this is so, then you would not be authorized to give any effect to the caveat, as such, to carry back his invention described in the patent, to a period prior to the date of the application on which the patent was granted.

Irrespective of the caveat, it is insisted by the plaintiff that he may show and that the evidence in the case proves, that he invented the feeding apparatus described in the specification of his reissued letters-patent as early as the 27th of October, 1848, or certainly as early as the 7th of November of the same year, and that he reduced the same to practice in the form of an operative sewing-machine. That proposition is wholly denied by the defendant, and he insists: 1st. That the plaintiff did not make any such invention in 1848 as is described in the reissued letters-patent; 2d. If he did, that he did not reduce it to practice in the form of an operative sewing-machine. Whether he made such an invention as is described in the specification of his reissued letters-patent in 1848, and if he did, whether he reduced it to practice or not in the form of an operative sewing-machine, are questions of fact to be determined by you, from all the evidence in the case.

If you find that he did not make any such invention in 1848, or if he did, that he did not reduce it to practice in the form of an operative sewing-machine, then you are not authorized to find that his patented invention takes date prior to the time when he filed his application for the original patent, as it is not pretended that the model sent to the patent office in 1852 was an operative machine for practical use. Should you find for the plaintiff on both of the points under the preceding instruction, you will then proceed to examine the three patents of A. B. Wilson, with the drawings and models and machines made under the same, which are in evidence in the case. To avoid all danger of confusion, I will only refer to three patents.

One to A. B. Wilson was issued November 12, 1850, the application for which was filed March 18, 1850. Another also to A. B. Wilson was issued August 12, 1851, the application for which was filed July 8, 1851. The third was issued to Wheeler, Wilson, Warren, & Woodruff, assignees of A. B. Wilson, on the 15th June, 1852, the application having been filed on the 7th of February, 1852.

Certain other patents were also introduced by the defendant in the same connection, which he insists are substantially a continuation of the inventions described in the original patents issued to Wilson. For the present, however, I wish to direct your attention only to such as were issued to A. B. Wilson or his assignees prior to the application filed by the plaintiff for his original letters-patent. On this branch of the case you will inquire and determine from the whole evidence bearing upon the point, whether the feeding apparatus described in the Wilson patents, or either of them, or in the patented machines, or either of them, made under the patents, and given in evidence, are substantially the same or substantially different from the feeding apparatus, described in the plaintiff's

specification in his reissued letters-patent. Whether Wilson's invention is substantially the same or substantially different from the plaintiff's patent is a question of fact for your determination, under the instructions of the court.

In determining that question you are not to determine about similarities or differences by the names of things, but are to look to the machines or their several devices or elements in the light of what they do, or what office or function they perform, and how they perform it, and to find that a thing is substantially the same as another, if it performs substantially the same function or office in the same way, to obtain the same result; and that things are substantially different when they perform different duties, or in a different way, or produce a different result. For the same reason you are not to judge about similarities or differences merely because things are apparently the same, or apparently different in shape or form, but the true test of similarity or difference in making the comparison, is the same in regard to shape or form as in regard to names, and in both cases you must look at the mode of operation, or the way the parts work, and at the result, as well as at the means by which the result is attained. In all your inquiries about the mode of operation of either machine, you are to inquire about and consider more particularly those portions of a given part which really do the work, so as not to attach too much importance to the other portions of the same part which are only used as a convenient method of constructing the entire part under consideration. You will regard the substantial equivalent of a thing as being the same as the thing itself, so that if two machines do the same work, in substantially the same way, and accomplish substantially the same result, they are the same; and so if parts of the two machines do the same work, in substantially the same way, and accomplish substantially the same result, those parts are the same, although they may differ in name, form, or shape; but in both cases, if the two things perform different work, or in a way substantially different, or do not accomplish substantially the same result, then they are substantially different.

Slight differences in degree, if properly understood, cannot be regarded as of weight in determining a question of substantial similarity or substantial difference. One thing may be a little longer or a little shorter than another, or it may work a little better or a little worse, and yet the two things may be substantially the same. But that principle must be applied with great care where, as in this case, the devices are minute mechanism. Should you find that the invention of Wilson, so far as respects the feeding apparatus, is not substantially the same as that described in the plaintiff's patent, then I instruct you that so far as respects the defence set up by the defendant under the Wilson patents, and those of a date subsequent to the plaintiff's application, the inquiry whether the plaintiff's invention takes date prior to the applications for his original patent, is wholly immaterial in this case, because Wilson's invention, if it be substantially different from the plaintiff's patent, cannot anticipate or supersede it.

But if you find that Wilson's invention, so far as regards the feeding apparatus described in the three patents under consideration, or in either of them, is substantially the same as the plaintiff's patented invention, you will then proceed to inquire, and determine from the evidence, when Wilson made his invention and reduced it to practice in the form of an operative machine, bearing in mind in respect to each of his patents in the case, that the patent (together with the application) is prima facie evidence that he was the original and first inventor of the improvement therein described, at the time when his application was filed in the patent office. You will also proceed to inquire and determine from the evidence, whether A. B. Wilson or his assigns did or did not construct machines under his first three patents, and sell the machines in the market for practical use, as sewing-machines, between the 8th of November, 1849, when the plaintiff's caveat ceased to have any legal effect for the protection of his right, and the 31st of March, 1853, when the application for his original patent was filed in the patent office.

A. B. Wilson, as he states, commenced to make a sewing-machine in February, 1849, at Pittsfield, in this state, and completed it about the 1st of April in the same year. When asked what he did with the machine, he stated that he sewed with it at various times, and made garments, and he afterwards gave the names of the persons for whom the garments were made. Several other witnesses testify that they knew he was at work getting up the sewing-machine, and saw it operated; and if the witnesses are to be believed, it sewed both straight and crooked seams, and sewed well. One witness, Lyman G. Burnell, testified that he made and assisted in making the needles and some of the screws for the machine, and another, W. D. Axtell, stated that after he had seen the machine operate he wrote a notice of it for publication. It appearing that the witness himself set the types at the printing-office, he was allowed to refer to the journal to refresh his recollection as to the time when he saw the machine and wrote the article for publication, and he states that he wrote the article and published it on the 18th of April, 1849. While living at Pittsfield, Wilson subsequently commenced a model of the machine, but he did not complete it until he changed his residence. In May, 1849, he went to North Adams in this state, carrying with him the machine and the model which was still unfinished, and while living there, he took the metallic parts

of the machine off of the wooden plate on which the machinery was placed, and used some of the parts for other machines; but he still has in his possession or control the needle-arm and thread-spring. Something had been done to the model before he left Pittsfield, and he completed it as he states at North Adams, in the summer of 1851. After it was completed, he sent it to his patent solicitors in New York, but if I understood the witness correctly he afterwards procured it again from them, and it was used at a certain trial, and he is not now able to state from his own knowledge where it is or whether it is in existence or not. He built another machine at North Adams in October, 1849, which as the witness states is fairly represented by the machine marked Z, given in evidence by the defendant, and called the "Adams brass-machine." Most of the metallic parts, as the witness states, are the identical ones which belonged to that machine, and that statement appears to be confirmed in certain particulars by the statement of Joseph N. Chapin, Joseph H. Adams, Willard N. Ray, and perhaps by one or two other witnesses who saw it operate. Parts of the machine, as Wilson states, were used by him in building another machine, but he affirms that the residue are the same as those exhibited in what has been called the "Bright machine."

As I understood the witness, he next made one or two iron machines which were completed before he made the patent office model, but you will recollect his testimony for yourselves, as I shall not attempt to give the exact language of the witness. He made the patent office model also at North Adams in February, 1850, and he states that it was made like one of the iron machines. Pursuing the subject in the order of time, the next machine constructed by Wilson is the one he made for his wife. Passing over what he stated about his going to New York and Philadelphia and Washington, you will recollect his statement that he returned to North Adams on the 25th of April, 1850. He completed the model for the patent office a short time before he went to Washington, and on his return he commenced the machine called "Mrs. Wilson's machine," and completed it in July of the same year. According to his testimony it operated well, and he states that he used it for an exhibiting machine in North Adams, and that his wife afterwards used it as a family machine for making garments for himself and others. She used it as a family machine, as I understood the witness, after they went to New York in November or December, 1850. It was the first nipper-feed machine made by Wilson, and he states that his wife used it in Watertown after he went there to reside. He went there himself in February, 1851, but his wife did not return from New York until the following month. And he also states that she brought the machine with her to Watertown, and while there used it for making garments for himself and others, and continued to use it to do her sewing until he got the machines with the four-motions' feed. Inquiry was made of the witness whether the machine is now in the same condition as it was when his wife used it in November or December, 1850. To that inquiry he answered in effect that it had been for years in his garret before he brought it to Boston for this trial and had become somewhat rusty, and that at the suggestion of Mr. Potter he had it cleaned up since he came here, but he states that there has not been any alteration in it other than cleaning it.

Joseph N. Chapin stated that this machine was finished in July, 1850; that he saw it operate in North Adams, and that it worked well; and he also states that he saw it operate in other places; that he saw Mrs. Wilson use it in making pantalcons, in New York, during the fall of 1850. It was also seen in North Adams by the witness, Joseph H. Adams, who states that he saw Wilson sew some pieces of cloth with it, and, as far as he could ascertain, it worked well. Chester F. Scott also states that he saw it at Watertown, in 1851, and saw Mrs. Wilson sewing with it, and he sewed with it himself at the office of the company. When asked what he saw Mrs. Wilson sew on it, he stated that it was a dress, or something of that kind, and he stated that it was a practical machine. Testimony has also been introduced by the plaintiff for the purpose of impairing the credit of A. B. Wilson as a witness. Ansel H. Barnum testifies that he worked for Warren, Wheeler, & Woodruff, during the fall of 1849, in the same shop where Wilson worked. He worked in three different rooms of the shop, and one of them (the upper one) was the room where Wilson worked, and the witness states that, although he was well acquainted with Mrs. Wilson, he never saw that machine, and he also states that Mrs. Wilson and Mrs. Cowan once came to the shop and got a nipper-feed machine, and one of them said that they were going to do some sewing. Charles R. Chult commenced to work in that shop on the 18th of March, 1851, and worked there about six months. He saw Mrs. Wilson occasionally, and was at her house, and never saw this machine, but he states that he had no opportunity to know whether or not she had it in her possession or use. William H. Hays commenced work there about the 20th of March, 1851, and worked there until the 12th of September, 1852. He says he never saw this machine, but he says he was not acquainted with Mrs. Wilson, and had little or no opportunity to see the machine. Frank Caffrey went into the employment of Warren, Wheeler, and Wood-

ruff the 1st of April, 1851, and stayed there until the fall of the same year; was sometimes in Mr. and Mrs. A. B. Wilson's room, and never saw this machine, or any other in her possession. Wilson worked for Ezra Ingraham in 1849. They had a conversation about the machine that Wilson commenced in Pittsfield, but they had no conversation about this machine. One of the experts called by the plaintiff, Mr. Hibbard, has expressed the opinion that this machine is one of very recent origin, and that he is unable to find in it such indications as he would expect to find, even if it had been used for one day.

Of course you will examine the machine, and weigh the opinion thus expressed, in connection with the positive testimony of Wilson, who states that he made it, and of the other witnesses who saw it at different places, and saw Mrs. Wilson using it, and of the person who operated it himself at the office of the company. Fraud is never to be presumed, and certainly not when the charge carries with it the imputation of an attempt to corrupt the fountains of justice by imposition and perjury; but the question is one of fact, and is entirely within your province. Warren, Wheeler, & Woodruff constructed some five hundred of the nipper-feed machines under a contract, and Wilson states that the first one was made in February, 1851.

C. F. Scott sewed with all of these, except three or four, and he says they worked well; and the same witness says they continued to construct these machines till October or November, 1851. Seventy-five were made before the witness J. N. Chapin left in May, 1851. Nearly two hundred of the number, as the witness George H. Chittenden states, were sold at the office in New York City where he was employed to sell the nipper-feed machines from the latter part of the year 1850 to September or October, 1852, and he says they operated well for that time. Besides those sold in the office, he knew of the sale of one hundred and fifty more, in the latter part of the year 1852. Defendant's witnesses represent, I believe, that the whole of the contract machines were either sold or delivered from the manufactory after they were built. On the other hand, one of the plaintiff's witnesses states that some fifty or seventy-five of the contract machines were remaining in the factory when he left in 1852. These machines were what the defendant has designated as his third form of feed, but the labels put on the machines are not evidence for your consideration. His third form of feed in the Wilson machine is what has been called the gun-barrel machine with the rotary hook. The witness Wilson commenced to build it in 1850, and completed it on the 5th of January, 1851. After that he commenced his fourth form of feed in May of the same year, but he did not apply for the patent till the 8th of July, and it was granted on the 12th of August of that year (1851). A. H. Burnham, one of the plaintiff's witnesses, states that in May or June, 1851, he saw a pocket machine which Wilson had of this description, and he says it was a completed machine and "did run." His fifth form was a four-motion feed with two teeth side by side feeding each side of the needle, but a feed with one tooth was soon substituted. Six machines with one tooth were made in the spring or early part of the summer of 1851, but all save one were soon altered to two teeth, one forward of the other. Both Scott and Wilson, I believe, state that the one-tooth machine fed goods tolerably well, but did not advance the material to be sewed with sufficient force. That patent was applied for on the 7th of February, 1852, and was issued on the 15th of June of the same year. The machine numbered nineteen is the next machine to which your attention is invited, which is called by the defendant the sixth form of feed. It has two teeth, one forward of the other, and is a four-motion feed. Two of the defendant's witnesses, Chester F. Scott and A. B. Wilson, state that it was made in the spring of 1851, shortly after the four-motion feed machine, with one tooth, and the former says that from one to two hundred machines of that description were made. He sewed with them all, and he states that they operated well, and that they were all taken from the shop, though he cannot say of his own knowledge that they were sold. When asked respecting the machine numbered twenty, which is also in the case, he said he first saw the machine in that exact form in 1851, remarking, however, in the same connection, that while the pattern was the same, the upper parts were different, that there was a difference in the pressure-foot, but adding that the pressure-foot was got up the last of the year 1851 or the first of 1852. Another witness for the defendant, G. H. Chittenden, stated that the change in the pressure-foot from that numbered nineteen to that numbered twenty, was made, as he thinks, in July, 1852; and he also states that in the fall of 1851 he became familiar with the fact that machines with four-motion feed were being manufactured. They were introduced, one at a time at first, and so, perhaps, up to the middle of June, 1852. O. F. Winchester got his first machine in the latter part of 1851, and used it for a year on trial, and then got ten more. H. Griswold got three machines in the summer of 1852; and Joseph H. Murry states that some twenty-three hundred were manufactured with two points before they added more points to the feeding instrument. In this connection you will bear in mind that the patent of A. B. Wilson, of the 12th of November, 1850, has been reissued. One of the reissued letters-

patent is dated the 22d of January, 1856, and the other is dated the 19th of December, 1856. The patent to A. B. Wilson, of the 12th of August, 1852, was also reissued to the Wheeler and Wilson Manufacturing Company, as assignees of A. B. Wilson, on the 28th of February, 1860; and the patent granted to W. P. N. Fitzgerald, as assignee of A. B. Wilson, is the one under which the defendant alleges the machine sold by him was made and sold.

These several patents have been admitted as tending to show that the first three inventions of Wilson are still under the protection of subsisting patents, and that they have not become the property of the public. One of the objections taken to the admissibility of those which bear date subsequent to the date of the writ, was waived by the plaintiff, and, therefore, they were admitted, and are in evidence in the case.

The defendant has also introduced the patent to Grover and Baker, dated June 22, 1852, together with the disclaimer accompanying the same, which is dated the 11th of December, 1854. These last-mentioned patents, together with certain explanatory statements of the witness Potter respecting the same, were admitted as tending to show that the claim of Wilson to the four-motion feed in his application for his patent of June 15, 1852, was withdrawn by mistake on the part of Nathaniel Warren, as to the date of the invention, which had been made by Wilson. Whether the evidence admitted in the case is or is not sufficient to satisfy you of that fact, is a matter for your determination; and these last-named patents were also admitted as tending to show, in connection with certain conveyances and assignments, or licenses, that the interest in the Wilson inventions was passed to, and vested in, the Wheeler and Wilson Manufacturing Company, to the extent described in these conveyances, assignments, or licenses, given in evidence in the case.

Considering the course of the arguments on the one side and the other, it will be sufficient for me to refer to the title papers, without any further remarks upon the subject. They are as follows:—Assignment of A. B. Wilson to Nathaniel Wheeler and Orlando B. Potter, dated February 1, 1856, conveying reissued patent No. 346, dated June 22, 1856. Declaration of trust of patent No. 346, for the benefit of the Wheeler and Wilson Manufacturing Company and the Grover and Baker Sewing-Machine Company. Assignment from Alanson Warren, George P. Woodruff, Nathaniel Wheeler, and A. B. Wilson to the Wheeler and Wilson Manufacturing Company of two letters-patent, one granted to them as assignees of Allen B. Wilson, and one assigned to them, but granted to Allen B. Wilson; said letters-patent being No. 8,296, granted August 12, 1851; and No. 9,041, granted June 15, 1852, said assignment being dated October 5, 1853. Assignment from William P. N. Fitzgerald to the Wheeler and Wilson Manufacturing Company of letters-patent, No. 12,116, dated December 19, 1854, granted to him as assignee of A. B. Wilson, assignment dated December 27, 1854. License from W. O. Grover, William E. Baker, and O. B. Potter to Nathaniel Wheeler, A. B. Wilson, Alanson Warren, and George P. Woodruff, under patent, No. 9,053, granted to Grover and Baker, June 22, 1852, license dated July 1, 1852.

Should you find, under the preceding instructions, either that the plaintiff did not invent the needle-feed exhibited in the old red machine, and reduce the same to practice in the form of an operative machine in 1848, or if he did, that the patented invention of the plaintiff, described in the specification of his reissued patent, as construed by the court does not embody the same, or a substantial and material part of the same, which was new and useful, or that the feeding apparatus described in the original Wilson patents is substantially different from the feeding apparatus described in the specification of the plaintiff's reissued letters-patent as thus construed, then you will have no occasion to consider the evidence on this branch of the case; for if the plaintiff did not make such an invention and reduce it to practice in the form of an operative machine in 1848, then he cannot carry back the date of his patented invention to any period prior to the time he filed his application for his original patent; and if the feeding apparatus described in each and every of the three original Wilson patents are substantially different from that of the plaintiff's patented invention, then the inquiry whether the plaintiff can or cannot carry back the date of his invention to a period before the application for his original patent was filed, is not involved in the issue between these parties, as it is not pretended by the defendant that the Blodgett machine is of a character to supersede the old red machine when the latter is used in the position in which it was evidently constructed and designed by the patentee to operate. On the other hand, if you find for the plaintiff on the first two points under the instructions of the court, but also find that one or all of the original Wilson patents, so far as respects the feeding apparatus therein described, and embodied in a practical machine or machines, is substantially the same as that of the plaintiff's patented invention, you will then proceed to the inquiries already suggested as arising out of the evidence on this branch of the case.

Although the plaintiff constructed a machine in 1848 (of which the old red machine is a true representation), and operated it in sewing pieces of canvas and padding, as

stated in his testimony, and carried it to Washington and filed his caveat; still, it is insisted by the defendant that the plaintiff cannot, under all the circumstances of this case, carry back his invention to any period prior to the time when he commenced to make the model of his patented machine. Upon that subject, I instruct you, that if you find that the plaintiff invented the needle-feed, which is in the old red machine, in 1848, embodying the same in a machine of which the old red is a true representation (excluding the rotary clamp), and operated it with the stationary holder, as he has described in his testimony, and carried it to Washington, leaving the stationary holder at home, and there constructed and fitted in the rotary clamp, and operated it there, as he has stated in his testimony; and on the 7th of November, 1848, filed his caveat in the patent office, still, if you also find that the plaintiff, on the same day that he filed the caveat, took the machinery out of its frame in Washington, and brought the parts home, leaving the frame there, and laid them aside as something incomplete and requiring more thought and experiment, before he restored the invention, in the form of an operative machine, although not with a definite intention of abandoning what he had accomplished, yet not with any determinate intention of resuming the same, but really for the purpose of preserving the parts, to be used by him or not as he might thereafter determine, and suffered his caveat to expire, and did nothing to restore the invention in the form of an operative machine, or to mature the needle-feed from the time he left Washington to the last of December, 1852, when he commenced to make a model with a view to apply for his patent, and, in the mean time, A. B. Wilson, without knowledge of what the plaintiff had accomplished, invented the same thing, and reduced the same to practice in the form of an operative machine, filed his application for a patent after the plaintiff's caveat had expired, and then obtained letters-patent for the same, and that A. B. Wilson, or his assigns, manufactured machines under that patent for practical use as sewing-machines, containing the same feed, and that the machines so manufactured were sold in the market, and went into practical use before the plaintiff commenced to restore his invention, or to make his model with a view of obtaining his original patent; then I instruct you that if the defendant's machine was made under the Wilson patent, and the defendant sold the same by the authority of Wilson or his assigns, the plaintiff cannot carry back his invention to any period prior to the time he commenced to make the model for his original patent, provided you also find that the Wilson patent embodies the same needle-feed as that of the plaintiff's patented invention.

All three of the patents granted to Wilson, namely, the patent of the 12th of November, 1850, the patent of the 12th of August, 1851, and the patent of the 15th of June, 1852, were issued prior to the plaintiff's application for his original patent; but you must apply the preceding instruction to each of these patents, and to the machines made under them separately, each being considered separately from the others, because the instruction embraces several elements, all of which must concur if you find for the defendant.

If you find for the defendant under the preceding instruction, as explained, then, the plaintiff cannot carry back his invention to any period prior to the time he filed his application for his original patent, and your verdict should be for the defendant. But if, under that instruction and all the instructions which preceded it, you shall find for the plaintiff, then you will proceed to the consideration of another ground of defence set up by the defendant on this branch of the case.

Suppose the plaintiff did invent the needle-feed embodied in the old red machine in 1848, and reduced the same to practice in that form, to the extent stated in his evidence, still, it is insisted by the defendant that he afterwards deserted and abandoned what he then accomplished, and having wholly neglected to do anything to restore the machine or to mature any needle-feed in a sewing-machine, from the 7th of November, 1848, to the last of December, 1852, or the 1st of January, 1853, he cannot, under the circumstances of this case, carry back his invention to any period prior to the time of his application for the original patent, or certainly, not to any period prior to the time when he commenced to make his model for the patent office.

Whether the plaintiff deserted and abandoned what he had accomplished, so far as the needle-feed is embodied in the old red machine, is a question of fact for your determination from all the evidence in the case, under the instructions of the court. If you find that the plaintiff, after having taken the machinery out of the frame in Washington and brought it home, leaving the frame there, laid the machinery aside as something incomplete and requiring more thought and experiment, and never intending to reconstruct the machine or to restore the needle-feed in the form of an operative sewing-machine, without material modifications or alterations, but only to preserve the parts to be used in other inventions as circumstances might arise, then I instruct you that you would be fully warranted in finding that he deserted and abandoned the invention so far as respects the needle-feed, provided you also find that he did nothing to restore the needle-feed in the form of an operative machine from the 7th of November, 1848, to the last of December, 1852, or the 1st of January, 1853. On the

other hand, if you find from the evidence, that the invention, so far as relates to the feeding apparatus, was completed and had been reduced to practice in the form of an operative machine, and the parts were boxed up after he returned from Washington, and laid aside without any intention of abandoning the invention, but with the intention of constructing a new frame, and restoring the invention in the form of an operative machine, which should include the needle-feed, and of applying for a patent, and the neglect and delay to resume the undertaking and carry such intention into effect is fairly and reasonably accounted for by the evidence in the case, then you are not authorized to find that the plaintiff deserted or abandoned what he had then invented and reduced to practice in the form of an operative machine. Whatever evidence there is in the case to account for the long delay to resume the undertaking and restore the invention in the form of an operative machine, and take the necessary steps to apply for a patent, is for your consideration; but I am not aware of any except the testimony introduced as to the state of his health and the condition of his pecuniary affairs, and that testimony is somewhat conflicting. While I cannot say as a matter of law, that this testimony is wholly irrelevant or immaterial (and therefore it is for your consideration), still I regard it as my duty to say that I think it is entitled to very little weight. Where an inventor has completed his invention and reduced it to practice in the form of an operative machine, and while in the exercise of reasonable vigilance to construct his model with a view to apply for a patent, he should be arrested in his efforts either by sickness or want of means to carry out his intentions, such evidence would deserve much consideration in a question like the present; and the suggestion would apply with equal, if not greater force, in the case of an individual who was using his best endeavors to mature and complete what he had really conceived, but had not fully reduced to practice in the form of an operative sewing-machine. Nothing of that kind, however, is suggested in this case, and obviously for the reason that the plaintiff cannot carry back the date of his invention to any period prior to his application for his reissued patent unless it appears that his invention was completed and reduced to practice in the form of an operative machine. In determining the questions arising under the last three instructions, you will also take into consideration all that occurred at Washington at the time he constructed the rotary clamp and filed the caveat, also the fact stated by himself, that he took the machinery out of the frame, leaving the frame there, and that he laid the parts aside in his trunk after he returned home, and when he moved to Granville that he boxed them up, suffering his caveat to expire, and did nothing to reconstruct his machine or to restore the needle-feed in the form of an operative machine until the last of December, 1852, or the 1st of January, 1853. You will also take into consideration all the evidence tending to show that while he did nothing to restore his machine to a condition which would enable him to apply for a patent, that he gave his time and attention (or a part of the same) to the completion of another invention embodying a different instrumentality for feeding. And you will also take into consideration the testimony of the witness Potter, as to what occurred at Hartford when he examined the Grover and Baker machine, and also the testimony of Mr. Bates as to what occurred in the interviews between Mr. Potter and the plaintiff at his office. If you find that the plaintiff deserted and abandoned what he had accomplished in the old red machine, and that Wilson in the mean time invented the same thing and reduced his invention to practice in the form of an operative machine and took out his patent, then the plaintiff cannot carry back his patented invention to any period prior to the application for his original patent, and your verdict should be for the defendant.

After a careful consideration of the evidence, however, if you should find for the plaintiff under each of the preceding instructions, then you will proceed to the second general ground of defence set up by the defendant.

The charge in the declaration in effect is, that the defendant's machine infringes the plaintiff's reissued letters-patent; and that is a question which you are to determine from all the evidence in the case, under the instructions of the court. But unless you find that the plaintiff is the original and first inventor of the needle-feed described in the specification of his reissued letters-patent, you will have no occasion to consider the question of infringement.

On the question of infringement, the burden of proof is on the plaintiff to show to your satisfaction that the defendant's machine (which it is admitted he sold as the agent of the Wheeler and Wilson Manufacturing Company) does infringe the third claim of the plaintiff's reissued patent, as construed and defined by the court. Whether the defendant's machine does infringe that claim or not, is a question of fact for your determination from all the evidence in the case, under the instructions of the court. Instructions have already been given you on another branch of the case, prescribing certain general rules of law by which you are to be governed in comparing one machine or device with another, to enable you to determine whether, in legal contemplation, the two machines or devices are substantially the same or substantially different; and those instructions are equally applicable to the present question in respect to the defendant's ma-

chine and the plaintiff's patented invention. But considering the nature of this inquiry, I think it necessary to give you some more specific instructions by which you will be governed in applying those general rules of law to the question under consideration. In determining that question you will find it necessary to keep constantly in view the instructions of the court as to the construction of the plaintiff's patent, else you will be liable to fall into error. By the true construction of the plaintiff's patent, the third claim is for his described means of feeding the cloth or other material to be sewed in a sewing-machine. What those means are, the instructions already given will enable you to understand with clearness and certainty, and if the defendant in his machine uses substantially the same means of feeding, in a way substantially the same, and they accomplish substantially the same result, then I instruct you that the defendant's machine infringes the plaintiff's patent, and your verdict should be for the plaintiff. But if you find that the defendant in his machine used substantially different means, or the means do substantially different work, and in a way and mode of operation substantially different, then I instruct you that the defendant's machine does not infringe the third claim of the plaintiff's patent, although it accomplishes substantially the same result, and your verdict should be for the defendant. His patent is not for a result, but for the means as substantially described in his specification for accomplishing that result, and to guard against mistake, I repeat that the claim is not for every means of applying power directly to the cloth, at or near the point where the stitches are being formed, for the purpose of feeding it in a sewing-machine in contradistinction to applying the power for that purpose to a plate, clamp, or bar; because if it were so, it would be a patent for an abstract idea or principle, and therefore would be invalid, but it is for such means of applying power to the cloth for the purpose of feeding it in a sewing-machine, as the plaintiff has substantially described in the specification of his reissued letters-patent, and if the defendant in his machine uses substantially the same means to accomplish that purpose, in substantially the same way, then his machine infringes the plaintiff's patent; but if the defendant in his machine uses substantially different means for that purpose, or the means do substantially different work, and in a way and mode of operation substantially different, then the machine does not infringe the plaintiff's patent. Applying the same rule of interpretation to the claim of his patent in another aspect, and it is obvious that the claim is not for the use of every vibrating piercing instrument in feeding material to be sewed in a sewing-machine, because no one can patent motion merely as contradistinguished from the means by which the motion is effected. But it is necessary to go further, and consider the subject in still another aspect. No one can patent an instrument which is old within the meaning of the patent law; and it is conceded that the needle and the awl described in the specification of the plaintiff's patent are old, and consequently it follows that the claim of the patent is not for every use of these instruments in feeding the cloth to be sewed in a sewing-machine, because these respective instruments, being old within the meaning of the patent law, the plaintiff could not, without more, patent them. He could only patent such means or mode of using them as he has substantially described in the specification of his reissued patent; and if the defendant in his machine uses substantially the same means, and in substantially the same way, to accomplish substantially the same result, then his machine infringes the third claim of the plaintiff's patent; but if the defendant in his machine uses substantially different means, or in a way or mode of operation substantially different, then his machine does not infringe the third claim of the plaintiff's patent. In determining whether the means and mode of operation in the plaintiff's patented invention are substantially the same or substantially different from those in the defendant's machine, you must bear in mind the instructions of the court already given, that there are included in the third claim of the plaintiff's patent, as part of the mode of operation, not only the vibrating piercing instrument, but also whatever parts necessarily act in connection therewith to feed the material to be sewed in a sewing-machine, so far as any function they perform modifies the action of the feeding instrument, and consequently whatever means are therein described which are necessary to the control of the cloth, to enable the vibrating piercing instrument to perform the function of feeding, and which modify the action of the feeding instrument, to the extent they modify it, are to be deemed parts of his described invention which the plaintiff has claimed; and the same remarks with the same qualifications, apply to the surface below the material to be sewed (called the table) which supports the cloth when it is pressed by the vertical bar or holder, so as to keep the cloth from slipping as the needle descends and perforates it; and also to the cloth-holder which exerts its pressure for that purpose, as more fully explained in the instructions already given.

For the purposes of this trial you will take it to be law, that the instructions given to you upon this subject are correct. No matter if different opinions may have been expressed by the witnesses or by counsel. Trial by jury, though an inestimable right, is not a trial without a court, and is not so regarded in the constitution of the United States or the laws of congress. Matters of

fact belong exclusively to the jury, but the court must determine questions of law, subject to exceptions, else it would fail to perform its duty and the law of the case could never be revised. Sometimes the court in trials of this description invites the attention of the jury to the characteristics of the invention and patented machine of the plaintiff and the machine of the defendant, and also attempts to classify the evidence introduced in the case on the one side and the other, but that duty has been performed with so much thoroughness by the counsel of the parties, that the court will omit it on the present occasion.

Witnesses, as a general rule, are required to testify to facts only, and are not allowed to give their opinions, but where the question at issue relates to a particular art, science, or profession, persons possessing peculiar qualifications, and skilled in that particular art, science, or profession are uniformly regarded as exceptions. Such witnesses are usually denominated experts, and their opinions are admissible in the case for the court and for the jury.

Two witnesses on each side have been examined as experts in this case, and in the course of the examination, the characteristics of all the machines given in evidence have been pointed out by them and explained. It would be difficult, if not impossible, for the court to add anything by way of explanation, without repeating what has already been several times rehearsed. Like all other evidence in the case, the opinions of the experts are for your consideration, and it is a matter within your province to determine what weight you will give to their testimony.

Much time has been spent in this trial, and it is very desirable that the controversy should now be settled upon correct principles of law, and the evidence in the case. Both parties appear to regard the matter in dispute as one of great importance, and I think you ought to give it a very deliberate consideration and use your best endeavors to agree upon a verdict.

Should you find for the defendant, under the instructions of the court, you will have no occasion to consider the question of damages; and, if I understand the views of the plaintiff, in case of your finding in his favor, he only claims nominal damages, and he can recover compensation for the sale of one machine only. Under the circumstances of the case, I do not think it necessary to remark further on this subject, except to say that in general the claim for damages in cases of this description is no test of the importance of the controversy. Parties coming into this court, as in all other similar tribunals, have a right to expect that justice will be administered according to law and the evidence, and it is the duty, both of the court and jury, to fulfil their just expectations in this behalf.

[The jury returned a verdict for the plaintiff for $500, which was subsequently set aside, and a new trial granted. See Case No. 7,409.]

## Case No. 7,411.

### JOHNSON v. ROOT.

[1 Fish. Pat. Cas. 351.] [1]

Circuit Court, D. Massachusetts. Oct., 1858.

PATENTS—CLAIM—CONSTRUCTION—INFRINGEMENT—EXPERTS—"EQUIVALENTS"—UTILITY—CAVEAT—PERFECTION OF INVENTION.

1. In determining what it is that the plaintiff has secured to him by his patent from the government, the court looks, in the first place, at what is called, technically, "the claim," which is the summing up at the close of the patent or specification preceding.

2. In construing the claim, the court takes into view the whole of what precedes it in the specification, and also such extraneous facts, presented by the evidence, as may aid in giving a construction to the patent, particularly the documents from the patent office which have preceded the granting of the patent itself.

3. The legal right of the patentee, is that which is secured to him by his patent; and if he has invented any thing else meritorious or otherwise, still, if it is not embraced in the patent, he can maintain no suit upon it.

4. If the defendant uses the plaintiff's patented invention, that which is secured to him by his patent, then he infringes, whatever else he may use, or whatever else he may have added to it.

5. In considering the opinion of an expert, it is proper to take into view, his ability, his knowledge of the art or profession in which he is engaged; the fairness with which he expresses an opinion; the impartiality of that opinion and the reasons which he assigns for it.

6. If one machine which is alleged to be an infringement of another produces a different result, or, in other words, is of greater utility than the preceding machine, it may be some evidence of a substantial difference between them; and the utility of the one over the other may be so great, as to be satisfactory evidence that some new principle is involved.

7. The term "equivalents" has two meanings, as used in patent cases. The one relates to the results that are produced, and the other to the mechanism by which those results are produced.

8. A mechanical equivalent, as generally understood, is when one thing may be adopted instead of another, by a person skilled in the art from his knowledge of the art.

9. The invention need not be of any high degree of utility—if it is of any practical utility—although of a very low degree, yet it may be said to be perfected in the eye of the law.

10. It is not sufficient that some part, incorporated into an invention, should have been thus perfected, so that it did not require further alteration, unless that part could be a machine, so as to be of some practical utility.

11. The caveat is not conclusive evidence that the invention is part perfected; a person may choose to file a caveat while he is going on and making improvements upon an invention which he has already completed, so as to be of practical utility.

12. If the invention was perfected, or, if not perfected, if the inventor used reasonable diligence to perfect it, then he had a right to have it incorporated into his patent, and to supersede those that had intervened between his first inven-

[1] [Reported by Samuel S. Fisher, Esq., and here reprinted by permission.]

tion or discovery and his subsequent taking out of his patent.

13. If he had not perfected it, and did not use due diligence to carry it into effect, and in the mean time, before he got his patent, somebody else had invented and used and incorporated into a practical, useful machine, that mode of feeding, then he could not, by subsequent patent, appropriate to himself what was thus embraced in the former machine between his caveat and obtaining of his patent.

14. As the plaintiffs' patent is subsequent to the use of the defendant's machine, when he would carry his invention forward to a time anterior to its use by the defendant he can have the benefit only of that which he had discovered and invented prior to the time when defendant used it.

This was an action on the case tried by Judge Sprague and a jury, to recover damages for the infringement of letters patent [No. 10,597], for an "improvement in sewing machines," granted to plaintiff March 7, 1854, and reissued February 26, 1856 [No. 355]. The claims of the original patent were as follows: "The making of a seam with a single thread by the combination of a single thread M, forked hook N, and expanding lever $D^1$, operating substantially in the manner and for the purpose herein specified; also the forming or making of a seam from a single thread by the running of a loop of thread through the material to be sewed, the running of a second loop through the material and putting the first loop through the second; the running of a third loop through the material and through the first named loop, the carrying of a fourth loop through the material and putting the third through it, and so on; putting the first loop through the second and around the third, the third loop through the fourth and around the fifth, and so on, forming the belaving double-loop stitch herein described in the manner set forth; also, the feeding of the material to be sewed by means of a vibrating needle, by which the material is moved along as required for the stitch, substantially in the manner herein specified." The claims of the reissued patent were substantially the same as those of the original, except the third, which was as follows: "3. The feeding of the material to be sewn by means of a vibrating piercing instrument, whether the said instrument be the needle itself or an independent instrument in the immediate vicinity thereof, substantially as herein described." The controversy was upon this claim, which, it was alleged, was infringed by the defendant, in the sale of what is known as the "Wheeler & Wilson" machine having the four-motion feed, consisting of a vibrating bar with teeth upon its upper surface, to move the cloth.

A. C. Washburn and William Whiting, for plaintiff.

Causten Browne, J. E. Maynadier, and George T. Curtis, for defendant.

SPRAGUE, District Judge (charging jury). It is the duty of the court to decide all questions of law which may arise in the progress of the trial, and to give instructions to the jury on those questions. It is the province and duty of the jury to decide all questions of fact; and any observations that the court may make as to the facts in the case are only designed to aid you in applying the law to the facts, and further, perhaps, to aid you, as far as the court may, in arriving at the questions which you are to decide, and the points that it may be material for you to take into consideration, in order correctly to apply the law which shall be laid down to you. And, gentlemen, in a case which has occupied so great a length of time, where the evidence has been so multifarious, both in kind and in detail, it may be of some importance, if we can, to disembarrass the case of considerations not in controversy, and questions not bearing, directly or indirectly, upon points really at issue, or to be decided by the jury. I shall not go into details of the evidence, gentlemen. That is for your consideration. All questions of the force and effect of the testimony, of the credit which you shall give to the witnesses, of the facts which you shall consider to be established, of inferences to be drawn from them, are matters for the jury alone. The law is to be given to you by the court, including the construction of written documents, and especially of the plaintiff's patent, depending, sometimes, however, upon the technical use of terms, if there be such, which have a use different from the usual and ordinary acceptation of the terms, and which may be matters of fact for the jury.

The suit is by Mr. Johnson against Mr. Root, for an alleged infringement of a patent. The patent has been produced, and is prima facie evidence of the right of the plaintiff to all that is contained in it, giving it its true and proper construction. The defense alleges that, in the first place, the defendant has not infringed—that is, has not used the invention which is secured to the plaintiff by his patent. (I shall employ the word "use," gentlemen, although, in strictness, what is complained of is, that the defendant has sold one of the machines embracing the invention of the plaintiff; "use" is a shorter term, and I shall, therefore, employ it.) After stating that he has not used the plaintiff's invention, as secured in his patent, the defendant says, in the second place, that if the machine which he has sold does embrace that which is in the plaintiff's patent, then the plaintiff's patent is not valid, because the plaintiff was not the first inventor. These, gentlemen, are the two grounds of defense, and the two general questions which you will have to determine. First, did the defendant infringe? and, second, if he did, was the plaintiff the first inventor of that which the defendant has used?

And in order, gentlemen, to determine the question which I take up first, because it was the first presented in the order of the trial, in order to determine whether the de-

fendant has used the plaintiff's invention, as secured by his patent, the first step is to ascertain, as clearly as you may, what it is to which the plaintiff has a right, under his patent. And here I would observe that there is no part of the plaintiff's patent which it is alleged the defendant has infringed, except that relating to the feeding of the material to be sewed. There are two other things embraced in his patent, relative to the seam, which, however, you have no occasion to trouble yourself about in the present case, unless they should, in any degree, throw light upon the third claim of his patent—that in relation to the feed. In determining what it is that the plaintiff has secured to him by his patent from the government, the court looks, in the first place, at what is called, technically, the claim, which is the summing up, at the close of the patent, or specification preceding; the claim being in the terms: "What I claim to have invented, and wish to secure by letters patent, is —," and then a condensed statement of what he wishes to have secured to him by his patent. But in construing that, we take into view the whole of what precedes it in the specification, and also such extraneous facts presented by the evidence, as may aid in giving the true construction to the patent, particularly the documents from the patent office which have preceded the granting of the patent itself. Now, that third claim is for this: "The feeding of the material to be sewed, by means of a vibrating, piercing instrument, either the needle itself, or some other instrument in the immediate vicinity thereof, substantially as herein described." It is upon that this whole controversy turns; it is that claim which embraces all the right that the plaintiff has. I say all the legal right. And here I would observe, gentlemen, that the evidence and the arguments on both sides have, very properly, gone into the inquiry, what was the invention?—what was done by the plaintiff from one time to another? That is all very proper, because it may aid in giving a construction to his patent. But his legal right is that which is secured to him by his patent; and if he has invented any thing else, meritorious or otherwise, still if it is not embraced in the patent, then he can maintain no suit upon it; he is necessarily confined to that which is granted to him by the deed from the government, which is called a patent.

Now, in the first place, gentlemen, this is not a patent for a result. It is not a patent for an abstract idea, or an abstract principle. You take the words of the claim itself to lead you. The object to be obtained is the feeding of the material to be sewed. The means are, a vibrating, piercing instrument, either the needle itself, or an independent instrument in the immediate vicinity thereof, substantially as therein described. Now, this patent is for means—a mechanism to accomplish a certain end. The first thing, then, which you will observe is, what is secured to the plaintiff. In looking at the means and mechanism to secure the end, it is, in the first place, the instrument—a vibrating, piercing instrument. And, to call your attention further to what things are in controversy, you will observe there is no controversy here as to the instrument used by the plaintiff and defendant, each being a vibrating instrument. There is no controversy that it is used in the immediate vicinity of the needle, and, therefore, I shall, for the sake of brevity, and of calling the attention to those matters which are in controversy—speak of it as the "piercing instrument"—the piercing being a matter in controversy. The patent does not stop there. What is embraced in it, and what is the essential part of it, is not merely the feeding of the material by such an instrument, but it is the instrument, followed afterward by the words, "as herein described." Both these are essential parts of this patent.

Upon the question of infringement, then, the inquiry is, in the first place, does the defendant, for the purpose of feeding the material, use substantially the same instrument therein described, and substantially in the manner therein described? If he does not use the same instrument—substantially the same instrument—and when I leave out the word "substantial," you will always understand that it is embraced—if he does not use substantially the same instrument, he does not infringe. If he uses the same instrument, and does not use it substantially in the manner therein described, he does not infringe; both of those going to constitute the invention which the plaintiff has secured to himself. It may thus appear, gentlemen, that if the defendant takes either one of those two, he takes something which belongs to the plaintiff, and, therefore, infringes. But, upon the construction of this patent, that would not be so. Because, if there had been, before this patent, a use of the same instrument, but not used in the same manner, the patent would be good. Therefore it is somewhat analogous—to give a mere illustration of my meaning—to a combination of two elements, both of which must be used, in order to constitute any thing. This is not a combination of two elements; I use the comparison only to illustrate the idea that both must be used.

Now, in inquiring whether the defendant uses substantially the same instrument as that described in the patent, and substantially in the same manner, you will, in the first place, inquire what is the instrument described in the patent? Well, gentlemen, the instruments described are a needle and an awl, called vibrating, piercing instruments—piercing instruments—and those described in the patent are the needle and an awl. Does the defendant use the instrument described in the patent? That is a question of fact for your determination. Then the question is,

does the defendant use the instrument of the plaintiff substantially in the manner described in the patent? The instrument for feeding, as described, is the needle: I think the awl is not described in the patent as feeding; it is introduced, and is one of the instruments named in the patent, but is not described in the operation of feeding. A needle being placed, with proper mechanism, perpendicularly, with the point downward, the material to be sewed being laid on a table beneath the needle, with a hole in the table, under the point of the needle, with a slot, so as to allow the vibration without touching the table, then, by proper mechanism, a force is applied vertically upon the needle, tending to drive it downward, and a force laterally applied at the same time, the needle thus receiving these two forces—the one perpendicular downward, the other lateral—a compound motion, as described, forcing it downward through the cloth, as I shall call the material to be sewed, the needle perforating the cloth and going through, and the point of the needle on the lower surface of the cloth, moving along through, carrying the cloth with it as it moves along laterally, and then after going the length of a stitch, rising, disengaging itself from the cloth, and then returning to the position where it began, in order to take a new hold. Now, gentlemen, you will observe that this produces what has been described to you, without controversy, as a curvilinear motion, and what I understand to be a continuous motion. The needle is described as going through the cloth. (I would here remark that the needle in the plaintiff's patent has two functions, the one that of forming the stitch, the other that of feeding the material to be sewed, and in speaking of it, you will understand that I speak of the instrument in relation to its function as a feeding instrument, unless I specify otherwise, and am intending to describe it to you merely as it is described in the operation of feeding.) Now there has been a good deal of controversy here as to the holding apparatus — whether it is or is not, a part of the feeding mechanism. Gentlemen, so far as the holding mechanism has an effect upon the instrument that feeds, so far is it to be taken into consideration in determining what is the operation of the instrument that feeds. If it modifies or changes the operation of the feeding instrument, you will take it into account. If it changes the character of the feeding instrument, you will take it into account in determining what is that character. There are two things, gentlemen, which—in order not to use terms that have been contended for on the one side or the other—I shall call "adjuncts," which you may take into view in forming your opinion of the operation of the feeding instrument, namely: the table and pressure-foot, as described in the plaintiff's patent. For I am now to lead you to consider what is the plaintiff's patent, as to the operation of the feeding instrument. One adjunct is the table upon which the cloth is placed. Now, you will observe that the table keeps the cloth in its position, so that when the thrust of the needle is made, the cloth is not carried forward by the force of the needle, it being kept there by the table. But the part of the table directly under the point of the needle has been removed, so that there is nothing to obstruct the downward progress of the needle, and the needle goes through the cloth with no opposing surface against the point. The other adjunct is the pressure-foot, as described in the plaintiff's patent. And that, as I understand it, is a surface of metal, which is pressed downward by a spring, and carried upward by a mechanical force applied to the bar. As described in the patent, the operation is this: The cloth being upon the table, this pressure-foot is placed upon the cloth, one part of the cloth being directly under the point of the needle, the pressure-foot a little distance from it, the pressure-foot keeping the cloth upon the table until the needle has perforated the cloth, as is the language of the patent. Then the pressure-foot is raised by the mechanism which effects that, to allow the cloth to be carried along by the needle in being fed, to allow the formation of the stitch. When the needle rises, the pressure-foot is again permitted to come down, by the action of a spring on the top, for the purpose of keeping the cloth from following the needle up as it rises, and then of keeping it down upon the table until the needle shall have again gone down and perforated the cloth, and then it is relaxed and carried upward, to allow the cloth to pass. And as the description is afterward given, the cloth is carried forward by the needle, and moved in feeding after perforation.

That, gentlemen, I believe is substantially the description of the mode of operation of the feeding instrument, as given in the plaintiff's patent, and the relation that these two things which I have called adjuncts have to it; and you will determine how far they modify or affect the motion of the instrument. Now, the question is, whether the defendant uses in his machine this mode, or has the same mode of operation of a piercing instrument. In the first place, as I have stated it, does the defendant use substantially the same instrument as that described in the plaintiff's as the feeding instrument? If he does not, then he is not guilty of infringement. If he does, then the question is, does he use it substantially in the same manner, substantially in the same mode of operation? In order to determine this question, gentlemen, you must, of course, ascertain what is the defendant's machine, so far as relates to the feeding apparatus. A comparison being required, you must, of course, understand both, in order to make the comparison intelligible. First, then, I would remark that if the defendant uses the plaintiff's patented invention—that which is secured to him by his patent—then he in-

fringes, whatever else he may use, or whatever else he may have added to it. If he has taken that which belongs to the plaintiff, then he is responsible, although he may have added something of his own. If he does not take that which belongs to the plaintiff, then it is wholly immaterial, in this suit, what he takes, or from whom he derives it.

In determining, therefore, as I have observed, whether the defendant uses the plaintiff's patent under consideration, you will look at the machine which has been produced. And here I may remark that there has been a vast deal of evidence of what Wheeler & Wilson, and Grover & Baker, and many other persons use: that is of no sort of consequence in the present case, unless it may aid you in determining what Mr. Root used after the grant of that patent, and before the bringing of this action, some six weeks. One machine is produced, sold by Root to a woman by the name of Johnson, who has been a witness upon the stand, and that has been presented to you.

Now, the comparison you are to make is between that machine which has been presented and the plaintiff's patent. And all the other matters that have been introduced are of no sort of importance, except as they may throw light upon the question, whether that machine marked "K," embodies what was secured to the plaintiff in his patent. And, gentlemen, that is before you. It has been described to you so often on both sides, that it can hardly be necessary for me to undertake to describe to you the operation of that machine. You have, then, upon the first question, does he use the instrument—the bar that is presented to you, with the points at the end, or with the roughened surface, or whatever they choose to call them, for I do not designate them except to call your attention to the thing—is that substantially the instrument described in the plaintiff's patent as the feeding instrument?

Then as to its mode of operation. That has been described to you in various ways—the motion upward to engage with the cloth: lateral to carry the material forward: the motion to disengage, and the motion to return laterally to its position again. Then as to the adjuncts generally. There is a pressure-foot, which, as I understand it, goes down opposite to the point of the feeding instrument. You will take this into consideration, gentlemen, as, indeed, you will all other relevant facts, in forming your judgment as to their being substantially the same in their mode of operation.

And here I would remark, gentlemen—not intending to go into any detail of the evidence—that you have several classes of evidence to which to turn your attention. In the first place, your own inspection and observation of the defendant's machine, and of the plaintiff's machine, as illustrated in the model, in the patent, and in the drawing, as a means of forming your judgment.

In the next place, you have the opinion of experts to aid you in forming your opinion upon the subject. Now, gentlemen, with respect to the opinion of experts, I would remark that in general, in the trial of causes in court, witnesses testify only to facts, the jury to form their own opinion from the facts. But there are various classes of cases which depend upon the knowledge of a peculiar art or science for their solution, of a particular business, requiring a peculiar knowledge, in order to form a satisfactory judgment of the question involved; and in this case the law allows testimony to be given by those skillful in the particular art, science, or profession, and permits them to give their opinions, as results which they arrive at from an examination of the questions of fact that are before the jury. And you have in this case gentlemen, three experts on each side, who have presented their opinions. I shall not go into the detail of their opinions. You will, of course, see that you are not bound by their opinions. You must form your own judgment, at last, upon this and upon all the evidence that you have in the cause. They are introduced only to aid you, gentlemen. You will rely upon them so far as you shall think proper to rely upon them. You will consider the opinion of experts, and will take into view the same things, probably, that you would in considering the value of an opinion of a professional man—a lawyer or physician—his ability, his knowledge of the art or profession in which he is engaged; the fairness with which he expresses an opinion; the impartiality of that opinion, and all those considerations which go to create a confidence or a distrust of the opinion which is given. You will take into consideration, also, the reasons that may be assigned by the experts for their opinions.

You have, besides these opinions of the experts, another species of testimony from those who have seen the actual operation of sewing machines, and who have undertaken to give you, not as matters of opinion, but as matters of fact, from their own observation, what they see to be the effect and the operation of the machines.

There is another species of evidence that has been introduced and relied upon, that is, the results of the two machines, when you come to compare them, which may sometimes aid you in determining whether they are substantially the same. Now, if one machine, which is alleged to be an infringement of another, produces a different result, or, in other words, is of greater utility than the preceding machine, it may be some evidence of a difference, a substantial difference between them; and the utility of the one over the other may be so great as to be satisfactory evidence that some new principle is involved, and that it is not substantially the same.

This is sometimes coupled, too, in considering the evidence, with the mechanical dif-

ferences. The mechanical differences may be sufficient to show that the two machines are not substantially the same. The difference of result and utility may be so great as to be satisfactory to the jury. They may be authorized to receive it as satisfactory, if it is of so very high a nature. And it may be that neither of these alone would be satisfactory, yet the mechanical difference and the difference of utility, taken together, may be sufficient to satisfy the mind. I call your attention, gentlemen, to these different particulars, which you may examine, to form your judgment whether the two machines are substantially the same, as to the feeding apparatus, such as I have explained to you, and embraced in the plaintiff's patent. In the question, gentlemen, whether two things are substantially the same or not, the mind naturally seeks for some criterion by which, as far as practicable, to determine whether they are substantially the same. Now, gentlemen, I do not mean to instruct you as matter of law, with respect to the criterion to be adopted. The suggestions that I make to you are for your consideration, such as are often made for the consideration of the jury. You have heard a good deal said, from time to time, in the course of the trial, of one thing in the one machine being an equivalent for another thing in the other machine, or of several particulars in the one being equivalent to several particulars in the other. The term "equivalent," gentlemen, has two meanings, as used in this class of cases. The one relates to the results that are produced, and the other to the mechanism by which those results are produced. Two things may be equivalent, that is, the one equivalent to the other, as producing the same result, when they are not the same mechanical means. Mechanical equivalents are spoken of as different from equivalents that merely produce the same result. A mechanical equivalent, I suppose, as generally understood, is where the one may be adopted instead of the other, by a person skilled in the art, from his knowledge of the art. Thus, an instrumentality is used in a mechanism; you wish to produce a pressure downward: it can be done by a spring, or it can be done by a weight. A machine is presented to a person conversant with machines. He sees that the force applied downward in the one before him, is by a weight; from the knowledge of his art, he can pass at once to another force, the spring, to press it downward; and those are mechanical equivalents. But, gentlemen, there may be equivalents in producing the same results, each of which is an independent matter of invention, and in that sense they are not mechanical equivalents. To illustrate my meaning, suppose, in early days, the problem was to get water from a well to the surface of the earth. One man takes a rope made of grass, and draws up a pail of water; another would see that, as a mechanical equivalent, a rope of hemp would accomplish the same result. But suppose another person comes, and for the first time invents a pump. That is equivalent in the result of bringing the water to the surface of the ground; in that respect it is equivalent, in producing that result, to hauling it up by a rope; but is not mechanically equivalent; it brings into operation, as you know, very different powers and forces, and would require invention to introduce it.

Now, gentlemen, however the appearance of a thing may be altered, if the aspect, the form, the appearance presented are changed only by the use of mechanical equivalents, then it is substantially the same thing, I suppose. That is to say, if a person has an invention, in which he is called upon, by the patent law, to make a full and clear description of the thing he has invented, if another person looking at that, can, from his knowledge of the subject, pass to the other thing that is used, without any invention, that the one is substantially the same as the other. It is not that every unskilled person shall see how they pass; but what is required is, that it shall be so described that those skilled and competent in the art, those who understand it, shall be able (not that an ingenious man can, seeing the new machine, sit down and find something else afterward, perhaps aided in some degree by that in inventing something that is not there, but whether, with a competent knowledge of his art, he will be able), by looking at that with care and examining it, to see that it may be done in a different mode, in a different manner, and it is done in that different mode or that different manner by the use of the knowledge which he has in the art. That would not be a new invention, or substantially differing from the original. But if he is obliged to go to invention, then he has a right to the benefits of whatever he thus invents; and if his invention is a substitution for the original invention, then it is not substantially the same, and he does not use it. But if he merely invents something to be added to it, then he can not take the original invention, because he has made something distinct to add to it, as a new improvement.

If, gentlemen, you should find that the defendant has not infringed, then your verdict will be for the defendant. And here I would observe, that the burden of proof is upon the plaintiff, to show that there has been an infringement. If you should find that the defendant does infringe, then you will pass on to the other inquiry, namely, the question of priority. Gentlemen, for any person to be entitled to an exclusive right, by virtue of a patent, he must be the first, as well as the original inventor. The defendants take this position, gentlemen: that the machine which they use does not infringe; but that if it does infringe, then the plaintiff was not the first inventor of that which is embraced in his patent. And that will bring you to the question whether the plaintiff was the

first inventor. His patent bears date March, 1854. The application for his patent was made in March, 1853. To that date only did he carry back his right by the introduction of his patent.

The defendant then proceeds to introduce evidence upon this question of priority; and, without going over the various matters introduced—which are not material—I would state that, prior to 1853, what I shall, for the sake of discrimination, call the Wilson feed (not meaning to go further as to that than to give it a name), had been used by Wilson, and embodied in a machine, as early, I believe, as 1851—certainly as early as 1852—and a model of it was deposited in the patent office, embracing the mode of feed that is in the Wilson machine; and it is not controverted that that is substantially the same as in the machine "K," which, it is alleged, infringes the plaintiff's patent. Thus, gentlemen, it is not controverted, as I understand, by anybody, that what was used by the defendant, and is now complained of, was known and used in the machine of Wilson as early as 1852; and that this supersedes the plaintiff's patent, unless the plaintiff can carry it forward to an anterior date—before 1852. The question then is, upon this point of priority, whether the plaintiff does, by his evidence, carry his invention, so far as relates to the feed embraced in his patent, to a date prior to that of Wilson. And here he relies upon the caveat of 1848, and the red model in which that invention was exhibited. It is not contended, gentlemen, that any thing was done between the autumn of 1848 and the use by Wilson, in his machine, of 1852, of the feed used by the defendant, except what is shown by the caveat, and the model of 1848.

Then, gentlemen, your inquiry is this: Was the caveat of 1848, as illustrated by the red model, the invention which is embraced in the plaintiff's patent? and then, if it is, is the plaintiff entitled to it? These are the various questions that are involved. This brings you to the question of what that caveat of 1848 was. You will examine that, and see what it describes. You have the model of it before you; and I do not intend anything more than merely to call your attention to the subject at present, and shall go into no particular description of it. The first question is: Was that perfected?—it being objected that it was not perfected by Mr. Johnson in 1848, nor until about the time that he took out his patent, or made his application for a patent. Now, gentlemen, if it was not perfected then, another inquiry would arise upon the question, whether he would be entitled afterward to put it into his patent; and that is, whether he had invented the feeding mechanism, and was using due diligence to perfect it? Was it perfected? It is not, gentlemen, merely the question whether the feeding apparatus, looked at as a distinct and separable matter was perfected, but whether, in connection with the machine or invention which he was making, the whole was perfected within the eye of the law. And here you will observe, too, that by being perfected, in the eye of the law, it is not meant that it should be carried to a point where there could not be any subsequent improvement—that it should have been made then as good as it could possibly be made, as a practicable machine, but that the invention should be completed so as to be of some practical utility. It need not be of any high degree—if it is of any practical utility—although of a very low degree—and has been completed so as to be of practical utility, and considered as completed, then it may be said to be perfected in the eye of the law.

Now, gentlemen, I have observed to you that it is not sufficient that some part incorporated into an invention should have been thus perfected, so that it did not require further alteration unless that part could be a machine, so as to be of some practical utility. It would not be sufficient. It must be embodied and connected with a machine which, as a whole, taking that part, must be of some practical utility, in order to prevent other people, coming afterward, from having the benefit of an invention which embraces that, and perfects a machine that renders that useful. For it may often happen that a person in pursuit of an invention goes a certain distance, makes certain parts of an invention but fails of arriving at any practically useful result, and the whole falls to the ground. Somebody else comes afterward and takes up the invention, and may incorporate into his invention something found by somebody before; but if that somebody has never perfected that part, in the eye of the law, as I have explained to you, the second is not to be prevented from having the benefit of that which has been left without practical fruit.

Now, gentlemen, was that perfected? That is a question of fact, upon the evidence, for you to determine. In the first place, you will look at the caveat in which it is described. It is contended, on the part of the defendants, that the caveat itself is conclusive evidence that that invention was not perfected. You will observe that the application which is in the caveat before you, made to the patent office by Mr. Johnson, for leave to file a caveat, sets forth that he has made a certain new and useful improvement in the sewing machine, and that he is then making experiments to perfect it, and asks leave to file a caveat to secure it. The defendant insists that that application is of itself conclusive evidence that he has not perfected it. We will look at it, gentlemen, and see. I do not instruct you that it is conclusive evidence; but it is evidence for you to take into view, in connection with the other evidence, and in connection with the other parts of the same instrument, in which

he begins by saying that he has made a new and useful invention in the sewing machine. Now, gentlemen, although a caveat is understood to be, and in this instance is, filed in order to allow the party to perfect his machine, yet if, in point of fact, the invention had been perfected, in the eye of the law, as I have explained to you, then, if you are satisfied of that from the evidence, you may deem it, for the purposes of this trial, as perfected. Or it may happen that a person may choose to file a caveat while he is going on and making improvements upon an invention which he has already completed, so as to be of practical utility. Therefore, gentlemen, I would say to you, that you will take into consideration the declaration of the plaintiff himself, in the application, that he had made a new and useful improvement in sewing machines, and the further declaration, that he is making experiments in order to perfect his invention, and the subsequent declaration that he has made a new and useful improvement in sewing machines, and the other evidence in relation to the case—that is, what is described in the caveat and the model which was made in 1848—and see if that exhibits to you a perfected machine; and then such further evidence as you have, as, of the actual operation of the machine that will be before you.

Now, gentlemen, if he had perfected it, then he had a right to embrace it in a patent that he should afterward take out. If he had not perfected it, then another question will arise, and that is, had he invented the feeding mechanism at that time, and did he use diligence to perfect that and put it into a perfect machine, so as to make it of some practical utility? In considering this question of reasonable diligence, it is not sufficient to answer that he used diligence in relation to some other invention or machine. The question is: Did he use diligence in perfecting that invention which he has made of the feeding apparatus? And in considering that, gentlemen, you will take into consideration the evidence in the case. Soon after he filed his caveat, which I think was early in November, 1848, it appears that, on his return from Washington, he wrote a letter to Mr. Elliot his agent, and in that letter he spoke of an improvement in the use of the needle as I understand it, for the forming of the stitch, which he thought he had made since he left Washington. This letter was in the latter part of November, 1848, if I recollect right. I do not understand that that makes an illusion to any improvement in relation to the feed apparatus; it is only that he dispenses with the carrying of one of the needles through the cloth; and in that letter he remarks that he thinks this will be an improvement as to the forming of the stitch, and that the only inconvenience is, that it will require a different mode of feed, by ceasing to apply the power directly to the cloth, and applying it to the clamp, or other instrumentality, that is to carry the cloth through with it. The mode often explained to you, of the feeding, by a caveat, before the supplementary letter, was by carrying the needles on each side, the cloth being held in a circular clamp. The other clamp had nothing to do with this, because that carried the cloth with it, the needle carried the cloth along, and the cloth carried the clamp along with it, by the motion of the needle.

Now, in considering the question of diligence you will look at the facts, and say whether he did use diligence up to the time of obtaining his patent, in perfecting any machine in which could be incorporated his feeding mechanism, as before. And in that you will consider the length of time, and whether he had left that and deserted it for something else; and in that case you will consider what that something else was; whether he left it for the purpose of relinquishing, abandoning its pursuit, so that he did not use all reasonable diligence, and left it until after he had seen the machine of Wilson in the patent office, which he did in 1852, and also in Mr. Potter's hands, at the hotel. You will take into consideration all the other facts and circumstances—what Mr. Johnson was doing—what diligence he used, and form your opinion whether he used due diligence to perfect that as a feeding mechanism, and make it of any practical utility.

If, gentlemen, the invention was perfected, as I have already said, or, if not perfected, if Mr. Johnson used reasonable diligence to perfect it, then he had a right to have it incorporated into his patent, and to supersede those that had intervened between his first invention or discovery and the subsequent taking out of his patent. If he had not perfected it, and did not use due diligence to carry it into effect, and, in the mean time, before he got his patent, somebody else had invented and used, and incorporated into a practical, useful, machine, that mode of feeding, then he could not, by subsequent patent, appropriate to himself what was thus embraced in the former machine, between his caveat and the obtaining of his patent.

I have said, gentlemen, that he could incorporate it into his patent under those circumstances, if he had complied with either of those requisites. The next question is (if you shall find that he could) whether he did incorporate it into his patent, and how far it is embraced in his patent. For, if he did invent it, and had a right to a patent for it, if he did not take a patent for it, then he has no exclusive right, and can not prevent other persons from a use of it; it is only for what he has patented that he has an exclusive right. You will, then, look at the patent—at the true construction of it, and see how far the patent

is the same with the invention in the caveat of 1848; how far one is embodied in the other.

You will observe here, gentlemen, that in the caveat of 1848, nothing is said of an awl; that was not introduced until the patent of 1853, as I shall call it, for the application was made at that time. The feeding was by means of a needle, as described. And here again, gentlemen, you observe that the needles in that had two functions. So far as is material in the present inquiry, we are to regard only the function of feeding. I believe, gentlemen, that was performed by the material being held in the circular clamp—I say the circular clamp, because the straight clamp was fed in a different mode, and not by the needles, and therefore I need not dwell upon that for a moment; the needle feed was effected by putting the material into the clamp, by which it was held, and then the needles passing through, one on the one side, and the other on the other, and each needle successively carrying the cloth forward the length of the stitch; the needles going through the cloth, each of them, then the feeding needle carrying it along, then drawn out of the cloth and returning to the place at which it began.

Now, gentlemen, if the plaintiff has embraced that, and so far as he has embraced that in his patent, he would have a right to it, under the conditions, and complying with the requisites, I have stated to you. Then the question would arise, does the defendant infringe that—for it may happen (I do not say it did; that is a matter entirely for your consideration) that the patent of the plaintiff may be in some respects different from the invention as developed in the caveat of 1848. Now, as the plaintiff's patent is subsequent to the use of the defendant's machine by Wilson and others, when he would carry his invention forward to a time anterior to its use by Wilson and others, he could have the benefit only of that which he had discovered and invented prior to 1852, when Wilson used it. The question then is, does the defendant infringe the invention of 1848, as incorporated into the patent of Mr. Johnson of 1854? Here, gentlemen, you will have to make the same comparison; and you will observe that the question of the law is here out of view. Whether that was a substantial change or variation from the caveat or not, it is out of view here; because it was not in that caveat—the needles only were there. Then the inquiry is, upon the same principles that I have already presented to you from the beginning, upon the question of infringement; does the defendant, in the machine "K," use the invention of feeding, being described in that as a needle, and the mode of operation described as in the caveat, and in the red machine? That is the question. If he does not so infringe, if the plaintiff had no right to have it in his patent, and has it in his patent, or has it not in his patent, then he is not guilty.

If you find for the plaintiff, gentlemen, another question will arise, and that is the amount of damages. That I hardly think it necessary to discuss at all. If the defendant has taken what belongs to the plaintiff, and used it wrongfully, you will give to the plaintiff some damages. No large amount is asked by the plaintiff, and there is no controversy upon that point. The great inquiry is, as stated by the counsel, the question of right. The only evidence directly to the point is, that no machine, here introduced, has been sold; and there is no direct evidence that Mr. Root sold any other machine than this one, embracing the plaintiff's invention. There is some evidence, I believe, from Mr. Howe, that Mr. Root sold some other machines, but Mr. Howe does not undertake to say, as I understand, whether they embraced this feed-motion. Perhaps he did, but the plaintiff's counsel, in his closing remarks, asked only for two or three hundred dollars, and I do not think it necessary to spend time examining that point. You will consider it, and act according to your judgment, if you should come to that question.

[Upon a subsequent trial, a verdict was rendered for the plaintiff for $500 (Case No. 7,410), which verdict was afterwards set aside, and new trial ordered (Case No. 7,409).]

JOHNSON (ST. LOUIS v.). See Case No. 12,235.

JOHNSON (SAMPSON v.). See Case No. 12,281.

## Case No. 7,412.

JOHNSON et al. v. SCHENCK et al.

[1 Cin. Law Bul. (1877) 374.]

Circuit Court, D. Louisiana.

TRADE-MARK — ASSIGNMENT BY ONE MEMBER OF FIRM—ESTOPPEL—EXCLUSIVE ASSIGNMENT.

[1. Letters by a partnership to purchasers of part of its business, showing its knowledge and assent to the use by such purchasers of certain trade-marks previously conveyed to them by one member of the firm alone, estops the surviving partner, on the death of the one who made the conveyance, to set up that the latter had no power to individually convey trade-marks used by the firm.]

[2. A distiller carrying on business in Cincinnati and New York sold his Cincinnati distillery, and gave to the purchasers a writing declaring that he extended to them and their successors "the use of all my brands formerly used by me in my Cincinnati house." *Held*, that this conveyed an exclusive right to use the trade-marks, and the seller and his firm had no right to retain the use of them in connection with goods made elsewhere than in Cincinnati.]

In October, 1868, Samuel N. Pike sold his distillery premises in Cincinnati to Mills, Johnson & Co. In the bill of sale conveying

the fixtures, stills, etc., the following words occurred: "Having sold to Mills, Johnson & Co. my premises, 18 and 20 Sycamore street, I hereby extend to them and their successors the use of all my brands formerly used by me in my Cincinnati house. Samuel N. Pike." Pike was carrying on business in New York City at the same time, to which place he had removed previous to the sale. His partners in the Cincinnati house (which he sold) and also in New York were George W. Kidd and others. After the sale, in October, 1868, to Mills, Johnson & Co., S. N. Pike & Co. continued to use the brands and trademarks at their New York house, against which Mills, Johnson & Co. protested. In 1871, Mills, Johnson & Co. registered various of the brands (Magnolia, Dave Jones, and others) in the patent office. In 1872 (December) Pike died, thus terminating the firm of S. N. Pike & Co. George W. Kidd, who was still a partner at the date of Pike's death, immediately formed a new firm, under the style of S. N. Pike & Co.'s successors, Geo. W. Kidd & Co.,—a curious title, by the way, —and also immediately claimed sole title to the brands and trade-marks which Pike had to convey to Mills, Johnson & Co. in his individual name in 1868, at which time it should be remembered Kidd was a partner with Pike. Kidd applied for a registration of the brands at the patent office, and succeeded in obtaining a decision from Commissioner Leggett, recognizing Kidd as the owner of the brands, and declaring that Pike lost his individual title to them when he took in Kidd as a partner, and could not, therefore, convey them individually, and declaring also, by the same reasoning, that Mills, Johnson & Co., even although they had paid a large consideration to Pike, had no title at all. The matter remained in this shape until about a month ago, when W. W. Johnson & Co. (of this city, and who succeeded Mills, Johnson & Co., October 1, 1875) brought suit in New Orleans, by attaching some 175 to 260 barrels of whiskey, branded "Magnolia," which Kidd had authorized some small concern in St. Louis to manufacture and brand and ship to the New Orleans market, to compete against the regular brand of W. W. Johnson & Co.

Edgar M. Johnson and Clark, Payne & Renshaw, for complainants.

BILLINGS, District Judge. This is a final hearing upon the amended bill, cross bill, and depositions involving the title to the trade-mark "S. N. Pike's Magnolia Whiskey, Cincinnati, Ohio." I assume that this trade-mark means that the article to which it is affixed was made at the place of business, and after the methods used by S. N. Pike at Cincinnati, Ohio, and that it does not import, and cannot be understood as importing, that the article was made by S. N. Pike personally. The fact that S. N. Pike has been dead for several years, and that his death was well known to the public, seems to authorize this construction; otherwise a serious question as to the public morality of allowing either party to use this trade-mark might be presented, that is to say, if the meaning of the trade-mark was that S. N. Pike personally made the article, nobody but S. N. Pike could consistently, with good morals, be allowed to use it, and the attempt to use it after his death was publicly known would be an attempt to perpetrate a fraud which would defeat itself. Both parties claim under S. N. Pike.

In the year 1864, S. N. Pike, being the owner of the trade-mark, formed with two other parties the firm of S. N. Pike & Co., who did business both in Cincinnati and New York. One of the parties subsequently withdrew from the firm. This firm continued in operation down to the year 1872, when S. N. Pike died. In 1868, S. N. Pike sold to complainants his establishment in Cincinnati for the manufacture or preparation of liquors, including the real estate, fixtures, and the usual paraphernalia of such an establishment. It is claimed on the part of the complainants at the time of this sale that S. N. Pike transferred to them the exclusive right to use this trade-mark. It is contended by the respondents (Kidd & Co.) that, S. N. Pike having allowed the firm of S. N. Pike & Co. to use this trade-mark from 1864 to 1868, it has become the property of that firm, and it was not in the power of S. N. Pike individually to alienate it; that it continued to be the property of that firm down to the time of S. N. Pike's death, since which time it has survived to the surviving partners.

The question which I propose to examine is, what was vested in the complainants' firm, and from whom, so far as concerns this trade-mark? There is nothing said of the trade-mark in the deed of the real estate, or in the assignment of the personal property; but there is this paper introduced as executed on October 1, 1868, which was the time when possession was given to complainants' firm under their acts of transfer: "Having sold to Mills, Johnson & Co. my premises, 18 and 20 Sycamore street, I hereby extend to them and their successors the use of all my brands formerly used by me in my Cincinnati house. Samuel N. Pike. Cincinnati, October 1, 1868." There is also a letter introduced by complainants, which is as follows: "New York, November 11, 1870. Messrs. Mills, Johnson & Co.: Dear Sirs—We understand you are using an exact copy of the inclosed, with your signature, on the 'Dave Jones' brand of whiskey. This is an infringement which we cannot permit, as you have no right to use it. Mr. Pike did not have this addition when he gave you the use of his brand. We, therefore, insist that you desist using the name on the Dave Jones packages. Yours truly, S. N. Pike & Co." A letter bearing date November 21, 1870 from the same parties, S. N. Pike & Co., re

cites in full the agreement of the 1st of October, also quoted, and claims that it has no reference to the addition of the Dave Jones' brand. It is, therefore, clear that S. N. Pike & Co. had a knowledge of the transfer to the complainants of the right to use this brand, and assented to it, and therefore the objection urged by the respondents' (Kidd & Co.'s) solicitors, that it was out of the power of S. N. Pike to transfer the right to use the brand, falls out of the case.

The remaining question, then, is, what right passed to the complainants under the paper executed by S. N. Pike on the 1st of October, 1868? That paper, in effect, transfers to complainants the right to use this brand, and also to their successors. Was this right an exclusive right? S. N. Pike and S. N. Pike & Co. were concluding their business in Cincinnati, the former having sold out to Mills, Johnson & Co. his place of business and the apparatus for conducting it The trade-mark pertained exclusively to an article made or vended in Cincinnati. Neither S. N. Pike nor his firm could continue to use that trade-mark excepting so far as related to articles already manufactured and held by them for sale in New York, without a fraud upon the public. Again, if any one but complainants are to be allowed to use this trade-mark, instead of being an advantage it might be ruin to their business. For this reason it seems to me that the words "all my brands formerly used by me in my Cincinnati house" carried with them the exclusive use of this brand. A trade-mark is a means of authenticating or indicating the origin of an article, and thus becomes a source of advertisement. It is necessarily connected with some business. In this case it was right and proper, and, indeed, natural, that the complainants, when they succeeded to the business establishment and the means of conducting the business which had belonged to S. N. Pike & Co., in Cincinnati, should succeed to the peculiar advantages and methods which their predecessors had successfully used, and had made known to the public by this trade-mark. It was a species of transfer of the good will which S. N. Pike & Co. had enjoyed, and which must continue to have its locality in Cincinnati, and could not in good faith towards the public be separated from that city, or used in connection with articles manufactured there. The question was made as to the meaning of the word "use." I do not see that there is any title in a trade-mark, excepting the right to use; and the trade-mark as conveyed to a firm and its successors, a complete interest, so far as it is capable of transfer, seems to me carried by these words. The question as to the right of respondents (Kidd & Co.), or either of them, to use the trade-mark, is, of course, disposed of adversely in the foregoing opinion.

As concerning the admission of testimony, all of the evidence offered by the complainants is suppressed, except the deed of the real estate; the act by which the fixtures and other property is assigned; the paper dated October 1, 1868; and the two letters of S. N. Pike & Co. referred to in the opinion of the court. All the testimony offered by the respondents is admitted.

Let, therefore, the injunction prayed for in the bill and the amended bill be granted and made perpetual, and let the matter be referred to M. M. Cohen, master, to take testimony upon notice, and report as to the amount of damages which the complainants have suffered.

## Case No. 7,413.

JOHNSON v. SIMS.

[1 Pet. Adm. 215.] [1]

District Court, D. Pennsylvania. 1800.

WAGES—SHIPPING ARTICLES—CONSTRUCTION.

Construction of an agreement in the shipping articles that no wages shall be paid to the seamen until the return of the vessel to the port of outfit.

[Cited in Bronde v. Haven, Case No. 1,924; Pitman v. Hooper, Id. 11,186; The Rajah, Id. 11,538; The General Chamberlain, Id. 5,310.]

The libellant [Daniel Johnson] claimed wages as a mariner on board the brigantine Lady Walterstorff [2] [Joseph Sims, owner]. The vessel sailed from Philadelphia for Surinam, but was prevented from entering her port of destination, it being blockaded. She proceeded to Demarara, and unloaded a great part of her cargo. With the residue she was returning to the port of Philadelphia, and was captured by the French. The libellant signed articles to go a voyage to "Surinam and at and from thence back to the port of Philadelphia, or to any port in Europe," etc. In these articles it was agreed, "that no officer or seaman belonging to the said ship shall demand or be entitled to his wages, or any part thereof, until the arrival of the said ship at the above mentioned port of discharge in Philadelphia." It appeared that the articles were read to the libellant, who was left to put his own interpretation upon them; though the captain said, he understood them so, that if the ship did not arrive in Philadelphia, no wages were to be paid. What was the understanding of the mariner on this subject, did not appear. It was therefore left to be gathered from the clause, how far it affected his present claim. It was contended, on the one part, that the mariner was entitled to his wages to the port of delivery at Demarara, and for half the time the ship stayed there—That this is settled law in common cases. But the question made on the other side was,—Whether the clause before recited

[1] [Reported by Richard Peters, Jr., Esq.]

[2] When this and several other cases were determined, capture by the French and condemnation were synonymous. The one and the other, in effect, were the same.

did not take this out of the common cases, and defeat his claim entirely, as the ship never arrived at Philadelphia.

PETERS, District Judge. There is no doubt but that the agreement of parties may control the general operation of law. But this agreement must be clear, and incapable of doubtful import. I will never decree a forfeiture, or loss of wages, unless the law or agreement of parties is fully and clearly, both in expression and import, against the claim. It does not appear in this case that more than the usual wages were agreed to be paid to the mariner, though the clause in question is out of the common course. There is no dispute, in this cause about the wages accruing after the vessel departed for Demarara. The capture occasioned the loss to the mariner of such wages. In the act of congress "for the government and regulation of seamen in the merchant's service" [1 Stat. 131], printed at large on the back of the articles signed by the mariner, the libellant in this cause (section 6), it is enacted "that every seaman or mariner shall be entitled to demand and receive from the master or commander of the ship or vessel to which they belong, one-third part of the wages which shall be due to him, at every port where such ship or vessel shall unlade and deliver her cargo, before the voyage be ended, unless the contrary be expressly stipulated in the contract."

In this case it is stipulated to the contrary: but I am of opinion that the clause in the articles relied on by the counsel for the owner of the ship, ought not to be extended farther than a stipulation, not to be entitled to demand or to receive the wages, or any part thereof, at the foreign port of delivery. The amount of the wages due at Demarara, must be considered to be, "debitum in presenti, solvendum in futuro." The stipulation does not alter the substance of the contract,[3] or the operation of law, but merely as it regards the time and place of payment. I do not consider the agreement, not to demand or receive wages until the arrival of the ship at Philadelphia, to be a contract that the risk shall be insured, or the arrival guaranteed, by the mariner. It is an agreement that such wages, as were legally due at a foreign port, should be paid only in Philadelphia. The period of payment was to be fixed by the arrival and discharge at Philadelphia, in a common course of events. But the arrival at that place was prevented by a casualty, not under the control of the mariner. It is no matter whether this casualty had been wreck, or what it was, capture. I am, under all the circumstances of this case, of opinion, and I adjudge, order and decree, that the owner of the brigantine Lady Walterstorff, pay to the libellant the wages due at the port of Demarara, and for half the time the vessel stayed at that port. And I do order and direct, that the clerk of this court adjust and report the quantum of wages, to the end that the amount of wages so adjusted and reported, be paid to the mariner, the libellant in this cause, with costs.

[3] See 2 Vern. 727.

JOHNSON (SMITH v.). See Cases Nos. 13,066 and 13,067.

## Case No. 7,414.

JOHNSON et al. v. SUKELEY.

[2 McLean, 562.] [1]

Circuit Court, D. Ohio. July Term, 1841.

VENDOR AND VENDEE—SPECIFIC PERFORMANCE—POWER OF ATTORNEY TO CONVEY LAND—EXECUTION AND ACKNOWLEDGMENT—CONSTRUCTION—DEED EXECUTED BY ATTORNEY—RIGHT OF VENDEE TO REFUSE.

1. Where a vendee asks the specific execution of a contract for the sale of land, the vendor, having agreed that the deed should be made by him before the payment of the consideration, has no right to require the money to be brought into court.

[Cited in Brock v. Hidy, 13 Ohio St. 310.]

2. Nor has he a right to have the money brought into court when he is in default.

3. A deed, or power of attorney, executed and acknowledged according to the laws of New York, is a good execution under the law of this state.

4. A power of attorney, to convey land in Ohio, is required to be recorded, by the statute, before the conveyance is executed. At all events it must be recorded before a record is made of the deed.

5. A power which authorizes the attorney to sell and convey lands, does not authorize him to make a deed for lands previously sold.

6. Except, under peculiar circumstances, the court will not compel a vendee to accept a deed executed by an attorney.

In equity.

Goddard & Convers, for complainants.
Mr. Curtis, for defendant.

OPINION OF THE COURT. This bill was filed to enforce the specific execution of a contract for the sale of certain lands, made by the defendant with Walter Turner, the 18th February, 1832. The defendant agreed to sell and convey to Turner 3,273 acres of land, at three dollars per acre. One third to be paid the first of May ensuing, with interest from the first of April, when good and sufficient warranty deeds were to be made. The balance, being secured, etc., to be paid in instalments. On the first of May three thousand two hundred and twenty two dollars were paid, and the interest. Turner entered into possession, and afterwards surrendered it to the complainants, who are still in possession. The 9th September, 1835, the complainants tendered the

[1] [Reported by Hon. John McLean, Circuit Justice.]

money due on the purchase, which was refused by the defendant, on the ground that Turner and complainants had a controversy respecting the right to the land. A motion was made by the defendant's counsel that a receiver be appointed, and that complainants be directed to pay him the money due on the contract.

In support of this motion the defendant's counsel cite the case of Clark v. Hall, 7 Paige, 382: "Where a bill is filed by the vendee against the vendor for a specific performance of a contract of sale of real estate, it is proper for the court, in the decree against the defendant for a specific performance, to give the necessary directions to compel the complainant to perform the contract on his part, by ordering the land to be sold, etc. And if the proceeds do not pay the sum due that the vendee pay the balance." This motion is made before the defendant has filed his answer. It is not known to the court whether he will admit the contract set out in the bill or repudiate it. Whether, if the contract is admitted, he is able and willing, on his part, to perform it. The first payment having been made within the terms of the contract, if the statement in the bill be true, and the residue of the purchase money tendered, there would seem to be no laches on the part of the complainants which can operate to their prejudice. Indeed, it would seem that the defendant is, himself, in default for not having made and tendered conveyances for the land as he was bound to do. In Birdsall v. Waldron, 2 Edw. Ch. 315, it was held, that where a vendor lets a purchaser into possession, upon an understanding not to require the consideration until the purchaser has a title, he can not be called upon to bring the money into court. Nor can it be done where possession has been given without any stipulation made about the purchase money. In Gibson v. Clarke, 1 Ves. & B. 500, it was held, if a purchaser be in possession under a prior title, or the possession commenced independently of the contract of sale, and the vendor be guilty of laches in perfecting the title, he can not compel the purchaser to bring the money into court. When a vendor is resisting performance, and does not recognize a bargain, such vendor can not compel the vendee to pay the consideration into court. Nor will the purchaser be compelled to pay the purchase money into court before the completion of the title, where the vendor has voluntarily permitted him to take possession without any stipulation or agreement about paying the purchase money, for it was a folly to permit it. Clarke v. Elliott, 1 Madd. 606. Fox v. Birch, 1 Mer. 105. In the present posture of the case it is clear that the defendant is not entitled to his motion. Nothing short of an admission of the facts in the bill, and a readiness on his part to make the conveyances, would authorize the interlocutory order asked by his motion. The motion is overruled.

The defendant's counsel then admitted the facts stated in the bill, and the equity of the complainant's case, and he presented to the court a conveyance for the land executed by R. Sukeley, as the attorney, in fact, of the defendant.

To this the counsel for the complainants make the following objections: First: The power does not appear to have been duly executed. Second: It authorizes the attorney to sell and convey with the usual covenants of warranty, but not to convey lands previously sold. Third: The power has not been recorded as the statute requires. Fourth: Vendee not obliged to receive a deed executed by power of attorney.

There seems to be no sufficient objection to the execution of the power. It appears to have been signed by the defendant, duly witnessed and acknowledged before an officer in the city of New York, authorized by the laws of that state to take acknowledgments of deeds, and this, under the statute of Ohio, is a good execution of the instrument. The second objection is entitled to more consideration. The act of this state, of the 22d February, 1831 [29-31 Laws Ohio, p. 347], provides that all powers of attorney, authorizing the execution of any deed, mortgage, or other instrument of writing, for the sale, conveyances, &c., of any lands, tenements, etc., in this state, shall be recorded in the office of the recorder of the county in which such lands, &c., are situated, previous to such sale, or the execution of such deed. This power of attorney has not been recorded, and it is difficult to obviate the positive provision of the statute. We are inclined to think, however, that the recording of the power of attorney before a record is made of the deed might be held sufficient. Under certain circumstances, perhaps, the deed might not be considered as taking effect until the power of attorney was recorded. But it is not necessary to place the objection to the deed on the construction of this statute, as the third objection must be sustained. The power authorizes the attorney "to sell and convey all and singular the lands whereof the principal was seized in the state of Ohio, and to dispose of the same absolutely in fee simple, for such price, or sum of money, and to such person or persons, as he shall think fit and convenient; and, also, in the name of the principal, to execute and deliver such deeds and conveyances, for the absolute sale and disposal thereof, as the said attorney shall think fit and expedient." Now, this power has no reference to land which had been sold, and only authorizes deeds to be executed of such land as the attorney should sell. For aught that appears the defendant may have unsold lands in Ohio, to which this power will strictly apply. It does not embrace the land purchased by the com-

plainants. This is a fatal objection to the deed now tendered by the defendant.

Another objection is stated to the power, that it does not authorize the execution of a deed with general warranty, and the case of Nixon v. Hyserott, 5 Johns. 58, is cited and relied on. As the objection just considered is fatal to the deed, it can not be necessary to consider this one. And we the more readily pass it over, as a similar objection is considered somewhat at large in the case of Taggart v. Stanbery (decided at the present term) [Fed. Cas. No. 13,724].

The last objection that a vendee is not obliged to accept of a deed executed by a power of attorney is not without force. In Sugden on Vendors, 1, 523, it is laid down that a purchaser is not required to accept a conveyance from an attorney, unless under peculiar circumstances. As justly remarked, there may be a revocation, by death or otherwise, of this power. If the power authorized the making of the deed, it would be necessary for the court to decide whether, under the circumstances, the deed should be accepted by the complainants. But as the power is defective this point does not arise. The equity of the bill being fully admitted by the defendant, by his voluntary answer, it is unnecessary to take a rule on him for answer; and as the case is submitted to the court for their order, it is decreed that the complainants shall pay the balance of the purchase money, including interest, either into the hands of the clerk of this court, with the usual rate of exchange on New York, within —— months, or that they shall tender the same to the defendant in the city of New York, which, in either case, shall be paid to the defendant on his delivering a good general warranty deed to the complainants for the land, as required by the contract.

## Case No. 7,415.

JOHNSON et al. v. THIRTEEN BALES, Etc.

[2 Paine, 639;[1] 6 Hall, Law J. 97; Van Ness, 45.]

Circuit Court, D. New York. 1814.

PRIZE—BURDEN OF PROOF—ALIEN ENEMY—RIGHT TO SUE.

1. The onus probandi in all prize causes is on the claimants.

2. If the claimants in a prize cause be admitted or proved to be alien enemies, they must be presumed to be in the ordinary and usual situation of alien enemies, to wit, in their own country, at all events out of this.

3. An alien enemy not here under letters of safe conduct, or under the protection of the government, cannot sue in the common law courts.

[This was a libel by Charles Johnson, on behalf of himself, owners, officers, and crew of the private armed vessel called "The Tickler," against thirteen bales and thirteen cases of goods and merchandise, found on board the ship Mary and Susan, Josiah Wilson, master. William Falconer appeared as claimant of nine bales of merchandise, in behalf of James Beswicke and son.]

By the title of this cause, it appears that the libellants in this were the same as in the preceding case [Case No. 7,417], and that the goods libelled were also found and captured on board the Mary and Susan, which renders it unnecessary to repeat here the allegation in the libel and claim. The principal question which was presented for the consideration of the court in this case, was, whether an alien enemy, under any and what circumstances, could be heard in the prize court.

D. S. Jones and Griffin, Emmet & Wells, for libellants.

Colden, Slosson & Irving, for claimant.

VAN NESS, District Judge. It is contended by the libellants, that James Beswicke & Son are alien enemies, and that this appears (1) by the pleadings; (2) by the papers found on board the captured vessel.

By the pleadings, because it is alleged in the libel, and not denied in the claim. I am of opinion that the allegation in the libel is sufficiently plain and explicit. That it is a material one, forming the very foundation of this proceeding, and that, according to all known rules of pleading, the main fact which sustains the prosecution, must, if it can, be negatived, or it will be taken as admitted. That this allegation is material and ought to be denied, the case of The Beursę Van Koningsberg is a direct and positive authority. 2 C. Rob. Adm. 169. It shows, conclusively, that enemy's interest must always be negatived in the claim. But, aside from this, I think the fact sufficiently proved by the papers found on board, and now before the court. The letters of Beswicke & Son leave no doubt that they are British subjects residing in Saddleworth, England; and if they did, that from Blackstock to Hugh Auchincloss would remove it. Being satisfied on that subject, it is unnecessary to determine how far their residence alone would invest them with a hostile character as to this transaction. It is a question on which much may be said in other cases, and I have deemed it most expedient to avoid an examination of it in one that does not require it.

In order to dispose of all the objections arising out of the form of the pleadings, I will, while on this part of the case, notice another raised by the counsel of the claimant, though in a late stage of the argument. It is urged that the libel should not only allege that the claimants are "alien enemies," but that they are "alien enemies resident abroad." It is very plain that both the libel and claim, in this case, are

[1] [Reported by Elijah Paine, Jr., Esq.]

inaccurately and loosely drawn. But it appears to me, that whether it be alleged or not, if the claimants be admitted or proved to be alien enemies, they must be presumed and taken to be in the ordinary and usual situation of alien enemies, to wit, in their own country, at any rate out of this. They cannot be here, without a letter of safe conduct, or by permission of the government. Once acknowledged to be alien enemies, they cannot be presumed to be here and to have that letter or that permission. That presumption would be unnatural and violent. If they have either, they ought to show it if they mean to make it the foundation on which to assert a right or to claim a privilege. On general principles, as enemies, they have no rights, no privileges, and if they mean to be exempted from the general rule, from the general operation and effect of a state of war, they must show themselves within some of the stipulated or customary exceptions. I believe it may be laid down as the general rule, that all presumptions must be against them. Sir William Scott says, the onus probandi in all prize causes is on the claimant. 4 C. Rob. Adm. 235. And in Sylvester's Case, 7 Mod. 150, it is decided by the court, that whatever the protection or license of an alien enemy may be, it must be set forth in the pleadings. Although these books are not esteemed very high authority, this case receives credit and respect from a reference in Bacon. But I think it can be shown, by precedent, that the allegation is not material. "Alien," says a learned judge, is a legal term, and amounts to many words. In Sylvester's Case, there was a plea that the plaintiff was "an alien enemy, born under the allegiance of the French king." To this there was a demurrer, and the plea was held good. The allegation, therefore, that he was resident abroad, was not deemed necessary. Daubigny v. Davallon, 2 Anstr. 462. In another case, the plaintiffs are alleged to be "Frenchmen, aliens, and enemies to the king of Great Britain," and that was held enough. The word "Frenchman," said the chief baron, "shows that they are the subjects of a nation at war with us. The averment that they are enemies of the king, is the same thing as if the plea had said that they adhere to his enemies." Here the claimants are alleged to be "subjects of the kingdom of Great Britain and Ireland, and enemies." "Subjects of the king of Great Britain" is certainly equivalent to "Englishmen and aliens," and they are alleged to be "enemies"—from which it must follow, that they adhere to the enemy, and then whether they are aliens, is perfectly immaterial. If they adhere to the enemy, they must be treated as such. The terms, "subjects of the kingdom of Great Britain and Ireland, and enemies," therefore embrace every allegation which, by these decisions, is deemed necessary. In support of these allegations, it is competent, though not necessary, for the captors to prove the residence of the claimants, which has been abundantly shown to be in Saddleworth. In the common law courts, the defendant must set forth, in his plea, everything requisite to negative the right of the plaintiff to sue. Here the onus probandi is on the claimant. He must show himself entitled to all the privileges he claims. It being admitted, then, and if not admitted, proved, that Messrs. Beswicke & Son are alien enemies, resident in the enemy's country, the question arises—whether they can be heard in this court; whether the claim of William Falconer, in their behalf, can be sustained, or must be rejected?

This question, abstractly considered, is simple enough, and, in my judgment, presents but few difficulties. But, in consequence of the course which the counsel thought proper to take, and the variety of topics which were introduced and discussed in the progress of the argument, it has become somewhat involved and complicated. I had at first intended to take as extensive a view, and give as full a discussion of each distinct point which had been made, as my convenience would allow. But I was embarrassed and arrested in the execution of this intention, by recollecting the claim interposed on the part of the government; by my ignorance of the precise ground that would be taken on the argument of that claim; and, also, by the consideration that some of the questions incidentally discussed here might be made principal grounds of defence in the other cases which are to follow this, and be more directly presented for the consideration of the court. In order, therefore, to avoid a premature and anticipated decision of questions involving the rights of other claimants, and on which other counsel may wish to be heard, I have found it necessary to take a view of this case somewhat concise and circumscribed. Beside the authorities which have been cited to show that an alien enemy not here under letters of safe conduct, or under the protection of the government, cannot sue in the common law courts, there are some others to which I shall refer.

The first is the Case of Sylvester, 7 Mod. 150, already alluded to. It is so early as the 1st of Queen Anne, and although it is not full in point, yet it will be perceived that it bears pretty directly on this question, and in principle is conformable to the later cases which will be examined.

The next case to which I shall refer is that of Wells v. Williams, reported at length in 1 Ld. Raym. 282, and concisely in 1 Lutw. 15, and 1 Salk. 46. This case ought to have been stated before the last, as it is anterior in its date, being the 9 Wm. III. It was an action of debt on bond. The defendant plead that the plaintiff was an alien enemy, and came into England "sine salvo conductu." The plaintiff replied, that at the time of mak-

ing the bond he was, and continued in the country, "per licentiam et sub protectione domini regis." To this replication the defendant demurred, and contended, that although the plaintiff was in England, by license, and under protection, yet, without a letter of safe conduct, he could not maintain a suit. The chief justice, in deciding the case, said, "an alien enemy, who is here in protection, may sue his bond or contract; but an alien enemy, abiding in his own country, cannot sue here." This case, if it be good authority, seems to be decisive on the question under consideration, and so far from being overruled or questioned, it is manifestly supported by the subsequent decisions that have been found or cited.

The case of Ricord v. Bettenham, 3 Burrows, 1734, was an action on a ransom bill. In this the authority of the last case, and the principles on which it rested, were fully recognized; and although the action was allowed, it was admitted to be an exception to the general rule, and sustained exclusively on the ground that in the single instance of ransom bills it was the practice of some other European nations. There are two other cases on ransom bills reported in Doug. 641, 649, note; Cornu v. Blackburne; and Anthon v. Fisher. These refer to the last case of Ricord v. Bettenham, and recognize these suits on ransom bills, as founded on a solitary exception to the general disability of an alien to sue, if resident abroad. These cases were prior to the statutes of 22 Geo. III., which put an end to suits on ransom bills.

The next is that of Daubigny v. Davallon (in the exchequer) Anstr. 462. This was a bill for the discovery of goods received by the defendants as agents for the plaintiffs, stating the discovery to be necessary for supporting actions at law, intended to be brought by the plaintiffs for the value of the goods. The defendants pleaded, in substance, that the plaintiffs were alien enemies, resident in France, and relied on the very cases I have cited from Strange, Lord Raymond and Douglass. It was decided that the plea was sufficient, and McDonald, chief baron, in delivering the opinion of the court, after stating that alien friends may institute suits, and the particular circumstances under which even alien enemies may sue, says: "But this claim to the protection of our courts does not apply to those aliens who adhere to the king's enemies. They seem upon every principle to be incapacitated from suing either at law or in equity. The disability to sue is personal. It takes away from the king's enemies the benefit of his courts, whether for the purpose of immediate relief, or to give assistance in obtaining that relief elsewhere." I would ask the attention of the counsel for the claimants to this decision. It is singularly applicable to the peculiar features of their case, and to the nature of the proceeding here: aliens adhering to the king's enemies shall derive no benefits through his courts.

After such decisive authorities, it must be unnecessary to multiply them. They are too numerous to admit of a minute examination, and I shall only refer to a few others, which prove incontestably that an alien enemy, commorant in his own country, cannot sue in the courts of the other. Sparenburgh v. Bannatyne (1797) 1 Bos. & P. 163; M'Connell v. Hector (1802) 3 Bos. & P. 113; Le Bret v. Papillon (1804) 4 East, 502; De Luneville v. Phillips (1806) 2 Bos. & P. [N. S.] 97. And this surely is all that is necessary to establish; for if neither of two belligerents can sue the other, how is either to be sued? To prove that neither can sue, is all that can be proved.

But Beswicke & Son proceed by an agent, and I shall cite one other authority to show, that in the common law courts they derive no advantage from that circumstance. The case to which I allude is that of Brandon v. Nesbitt, 6 Durn & E. [Term R.] 23. It was an action on a policy of insurance, effected by the plaintiff on account of alien enemies resident in France, and who were indebted to him, the plaintiff, a British subject, in a sum exceeding the amount of the policy, and he intended to reimburse himself in part by a recovery in this suit. Lord Kenyon decided, that an action would not lie, either by or in favor of an alien enemy, under such circumstances. That what he could not do directly he should not do indirectly. This is precisely the case here, and brings the common law authorities directly to the point, before the court. The case of Bristow v. Towers, Id. 35, is similar in principle. Having, as I think, sufficiently ascertained that alien enemies, commorant in their own country, cannot sue in the common law courts, it is proper to examine what are the principles and practice adopted by courts proceeding according to the law of nations and of war.

The first authority to which I shall refer, in pursuing this inquiry, is Bynkershoeck. For of all writers on public and general law, he is the most lucid and satisfactory, on the particular subjects of which he treats. In the 25th chapter of his treatise on the Law of War, at the head of the 8th section, the learned translator lays it down, as the clear and indubitable result of his author's reasoning, "that one who resides in an enemy's country, under a safe conduct from the sovereign, may sue and be sued." This is the principle adopted by the common law courts. In the 7th chapter of this treatise will be found what the author considers, in this respect, the disabilities of alien enemies not thus in the country. In order to meet the remarks which were made upon it, I will state it with some precision. The author says, "that except in the case where there is a mutual commerce permitted by both belligerents, an alien enemy has no persona standi in judicio." This phrase is rendered,

by the learned translator, "no right to be heard as plaintiff in courts of justice," and this explanation is relied on to support the rights of the claimants to be heard. It is extremely doubtful, I think, whether this be a just exposition of these words; but it is perfectly immaterial whether it be or not. Admit, for a moment, that by these words, the author means to say, that an alien enemy "cannot be heard as plaintiff in a court of justice;" and admit, also, all that was said by the counsel, that the present claimants must be considered, not as plaintiffs, but defendants; that in common law language, they are not suing, but sued; and how does it aid them? It is very obvious, that this mysterious sentence is but part of the law which Bynkershoeck means to state. It is but part of what he does state on the subject. He here says, that an alien enemy can have "no persona standi in judicio," "cannot be heard as plaintiff in courts of justice." And in the next section he proceeds—"moreover, if you do not permit your enemy to bring actions, neither can you, with justice, suffer them to be brought against your enemy;" and then goes on to reprobate, in very decisive language, a different course which had once been permitted by the Dutch government—so that the explanation of the learned translator may be permitted to remain as altogether harmless, and not at all at variance with the general law established by the context; which indubitably is, that the subject of one belligerent cannot have a legal personal standing in the courts of the other. He cannot appear or be heard in them, except in the cases which have been mentioned. He is totally ex lex. In the language of one of the English authorities, "he cannot have the benefit of the king's courts." Adopting this as the law, it becomes immaterial to inquire, whether the claimants must be viewed as plaintiffs or defendants; whether the proceeding is by, or against them. But surely they are not in the situation of ordinary defendants. In the first place, they are not brought here by any compulsory process. They appear here voluntarily, to assert and prosecute a right, not to defend property, which is demanded of them and in their possession, but to demand and recover property, the possession of which they have lost—not to resist an injury threatened, but to claim a benefit alleged to be withheld. And this is precisely what even the most doubtful authorities say they shall not be permitted to do.

Sir William Scott, who, when his opinions are not influenced by the executive authority, or by the peculiar situation and policy of his nation, is great and high authority, has adopted these principles in their whole extent. "In time of war," he says, "there is a total inability to sustain a contract, by an appeal to the tribunals of the one country, on the part of the subjects of the other. In the laws of almost every country, the character of alien enemy carries with it a disability to sue, or to sustain, in the language of the civilians, a 'persona standi in judicio.' The peculiar law of our own country, applies this principle with great rigor. The same principle is received in our courts of the law of nations; they are so far British courts, that no man can sue therein, who is a subject of the enemy, unless under particular circumstances, that pro hac vice discharge him from the character of enemy." The same principle then is received in the admiralty and common law courts; and nothing more is requisite than to conform its application to the nature of the subject in controversy, and to the proceedings of the respective courts. The proceedings in one are in personam, in the other in rem. If in the one, the benefit of enforcing a personal contract is withheld, so in the other must be withheld the benefit of claiming and demanding the thing or property in dispute. In the one, he shall not be entitled to a proceeding, by means of which he may recover the value of the property he pursues, nor in the other the property itself. Sir William Scott has not only recognized these principles in theory, but has evidently adopted them in practice. Wherever the character of the claimant, or the property seemed at all tinctured with hostility, the claim has either been rejected, or the property condemned. The grounds on which the cases of The Walsingham Packet [2 C. Rob. Adm. 78], that of The Juffrouw Louisa Margaretha [1 Bos. & P. 349, note], and others, referred to in the case of The Hoop [1 C. Rob. Adm. 196], were decided, although not precisely to this point, have their origin in the same principle. But I think the case of The Two Brothers, 1 C. Rob. Adm. 134, is very conclusive. It appears from that case, that even where property is captured within the limits of a neutral country, the original owners cannot claim it in the courts of the country at war with theirs. Their relief must be obtained through the neutral government of the violated territory. The property being hostile, as between the captors and owners was liable to capture, unless saved by the situation in which it was placed. If so, the government exercising jurisdiction over the place where it was taken, must do justice to the party whom it has permitted to be injured. That is the only way in which he can obtain it. This principle is certainly incontestable, and will presently receive an application to this case.

Two recent cases have been referred to by the counsel for the claimants, as authorizing the reception of this claim; The Hoop (decided at doctor's commons by Sir William Scott) [supra], and The Zodiack [1 Stew. Vice Adm. 333], in the vice-admiralty court, at Halifax. But on examining these cases, they will be found to be wholly unconnected in principle with this. The objection to this claim is, that it is offered by and on behalf of an enemy, who neither by municipal nor

general law, has a right to appear in our courts. But the moment he is divested even temporarily of his hostile character, he is restored to this right. He can be thus exonerated from the character of an enemy, either by an express act of the sovereign power of our own country, or by being placed in a situation where the law of nations interdicts all acts of hostility from being committed by or against him. This was precisely the situation of The Hoop [supra] and The Zodiack. The owners of the first were completely exonerated from the character and consequences of hostility, by a license from the British government, which, as to that government, legalized the transaction in which they were concerned, and quo ad that, rendered them friends. In everything that related to it, they were in the situation of neutrals at least. They had an undoubted right, therefore, to be heard in the courts of England on every question connected with that voyage. In their character of authorized and permitted traders, they were in a capacity to claim, and therefore to receive restitution. This is a very clear case. Show a license from this government to Messrs. Beswicke & Son to import these goods, and there is an end to the question. They shall not only be permitted to claim, but they shall have restitution.

The case of The Zodiack is equally clear. She was captured by a British cartel schooner, which was interdicted expressly by her own government, and by the law of nations, from committing any act of hostility during the voyage in which she was so employed as a cartel. Every hostile act, therefore, on her part was a violation of the faith of her own government, and of universal law. Every capture by her was illegal and void ab initio. She was not, during that voyage, the enemy of the American vessel; neither could capture the other. If the cartel had been brought in here as a prize, she must have been restored instantly, on the ground that she was divested of her hostile character by the flag she bore. The American vessel could not be captured by her, therefore, as an enemy. The faith of the government was pledged, that her cartels should comply with the usages of war, which require that they shall make no captures, and if they do, that they shall be restored. It is admitted in the case of The Zodiack, that the claim is received and restitution awarded, by reason of its own peculiarity. It is an exception to the general laws and rules of war, and cannot be adjudged on general principles. I shall not quote Chitty's Law of Nations as an authority. It contains nothing original or new. It is but a hasty and imperfect collection of authorities as to modern usages and practice, chiefly taken from Sir William Scott's decisions. All he says on the question before us, is a literal extract from the judgment in the case of The Hoop. The examination I have given this question, leaves no doubt in my mind, that Beswicke & Son, being alien enemies, commorant in the enemy country, cannot be heard in this court, and that the claim interposed by William Falconer in their behalf, must be rejected.

JOHNSON v. THREE HUNDRED AND EIGHTEEN AND ONE-HALF TONS OF COAL. See Case No. 14,010.

## Case No. 7,416.

JOHNSON v. TOMPKINS et al.

[1 Baldw. 571.] [1]

Circuit Court, E. D. Pennsylvania. April Term, 1833.

EVIDENCE — SLAVERY—BILL OF SALE OF SLAVE—RIGHT TO PURSUE ABSCONDING SLAVE — COMBINATION OF SEVERAL TO COMMIT A TRESPASS—LIABILITY—FALSE IMPRISONMENT.

1. On a question of slavery or freedom, the same rules of evidence prevail as in other cases concerning the right to property.

[Cited in Groves v. Slaughter, 15 Pet. (40 U. S.) 512; U. S. v. Morris, Case No. 15,815.]

2. A bill of sale is not necessary to pass the right to a slave.

3. A citizen of another state, from whom his slave absconds into this state, may pursue and take him without warrant, and use as much force as is necessary to carry him back to his residence.

[Cited in Muller's Case, Case No. 9,913.]

[Cited in Day v. Townsend, 70 Iowa, 540, 30 N. W. 753.]

4. Such slave may be arrested on a Sunday, in the night time, and in the house of another, if no breach of the peace is committed.

[Cited in U. S. v. Stevens, 16 Fed. 105.]

[Cited in Turner v. Wilson, 49 Ind. 586.]

5. This right of the master results from his ownership and right to the custody and services of the slave by the common law, and the eleventh section of the abolition act of 1780, and other laws of this state. It is the same right by which bail may arrest their principal in another state.

6. The constitution and laws of the United States do not confer, but secure this right to reclaim fugitive slaves, against state legislation.

[Cited in Re McDonald, Case No. 8,751; Osborn v. Nicholson, Id. 10,595.]

7. It is no offence against the laws of this state, for a master to take his absconding slave to the state from which he absconded, the offence consists only in taking a free person by force under the act of 1820, or the act of 1788.

[Cited in Driskill v. Parrish, Case No. 4,089.]

8. No person has a right to oppose the master in reclaiming his slave, or to demand proof of property. A judge or magistrate cannot order his arrest or detention, without oath, warrant, and probable cause.

9. The master may use force in repelling such opposition, or the execution of such order, and the officer who gives such order, and all concerned in its execution, are trespassers.

10. The act of assembly does not require notice to be given to a justice of the peace, for acts

[1] [Reported by Hon. Henry Baldwin, Circuit Justice.]

done in violation of the constitution, or where he has no jurisdiction.

11. Where two or more persons agree to commit, or unite in the commission of an unlawful act, each who is present, or advises, consents, or in any way aids, assists, or consents to the act, is liable in trespass.

[Cited in Bright v. Patton, 5 D. C. 535.]

12. It is false imprisonment to detain another by threats of violence to his person, or deprive him of the freedom of going where he will by the well grounded apprehension of personal danger, though no assault is committed.

[Cited in Marshall v. Heller, 55 Wis. 394, 13 N. W. 236.]

This was an action of trespass vi et armis, false imprisonment, etc. The following is a brief outline of the circumstances. Some time previous to the month of October, 1822, negro Jack, a slave, the property of the plaintiff, absconded from his master, residing near Princeton, New Jersey, fled to the county of Montgomery, in Pennsylvania, in the neighbourhood of Hatborough, commonly called the Billet, and there was hired by the defendants, John and Isachar Kenderdine. On Sunday morning, the 20th of October 1822, the plaintiff, with his brother, Ralph Johnson, and his friends, Messrs. Withington and Skilmore, left Princeton, crossed the Delaware, and about an hour before sunset arrived at the Billet, for the purpose of securing and taking up Jack as a runaway slave. They put up at the best known tavern in the village, then kept by Mr. Marples. Upon ascertaining where Jack was, they left their great coats and umbrellas at Marples, and proceeded to the residence of the defendant, John Kenderdine, who lived about four miles from the Billet. They previously ordered their supper to be ready on their return, and mentioned to Marples (the landlord) the object of their visit, and what they were about to do. About dusk they arrived at Kenderdine's, there was sickness in the family, and the male members of the family were from home. Three of the four Jersey party left the wagon in the road, and went to the kitchen of the mansionhouse and knocked at the door. They were told to walk in, when one of them said an accident had happened to their wagon, and they wished help. In an instant Jack was recognised, they then said that no accident had happened, but that they used this precaution to secure him. Jack agreed to go at once. He was placed in the wagon with fetters, and upon returning to the house, and making an ineffectual attempt to obtain Jack's clothes, the party proceeded to return to the Billet. There was contradictory testimony as to certain threats, alleged to have been made in and on the road by the associates of the plaintiff, but it was proved that they declared that if they would go with them to the Billet, they would satisfy Isachar Kenderdine that they had the right to take Jack. Before they started, Isachar Kenderdine had arrived at his brother John's house, and demanded their authority to take Jack. The taking was conducted so quietly that it was not heard in the sick room up stairs. Before the party had got back to the Billet, they were overtaken by John and Isachar Kenderdine, and a large assemblage of persons, who had been collected; were attacked with stones and clubs; the plaintiff received a blow, which produced a contusion on the side of the head, and the physician pronounced it a serious wound. When they arrived at the Billet they were surrounded by a mob of forty or fifty persons, and were compelled to go at once to Judge M'Neil, an associate judge of Montgomery county, to prove their property. The plaintiff being very weak, begged to stay till morning. This was refused, and the plaintiff and one of his associates rode in their wagon, and the other two walked to the residence of the judge. Among the crowd were the defendant, Tompkins, a justice of the peace, and the constable Silas Roney, who was at that time only a spectator. When they arrived at the residence of Judge M'Neil, a partial hearing took place, and the judge recommended a further hearing as to the slavery of Jack, and that in the mean time Justice Tompkins should commit Jack to jail, and bind over the plaintiff and his associates to prosecute his claim. John and Isachar Kenderdine went to Justice Tompkins, and entered security in 800 dollars for the appearance of Jack to answer to the claim of his master. The constable and the mob then conducted the Jersey party back to the tavern, and kept them in custody till the next day.

The defendant gave in evidence that Judge M'Neil, had directed John Kenderdine to bring the plaintiff and his party before him, by force, if they resisted, but Judge M'Neil stated that he meant legal force, and when they were before him, seeing a justice of the peace (Tompkins), and the constable (Roney), in company, he believed they were brought before him by legal authority. During the night, Withington escaped and came to the city, and it was supposed gave information to the friends of the plaintiff of his detention; the remaining three were treated with great severity, being refused even a bed. Before daylight on Monday morning, a compromise was agreed to by all the parties who were present, the plaintiff offered to manumit Jack and pay the expenses. A message was despatched to John Kenderdine to obtain his consent, but he peremptorily refused, declaring they should be prosecuted. On Monday morning the three Jerseymen were taken before Justice Tompkins, and security in 6,000 dollars was required of them to answer the charge of kidnapping. The plaintiff and his party not being able at that time to give the security, the justice was proceeding to write a commitment, when the constable interposed and said he would be security for their appearance on the next day. They were accordingly conducted back to

Marples's tavern, and remained there under custody till the next day, Tuesday. During the second night, John Kenderdine and eight or ten of his friends, came to the tavern, and insisted upon taking charge of the prisoners; some of the party behaved with great rudeness. The constable remonstrated, but they persisted, and he withdrew from the charge. On Tuesday the friends of the Jersey party arrived from Newtown, in Bucks county, and the city of Philadelphia, and they entered into security in 2,000 dollars, respectively, and one security in the like sum to appear at the next court of quarter sessions, to answer the charge of kidnapping. John and Isachar Kenderdine were bound over to testify against them. The grand jury examined the witnesses for the prosecution, and returned a true bill. At the trial at Norristown, Montgomery county, before the pettit jury, great excitement against Johnson and his co-defendant, prevailed. A subscription was made to employ additional counsel to aid the attorney-general in conducting the prosecution; after a long and arduous trial, the defendants were acquitted, and negro Jack was delivered up to his master, Caleb Johnson, the present plaintiff, by order of Judge Jones, one of the judges of the court of common pleas of Montgomery county.

There never was any authority in writing, either warrant or commitment, to detain the Jersey party; there never was any hearing, on oath or affirmation, nor was there any complaint made on oath or affirmation before Judge M'Neil or Justice Tompkins on Monday; the evidence was contradictory whether any complaint on oath or affirmation was made before Justice Tompkins on Tuesday. On the present trial there was no dispute that Jack was a slave, since his restoration to his master he had manumitted him. Jack was now living near to his master, in the vicinity of Princeton, and had attended the last court as a witness for the plaintiff, when the trial was postponed. Caleb Johnson, the plaintiff, was a farmer of considerable wealth and unexceptionable character, it appeared also that the defendants were men of moderate property, also of a fair character, and highly respectable members of the society of friends.

J. Randall and Mr. Kittera, for plaintiff.

Jack is admitted to have been the slave of the plaintiff, who had by the constitution of the United States, and the act of February, 1793 (1 Story's Laws, 285 [1 Stat. 302]), a perfect right to take his slave within this state, at any time he pleased, to use any force necessary for the purpose, to detain him a reasonable time before taking him to any magistrate, and to select any one before he would bring him ([Respublica v. Richards] 2 Dall. [2 U. S.] 225; Hill v. Low [Case No. 6,494]), they also referred to a manuscript opinion of Judge Peters in that case. This right of the master cannot be restrained or qualified by state laws, or be obstructed by state officers, nor is the right of property to be decided by the laws of the state to which the slave absconds. In New Jersey every coloured person is presumed to be a slave, till the contrary is proved. 2 Halst. [7 N. J. Law] 253. It is no justification of defendants, that the slave was arrested on Sunday, the master had a right to do it on that day, on the same principle that bail may take his principal on Sunday. 6 Mod. 231. The acts done by the defendants were in law an arrest and imprisonment, though the person of the plaintiff might not have been touched (2 Saund. Pl. & Ev. 520; Ryan & M. 321; 21 E. C. L. 449), and every person present and consenting to what was done is equally liable with those who did the act. If a felony had been committed, the plaintiff was liable to arrest without a warrant, but the party arresting does it at his peril, and if the party arrested is not guilty, he may recover damages; here there is no pretence of guilt, and the case is not within the act of 1820, which will be confined to force or fraud used on a freeman, according to the opinion of the supreme court on a similar law. Respublica v. Richards, 2 Dall. [2 U. S.] 226.

Mr. Rawle, Jr., and Mr. Sergeant, for defendants.

As plaintiff claims his rights by law, he must obey it, and a master has no right to pursue his fugitive slave into the house of another (Lane v. Mason [unreported], before Judge Peters); nor to arrest him on Sunday, as no writ or process can be served on that day (Purd. Dig. 850); and when he arrests him, he is bound to take him before a magistrate, in order to procure a warrant for his removal, pursuant to the act of congress. No force can be used but in taking the slave to the magistrate, or removing him out of the state after a warrant is obtained, and if the master does not follow the act of congress, he becomes answerable to the laws of the state punishing kidnapping, which, by the act of 1820, consists in taking any coloured person out of the state by force, unless done according to the provisions of that law. Purd. Dig. 652. By the law of Pennsylvania, every person, black or white, is presumed to be free till the contrary is proved. The plaintiff brought himself within the penal provisions of the act of 1820, if he did not immediately, on the arrest of Jack, prove his property in him, and procure a warrant from a judge or magistrate; the offence is a felony, and he became liable to an arrest by any person who saw him in the act of removing Jack from the state without a warrant. A warrant may issue on reasonable suspicion of a felony being committed. 1 Selw. N. P. 126; 6 Bac. Abr. 572-574; Moore, 408. The constable had a right to detain the plaintiff for examination (1 Hale, P. C. 585, 586), and any bystander who saw the act committed had a right to demand the

authority by which an act which was prima facie a felony by the law of the state, was committed. The defendants did no more than they had a right to do, the person of the plaintiff was not violated, none of them touched him, and words alone are neither an arrest, an assault, or imprisonment; there must be a touch, or physical restraint. Bull. N. P. 22; 2 Selw. N. P. 113; 1 Salk. 79; 6 Mod. 173; 4 Johns. 32; 5 Bos. & P. 211. This action cannot be supported against Mr. Tompkins, who is a justice of the peace, and cannot be sued for any act done by virtue of his office, unless the notice prescribed by the act of assembly is previously given, which has not been done. Purd. Dig. 492; 1 Smith's Laws, 364, 365.

BALDWIN, Circuit Justice (charging jury). The facts of this case are not complicated, nor is there much contest about those which are material to its decision; the questions of law however are of the last importance, involving the rights of property and the personal rights of the citizens of this and other states, to an extent which calls for a plain expression of our opinion, in order to have the law finally settled by the supreme court, on the interesting subjects now before us.

On a question of slavery or freedom, the right is to be established by the same rules of evidence as in other contests about the right to property,—[Queen v. Hepburn] 7 Cranch [11 U. S.] 295,—quiet and undisturbed possession is evidence of ownership, and cannot be disturbed by any one who has not the right of property, and the burthen of its proof rests on the one who is not in possession. In this case the proof of Jack being the slave of the plaintiff, is full, clear, and uncontradicted; Jack admitted that he was a slave till thirty years of age, when he alleges he was entitled to his freedom by the will of a former master; this assertion is wholly unsupported by proof, and contradicted by the will in evidence before you. Were this a trial between Jack and the plaintiff on a question of freedom, there could be no doubt on the evidence before you, a bill of sale is not necessary to show the property to be in the plaintiff, it may be proved by parol evidence, or inferred from long possession. [Pirate v. Dalby] 1 Dall. [1 U. S.] 169. The ownership of Jack being thus clearly made out, he must be deemed to be the property of Mr. Johnson, over which he has the same control as over his land or his goods. It is not permitted to you or us to indulge our feelings of abstract right on these subjects; the law of the land recognises the right of one man to hold another in bondage, and that right must be protected from violation, although its existence is abhorrent to all our ideas of natural right and justice.

As a consequence of this right of property, the owner may keep possession of his slave; if he absconds, he may retake him by pursuit into another state, and may bind or secure him in any other way, to prevent his second escape, he may arrest him by the use of as much force as is necessary to effect his reclamation; he may enter peaceably on the property or into the house of another, taking care to commit no breach of the peace against third persons. But it is no breach of the peace to use as much force or coercion towards the fugitive as suffices for his security, as without such force no slave could be re-taken, without his consent. The master may also use every art, device or strategem to decoy the slave into his power; odious as these terms may be in their application to an unlawful act, they ought to be considered as far otherwise when used for a lawful and justifiable purpose. It is every day's practice to detect counterfeiters, and those who pass counterfeit money, by employing persons to purchase it from them; it is necessary for the purpose of public justice that such and similar means should be resorted to, or criminals would escape detection; they are neither immoral nor illegal. This right of a master to arrest his fugitive slave, is not a solitary case in the law; it may be exercised towards a fugitive apprentice or redemptioner, to the same extent, and is done daily without producing any excitement; an apprentice is a servant, a slave is no more; though his servitude is for life, the nature of it is the same as apprenticeship or by redemption, which, though terminated by time, is, during its continuance, as severe a servitude as that for life. Of the same nature is the right of a parent to the services of his minor children, which gives the custody of their persons. So where a man enters special bail for the appearance of a defendant in a civil action, he may seize his person at his pleasure, and commit him to prison, or if the principal escapes, the bail may pursue him to another state, arrest and bring him back, by the use of all necessary force and means of preventing an escape. The lawful exercise of this authority in such cases is calculated to excite no sympathy; the law takes its course in peace, and unnoticed, yet it is the same power, and used in the same manner, as by a master over his slave. Had Jack been the apprentice of Mr. Johnson, or had he been the special bail of Jack, he would have the same right to re-take him as he had by being his owner for life; the right in each case is from the same source, the law of the land. If the enforcement of the right excites more feeling in one case than the other, it is not from the manner in which it is done, but the nature of the right which is enforced; property in a human being for life. If this is unjust and oppressive, the sin is on the heads of the makers of laws which tolerate slavery, or in those who have the power, in not repealing them; to visit it on those who have honestly acquired, and lawfully hold property, under the guarantee

and protection of the laws, is the worst of all oppression, and the rankest injustice towards our fellow-men. It is the indulgence of a spirit of persecution against our neighbours, for no offence against society or its laws; for no infringement of the rights of others, but simply for the assertion of their own in a lawful manner. If this spirit pervades the country; if public opinion is suffered to prostrate the laws which protect one species of property, those who lead the crusade against slavery may, at no distant day, find a new one directed against their lands, their stores and their debts; if a master cannot retain the custody of his slave, apprentice, or redemptioner, a parent must give up the guardianship of his children, bail have no hold on their principal, the creditor cannot arrest his debtor by lawful means, and he who keeps the rightful owner of lands or chattels out of possession, will be protected in his trespasses.

When the law ceases to be the test of right and remedy; when individuals undertake to be its administrators by rules of their own adoption, the bands of society are broken as effectually by the severance of one link from the chain of justice, which binds man to the laws, as if the whole was dissolved. The more specious and seductive the pretexts are under which the law is violated, the greater ought to be the vigilance of courts and juries in their detection; public opinion is a security against acts of open and avowed infringements of acknowledged rights; from such combinations there is no danger; they will fall by their own violence, as the blast expends its force by its own fury. The only permanent danger is in the indulgence of the humane and benevolent feelings of our nature, at what we feel to be acts of oppression towards human beings endowed with the same qualities and attributes as ourselves, and brought into being by the same power which created us all; without reflecting that in suffering these feelings to come into action against rights secured by the laws, we forget the first duty of citizens of a government of laws; obedience to its ordinances. The opinion of Judge Washington, in Hill v. Low [Case No. 6,494], meets our entire concurrence. "That if a man should honestly believe that the person claimed as a fugitive did not in fact owe service to the claimant, he could not in his defence allege ignorance of the law, and that such matters were unfit for the inquiry of the jury. That it was sufficient to bring the defendant within the provisions of the law, if having notice either by the verbal declarations of those who had the fugitive in custody, or were attempting to seize him; or by circumstances brought home to the defendant, that the person arrested was a fugitive or was arrested as such." The case must be decided by the facts in evidence, and will not be influenced by the defendant's belief or knowledge of them in any other way than in mitigation of damages, if you are satisfied that they were really ignorant of Jack's situation, and they believed him free.

Their interference was purely voluntary. The first inquiry then is, was it justifiable? The slave was arrested on Sunday, it is true, but no law prohibits a man from protecting or reclaiming his property on that day. 5 Serg. & R. 301. Working on Sunday is no breach of the peace (1 Serg & R. 350) when done without noise or disorder. A justice of the peace has no right to enter on the land of another on Sunday for the purpose of obtaining evidence of a breach of the Sabbath against the will of another. He ought to summon the offenders the next day, and proceed against them in the usual manner. Id. 351. If the service of process on Sunday was illegal, except for a breach of the peace or felony, the defendants could not arrest or detain the Jersey party without process or legal authority for any other cause. The slave, it seems, was seized in the twilight or night, but that did not justify the interference of the defendant to rescue him, or obstruct the plaintiff in removing him; the putting of irons upon him is of itself no justification of the infliction of any violence upon the plaintiff. If it was an act of unnecessary severity, it would be a circumstance for which you would make a proper allowance in assessing damages, as one which would mitigate the conduct of the defendants, by the excitement which it would be apt to produce.

If you believe the evidence, the plaintiff has established his right to arrest Jack; proof of his slavery and owing service to him absolves him from the risk he ran in seizing him; but the same fact which absolves him makes the defendants liable, if they have done any act not warranted by law by which the plaintiff has suffered an injury. It is contended that they had a right to arrest the plaintiff and his party when in the act of committing, attempting to commit a felony, or doing an act which might amount to a felony, and prevent its commission thereby; and such is undoubtedly the law. There may be an arrest without warrant by a public officer, or a private person, who sees another commit a felony; or if a felony is known to have been committed, the person committing it may be pursued and arrested; and when there is only probable cause of suspicion a private person may, without warrant, at his peril make an arrest. 6 Bin. 318, 319. A constable may arrest without warrant for a breach of the peace in his presence, and commit the offender to jail for safe keeping, so may a private person for felony, or on an affray which has taken place in his presence, or where an arrest is made on suspicion. 8 Serg. & R. 49, 50. Such is the law of Pennsylvania, which secures the peace of the public, but the law does not stop here; it does not leave the citizen at the mercy of peace officers or in-

dividuals; they make the arrest at their peril; in the emphatic language of the late Chief Justice Tilghman: "I say at his peril, for nothing short of proving the felony will justify the arrest" (6 Bin. 319); and the present chief justice, in declaring the right of the constable to arrest in such case says: "There is no danger to the liberty of the citizen in this, for if the arrest and detention be improper, the prisoner can have instant redress by the writ of habeas corpus, and the constable may be punished by indictment, or subject to damages in an action of trespass." 8 Serg. & R. 50. The law is the same as to the plaintiff. At the common law a master had a right to take up his runaway servant, and for this, as for any other lawful purpose, might enter peaceably into any house, unless forbidden by the owner. Any person with authority from the master might do the same. The domestic authority of masters and parents must be supported, as essential to the peace of society, and contributing to a due subordination to the authority of government (Addison, 325), the acts of assembly do not give, but only enforce this right. If the person arrested is not a servant or slave, or the person making the arrest has not the authority of the master for so doing, he is in either case liable for the illegal arrest.

You will therefore consider the law as settled, that where an arrest is made without a warrant from a proper officer, the person making the arrest is liable in damages to the party arrested, if he is innocent of the offence with which he is charged, and for which he has been arrested, though the person arresting may have honestly believed the other guilty; though there was ground for suspicion, or probable cause for the arrest, he is liable to an action for the arrest, unless actual guilt appears. These circumstances will weigh with a jury in reducing damages, but as the arrest turns out to be illegal, it cannot be justified; the reason is obvious, though the public peace requires the speedy apprehension of offenders against the law, it does not authorize the imprisonment of the innocent; from this rule there is no exception, where the arrest is without warrant. If a lawful warrant is directed to an officer, or a private person, and he does not exceed or abuse the authority it confers, he is liable to no action, though the person who is described in the warrant, and arrested, is wholly innocent of the offence charged; this is also an incontestable principle of the law; so that while innocent men are protected in their liberty against arrests, by officers or private persons, on their own authority, the latter are equally protected in the execution of lawful process. In the one case they act at the peril of the party arrested being guilty, in the other the law absolves them from any responsibility. The law is the same if a constable seizes a person as a runaway servant, by order of one claiming to be his master, he is liable to an action if the person arrested is not his servant; but if he apprehends him on a warrant from a magistrate no action lies against him.

You will then apply these rules of law to the case before you, and inquire whether the plaintiff, and those acting under his authority, committed any felony or breach of peace, in seizing, securing, and carrying Jack to the house of Marples, in Hatborough. The record of their acquittal is conclusive evidence of their innocence of the offences charged in the indictment preferred against them at Norristown, either jointly or severally; you are bound to consider them each and every one as not guilty of any of the matters charged as a felony or offence under the act of assembly of March, 1820, or the common law. Independently of this acquittal, if Jack was the slave of the plaintiff, neither he nor the others of his party could be guilty of kidnapping, under that or any other law of the state. So long since as 1795, the supreme court unanimously decided that it was no offence, under the seventh section of the act of March, 1788, for a master to arrest his slave forcibly, and carry him out of the state; that the law was intended, and only applied, to carrying a freeman out of the state into bondage. [Respublica v. Richards] 2 Dall. [2 U. S.] 226. The law of 1820 (section 1), on which the plaintiff was prosecuted, was copied from the law of 1788, and must receive the same construction; its reenaction, with the full knowledge which the legislature must be presumed to have had of its judicial exposition by the supreme court, which had remained unquestioned for twenty-five years, without any alteration, is to be considered as not intended to alter, and as not altering the law on the subject. The rule thus established by the legislature and courts of the state, is the rule for our decision, both by the thirty-fourth section of the judiciary act, and the uniform decisions of the supreme court of the United States; it need not, therefore, be regarded with any jealousy, as opposed to the laws, policy or feelings of the state, or the people thereof; neither do we think it necessary to add any reasons to those given by Chief Justice M'Kean, Respublica v. Richards [supra], in the charge of the court to the jury. "The severity of the punishment to be inflicted in case of a conviction (a punishment the same, in its nature, as is inflicted for the most infamous crimes), ought certainly to induce the jury to deliberate well, before they determine, that the act committed by the defendant constitutes the offence, which is the object of the law. The extravagant operation and extent of the doctrine on which the prosecution is maintained, ought also to awaken the most serious attention, for it has been contended, in effect, that should a traveller bring into this state a negro or mulatto slave; nay, should a tradesman of Pennsylvania have a negro or mulatto indented servant, who being sent

on an errand, loiters away his time in tippling, in debauchery, the master cannot forcibly seize and carry the delinquent to another place, either beyond or within the jurisdiction of Pennsylvania, without incurring the penalties of the act of assembly: if it is intended afterwards to keep and detain the negro or mulatto as a slave or servant. Is it rational to conceive, that any legislative body would have destined for such an act so grievous a punishment? Again: It has been alleged that the law has made no difference, and therefore, that the court can make none, between a freeman and a slave, provided the injured party is a negro or mulatto. But is it possible that any individual of common sense, that any assemblage of enlightened men should so confound the nature of things, should so pervert the principle of justice, as to suppose, that it is as criminal for a master to carry off his own slave with the intent to retain him in slavery, as for a stranger to carry off a freeman, with the intent to sell him into bondage? Can these actions merit the same degree of punishment? It is evident however that such enormities are not imputable to the legislature of Pennsylvania. By the tenth section of the act for the gradual abolition of slavery (1 Dall. 841) persons merely sojourning in this state have a right to retain their slaves for a term of six months, and the delegates in congress from other states, foreign ministers and consuls, enjoy that right as long as they continue in their public characters; the succeeding section likewise expressly provides that absconding slaves shall derive no benefit from the law, but that their masters shall have the same right and aid to demand, claim and take them away that they had before. This act of assembly, and particularly these provisions, are not repealed by the supplemental act on which the prosecution is founded. Then we find that any traveller who comes into Pennsylvania upon a temporary excursion for business or amusement, may detain his slave for six months, and the previous law (recognised by act of assembly during that term), authorizes the master to apprehend the slave, and entitles him to the aid of the civil police to secure and carry him away. By a regulation of this kind the policy of our own system is reconciled with a due respect to the system of other states and countries, while an opposite construction would render it impossible for any American or foreigner to pass with a slave through the territory of Pennsylvania. It has been said that the word slaves, or servants, which are used in the other provisions of the supplemental act, being omitted in this section, it must be inferred that the legislature intended to protect the slave or servant as well as the freeman from the outrage contemplated; but, in our opinion, that very omission shows the fallacy of such a construction, for if the legislature designed to protect freeman and not slaves, they could not in any other way more effectually manifest their meaning. In short, the evil apprehended was that of forcing a free negro or mulatto into another country and there taking advantage of his colour to sell him as a slave, and for such an offence the punishment denounced by the law would be justly inflicted. Upon a review of the facts, likewise, we find occasion to regret that the prosecution should have been conducted with a zeal which rarely appears in the prosecution of the highest criminal on the strongest proof. There is not, however, a tittle of evidence to establish the charge that the defendant seduced the negro, or that he even spoke to him in Pennsylvania, where the action of seduction must be committed to vest the jurisdiction in the court. Nor can it be fairly said that he caused the negro to be seduced, for the advice given to General Sevier was merely the advice of a friend, which could not surely merit the ignominious punishment of the law, and which was not in fact adopted, as the negro was forcibly, and not by seduction sent out of the state. But, upon the whole, we were unanimously of opinion, as soon as it was proved that the negro was a slave, that not only his master had a right to seize and carry him away, but that in case he absconded or resisted, it was the duty of every magistrate to employ all legitimate means of coercion in his power for securing and restoring the negro to the service of his owner, whithersoever he might be afterwards carried."

We have laid down the law to be, that bail may arrest their principal; this, too, we have done in accordance with the decisions of the supreme court of this state. "In the relation in which the several states comprising the union stand to each other, the bail in a suit entered in another state, have a right to seize and take the principal in a sister state, provided it does not interfere with the interest of other persons who have arrested such principal." 2 Yeates, 264. Special bail may take up the principal when attending court, or at any time he pleases. "It has been quaintly said that the bail have their principal always on a string, and may pull the string whenever they please, and render him in their own discharge. 4 Yeates, 125; S. P. 3 Yeates, 37." The court refer to and adopt the law as laid down in England, in the same words (6 Mod. 231) in which it is added they may take him even on a Sunday, "and confine him till the next day, and then render him;" it is therefore the common law of Pennsylvania as well as of England. We have also stated the law to be that apprentices, redemptioners, slaves and servants who abscond from the service of their masters, may be apprehended wherever they may be found; this we have done not only on the authority of the courts of Pennsylvania, but of its various laws. By the act of 1770, yet in force, a fugitive apprentice may be apprehended by a warrant from a justice, and com-

mitted to jail till he will consent to return to his master, or give security to answer his complaint. Purd. Dig. 42. This act was extended to redemptioners in 1820. If any person harbour him without giving notice to his master, he shall pay 20 shillings a day (Id. 43), and the apprentice to serve five days, for each day's absconding (Id. 829). The act of March, 1780, which declared all issue of slaves born after that day to be free, unless registered according to its provisions, puts negro and mulatto servants, till twenty-eight, on the same footing as servants by indenture. 1 Dall. 839, 840, § 4. The reward for taking up runaway and absconded negro and mulatto servants and slaves, and the penalties for enticing away, dealing with, or harbouring them, are also the same as in the case of servants bound for four years. Id. 841, § 9. It was "provided that this act, or any thing it contained, shall not give any relief or shelter to any absconding or runaway negro or mulatto slave or servant, who has absented himself, or shall absent himself from his or her owner, master or mistress; residing in another state or country; but they shall have like right and aid to demand, claim, and take away his slave or servant as he might have had in case this act had not been made." Id. 842, § 11. This section remained in force till 1826; it was therefore applicable to this case in 1822. It is all important, as evincing the spirit, policy and feeling of the state, to be utterly opposed to the relief or sheltering of absconding or runaway slaves or servants from other states, or considering the masters who come to reclaim them as felons. On the contrary, it expressly declares that they shall have right and aid, to demand, claim and take away his slave or servant; and in order that the meaning of this part of the law should not be misunderstood, that the benevolent objects of the legislature, as declared in the preamble, should not be perverted to purposes forbidden by the law, it puts the master on the same footing as to carrying his slave out of the states, as if the law had never been passed. This is language which cannot be misunderstood.

It is due to the character of the state that its own laws at least should be respected in courts of justice, by all who are concerned in its administration; it is our most solemn duty to enjoin it on you to take the law of the land as you see it in the statute books, and enforce it according to its provisions. Remember too that this law is that act which has been the pride of Pennsylvania, as one of the most noble and glorious emanations from the spirit of the revolution, as declared in the preamble, which has been read to you with the most touching force and eloquence. But you must not take the spirit of the law according to the impulse which operates to rouse the feelings of counsel in the cause of their clients; look on it, examine its enactment, not only with a watchful eye, but if you please, in the plenitude of philanthropic zeal in the cause of oppressed humanity. To relieve the oppressed, rescue the free from bondage, to punish those who violate the rights of man and humanity, to protect our fellow-man from injustice, and to secure to all alike the benefit of the laws, are the imperious duties of jurors. In obedience to such dictates we call your attention to the laws for the gradual abolition of slavery in Pennsylvania. The two first sections are the preamble. The third declares that no child hereafter to be born shall be a servant for life or a slave. The slavery of children in consequence of the slavery of their mothers, is for ever abolished. The fourth has been noticed. The fifth directs slaves to be registered before the 1st of November, 1780. The seventh directs negroes to be tried for crimes and offences like other inhabitants. The tenth declared all unregistered slaves to be free, except the domestic slaves of members of congress, foreign ministers and consuls, and persons passing through or sojourning in the state, not resident in it, and seamen not owned in the state or employed in ships belonging to the inhabitants of the state. This is the substance of the abolition act. The eleventh excepts fugitives, as has been noticed. This law was explained and amended by the act of March, 1788, which declared all slaves brought into the state by persons residing or intending to reside in it, to be immediately free; prohibits the taking of the slave out of the state with intent to change his place of residence, or selling him for such purposes, directs the registry of the children of slaves, and punishes kidnapping. In the spirit of these laws the legislature passed "An act to incorporate a society by the name of the Pennsylvania society for promoting the abolition of slavery, and for the relief of free negroes unlawfully held in bondage, and for improving the condition of the African race." No society was ever founded for nobler objects, or more deserving of public encouragement and approbation; but it was no part of the design or objects of this benevolent society, to protect or rescue runaway slaves from the claims of their masters. It was provided in their charter that their by-laws, rules, orders and regulations enacted, or to be enacted, be reasonable in themselves, and not contradictory to the constitution and laws of the state. Acts Assemb. A. D. 1789, pp. 218, 223. So far as has come to our knowledge or information, this society has acted on the philanthropic principles of its institution, and none other, never interfering with the rights of property, as secured by the laws, they have not infringed the condition of their charter, but pursued their legitimate objects with untiring zeal. If they have been perverted by any honorary member, like Mr. Ellis, by contributing money to employ counsel to prosecute a master for lawfully seizing and taking away his runaway slave, we are well convinced that it

has been equally repugnant to the feelings and practice of the members of the society, as it would be to their charter.

These laws remained unchanged till 1820, when an act was passed on the subject, the provisions of which need not be particularly recited; the proviso in the second section is, however, important: "Provided always, that nothing herein contained shall be construed as a repeal or alteration of any part of an act of assembly, passed 1st March, 1780; or of any part of the act of 29th March, 1788, except the seventh section, which is repealed." This is the section which prescribed the punishment for kiunapping, and was copied except as to the punishment, into the first section of the law of 1820. By the law of 1788, the punishment was a fine of 100 pounds, and confinement at hard labour not less than six, or exceeding twelve months, until the costs be paid. 2 Dall. 589. By the law of 1820, the fine was not less than 500 dollars, or more than 2,000 dollars, to be deemed guilty of a felony and sentenced to undergo a servitude not less than seven or more than twenty-one years, confined, kept to hard labour, fed and clothed as is directed by the penal laws of this commonwealth, for persons convicted of robbery. Purd. Dig. 653. The punishment of the first offence of robbery is a servitude of not less than one or more than seven years, and for a second offence not exceeding twelve years. Act 1829; Purd. Dig. 821. On the first conviction of murder in the second degree, the punishment is servitude for not less than four or more than twelve years; for the second offence, confinement for life. Act 1829; Purd. Dig. 648.

The penal laws of Pennsylvania are just, mild and humane; her penal code is admired not only in this, but in all the civilized nations of the world. Here punishment is graduated in proportion to the enormity of the offence, and cruel punishments are expressly forbidden by the constitution, as well as excessive fines (article 9, § 13) and by the eighth amendment to the constitution of the United States. That offence must be dark and black indeed, which is in the view of the legislature so much more heinous than highway robbery or wilful murder. Can you believe that it was their intention to subject the man who arrested his own fugitive slave by force, with the intention of conveying him to his home in another state, to a punishment greater in a threefold degree than the most aggravated highway robbery, and for a time exceeding by nine years the utmost term of servitude which a court could, for the first offence, inflict on the vilest murderer, whose forfeited life may have been spared by the mistaken humanity of a jury? Would a wise, just, or humane body of men pass a law which would put on a level the man who reclaimed his own property by lawful means, and the wretch who would drag a freeman into bondage, and punish as felons of equal grade, a respectable farmer from an adjoining state, with the sordid habitual trafficker in human flesh, the lawful taking of one's own property, with the stealing of a human being? When the punishment of kidnapping was only a fine of 100 pounds, and the extent of confinement only one year, the supreme court declared that such enormities were not imputable to the legislature of Pennsylvania; we should do them great injustice not to rescue them a second time from the imputation, when the fine is greatly increased, and the servitude extended not only to seven, or twenty-one times the extent, but directed to be as a felon, and highway robber; law, justice and humanity combine to repel an idea so dreadful. The great and benevolent act for the gradual abolition of slavery did not abolish the distinction between bond and free negroes and mulattoes, the freeman and the absconding slave, the master who brought his slave here to reside, and the master who came here in pursuit of one who absconded from him; and when you are invoked to respect the legislation and spirit of the state, you will remember that this consists in obedience to its laws, which expressly declare; that they give no relief or shelter to runaway slaves from other states; that their master shall have a like right and aid to demand, claim, and take them away, as if the law for the abolition of slavery had never been passed; and remember too that this law is expressly declared not to be changed or repealed by the law of 1820, under colour of which the defendants claim the right to consider the plaintiff as a felon for doing the very act, for which he had a right to aid, help and assistance by the abolition act, and by which the runaway slave was denied relief or shelter within the state.

While the abolition act put free blacks on the footing of free white men, and abolished slavery for life, as to those thereafter born, it did not otherwise interfere with those born before, or slaves excepted from the operation of the law; they were then, and yet are, considered as property; slavery yet exists in Pennsylvania, and the rights of the owners are now the same as before the abolition act; though their number is small, their condition is unchanged. The rights of the owners of fugitive slaves to take them to their homes in another state, were as perfect in 1822, as they were before the revolution; these rights are defined by the abolition act in the most plain, explicit terms, without any condition imposed on their exercise. The right was complete and perfect, if there existed between the person seizing and the person seized, the relation of owner and slave, or master and servant, the master or owner might take away his slave or servants to another state or country where he resided, without the consent of the negro, the person with whom he lived, the neighbourhood, or the order or warrant of any magistrate. The law was his warrant, his authority, in the execution of which the master had a right to aid, and it is by this law that the rights of the parties in this suit

must be tested in this case. If Jack, therefore, was the slave or servant of Mr. Johnson, the act of seizure was lawful; and if the defendants, or any of them, beat, assaulted, arrested or imprisoned him, or any one acting by his authority, the act was illegal without the lawful warrant or authority of any officer of the law. Had the defendants any such authority?

In inquiring into the laws of Pennsylvania, on the subject of the rights and liberties of its citizens, and those of other states, a court who is to decide and instruct a jury upon them according to the law of the land, is not at liberty to overlook that law which is supreme. The eighth section of the ninth article of the bill of rights in the constitution of Pennsylvania declares, "that the people shall be secure in their persons, houses, papers and possessions from unreasonable searches and seizures; and that no warrant to search any place or to seize any person or things, shall issue without describing them as nearly as may be, nor without probable cause supported by oath or affirmation." The fourth amendment to the constitution of the United States declares, "that the right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures, shall not be violated, and no warrant shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the person or things to be seized. The supreme court of this state have decided that a warrant for forgery issued by a president of the court of common pleas, on the ground that it appeared to the judge from common report that there was strong reason to suspect the party charged to be guilty, and that he was likely to depart and retreat to parts unknown, before the witnesses could be summoned to appear before the judge to enable him to issue a warrant on oath, was illegal on the face of it, and a constable not bound to execute it. 3 Bin. 43, 44; Purd. Dig. 510. The first order issued by Judge M'Neil was to John Kenderdine, without oath, affirmation or any probable cause whatever; on the mere statement made by him, the particulars of which the judge has been unable to recollect, so as to even state them at the trial for our information; if instead of a verbal direction to bring the Jersey party before him, he had issued a warrant for the purpose, the legal result would have been the same. Being in direct violation of both constitutions, utterly wanting every requisite prescribed, this order was, as every warrant or written authority from the judge would have been, utterly illegal, null and void, to all intents and purposes; affording no justification to Kenderdine to execute it, or to any one in assisting him, any act done under such an order is as illegal as if none had been given, and for any injury done to the person or property of the plaintiff, or the others of his party, an action would lie as well against the judge as all those who acted in pursuance of that order, whether it issued to bring the parties before the judge to prove the plaintiff's property in Jack, or to answer for a crime or any offence against the laws. The liberties of our citizens do not depend on such a tenure as an admission of the legality of this order would imply; nor are constitutional provisions for their protection, to be deemed such solemn mockeries as we should make them by justifying the conduct of the defendants in pursuance of it. You will therefore consider every act done by them, or any of them, every assault or offer of force, arrest, confinement, or restraint of the personal liberty of any of the Jersey party, under or by virtue of the order of Judge M'Neil, as wholly without authority of the law, and in direct violation of its most solemn provisions.

We now come to the second order of the judge. The judge tells us that he took it for granted, from seeing the justice and constable in company, that the Jersey party were in their legal custody, and in consequence of such belief, he suggested the propriety of committing the negro to the county jail, and binding over the other party to prove their property, if they had any. If you believe the statement of the judge, there can be no difficulty in deciding on the merits of this part of the transaction, taking it in either way. As a compulsory proceeding on the Jersey party to compel them to prove the property in Jack, it was without any authority of law as utterly void as the former order. If it was to detain, confine or arrest them on a criminal accusation, it was unconstitutional, for the want of an oath and probable cause; there is no evidence of even an accusation made against them in any specific shape, or charging any definite offence; the judge does not state that any application was made for any process to be issued by him; if he is credited, he gave no order, but only suggested, advised or recommended the course he pointed out. You will judge, from the whole evidence, what was the nature and object of the proceeding before the judge, and of what he did advise or direct. By referring to that part of the book of Justice Tompkins which has been read, it seems to have been well understood by him at least, "that it was thought advisable to commit the said Jack to jail for safekeeping, until the said Caleb Johnson should have an opportunity to prove his property." The recognizance of Mr. John and Justinian Kenderdine, taken on their return from the judge's on Sunday night, shows their understanding of the matter; the condition was to deliver the said Caleb Johnson, whenever his claim is completely established, or deliver him up at the next court of quarter sessions of Montgomery county, etc. This was the only act of Mr. Tompkins which appears to have been done officially by him that night, of which there is any evidence, unless the setting Jack free under the recognizance was intended to be an official act. As the advice or di-

rection of Judge M'Neil was not pursued by the commitment of Jack, the condition of the recognizance was one which the judge or justice had no power or right to impose; the proceeding at the judge's was wholly illegal, and the detention of the Jersey party that night lawless and unjustifiable.

We now come to the proceedings before the justice on Monday morning. According to the account of Mr. Roney, the constable, no witnesses were examined, no oath or affirmation was administered by the justice, or any question put to the Jersey party, except whether they had bail; they said they could procure bail if they had an opportunity; the justice said he must commit them, and took up his pen to write, the constable then said he would be forthcoming for their appearance next morning, and they returned to the Billet. Skillman gave the same account of this part of the transaction of the justice's. If you believe this statement, it is the worst part of the transaction; with ample time to proceed deliberately in due form of law, with no crowd or confusion to prevent a full and patient examination, there was no excuse for not strictly pursuing every step required by the law and constitution. The question of Jack's slavery had assumed a definite shape by his admission before the judge in the presence of Justice Tompkins and the rest of the party, that he was born a slave, and that he had lived with Mr. Johnson as such; he admitted his slavery till he was thirty, when he alleged he was free by the will of Judge Berrian, of New Jersey. The production of this paper then was necessary to make out the truth of Jack's assertion, but it does not appear to have been called or sent for, nor was Jack called on to verify his statement on oath, though he was a competent witness against Mr. Johnson, if he was a free man or only a servant for years. There could not be probable cause for the prosecution, unless there was at least some legal evidence of his freedom made out by oath or affirmation. Jack's assertion, not under oath or affirmation, was not even the shadow of probable cause to justify the justice in committing, arresting, detaining or issuing a warrant for the apprehension of the Jersey party, or any of them. Does the evidence of Robert Tompkins change the result? It is your exclusive province to decide on his credibility, you may believe or disbelieve his evidence, as you may think proper; but in giving you our opinion as to its legal effect, we must consider it as true. He says that John and Sarah Kenderdine were examined before the justice, but does not state what evidence was given, and no paper or book containing it was given in evidence; this removes one constitutional objection; but it leaves the proceedings open to another fatal one, the want of probable cause on which to issue a warrant or order of arrest. This witness does not state whether any of the other party were present or not. This is an all important matter. The ninth section of the ninth article of the state constitution provides, "that in all criminal prosecutions the accused hath a right to be heard by himself and counsel, to demand the nature and cause of the accusation against him, and to meet the witnesses face to face." The sixth amendment to the constitution of the United States provides, "that the accused shall enjoy the right to be informed of the nature and cause of the accusation against him, and to be confronted with the witnesses." It is therefore incumbent on the defendants to satisfy you that the parties accused before the justice, were present on the examination of the witnesses against them; if it took place before they were brought before him, and was not read to them or information given to them of its substance; or if it was had after they left the office, or done at any time, as a colour or cover for the proceedings which took place, without the presence or knowledge of the accused, it was not only utterly lawless, but aggravated by being done under the pretence of conformity to the provisions of the constitution. Ex parte Bollman, 4 Cranch [8 U. S.] 124. As to all the proceedings then of the defendants which took place, either for the purpose of taking the Jersey party before the justice or judge to prove the property of the plaintiff or to establish a charge of kidnapping; we instruct you, without hesitation, that they were without any warrant or authority of law, wholly unqualified and illegal.

We will now inquire whether there was any lawful cause to arrest on any other ground. The first section of the bill of rights in the constitution of Pennsylvania declares, "that all men have the inherent and indefeasible right of enjoying and defending life and liberty, of acquiring, possessing and protecting property," "that no man can be deprived of his liberty or property but by the judgment of his peers, or the law of the land." Section 9. That the right of citizens to bear arms in defence of themselves and the state, shall not be questioned. Section 21. The second section of the fourth article of the constitution of the United States, declares, "the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states." The tenth section of the first article prohibits any state from passing any law "which impairs the obligation of a contract." The second amendment provides, "that the right of the people to keep and bear arms shall not be infringed." The sixth, "that no man shall be deprived of liberty or property, without due process of law." In addition to these rights, Mr. Johnson had one other important one, to which we invite your special attention, and a comparison of the right given and duty enjoined by the constitu-

tion of the United States with the eleventh section of the abolition act of 1780. "No person held to service or labour in one state, under the laws thereof, escaping into another, shall, in consequence of any law or regulation, be discharged from such service or labour, but shall be delivered up on claim of the party, to whom such labour or service shall be due." Const. U. S. art. 4, § 2, cl. 3. Pursuant to this provision of the constitution, the act of congress of the 12th February, 1793 [1 Stat. 302], was passed, not to restrain the rights of the master, but to give him the aid of a law to enforce them. This law has been read to you, together with the opinion of our respected predecessors, in the case of Hill v. Low [Case No. 6,494], to which we give our entire assent, so far as it affirms the unqualified right of the master to seize, secure and remove his fugitive slave. "To carry into effect the constitutional provisions on this subject, the act of congress of February 12th, 1793, was enacted. This act empowers the person to whom a fugitive from labour or service is due, his agent or attorney 'to seize or arrest such fugitive from labour, and to take him or her before any judge of the circuit or district courts of the United States residing within the state, or before any magistrate of a county, city, etc. wherein such seizure was made, and on proof of owing service to the claimant, either by affidavit or other evidence taken before a judge or magistrate of the state from which the fugitive escaped, the judge or magistrate of the state in which he or she is arrested shall give a certificate thereof to the claimant, his agent or attorney, which shall be a sufficient warrant for removing such fugitive.' By this it clearly appears that the claimant, his agent or attorney, has the authority of this law to seize and arrest without warrant or other legal process, the fugitive he claims, and that without being accompanied by any civil officer, though it would be prudent to have such officer to keep the peace. Whilst thus seized and arrested, the fugitive is as much in custody of the claimant, his agent or attorney, as he would be in that of a sheriff or other officer of justice, having legal process to seize and arrest, who may use any place proper, in his opinion, for temporary and safe custody." Do you perceive in this anything discordant with the feelings, the spirit, the policy, or the legislation of Pennsylvania, as manifested in the abolition act, or the one passed to amend and explain it? Do these constitutional and legal provisions give any right to the plaintiff, or enjoin any duty on others, which are not the fundamental principles of her own laws, as acted on and enforced in her own courts, as of paramount and supreme authority? If you have any doubt, here is the opinion of one of the most humane and benevolent judges who ever presided in any court, the late Chief Justice Tilghman, in delivering the opinion of the supreme court of this state. Wright v. Deacon, 5 Serg. & R. 63. "Whatever may be our private opinions on the subject of slavery, it is well known that our southern brethren would not have consented to have become parties to a constitution, under which the United States have enjoyed so much prosperity, unless their property in slaves had been secured. This constitution has been adopted by the free consent of the citizens of Pennsylvania, and it is the duty of every man, whatever may be his office or station, to give it a fair and candid construction." After referring to the constitution, he observes; "here is the principle—the fugitive is to be delivered upon claim of his master." But it required a law to regulate the manner in which this principle should be reduced to practice. It was necessary to establish some mode in which the claim should be made, and the fugitive be delivered up. He then recites the act of congress, and continues; "it plainly appears from the whole sense and tenor of the constitution and act of congress, that the fugitive was to be delivered up on a summary proceeding, without the delay of a formal trial in a court of common law. But if he had really a right to freedom, that right was not impaired by this proceeding—he was placed just in the situation in which he stood before he fled, and might prosecute his right in the state to which he belonged." This is in the spirit of the law, policy and feeling of Pennsylvania, as declared by the supreme court, and if the acts and proceedings of inferior courts and judges, in opposition to the rights of the owners of fugitive slaves are quashed as illegal, of what nature must be the lawless conduct of individuals, who, by an assumed authority, undertake to obstruct the execution of the supreme law of the land? The supreme court declares that the constitution of the United States would never have been formed or assented to by the southern states, without some provision for securing their property in slaves. Look at the first article, and you will see that slaves are not only property as chattels, but political property, which confers the highest and most sacred political rights of the states, on the inviolability of which the very existence of this government depends. The apportionment among the several states comprising this union, of their representatives in congress. The apportionment of direct taxes among the several states. The number of electoral votes for president and vice president, to which they shall respectively be entitled. The basis of these rights is, "according to their respective numbers, which shall be determined by adding to the whole number of free persons, including those bound to service for a term of years, and excluding Indians, not taxed, three-fifths of all other persons." So that for all these great objects, five slaves are, in federal numbers, equal to three freemen.

You thus see that in protecting the rights of a master in the property of a slave, the constitution guarantees the highest rights of the respective states, of which each has a right to avail itself, and which each enjoys in proportion to the number of slaves within its boundaries. This was a concession to the southern states; but it was not without its equivalent to the other states, especially the small ones—the basis of representation in the senate of the United States was perfect equality, each being entitled to two senators—Delaware had the same weight in the senate as Virginia. Thus you see that the foundations of the government are laid, and rest on the rights of property in slaves—the whole structure must fall by disturbing the corner stones—if federal numbers cease to be respected or held sacred in questions of property or government, the rights of the states must disappear and the government and union dissolve by the prostration of its laws before the usurped authority of individuals.[2]

We shall pursue this subject no further, in its bearing on the political rights of the states composing the union—in recalling your attention to these rights, which are the subject of this controversy, we declare to you as the law of the case, that they are inherent and unalienable—so recognised by all our fundamental laws. The constitution of the state or union is not the source of these rights, or the others to which we have referred you, they existed in their plenitude before any constitutions, which do not create but protect and secure them against any violation by the legislatures or courts, in making, expounding or administering laws.

The nature of this case, its history, and the course of the argument, call on us to declare explicitly what is the effect of a constitutional protection or guarantee of any right, or the injunction of any duty. The twenty-sixth section of the bill of rights in the constitution of Pennsylvania, is in these words; "to guard against transgressions of the high powers we have delegated, we declare (we the people of Pennsylvania), that every thing in this article is excepted out of the general powers of government, and shall for ever remain inviolate." A higher power declares this constitution and the laws of the United States which shall be made in pursuance thereof, shall be the supreme laws of the land, and the judges in every state shall be bound thereby, any thing in the constitution or laws of any state to the contrary notwithstanding. Const. U. S. art. 6, cl. 2. An amendment of the constitution is of still higher authority, for it has the effect of controlling and repealing the express provisions of the constitution authorizing a power to be exercised, by a declaration that it shall not be construed to give such power. [Hollingsworth v. Virginia] 3 Dall. [3 U. S.] 382. We have stated to you the various provisions of the constitution of the United States and its amendments, as well as that of this state; you see their authority and obligation to be supreme over any laws or regulations which are repugnant to them, or which violate, infringe or impair any right thereby secured; the conclusions which result are too obvious to be more than stated. Jack was the property of the plaintiff, who had a right to possess and protect his slave or servant, whom he had a right to seize and take away to his residence in New Jersey by force, if force was necessary, he had a right to secure him from escape, or rescue by any means not cruel or wantonly severe—he had a right to carry arms in defence of his property or person, and to use them, if either were assailed with such force, numbers or violence as made it necessary for the protection or safety of either; he had a right to come into the state and take Jack on Sunday, the act of taking him up and conveying him to the Billet was no breach of the peace, if not done by noise and disorder, occasioned by himself or his party—and their peaceable entry into the house of Mrs. Kenderdine was lawful and justifiable, for this purpose in doing these acts they were supported by laws which no human authority could shake or question. The power of the state was incompetent to impair the obligation of the contract of purchase from Rowley and Berrian, or to discharge Jack from the service of his master; he could not be impeded in the prosecution of his lawful pursuit, or restrained of his liberty, without the commission of an offence and process of law. Did they commit any breach of the peace? Joseph Kenderdine proves he was in the house when they entered and took Jack, he heard no noise, and did not see them enter—he informed his uncle of what had happened, came with him and his aunt to the wagon, but does not recollect what was said. Sarah Rakestraw testifies she heard Isachar ask them to prove their property, to which they replied, to stand off, and if he resisted they would blow him through—if this witness is credited, it shows the use of language rude and rough; but it did not amount to a breach of the peace without an offer to use an offensive weapon, or proof of some act done. Had such offer been made when Mr. Kenderdine was doing any act which interfered with their rights, they would have been justified in using as much force as was nec-

[2] In addition to these provisions of the constitution there is another, which is deserving of the most serious notice. In the fifth article, in relation to amendments of the constitution, is the following clause: "and that no state shall, without its consent, be deprived of its equal suffrage in the senate." If the small states should refuse to surrender this right, and the constitution be so amended as to abrogate slave representation and federal numbers, no hope could be indulged that the union could survive the event. The rights of the states within which slavery exists, and the rights of the small states must be preserved or surrendered together—a separation must be fatal to "a federal government of the states."

essary to enable them to proceed in their lawful business—his demand of proof of property was unauthorized, if the law gave him this right he would also have the right to judge of its sufficiency; but he was acting in his own wrong in making the demand, and they were under no obligation, legal or moral, to exhibit their papers, and submit to an examination by him in the highway. A request, at a proper time and place, and under circumstances where there would be any probability of a candid and impartial attention to legal evidence, respect for the rights of property, or the laws of the land, would, if refused rudely, have indicated a disposition on the part of the Jerseymen extremely reprehensible, and put their refusal on a very different footing from that in which it appears by the evidence of Miss Rakestraw; though even in such case they would not have been compelled by law to show their property or authority, yet rude conduct or language would have tended much to have palliated any excitement or violence which followed a refusal to accede to a proper request. On this subject there is much weight in the remark of the defendant's counsel, that there is a social law, a law of decent respect for the opinions of others, which ought not to be overlooked in the assertion of right—but it is most certainly a gross violation of this social law, to rudely demand as a right that which ought to be conceded only to courtesy of manner and propriety of time, place and circumstance.

The next act of the Jersey party which is complained of, is the threat to blow out the brains of Isachar Kenderdine, when he either had seized, or was about to seize one of their horses by the head, for the purpose of stopping them in the road, near the meetinghouse. At this time there was a crowd of some twenty or thirty about the wagon, and shortly after the plaintiff was struck in the head with a stone. Under such circumstances, a demand to prove property or to stop, was most unseasonable and improper, any attempt to stop them was unlawful, and would have justified the repelling such an attempt by as much force, and with such weapons as would be necessary to their safe passage to the Billet; what was said or done by them was no breach of the peace, or other offence, which in any manner justified their arrest or detention. 5 Serg. & R. 301.

The next inquiry is whether the plaintiff has been assaulted, beat, or imprisoned by the defendants, or either of them, and by whom. An assault is an offer to strike, beat, or commit an act of violence on the person of another, without actually doing it, or touching his person. A battery is the touching or commission of any actual violence to the person of another in a rude or angry manner. Imprisonment is any restraint of the personal liberty of another; any prevention of his movements from place to place, or his free action according to his own pleasure and will; a man is imprisoned when he is under the control of another in these respects or either of them, against his own will. It is false imprisonment when this is done without lawful authority, and such imprisonment is deemed an assault in law, though no assault in fact is made; the one includes both offences, the act being unlawful. In actions for injuries of this kind, all parties who are proved to have taken any part in the assault, battery or imprisonment, are principals, and answerable for all acts done by themselves or by any others concerned in the transaction, by their order, consent or procurement, or in pursuance and furtherance of an object or enterprize in which they have all engaged and which is illegal. If two or more agree or combine to effect an unlawful purpose, each one of the party is answerable for all acts done in, or leading towards the accomplishment of the joint object, directly connected with it or naturally consequential. If the object and purpose is entered upon and commenced by the parties concerned, and other individuals, or a crowd assembled in consequence, and consummate the act or join in its execution; the original parties are responsible for their conduct, though the immediate actors may be unknown to them, or have no other concerted agreement or connection with them, than by the unlawful acts committed, intended or tending to effectuate the original object and purpose. If a man does an unlawful act, apt or likely to do an injury to some person, and an injury is actually caused thereby, it is immaterial by what intermediate hand it is inflicted, the first wrong doer is directly answerable to the injured party as the immediate trespasser; as where a man threw a lighted squib into a crowded markethouse, it was thrown by one and another, till it struck a person, and put out his eye—the man who first threw the squib was made answerable. 3 Wils. 407. So is the law where one man publicly and unjustly charges another with the commission of an offence or crime of which he is innocent, and an injury is inflicted on him by an excited crowd. It is more dangerous than the squib, because more apt to be attended with fatal consequences, and no cry would be more exciting in Pennsylvania, in the most orderly community, than that of kidnapping. You will then understand the law to be well settled, that it is not necessary to bring home to any of the defendants, the definite act which has caused the injury; the law fastens the consequences of any illegal act upon them, which they have, in any manner, as before mentioned, directly or indirectly done, brought about or caused. Their mere presence, however, when the act is committed, does not make them accountable for it, without some participation on their part, or exciting, directing, consenting to or encouraging it—there must be some evidence of their acting, or causing others to act. If they

take any part you may consider any or each of them who do so, answerable for all that is done, unless you are satisfied that this interference was unconnected with the original and principal purpose. If an illegal act is done under colour of legal authority or process, from an officer who had no jurisdiction of the subject matter, or whose order or process is made or issued in violation of the law, the judge or justice, and party procuring it, are trespassers, so is the officer and all who act under him, if the process is void on the face of it (10 Coke, 76), and his who procures such order on false pretences, is the most aggravated case. It is not necessary to constitute false imprisonment, that the person restrained of his liberty should be touched or actually arrested, if he is ordered to do or not to do the thing, to move or not to move against his own free will, if it is not left to his own option, to go or stay where he pleases, and force is offered or threatened, and the means of coercion are at hand, ready to be used—or there is reasonable ground to apprehend that coercive means will be used, if he does not yield. A person so threatened need not wait for its actual application. His submission to the threatened and reasonably to be apprehended force, is no consent to the arrest, detention or restraint of the freedom of his motion—he is as much imprisoned as if his person was touched, or force actually used; the imprisonment continues until he is left at his own will to go where he pleases, and must be considered as involuntary, till all efforts at coercion or restraint cease, and the means of effecting it are removed.

On the part of Mr. Tompkins it is contended that the plaintiff has failed in his action as to him, for want of the notice required by the act of assembly which has been read. Purd. Dig. 492. This act applies to all official acts of a justice of the peace, and must be liberally construed so as to give them the full benefit of the protection intended by the notice. Though the act done is prohibited by law, and a penalty imposed, as for marrying a minor without the consent of his father (5 Bin. 24), or arresting a party by warrant for an act which is no offence, as travelling on Sunday, or if in the honest exercise of his jurisdiction, he judges erroneously of the legal character and consequences of an act done, and treats as an offender, a person who has committed no crime (5 Serg. & R. 301, 302), he is entitled to notice. On the other hand, if he acts from improper motives, in a case where he had no authority to act at all, or in the manner in which he did act, he will be deemed to have acted merely under the colour or pretence of his office, and not by virtue of it, and no notice is necessary. Nor if he took any part in this proceeding without intending to act as a justice of the peace in his official character, or did or directed any act to be done, in a matter whereof he had no jurisdiction. He must be clothed with official power to do the act officially, so that he is authorized to judge and decide whether the offence charged has been committed, or whether the thing done is punishable or within his cognizance—if he judges honestly, however mistakenly or ignorantly, he is entitled to notice in all such cases, though he cannot be justified in doing the act.

But if some things are indispensable to bring his official power into action, and those things appear not to have been done, his acts are null and void, and cannot be official; as issuing a warrant of arrest on a criminal accusation, without probable cause, supported by oath or affirmation—the power to do this is expressly excepted from all the powers of the government, by the bill of rights of Pennsylvania. No act can be by virtue of office, which the power of government is incompetent to authorize; it must be taken to be by the mere colour of office, and no notice is necessary, whatever his motives or intentions were. It is for you to decide on all the evidence in the clause applicable to Mr. Tompkins—how he acted in any of the scenes which occurred; you will consider him as any other defendant, as to all matters over which he had no official power to act, or in which he did not intend to act officially—you must find in his favour, if all his acts to the injury of the plaintiff were official. These are points of law which furnish the rules for the decision of this case; you will apply the evidence you have heard to ascertain the facts as they bear on each defendant.

In contrasting the conduct of the respective parties, you can decide which has acted within and under the authority of the law, and which has violated it; if the evidence has made the same impression on your minds as on ours, there cannot be a doubt that the defendants have inflicted injuries on the plaintiff for which he is entitled to redress at your hands. If the rights with which he was clothed by the supreme law of the land, are to be neither respected or protected, you or we cannot be protected in its administration; our powers are derived from the laws and constitution of the state and union; his are from the same source and authority, and from one source higher than either. That power which can at its pleasure alter and rescind any of the provisions of the constitution itself, by a constitutional amendment; by that power Caleb Johnson is invested with and guarantied in the enjoyment of rights which can be neither infringed or impaired by all the power of the state or general government, so long as the supreme law to which they are subordinate is obeyed. And shall it be permitted to individuals acting under the impulse of their own feelings and passions to do what is forbidden to the legislative power of the country, with no other check on their actions than what

they may call the social law of the place, or public opinion? This case illustrates the effects of indulging that false philanthropy which prostrates the law and the constitution in its zeal against slavery; it extends not merely to make the slave free, but freemen slaves. The plaintiff and his party were denied the use of a bed, and this by zealots in the cause of humanity and benevolence. What would have been said of Mr. Johnson if he had refused Jack a place, and means of rest and sleep—and it is to sanction such philanthropy that laws are to be disregarded, not only to justify the defendants in attempting to liberate Jack, but forcing his master from place to place as a criminal, prosecuting and now denouncing him as a felon. Though he offered manumission to his slave on the first night, and has since executed it, the defendants did not then, nor do they now, relent, even after the full investigation which the cause has undergone. We had hoped that they would have offered some circumstances of mitigation or excuse, which would have made the question for your decision one of mere compensation to the plaintiff for the injury he has actually sustained, without giving any thing in damages by way of public example, to prevent future outrages against the laws and the constitutional rights of citizens of the United States. We very much regret that by justifying their whole conduct, and boldly making the issue before you one of right, there is but one mode left to you by which you can meet your duty to the parties and the country. If there are any rights of property which can be enforced, if our citizens have personal rights which are made inviolable under the protection of the supreme law of the state and union, they are those which have been set at naught by some of the defendants. As the owner of property, which he had a perfect right to possess, protect, and take away; as a citizen of a sister state, entitled to all the privileges and immunities of citizens of any other states, Mr. Johnson stands before you on ground which no law can take from under him—it is the same ground on which the government is built. If the defendants can be justified in what they have done, we have no longer law or government—and if the personal liberty of the citizens can be thus violated with impunity, there remain to us no rights worth protecting.

The political aspect of public affairs cannot be overlooked when a court and jury are called on to decide on constitutional questions. The country has happily passed through some exciting and painful scenes, threatening its peace. No one can tell what danger may be impending over us, or how imminent it may be—but it is certain that there is much cause for vigilance in all those concerned in the administration of the law of the land, in enforcing its provisions, and by punishing all infraction, in such a manner, that it shall be in its operation, as well as in its name, supreme—the only test and standard of right and wrong. As citizens of Pennsylvania and the United States, it now rests with you to pass upon the rights in controversy between these parties; they are of the highest importance to every man in the community, and to the whole country, as affecting its deepest concerns. The question of damages is exclusively with you—though the defendants have not given in evidence or urged by their counsel, any matters in extenuation, we cannot help remarking that they appear to be respected in their neighbourhood; they are members of a society distinguished for their obedience and submission to the laws; than whom none other is more meritorious in their charity, benevolence and exemplary good conduct in all the relations of life. By what motives they were actuated towards the plaintiff, who never injured them or theirs in the pursuit of his property, is hard to imagine—it would seem that they were impelled by some cause not disclosed in the evidence or argument of the cause—some spirit or tone in public opinion, the temper of the times, some erroneous impressions of the policy of the law of 1820, or mistaken advice on its construction. This, however, is left to mere conjecture, as we are not authorized by the defendants to place their conduct on this footing, the case must be left to you on the question of right, according to the laws and constitution, as they have been shown to you, and on the question of damages, as you shall think the justice of the case demands.

Verdict for 4,000 dollars damages, and judgment on the verdict.

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JOHNSON (TURNER v.). See Case No. 14,261.

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## Case No. 7,417.

JOHNSON et al. v. TWENTY-ONE BALES, ETC.

[2 Paine, 601;[1] 6 Hall, Law J. 68; 3 Wheeler, Cr. Cas. 433; Van Ness, 5.]

Circuit Court, D. New York. Jan., 1814.

ADMIRALTY—PRIZE—JURISDICTION — LAW OF NATIONS—CONFISCATION OF ENEMIES' GOODS—HIGH SEAS—NATURALIZATION FOR SPECIAL PURPOSE—RESIDENCE—DOMICIL—INTENTION.

1. The law of nations is the law of nature, rendered applicable to political societies, and modified in progress of time by the long-established usages and written compacts of nations.

2. As soon as war is declared, all the property of the enemy or his subjects, wherever found, whether on the land or on the water, is lawful prize.

3. Whether the confiscation of enemies' goods in the country at the commencement of hostilities, is not protected by treaty, would be deemed a violation of the law of nations, quaere.

4. As a general rule, and in the absence of special compact, no effects belonging to an alien

[1] [Reported by Elijah Paine, Jr., Esq.]

enemy are, by the law of nations, under the safeguard of the public faith, except such as are under particular circumstances within the country at the commencement of hostilities.

5. Whether not only the property, but the owner, the claimant, must not have been within the country before the war, to entitle either to governmental protection, quaere.

6. The common admiralty jurisdiction extends to all things done super altum mare.

7. The prize jurisdiction embraces the whole question of prize, unrestrained by the locality of the capture; and takes cognizance of all captures, no matter where made, if made as prize. The validity of the capture depends on the "jus belli," as determined by the law of nations. The effect and ultimate direction of the forfeiture, depends on the rights granted by the terms of the commission as explained by legal definitions, and recognized by universal usage.

8. All waters not comprehended within the body of a county, constitute a part of the high sea.

9. Vessels at sea are no longer considered as part of the territory of a nation. The flag protects nothing but the vessel, and only designates to what portion of the globe she belongs.

10. Whether a naturalization obtained for special and temporary and not for general and permanent purposes, can be valid and effectual, quaere.

11. Residence is prima facie evidence of national character; susceptible at all times, however, to explanation. If it be for a special purpose, and transient in its nature, it will not destroy the original or prior national character. But if it be taken up animus manendi, then it becomes a domicil, superadding to the original or prior character the rights and privileges, as well as the disabilities and penalties of a citizen or subject of the country in which the residence is established.

12. Residence alone, wherever it may be, is the source and foundation of domicil, and from the length of the residence is derived the evidence of an intention to remain.

13. Residence gives national character, independent of the political state or condition of the country in which it is established. Whether the native country, or the adopted country, be at war or peace, is immaterial. By residence, neutrals become belligerents, and belligerents neutrals.

14. A temporary excursion, either to the place of the original domicil, or to any other, will not be deemed to interrupt the residence; the time previous to the absence attaching to that subsequent, and constituting a continual residence.

[Cited in Doyle v. Clark, Case No. 4,053.]

15. Where the intention as to residence has been openly declared, that, however short the residence may have been, will establish the domicil.

16. Whether a citizen or subject of one belligerent can, stricti juris, withdraw anything from the territories of the other, quaere.

17. The character which residence gives, can only be divested by an actual departure from the country in which it is established, or at least some act that may be deemed an actual commencement of his movement from it, and a real effort to regain his prior domicil.

[This was a libel by Charles Johnson, on behalf of himself and officers and crew of the private armed vessel the Tickler, against twenty-one bales, twenty-eight cases of merchandise, and twenty-seven hundred and eight bars of iron, claimed by Robert Falconer, for and on behalf of John Richardson.]

D. S. Jones and Griffin, Wells & Emmett, for captors.

Mr. Colden, D. B. Ogden, and Mr. Harrison, for claimant.

VAN NESS, District Judge. This case will first be considered as it is disclosed by the ship's papers, and the preparatory examinations, and then will be examined the defence arising out of the further proof that was ordered and produced. It appears by the papers that the property in question was laden on board the ship Mary and Susan, at Liverpool, in England, some time in the month of July, 1812. That the Mary and Susan is an American registered vessel, and that she sailed from Liverpool on the 16th July, 1812, on a voyage to New York, with these goods on board, and under a charter party to John Richardson, styling himself an "English merchant, residing in Liverpool." That she had a license on board, obtained from the British government, to protect her against capture by British cruisers. That at the time of her departure, information of the hostilities existing between the United States and Great Britain had not reached England. That on the 3d September, 1812, she was captured as a prize by the privateer Tickler, and brought into the port of New York. The position in which she was taken is not ascertained with precision. It is differently stated in the preparatory examinations which have been read, varying from eighteen to thirty miles south of the lighthouse. It is also in evidence, that John Richardson, the person in whose behalf these goods are claimed, is a native subject of the king of Great Britain, but a naturalized citizen of the United States. The national character of Mr. Richardson is the principal ground on which this cause must be decided; but before I proceed to consider that, to examine the effect of his naturalization here, and of his subsequent residence in England, with the explanation given of it, by the further proof which was ordered and produced, I wish to dispose of some other questions which were first raised as principal grounds of defence, in a preceding cause, and also relied on in this.

It has been insisted, that this property was confided to the faith of the government, because laden on board an American vessel before the commencement of hostilities, and proceeding to its destined port in ignorance of that event. 2d. That it was captured within the territorial waters of the United States; thus under the protection of the government, and not subject to be made prize. 3d. That it was exempt from capture, because proceeding in an American vessel, and under the American flag.

In examining the points which have been stated, it will be necessary to advert to some general principles of the law of nations. In

doing this, it will not be requisite to notice particularly its divisions into necessary, voluntary, conventional, customary or positive. The law of nations, without defining or developing its divisions more minutely, may be stated to be the law of nature, rendered applicable to political societies, and modified, in progress of time, by the tacit or express consent, by the long-established usages and written compacts of nations: usages and compacts become so general that every civilized people ought to recognize and adopt their principles. A principle which is deducible from natural reason, and firmly established by the primitive law of war, the general law of nations, in which is not embraced the conventional or customary law, is, that as soon as war is declared, all the property of the enemy or his subjects, wherever found, whether on the land or on the water, is lawful prize. This position, it is presumed, will not be contested. It is laid down in terms thus broad by all the late as well as the early publicists. By Grotius, lib. 3, cc. 8, 5; Puffendorf, Law Nat. c. 8; Bynkershoeck, c. 2; Vattel, Law Nat. lib. 3, c. 5; Martens, Law Nat. lib. 8, c. 2. If, then, enemy property under any circumstances be exempt from the rigorous operation of this principle, the exemption must be found in the conventional or customary law. That the rigor of this fundamental law has been relaxed by the express agreement of some nations, the tacit acquiescence and consequent customs of others is freely admitted. The severity of the laws of war, and the stern exercise of many belligerent rights, have been gradually modified and ameliorated as civilization and refinement diffused their influence over the nations of the earth; national humanity has kept pace with the progress of science and religion, which gradually infused the benignity of their principles into the whole system of national intercourse. The enlarged views and intellectual improvements resulting from the one, gave efficacy to the precepts of the other, which taught all people that public, like municipal laws, were to be administered, not only in justice, but in mercy.

It was about the middle of the 17th century that these enlightened views were matured into a decisive and practical influence on the conduct of belligerent powers. That the ferocious and sanguinary spirit which had uniformly distinguished national conflicts began to abate. That war became more a contest between governments, than nations, between monarchs contending for political supremacy, with objects more direct and definite than individual calamity. The petty pillage of a town, and the oppression of individuals, whom accident or the pursuit of fortune had placed within his power, ceased to add to the laurels of the prince, or the splendor of his throne; and this new view of national honor and magnanimity, this revolution in moral feeling, produced a correspondent revolution in the practice, if not in the laws of war. This, too, was an important epoch in the history of European commerce. Ever since the reign of Elizabeth, England had taken a conspicuous part in the politics of Europe. That active princess entered with spirit into the affairs of the continent, for the express purpose of extending the trade and commercial connections of her kingdom. The impulse generated by her measures continued and extended its influence through the whole of the seventeenth century—and it was soon perceived, that a more liberal policy towards each other's subjects, at the commencement of hostilities, was necessary to the safety and convenience of commercial enterprise. To all the views and feelings, therefore, resulting from the increased wisdom and refinement of the times, were added the powerful motives of direct and evident interest. That commerce might be beneficial, not only to individuals, but to the revenues of the state, it was necessary that those engaged in it should pass freely from one country to another, and dwell with safety wherever their pursuits might lead them. If, in times when princes were as capricious, when wars were as frequent quite, and undertaken for causes as trivial as at present, these excursions were to have been attended with captivity and confiscation, it is easy to perceive the evils that would inevitably interrupt the progress of the commercial system then contemplated and begun.

In the progress of social improvement, therefore, we find the source of the desire to remedy these commercial embarrassments, and in that desire the proximate cause of the practice which now generally prevails among belligerents, of exempting from seizure the persons, and from confiscation the effects of each other's subjects within their respective territories, immediately on the commencement of hostilities. The form in which it first appeared, was that of giving notice to alien enemies to depart with their goods, and stipulations to this effect are first found in treaties made soon after that of Munster, in 1647–8. During the violent and complicated wars, terminated by that convention, the property of hostile individuals, as usual, had been confiscated; but by the 24th article, restitution was agreed upon. And in the treaty made seven years afterwards between Cromwell and Lewis XIV it was agreed, that in case of war, the merchants of the contracting powers should have six months to depart with their effects. This is the first stipulation of the kind I have found in a treaty. I am aware that in England some regulations favorable to the freedom of commercial pursuits had been adopted at an earlier period, as appears by the 30th chapter of Magna Charta, and a statute passed in the reign of Edward III. But these were local and municipal regulations, and failed to produce an immediate or de-

cisive effect on the customs of Europe, although they may have prepared the way for the treaty stipulations to which I have alluded. Notwithstanding the precedent which had been established, and the concurring motives of interest and humanity which demanded an amelioration of the first severities of war, the safety of alien enemies, and their effects, rested for a long time exclusively on the special stipulations of treaties. So late as the period when Bynkershoeck wrote, the beginning of the last century, they received no sort of favor or protection, unless there existed a treaty to that effect between the belligerent states. Even Vattel recognizes the relaxation of the ancient rule as a modern practice. From recent instances, and from finding the provision in question in some of our latest treaties, it is even doubtful now whether it has acquired the force of a national custom, and whether the confiscation of enemies' goods, in the country, at the commencement of hostilities, if not protected by treaty, would be deemed a violation of the law of nations, or a mere departure from a recent practice. In the war in which we are now engaged, it is conceded that the rule is to be applied; and having briefly traced its origin and progress, it remains to examine its extent.

It will appear, I think, from the authorities which must govern us, that no effects belonging to an alien enemy, but such as are under particular circumstances within the country at the commencement of hostilities, have ever been deemed, by the law of nations or the usages of war, under the safeguard of public faith, where special compacts do not vary the general rule. No other property is within the modification of the law. All that comes into the country subsequent to the declaration of war, is still subject to seizure and confiscation, where there is no treaty on the subject. We have none with England that can arrest or suspend the application of this principle. In the treaty between the United States and Prussia, the contracting parties stipulated, that in case of war, the subjects of each other should be allowed nine months to settle their affairs and depart with their effects; and the 26th article of the treaty of 1794, with England, is somewhat similar. Both obviously relate to property in the country at the commencement of hostilities, and therefore under the protection of the government.

In an examination of the present question, but little aid can be derived from early writers on national law. Grotius and Puffendorf, and their cotemporaries, who explain with great minuteness the duties and obligations arising from the primitive laws of war, afford no light on a principle unrecognized in practice, at a period when the physical force of nations was not limited in its exercise by those rules which have since derived authority from the acquiescence of a more refined age. The exemption of enemies' property from confiscation under any circumstances, formed no part of the martial policy of that day. Bynkershoeck, as has already been noticed, states in his seventh chapter, that all enemies' goods in the country at the commencement of war, are confiscated, unless protected by treaty. In chapter 3, when treating of the suspension of commercial intercourse between enemies, he says: "It is clear that the goods of enemies brought into our country, are liable to confiscation." Vattel confines the exemption expressly to goods in the country at the time war was announced. I shall give his words, for I may, perhaps, have occasion to make another remark upon them: "The sovereign declaring war can neither detain those subjects of the enemy who are within his dominions at the time of the declaration, nor their effects—they came into his country on the public faith. By permitting them to enter into his territories, and continue there, he tacitly promised them liberty and security for their return; he is, therefore, to allow them a reasonable time for withdrawing with their effects; and, if they stay beyond the term prescribed, he has a right to treat them as enemies—though as enemies disarmed." This embraces all the law on the subject; for, although recognized, it is nowhere more distinctly stated. Martens, more rigid in the application of the rule, says: "Where there are neither treaties nor laws touching these points, nations continue still to seize on all the property belonging to their enemies' subjects which is carried into their territories after the declaration of war." This goes directly to the point before us—and I shall add an extract from Chitty to the same effect. He says, that "in strict justice, the right of seizure can take effect only on those possessions of a belligerent which have come to the hands of his adversary after the declaration of hostilities." In another place he observes: "The prohibition of Vattel reaches to the exemption only of goods in our hands at the time of the declaration, and does not cover property coming into our territory after that declaration." That the exemption of Vattel embraces only goods in the country at the rupture, is perfectly plain; and I think it open to an inquiry, whether a still more rigid rule may not be fairly extracted from the terms in which it is expressed, which is, whether not only the property, but the owner, the claimant, must not have been within the country before the war, to entitle either to governmental protection. Personal property follows the rights of the person. On general principles, therefore, unless the person claiming is entitled to protection, his property cannot be. The persons, according to Vattel, entitled to protection, are those who were in the country at the declaration of war. They must be permitted to return with their effects. And it seems to me that the exemption of hostile property from seizure is founded entirely on this personal

right, and that this right is derived from the circumstance of having come into the country before the war, and therefore on the public faith. In common with all other general rules, this must ever be subservient to the express stipulations of a treaty. As it does not seem necessary, I shall not now examine whether such exist between the United States and Great Britain. These remarks are only the partial result of a general investigation, and not a direct examination of the principle they embrace. They are, therefore, particularly open to correction.

This particular branch of the subject has been examined with some care, for the purpose of ascertaining whether there were any, and if so, what circumstances, that could take enemy property, not in the country, out of the operation of the general rule clearly established by the authorities which have been referred to; and I am constrained to say, that not a single dictum has been found, except that in Azuni, to which I shall have occasion to refer, claiming the safeguard of public faith for property not actually within our territorial limits at the commencement of the war. The inference appears to me irresistible, that no extension of the principle is intended. It would seem to follow, then, under the rule which appears to me to be established by that public law which must control the decisions of this court, that if this must be considered enemy property, it is subject to capture and condemnation as prize. Whether the result of my examinations be correct or otherwise, to attempt to show, after what has been said, that the property in question is not protected because laden, and proceeding in ignorance of the war, would be superfluous and irregular. But indulging, as I do, a proper diffidence in my own opinion of the law, on a subject so novel and important, I must be permitted to fortify it, by attempting to develop what I conceive to be the practice of other nations who profess to be governed by it.

In the doctrines held and enforced by Great Britain, we may, perhaps, find a satisfactory exposition of the law, in cases like this we are discussing. And if, in a war with her, we adopt the construction of her own government, and the practice of her own courts, we can afford no just ground of complaint. In examining these we shall find, not only that the English prize courts are in the constant habit of condemning property brought in ignorant of the war when captured, but property in port at the commencement of hostilities, and even property captured before the war, but in contemplation of that event. The only difficulty and discussion that ever occurred on the subject in that country, was to whose benefit the condemnation should inure: whether to the lord high admiral, or, since the abolition of that office, to the king in his office of admiralty, or to him jure coronae. During the usurpation of Cromwell the office of lord high admiral was in various ways depressed, and its perquisites reduced. The protector found them valuable, and it became his policy and his interest, not only to engross and direct their application to unusual purposes, but to abolish the office itself. From time immemorial, captures made from the enemy under particular circumstances had been considered as perquisites of the admiral, and, under the name of droights of admiralty, appropriated to support the dignity and splendor of his station. The sinister policy and distracted views of the government, at this period, introduced much confusion as to the distribution of the revenue arising from these sources; and at the restoration, the distinction between droights of admiralty and direct forfeitures to the crown was ill understood, and but little regarded in practice. With the regular settlement of the government, the lord high admiral began to claim what had once been considered the rights and emoluments of his office, which produced much animated discussion between him and the king. The controversy was at length referred to the greatest lawyers and the ablest civilians in the kingdom. From their combined wisdom resulted an order of the privy council, which, with great apparent precision, designated the rights and settled the conflicting pretensions of these worthy brothers. This order in council bears date the 6th of March, 1665. As far as relates to this subject, it remains unaltered, and at this day governs the decisions and practice in the British prize courts. Independent of all other matter, a reference to the terms of this order alone will abundantly show that property coming in, ignorant of the war, is subject, in England, to seizure and confiscation. The part of the order connected with this question is in these words: "All ships and goods belonging to enemies, coming into any port, creek or road of his majesty's kingdom, of England or of Ireland, by stress of weather or other accident, or by mistake of port, or by ignorance not knowing of the war, do belong to the lord high admiral." Enemy's ships and goods, then, coming into a port, creek or road, not knowing of the war, are condemned to the admiral. But the coming in must be voluntary, unconnected, at least, with any circumstances resulting from the war, to constitute a droight of admiralty. But what if it be not so? The answer of Sir William Scott is plain: "When vessels come in, not under any motive arising out of the occasions of war, but from distress of weather or want of provisions, or from ignorance of war, and are seized in port, they belong to the lord high admiral. But where the hand of violence has been exercised upon them, where it arises from acts connected with war, &c., they belong to the crown." Thus far, then, we have an exposition of this order, and therefore of the

British practice, which is still regulated by it, showing conclusively that ignorance of the war does not avert a forfeiture, and that under this part of the order these goods would not be droights of admiralty, because the hand of violence has been upon them; because her coming in arose from acts connected with war.

A practical illustration of those principles will be found in the arguments of counsel and judgments of the court in the cases of The Danckebaar Africaan, 1 C. Rob. Adm. 107, The Herstelder, Id. 114, and The Rebeckah, Id. 227, and The Maria Francoise, 6 C. Rob. Adm. 282. All these vessels, I believe, were captured in ignorance of the war. The word "coming," Mr. Brown says, in his "Civil and Admiralty Law," is worthy of attention; and so, indeed, it is in an English prize court. He goes on to say, in the words of Sir William Scott, extracted verbatim from the case of The Rebeckah: "It has, by usage, been construed to include ships and goods already come into ports, creeks or roads," &c.; and in consequence of this construction he adds, "all vessels detained in port, and found there at the breaking out of hostilities, are condemned jure coronae to the king." This practice of condemning vessels in port, at the breaking out of hostilities, is founded exclusively on this strange construction of the order; and it is remarkable enough that they are condemned jure coronae to the king. The claim of the admiral is defeated, I presume, by the circumstance that they were not enemy's vessels when they came in, as he is entitled only to enemy's vessels coming in. Another part of the order is: "All such ships as shall be seized in any of the ports, creeks or roads of this kingdom or of Ireland, before any declaration of war or reprisal by his majesty, do belong unto his majesty." Under this is probably sanctioned the condemnation of property detained by embargo before war is declared; and hence, also, property captured before the war, under whatever pretence or mistaken motive, will be condemned if hostilities commence before the adjudication. Sir William Scott says, that "the person claiming must not only be entitled to restitution at the time of seizure, but he must be in a capacity to claim at the time of adjudication." This, at first view, would seem to be at variance with the general rule or practice already assented to, that property in the country is not liable to confiscation. But the reason of the distinction no doubt is, that the property thus situated came in by coercion, and furnishes conclusive evidence that the rule exempting hostile property from confiscation must be strictly construed; that under the diversified circumstances and various situations in which it may be placed and captured, the public faith is only pledged for the protection of that which was not only in the power of the adversary, but had been voluntarily brought within his territory, and placed within his power, before the commencement of hostilities. Thus, then, I think it appears, where there is no reciprocal agreement to prevent it, that property is condemned in England, although captured in ignorance of the war, or lying at liberty in port at the commencement of hostilities, or in any way seized or detained before the declaration of war.

In opposition to this practice, and to what I conceive to be the clear and established laws of war in such cases, a passage from Azuni has been cited in these words: "A merchant vessel that happens to be at sea when the nation to which it belongs enters into a war, cannot be captured on its arriving at an enemy's port, in right of the war which has supervened between the two nations. He ought then to be under the safeguard of the public faith." What he ought to be, and what he is allowed to be, by the usages and customs of nations, are very different things. Each of us might, in our closets, devise many humane and beneficial modifications of the laws of war—but to what purpose? The whims and reveries of authors do not govern nations at this day; it requires the sanction of the civilized world to invest them with the force and authority of laws. The passage is remarkable, because it has neither the opinion of any publicist, nor the practice of any nation to support it. 'Tis true he refers to two treaties for a recognition of this principle, and two individual instances of personal magnanimity: the one extracted from a French newspaper. On this authority he has announced a new law to belligerent nations. Surely the provisions of two treaties are not binding on nations not parties to them, nor can personal magnanimity establish a rule for the government of the world. This principle of Azuni has not yet, and I will venture to predict never will, become part of the law of nations, and it never ought, if wars are, as they should be, commenced only for just causes and with legitimate views. The end of a just war is to obtain a remuneration for some loss sustained or injury received; and after announcing to the world that force will be employed to obtain that which is withheld, can it be necessary, in every individual case of attack, to send a herald to proclaim your intention, that your adversary may be prepared to resist—thus hazarding a loss equal to that which it is sought to repair? On a careful perusal of the work in which this doctrine is advanced, I think it will be found that to whatever consideration it may be entitled as a work of ingenuity and research, it is unworthy of much weight as an authority. It was produced, if not under the dictation of a distracted government, yet in some degree for the purpose of supporting the alterations it proposed in the maritime laws of nations, and under the operation of prejudices too strong to admit of an impartial examination

of a national question. It was obviously written under the innovating influence of the times, at a period when the inflamed passions of men, and the convulsed energies of nations, were uprooting the foundations of social and political order; when new systems of policy, of municipal and of public law, were everywhere springing up with a luxuriance that threatened to confound all established principles, and perplexed the soundest understandings; when intellectual efforts were perverted by the captivating novelties and splendid plausibilities, engendered "in that season of fulness which opened" upon the world with the French Revolution; when changes and innovations, eccentric in their nature, and infinitely various in their character, overwhelmed every system of ethics and philosophy which laborious wisdom had devised or time consecrated—absorbed or dissipated all that was fantastic in superstition, or venerable in orthodox opinion, while the victorious eagles of a frenzied people indiscriminately overshadowed or subverted all the monuments of human folly, and all that remained of ancient grandeur. From sources so agitated, if not polluted, nothing satisfactory can be drawn. The oracles of wisdom are seldom uttered amidst scenes of tumult and commotion. We must look back beyond the troubles of these latter days for wise rules, and trace their modifications and present form through the acknowledged and uniform practice of settled and civilized nations. That is at variance with this novel suggestion, and it cannot be admitted on an authority so questionable.

It is alleged, 2dly, that this property was captured within the territorial waters of the United States, and therefore not subject to be made prize. There is something so novel in this position, and in the arguments which it has suggested, that it is difficult to reduce them to a systematic examination. It would be easy to explain the foundation of the jurisdictional right of every nation to those portions of the sea that wash its shores. To show that the source from which it is derived is self-preservation. That this sovereignty is assumed by, and conceded to each, for the preservation of its own peace, to avoid the evils that may result from a warfare between others, prosecuted within its immediate vicinity. But whatever may have been the origin of this claim, or by whatever reasons sustained, the precise nature of this sovereignty is involved in some obscurity. It will, however, be unnecessary to investigate that minutely, in order to explain the difficulty which the argument on this branch of the subject was intended to present. By examining the constitution of the admiralty and prize courts, and the power derived to the captors by the prize commission, it will become obvious that it has no connection at all with the general question of prize—that it affords protection under particular circumstances to a friend, never to an enemy—that it is an appendage (if I may use the term) to a neutral territory—but does not, and cannot exist between belligerents.

The common admiralty jurisdiction (as Comyn calls it) extends to all things done super altum mare. The prize jurisdiction is not thus limited. It embraces the whole question of prize, unrestrained by the locality of the capture: it takes cognizance of all captures, no matter where made, if made as prize. The validity of the capture depends on the "jus belli" as determined by the law of nations. The effect and ultimate direction of the forfeiture depends on the rights granted by the terms of the commission, as explained by legal definitions, and recognized by universal usage. What, then, does the prize commission grant? To make captures of enemy goods on the high seas, limiting the power intended to be conveyed, by the very terms that limit the common admiralty jurisdiction. By ascertaining the extent of that jurisdiction, we must necessarily discover what is meant by the high seas, and thus the interest derived from this capture. Wood gives the answer of the judges of the realm, to the complaints of the admiral concerning prohibitions granted by the common law courts. In different places, they say: "By the laws of this realm, the court of the admiral has no cognizance or jurisdiction of any manner of contract, plea, &c., within any county of the realm, either upon the land or the water. It is not material whether the place be upon the water, infra fluxum and refluxum aqua, but whether it be upon any water, within any county," "taking that to be the sea wherein the admiral hath jurisdiction, which is before by law described to be out of any county." Comyn says: "The admiralty has jurisdiction in matters on the main sea, or coasts of the sea, not being part of the body of any county. And if it be between high and low-water mark when the sea flows; for then it is super altum mare, though upon the reflux it be infra corpus comitatus." The admiralty, then, has jurisdiction on all waters, not infra corpus comitatus; and how is it given? by the very terms contained in this commission. All waters, therefore, not comprehended within the body of a county, constitute a part of the high sea; unless it can be shown, then, that this capture was made within the limits of a county, it was well made, and vests an interest in the captors.

In analogy to the British practice, it has been contended, that by reason of the locality of the capture, the forfeiture must go to the government, in the nature of a droight of admiralty, because included, I presume, in the terms of the British order, which gives a direction to the forfeiture. But we have neither droights of admiralty, nor such an order; the whole subject must be regulated by the commission and instructions. We can only discover what has been reserved to the government, by ascertaining

what has been granted. They have authorized captures on the high seas, which I think has been shown to include the spot where this capture was made. If even we had droights of admiralty, and an exact copy of that order in force here, still the forfeiture would go to the captors. The place of capture is not embraced by either of the terms used in it, as appears clearly in 2 Browne, Civ. & Adm. Law, 61, and by the exposition given of them by Sir William Scott, in 1 C. Rob. Adm. 231.

It is insisted, 3dly, that this property is exempt from capture, because proceeding in an American vessel, and under the American flag. This objection would seem to be sufficiently answered by the principles already laid down. The same rules that explain the admiralty jurisdiction, and designate the limits between it and the common law jurisdiction, must determine what, under the law of nations, is to be considered in the territory, so as to exempt it from capture; it must be within the common law jurisdiction, within the body of a county. The notion that vessels must be considered as part of the territory of a nation, is antiquated and exploded. The most strenuous advocates for the freedom of goods in free ships, no longer place the controversy on that ground. The principle first formally promulgated in the Consolato del Mare about the twelfth century, that enemy property was good prize on board free ships, has certainly been contested at different periods. It has sometimes been admitted and rejected by the same and different nations: but the high authority of that celebrated code, has generally prevailed where treaty stipulations did not establish a different rule. Within our own times it has been attempted, with great force and with much spirit, to establish a different principle, but it was lost with the scattered fragments of the armed neutrality. Amidst the uproar of the world, the flag, too, has dwindled into a vain emblem of sovereignty, protecting nothing; nothing certainly but the vessel, and designating only to what portion of the globe she belongs. These are the principles of England. They were recognized by our government in its correspondence with the French minister in the year 1793, and I am not prepared to deny that they are founded in reason.

The additional instructions issued by the president, have been relied on as a ground of defence. These instructions were prepared and dated at the city of Washington, the 26th August. On the 29th they were known here. The privateer Tickler was then at sea, and there is no evidence at all to show, that she had a knowledge of them at the time this capture was made, to wit, the 3d September. Indeed, all presumption is against it. Considering, then, the captain of this privateer as ignorant of these instructions, and under the circumstances of the case he must be so considered, I am of opinion, that they could have no effect or operation on his conduct. There is a material difference between acting in ignorance of a supreme legislative act and of executive orders. The one affords no impunity to the commission of a crime; the publication of a law enacted by the known public authority of the country, which operates upon every member of the community, is the only notice which, in the nature of things, can be given of it. A knowledge of it must be presumed ex necessitate, from the impossibility of giving to it farther publicity. But a private executive instruction, for the government of a certain class of public agents, can be made known to them in a different manner, and must be so, before they can be governed by it. In short, the one is a public, the other a private instrument. Ignorance of the one cannot be alleged, but the other cannot be obeyed unless known. A law operates until repealed with the same solemnity with which it was enacted. An instruction must be obeyed, until revoked with the same formality with which it was given. The original instruction was given and communicated to the commanders of these vessels, and another intended to annul or supersede it, must be given and communicated to them in like manner to produce that effect; until then the first instruction is their only rule of action. Again, this is a warlike operation. Considering, then, these instructions of the president in a military point of view, is not every act done under the one legal and effectual until another is communicated? If the libellants had been instructed to capture property of this description, would they not have been bound to do so until an order interdicting it was received? The case has been likened to captures made after a treaty of peace signed; but there is not the least similitude. To capture enemy property is a right of war. If there be no war, there can be no capture. The right to capture is during war, and is extinguished with it, eo instante. Some publicists have contended, even that a capture is good till notice of peace received. But that is exploded. I am clearly of opinion, therefore, that these instructions can have no weight under the circumstances of this case. But suppose, for a moment, that they were to have effect, that they were known, or though not known, that still they were binding. That, it seems to me, would only raise a question between the government and the captors. If this be enemy property, this court would not restore it. If the captors have no claim, it would be condemned to the government. But from the best view I am able to take of these additional instructions, it appears to me that they were not intended to touch the case of enemy property. It is well known, that at the commencement of the war, American vessels, laden in most cases with

American property, were molested and captured by privateers, with a view to a condemnation, on the ground of being engaged in an illegal trade with the enemy. As these vessels sailed in ignorance of the war, the government thought, that under all the circumstances of the case, they were entitled to consideration and lenity. These instructions, then, were issued to protect American vessels and American property from molestation before their arrival, without intending, in my judgment, to interfere with the question of prize in relation to enemy property. If it were otherwise, it would present the case of the executive abrogating, not only a right already vested by law, but one which is universally given and recognized in modern warfare, to capture enemy property on the high seas; and a proceeding resulting in nothing but drawing the forfeiture to the government; thus frustrating the very objects which had led these people to this species of warfare—to capture hostile property within the limits prescribed by their commission. I cannot give to these orders a construction that will lead to this conclusion.

The last question to be considered is whether Mr. Richardson, in whose behalf this property is claimed, is, for the purposes of this proceeding, entitled to all the rights and immunities of an American citizen. In the prosecution of this inquiry, I shall not stop to examine whether a naturalization, obtained for special and temporary, and not for general and permanent purposes, can be valid and effectual? Whether a government is bound, under any circumstances, to protect a citizen or subject, who not only withdraws voluntarily from the performance of every duty, but who, for nearly "twice the period that ordinary calculation assigns to the continuance of human life," incorporates himself and his resources with the numbers and the wealth of another nation? These, in my judgment, are questions well worthy of consideration, and less easy of solution than seems to be apprehended. But, as I have already exceeded the limits usually observed on occasions of this sort, I shall waive their discussion now, and notice only the more limited difficulties suggested by the course of the argument. The facts relative to Mr. Richardson's naturalization here, and residence abroad, as disclosed by the further proof which was ordered, are these: It appears that he was naturalized as a citizen of the United States in the year 1795, according to the laws then in force on that subject; that in 1797 he went to England; that in 1799 he came again to this country, and returned to England in 1800, where he continued to reside till March, 1813, making a residence of sixteen years in England, with the exception of a visit to this country of a few months. The effect of that will presently be noticed. It is contended by the captors that this residence constitutes a domicil under the law of nations. A commercial residence, within the principles of prize law, investing the claimant with all the characteristics of a British trader, and involving him in all the consequences and all the evils incident to that character.

I think it may be assumed as a principle, that the law of nations, without regarding the municipal regulations prescribed for his admission, views every man as a member of the society in which he is found. Residence is prima facie evidence of national character; susceptible, however, at all times, of explanation. If it be for a special purpose, and transient in its nature, it shall not destroy the original or prior national character. But if it be taken up animus manendi, with the intention of remaining, then it becomes a domicil, superadding to the original or prior character, the rights and privileges, as well as the disabilities and penalties of a citizen or subject of the country in which the residence is established. "The domicil," says Vattel, "is the habitation fixed in any place with an intention of always staying there. A man does not then establish his domicil in any place, unless he makes sufficiently known his intention of fixing there, either tacitly, or by an express declaration!" Again: "The natural or original domicil is that given us by birth, where our father had his; and we are considered as retaining it, till we have abandoned it in order to choose another. The domicil acquired, is that where we settle by our own choice." This is the general principle, determining the national character solely by the domicil, whether natural or acquired. As the original domicil is given by birth, it requires no explanation. But what shall constitute an acquired domicil? Although the definition given of it appears, at first view, sufficiently plain, yet in analyzing it we have soon to encounter an important difficulty. When shall the intention to remain be deemed to exist? If it be not openly declared, when, as Vattel expresses it, shall it be deemed to be tacitly made known? What shall be evidence of the animus manendi and determine the intention? In order to ascertain this, we must resort to the exposition of able magistrates, whose duty it has been to expound and apply this public law; we must descend into an examination of the judgments and official acts of tribunals sitting and deciding under the law of nations.

It has been contended that the practical illustration of this doctrine, derived from the course and practice of the prize courts, justifies the following conclusions: 1st. That no residence establishes a domicil to any hostile purpose, or operating a condemnation of goods, but that which is either taken up or continued after the commencement of hostilities. 2d. That on the breaking out of war, a citizen or subject of one belligerent country, has a right to return from the other, and bring with him, or withdraw from

thence, his goods and effects. I think the consideration of these propositions will embrace all the arguments, and lead to an examination of all the authorities which are in any way applicable to the merits of this cause. It must be remembered, that the principle laid down by Vattel is general, and must be universal in its application. It has no relation whatever to either a state of war or peace. The different authorities which have been cited, must all be examined with a reference to that.

The most general view which has been taken of this subject by Sir Wm. Scott, is in the case of The Harmony, 2 C. Rob. Adm. 324. "Of the few principles," he says, "that can be laid down generally, I may venture to hold, that time is the grand ingredient in constituting domicil. I think that hardly enough is attributed to its effects; in most cases it is unavoidably conclusive; it is not unfrequently said, that if a person comes only for a special purpose, that shall not fix a domicil. This is not to be taken in an unqualified latitude, and without some respect had to the time which such a purpose may or shall occupy; for if the purpose be of a nature that may, probably, or does actually detain the person for a great length of time, I cannot but think that a general residence might grow upon the special purpose. That against such a long residence, the plea of an original, special purpose could not be averred; it must be inferred, in such a case, that other purposes forced themselves upon him, and mixed themselves with his original design, and impressed upon him the character of the country where he resided." Surely, if terms can be explicit, and language can be plain, this is so. There is in it not the least allusion to a state of hostilities, or to a belligerent country. The terms are as comprehensive as those of Vattel. Showing, that residence alone, wherever it may be, is the source and foundation of domicil, and that from the length of the residence is derived the evidence of an intention to remain. If this be not so, why is time the grand ingredient in constituting domicil? If residence in a hostile country were necessary, that would be the grand ingredient; the characteristic feature in this acquired character which works a forfeiture of goods. But it is said, that the further remarks of this great authority in the same case, furnish an inference unfavorable to the opinion I have expressed: "Suppose a man comes into a belligerent country, at or before the beginning of a war; it is certainly reasonable not to bind him too soon to an acquired character, and to allow him a fair time to disengage himself."

From this, I should draw an argument directly the reverse of that which it has been cited to support; why is it too soon to bind him to an acquired character, who comes into a belligerent country at or before the beginning of a war? Most assuredly, because he had not, by a residence previous to the war, established a domicil, or manifested his intention to remain. His residence had been too short to afford evidence of a determination to fix his habitation there. He shall, therefore, be permitted to make his election to retire, and be allowed a fair time to disengage himself. If this claimant had arrived in England at, or immediately preceding the war, we would have had a very different case to examine. Sir William Scott proceeds: "In proof of the efficacy of mere time, it is not impertinent to remark, that the same quantity of business which would not fix a domicil in a certain space of time, would nevertheless have that effect, if distributed over a larger space of time. Suppose an American comes to Europe, with six temporary cargoes, of which he had the present care and management, meaning to return to America immediately; they would form a different case from that of the same American coming to any particular country of Europe with one cargo, and fixing himself there to receive five remaining cargoes, one in each year successively. I repeat, that time is the great agent in this matter; it is to be taken in a compound ratio of the time and the occupation, with a great preponderance on the article of time; be the occupation what it may, it cannot happen, but with a few exceptions, that mere length of time shall not constitute a domicil." He here supposes an American to go to Europe —not to any particular hostile country—and to remain for five years, intimating distinctly that it would fix on him the national character of the country in which he was thus established. It appears, also, from the same case, that one of the Murrays was considered, by the common law of England, as a British trader, subject to the bankrupt laws of that kingdom. How a British trader? Hostilities did not exist then between that country and this. He had acquired, therefore, the character of a British trader, by a residence in time of peace. It is that character that brought him within the operation of these local laws, and that character that would work a condemnation of his property in the prize courts of a nation at war with England. This case is so replete with information on this subject, that I shall notice one other passage found in the judgment of the court: "Time, I have said, is a great agent in those matters, and I should have been glad to have heard any instance quoted, on the part of Mr. Murray, in which a residence of four years, connected with a former residence, was deemed capable of any explanation." It is true, that the residence of the claimant, in that case, was in a hostile country; but it is equally true, that in the passages to which I have referred, the court lays down the general principle, without any reference whatever to the fact, as is obvious from the context, and his general reasoning on the subject.

The case of The Indian Chief (3 C. Rob. Adm. 17) affords much light on this question. This vessel was seized in a British port where she came for orders, on a voyage from an enemy colony to Hamburgh. The claimant was a native American, and the court, after stating that fact, says:—"He came, however, to this country in 1783, and engaged in trade, and has resided in this country till 1797; during that period he was undoubtedly to be considered as an English trader; for no position is more established than this, that if a person goes into another country and engages in trade, and resides there, he is, by the law of nations, to be considered as a merchant of that country. I should, therefore, have no doubt in pronouncing that Mr. Johnson was to be considered as a merchant of this country at the time of the sailing of this vessel on her outward voyage." The vessel sailed in 1795. The residence in this case was twelve years. In the case of Mr. Miller, the claimant of the cargo of this vessel, the principle under consideration was applied with great rigor. He was an American citizen and American consul, resident in some of the remote possessions of Great Britain, in India. He was for that reason pronounced by the court of admiralty a British merchant, and his property condemned for being engaged in a trade prohibited to British subjects. It is very manifest, therefore, that foreigners who reside in Great Britain, and enter into trade, are considered by the government and courts of that country, in pursuance of the general principle of the law of nations, as British merchants, entitled to all the privileges, and subject to all the restrictions of the native merchants of that kingdom.

It also appears, from other cases, that the principle is impartially and universally applied; that their own subjects, when settled abroad, are allowed all the benefits, and held to all the restraints of the native subjects of the country in which they reside. If resident in a neutral country, they are treated as neutral merchants, and may trade freely, even with the enemies of their native land. This general rule is given by Sir William Scott, in the case of The Emanuel, 1 C. Rob. Adm. 302. "The general rule is, that a person living bona fide in a neutral country, is fully entitled to carry on a trade to the same extent as the native merchants of the country in which he resides." In the case of The Dree Gebroeders, 4 C. Rob. Adm. 233, and The Adriana, 1 C. Rob. Adm. 313, the rule is exemplified. Grant and Boland, the respective claimants, were both native subjects of Great Britain, claiming the American character. It does not appear that they were ever naturalized in this country. The court makes no allusion to that circumstance, with the view, no doubt, if the fact were so, to avoid discussing the question of naturalization. He examines nothing but their residence, and admits that, if they had sufficiently proved it to have been in this country, they would have been entitled to a neutral character. In the case of La Virginie, 5 C. Rob. Adm. 98, a Frenchman claimed the benefit of the American character; and it is fully admitted by the court, that if he had sufficiently made out his residence to have been in this country, he would have been entitled to restoration as a neutral. So it has been decided, even by the lords on appeal, that a British-born subject, resident at Lisbon, acquires by that circumstance the Portuguese character, and can trade with impunity with the enemies of England. And it would seem, by a recent decision, that the same rights are allowed to British subjects residents in this country. There are a great variety of cases, as well in the common law books as in the admiralty decisions, which have a bearing, in point of principle, on this question; but it cannot be necessary, nor is it now convenient, to analyze them all. From all, I think it appears very conclusively, that residence gives national character, independent of the political state or condition of the country in which it is established. Whether the native country or the adopted country be at war or peace, is perfectly immaterial. By residence, neutrals become belligerents, and belligerents neutrals.

But the question constantly recurs: What is it that constitutes this residence? And it certainly is not easy to answer it with precision. It must be such a residence, however, as will stop the party from saying that he came for a special or temporary purpose, such as will fix upon him the animus manendi, the intention to remain. The residence itself, as I have said, is prima facie evidence of the intention; if continued, it becomes, in process of time, conclusive. In the case of The Indian Chief, twelve years was decided to have that effect. In the case of The Embden [1 C. Rob. Adm. 16], ten years was said to fix the national character. In that of The Harmony, four years was declared not susceptible of explanation. In this case there has been a residence of sixteen years, with the exception of a visit to this country. It is well established that a temporary excursion, either to the place of the original domicil or to any other, shall not be deemed to interrupt the residence; the time previous to the absence shall attach to that subsequent, and constitute a continued residence. But taking the time most favorable to the claimant, there is an uninterrupted residence of thirteen years, which, in my judgment, is unavoidably conclusive. In this case, most especially. Mr. Richardson is a native British subject, and the same authority, so often quoted, says: "It is always to be remembered that the native character easily reverts; and that it requires fewer circumstances to constitute domicil in the case of a native subject, than to impress the national character on one who is originally of another country." La Virginie, 5 C. Rob. Adm.

8. This rule applies here with great force. It does not appear, from any evidence that has been produced, that Mr. Richardson was recognized in England as a citizen of America; and upon the general principles held by the government of that country, we must presume that he mingled again with the mass of its population, as a legitimate, complete British subject, enjoying all the rights and advantages of that character without being subject to any of the restrictions and inconveniences of an American citizen. It does not appear that even after the war he was, by himself, or by others, considered liable to the ordinary evils incident to the citizens of a hostile country. There may be other evidence of the intention than that which mere length of residence affords. The intention may be openly declared, publicly made known; and that, however short the residence may be, shall establish the domicil. Whitehill had been but two days in the enemy country when war was declared; but he had previously avowed his intention to remain, and his property was condemned. It has been alleged that Mr. Richardson was established in Liverpool as a commission merchant only, and that he was not engaged in general commerce. That is wholly immaterial—quoad this shipment, he can only be recognized as a merchant; his domicil is established, and this transaction imparts to it a commercial character.

Having endeavored to show how a domicil is established—how a foreign commercial character is acquired—it will be proper to inquire how it is divested; how a citizen of one country can disengage himself and his property from the effects and consequences of a residence established in another; and this brings me to an examination of the last point which I have proposed to consider. It is insisted that Mr. Richardson, being a naturalized citizen of the United States, had a right to withdraw his property from the hostile country. As a general proposition, I think this cannot be maintained. It is by no means clear that a citizen or subject of one belligerent can, stricti juris, withdraw anything from the territories of the other. It is no doubt true that bona fide cases of this kind are treated with indulgence; and that, from motives of public policy, the general principles of the laws of war are not unfrequently relaxed and accommodated to the sufferings and peculiar circumstances of individuals. But it is of no use to discuss the principle, unless the facts disclosed can bring the case within it. It is both proved and admitted that this property was shipped before the declaration of war was known to the claimant, and it is difficult to conceive how property can be claimed here as withdrawn from the hostile country, when it was sent before the claimant knew that the respective nations were at war. This difficulty is increased by the full proof before the court that these goods were shipped for sales and returns. They were not sent to remain here and wait the arrival of the owner. It is clearly established, by the papers, that they were to be sold as soon as might be convenient, and the avails remitted to him in England. All expectation of success, therefore, from this source, must certainly be ill founded.

It is further urged that Mr. Richardson's affidavit, and others offered as further proof, show that he intended to return to this country. The affidavits which have been produced to this point are those of Robert Falkner, James Mills and John Sill. Their affidavits go to show that Mr. Richardson, while in England, at different times expressed an intention to return to America, if the orders in council, complained of by this country, were not repealed, and the commercial intercourse between the two countries restored. Mr. Richardson himself deposes, that he did make these declarations, and did entertain that intention. These facts are well proved, and the claimant is entitled to the full benefit of them. But however distinctly these declarations were made and repeated, and however earnest and decisive that intention may have been, I hold, on the authority of the judgment in the case of The President, and many others, that it is perfectly immaterial and unavailing in a prize court. "A mere intention to remove," said Sir William Scott, "has never been held sufficient without some overt act, being merely an intention, residing secretly and undistinguishably in the breast of the party, and liable to be revoked every hour. The expressions of the letter in which this intention is said to be found are, I observe, very weak and general, of an intention merely in futuro. Were they even much stronger than they are they would not be sufficient. Something more than mere verbal declaration, some solid fact, showing that the party is in the act of withdrawing, has always been held necessary in such cases." 5 C. Rob. Adm. 280. Besides, the intention which was entertained rested wholly on a contingency, the alternative of which might instantly have obliterated this impression from his mind, and produced a determination not to return. This, in fact, must have been the state of the claimant's mind at the moment this shipment was made. He knew not of the war, and the only assigned cause for his intention to return to America was removed. In his opinion the orders in council were so revoked that the usual commercial intercourse between the two countries would be soon restored. Under that supposition these goods were shipped, and from his own showing, therefore, I am not only authorized, but bound to presume, that the intention to return to this country did not at that moment exist. But if it had so existed, the judgment in the case of The Indian Chief, 3 C. Rob. Adm. 14, shows how insufficient and ineffectual it is considered in the prize courts of England. It is there most decisively stated, that the character acquired by residence ceases only by non-residence; that

it ceases only from the time the party turns his back on the country where he has resided, on his way to his own; that it adheres to him till the moment he puts himself in motion, bona fide, to quit the country of his residence, sine animo revertendi. The vessel, in that case, was the property of a Mr. Johnson, a native American, but who had for some time resided in England. She was seized as being engaged in a trade with the enemies of England. The court distinctly determined that, if Johnson had remained in England till the time of seizure, she would have been condemned as the property of a British merchant; but as he had left the country on his way to America, he must be deemed to be in pursuit of and to have revived his native character; and for that reason only she was restored. So in the case of The Curtissos [3 C. Rob. Adm. 21, note]: He had been resident in an enemy colony, but had left it before the capture of his property, and was actually on his way home. The lords, on appeal, decided that as he had put himself in motion towards his own country, as he was in itinere he was entitled to restitution. There are other decisions of these distinguished authorities, showing that the character which residence gives, can only be divested by an actual departure from the country in which it is established, or at least some act that may be deemed an actual commencement of his movement from it, and a real substantial effort to regain his native or prior domicil. The principle of these decisions I shall adopt in this case, because I think it founded in good sense, and furnishing the only practicable application of a rule, intended to ameliorate the strict laws of war. If the rule be not thus restricted, and thus applied, there will be no end to alleged intentions of returning. If a previously declared intention is to justify exportations from the enemy country in every dubious state of things, they will always be made in anticipation of possible consequences, and speculative projects, leading to a long-continued intercourse, the evils of which cannot be foreseen, and which it would certainly be destructive to tolerate.

It is said that Mr. Richardson executed the intention he had expressed, by returning to this country. As he has returned, he is certainly now entitled to the benefit of it; but it cannot have a retrospective operation. Having acquired and established the character of a British trader, it adhered to him until he did return. It is also said, and I admit, that a person in a foreign country, at the commencement of hostilities, may elect to return or remain abroad; but surely that election must be made known. How can it be disclosed? What shall be evidence of his election? We have seen that a mere declaration of his intention to return is insufficient. I should presume that a continuation in the foreign country, is the most conclusive evidence that can be furnished of his election to remain, and in the nature of things nothing can be legal and conclusive evidence of his election to return, but an attempt to carry that election into effect. In every act done to effectuate that, he shall be protected. While he remains, the presumption of law is against him, and can only be repelled by the commencement of his return. He cannot remain in the hostile country sending out as many goods as may suit his convenience, and then claim them upon the ground of a previously-declared intention to return. The shipment and his return must be cotemporaneous acts, or so nearly connected in point of time, as substantially to form but one transaction. It is evident from the facts in the case, that at the time this shipment was made, Mr. Richardson was not in pursuit of his American character. This, then, was an act done as a British trader, and cannot be otherwise considered. Mr. Richardson, moreover, did not leave England till seven or eight months after the capture of the Mary and Susan, and his return is now fairly open to the suggestion that it was produced by the capture of his property. Upon principle, therefore, and upon authority too, it is not entitled to consideration, and must be laid entirely out of the case.

I perceive the necessity of closing this opinion without adverting to a few other topics which the argument presented. I have already been too diffusive, for which the nature of the cause, it is hoped, will be deemed a sufficient apology. I was duly impressed with its novelty and importance, and have felt a solicitude, amidst the pressure of other business, to manifest at least a desire to arrive at a just conclusion. That which has been pronounced has been resisted with all the feelings that human misfortune and individual calamity are calculated to produce; but it has been forced upon me by what I conceive to be clear and explicit, though rigorous rules of law, which imperiously demand the suppression of all personal sympathies. I have, however, the consolation to know that if injustice has been done, relief will be administered in another place, where the skill and profound researches of the judge cannot fail to detect and correct my error.

[See Case No. 7,415.]

## Case No. 7,418.

JOHNSON v. UNITED STATES.

[3 McLean, 89.] [1]

Circuit Court, D. Michigan. Oct. Term, 1842.

CRIMINAL LAW — STATUTE OF LIMITATIONS — HABEAS CORPUS — LAYING DAY IN INDICTMENT — PLEADING.

1. The act of 1790 [1 Stat. 112] limiting the prosecutions of certain offences to two years,

[1] [Reported by Hon. John McLean, Circuit Justice.]

applies to offences under statutes subsequently passed.

[Cited in U. S. v. Shorey, Case No. 16,281; Re Callicot, Id. 2,323; Re Davison, 21 Fed. 621.]

2. On a habeas corpus the court cannot look behind the sentence of the court, where it had jurisdiction.

[Cited in Re Veremaitre, Case No. 16,915; Re Kaine, Id. 7,598; Ex parte Lange, 18 Wall. (85 U. S.) 205.]

[Cited in Wright v. State, 5 Ind. 295; Platt v. Harrison, 6 Iowa, 81; State v. Towle, 42 N. H. 542.]

[See Ex parte Bennett, Case No. 1,311.]

3. The day laid in the indictment is not material, and the offence may be proved to have been committed at any other time.

4. Where there is a bar, under the statute of limitations, it should be pleaded.

[Cited in U. S. v. Six Fermenting Tubs, Case No. 16,296; Re Bogart, Id. 1,596; U. S. v. Brown, Id. 14,665.]

On habeas corpus.

Mr. Howard, for plaintiff.

Mr. Bates, Dist. Atty., for defendant.

OPINION OF THE COURT. This is an application for a rule to show cause why a writ of habeas corpus should not be issued to bring up the body of the defendant, now confined in the penitentiary by the sentence of this court, for aiding and assisting in making counterfeit money. The indictment charged the offence to have been committed more than two years before the indictment was found. The 31st section of the act of the 30th April, 1790, declares, "that no person shall be prosecuted, tried or punished, for any offence not capital, &c. unless the indictment or information for the same shall be found or instituted within two years from the time of committing the offence, &c., provided that nothing herein contained shall extend to any person or persons fleeing from justice." As the act under which the defendant was indicted and convicted, was passed after the above act of limitation was enacted, a question is made whether the limitation can apply to statutes subsequently passed. In the case of Adams v. Woods, 2 Cranch [6 U. S.] 336, the court held the limitation of the act of 1790, did apply to offences under subsequent statutes. By the act of 28th February, 1839 [1 Stat. 321], the limitation on criminal prosecutions "for any penalty or forfeiture, was extended to five years." But the case before us comes under the act of 1790. And it is insisted, that as that act prohibits the punishment of the offender, where the prosecution is not commenced within the two years, the proceedings were null and void, and not merely erroneous; and that on this ground the prisoner should be discharged. Where there is a want of jurisdiction apparent upon the record, the proceedings of a court are not valid. But there is no want of jurisdiction in this case. The court had jurisdiction of the offence, and if there was a bar under the statute, it should have been pleaded. No such plea was interposed, and the question is, whether the objection can be raised on a writ of habeas corpus. We suppose it cannot. By failing to set up the defence, the defendant waived it. And if this were not the legal effect of failing to set up the statute, it is clear that on the habeas corpus, the court cannot look behind the sentence of the court, where the jurisdiction is undoubted. The time laid in the indictment is not material, and proof may have been made on the trial, that the prosecution was commenced within the limitation of the act. And the proviso in the statute, that it shall not run where the defendant absconded, is an exception which may have been shown by the evidence. In every aspect in which the case may be considered, there seems to be no ground on which the defendant can claim his discharge. The motion is overruled.

## Case No. 7,419.

JOHNSON et al. v. UNITED STATES.

[5 Mason, 425.] [1]

Circuit Court, D. Maine. May Term, 1830.

CUSTOMS DUTIES — BOND FOR PAYMENT OF — UNLAWFUL CANCELLATION BY COLLECTOR — WHAT IS A VALID PAYMENT — AUTHORITY TO BIND GOVERNMENT — WHETHER GOVERNMENT BOUND BY AN ESTOPPEL — APPOINTMENT OF SUCCESSOR —EFFECT—DEMURRER TO EVIDENCE.

1. If a collector of the customs cancels a bond for duties, without receiving payment of the amount of duties, in connivance with the debtor, the cancellation is void, and the bond may still be declared upon as a subsisting deed; for the cancellation is, in such a case, a flagrant violation of duty.

[Cited in Bottomley v. U. S., Case No. 1,688.]

2. A collector of the customs is not at liberty to receive any thing but money of the United States, or foreign gold or silver coin made current, in payment of duties.—If he receives a check on a bank in payment, it is at his own peril, and if the check is not paid, the bond is not discharged; a fortiori, it is not discharged by the receipt of a memorandum check.

3. A collector, like other public officers, cannot bind the United States by any acts beyond, or contrary to, the authority given him by the laws.

[Cited in U. S. v. Bradbury, Case No. 14,635; U. S. v. Buchanan, 8 How. (49 U. S.) 106.]

[Cited in Indiana Cent. Canal Co. v. State, 53 Ind. 593.]

4. The receipt of a collector acknowledging payment is prima facie evidence, but not conclusive, of the fact of payment.

5. Upon a demurrer to evidence, the party demurring is bound to admit all the facts, which the evidence on the other side conduces to prove; and the court on such a demurrer will infer them in his favour.

6. Quaere, whether a collector is not to all intents functus officio, as soon as a removal takes place by the appointment of another person in his stead?

7. The government is not ordinarily bound by an estoppel.

[Cited in John Shillito Co. v. McClung, 2 C. C. A. 526, 51 Fed. 875; Lake Superior

[1] [Reported by William P. Mason, Esq.]

Ship Canal, Railway & Iron Co. v. Cunningham, 44 Fed. 833.]

[Error to the district court of the United States for the district of Maine.]

The original action was debt, brought by the United States upon a bond given for the payment of duties in the usual form. The declaration alleged, that the defendants, on the 8th of September, 1828, by their writing obligatory of that date, sealed with their seals, which having been lost and destroyed cannot be produced here in court, bound themselves unto the United States, in the sum of ten thousand dollars, to be paid by the defendants on demand; yet, &c. The defendants pleaded, 1. Non est factum; 2. That they bring into court here the said supposed writing obligatory, mentioned in the plaintiffs' declaration, and pray that the same may be read and enrolled here in court; and the said supposed writing obligatory, and the condition thereof, are read and enrolled here in court in these words, viz. (setting forth the bond and condition verbatim, the bond having still on its face the seals of the parties, but with a cancellation or cross over the names as follows, X); which being read and heard, they plead actio non, &c., averring a payment of the amount of the duties on the 12th of May, 1829, (the condition of the bond being for payment of the duties on or before the 8th day of June, 1829,) to the collector of the customs for the district of Bath, for the time being, and that the sum so paid "was then and there accepted by the said collector, as full and complete performance of said condition; and said collector delivered up said writing obligatory, to said defendants, cancelled and receipted according to the condition of the aforesaid writing obligatory; and this they are ready to verify; wherefore, &c." The United States replied, that the defendants did not pay said sum to the collector of the customs for the district of Bath, in manner and form, &c., offering an issue to the contrary, which was joined by the defendants. At the trial of these issues, there was a demurrer to evidence on behalf of the United States, and a joinder in demurrer by the defendants, upon which the district judge gave a judgment in favour of the United States; and the present writ of error was brought to that judgment.

The evidence, as stated in the demurrer to evidence, was as follows:

"The plaintiffs sue the defendants in a plea of debt, and declare on a bond, dated September the eighth, in the year of our Lord one thousand eight hundred and twenty eight, for ten thousand dollars, as lost and destroyed, as will be made to appear by reference thereto. And the defendants appear by their attorneys, and plead, first, non est factum, and issue is joined thereon; and secondly, payment of the amount due on said bond, and the plaintiffs reply to said second plea, denying the payment, and issue is thereon joined; all which pleadings are at large to be considered as herein set forth; and thereupon a jury is duly empanelled to try the said issues, and the cause is opened to the court and jury by reading the pleadings; and the plaintiffs to maintain the issues on their part, called upon John B. Swanton, who being duly sworn, testified as follows:

"'I, John B. Swanton, on oath declare and say, that I do not recollect of delivering a bond dated September 8, 1828, payable June 8, 1829, signed by Johnson Williams and others, to William King, the present collector at Bath; if not delivered to him, it was delivered to Mr. Williams, who paid it to me or my son; but my impression is, that the bond he paid me fell due in July. It was either handed to Mr. King or Mr. Williams. There has been some difference in the communications between the comptroller, Mr. King, and myself, in regard to bonds, and I cannot decide from the inspection of the authenticated paper exhibited to me, whether the bond inquired for is contained in the original account or not. I delivered a duty bond or bonds to the defendants, the last day of payment of which had not arrived, on the fifteenth day of May last. I think there was one or two. I took a check or checks on the Lincoln Bank in payment of the same. I cannot be positive whether I was in the office that day when the checks were given, or whether my son received them; nor whether they were signed by J. Williams, or J. Williams & Co.; whether they were memorandum checks or not, I cannot say. I considered memorandum checks best, as the cashier would not be likely to pay them to a third person; I considered those checks perfectly good. My bondsmen to the United States became alarmed, and one of them called on me and I offered to give him security, either in money or notes. The checks taken in this case were sent to Mr. Williams, who sent me the notes of J. Williams & Co. for the amount of the checks, which I delivered to Mr. Riggs, the bondsman, as security. I should think the notes were delivered Riggs the last of June or first of July. The checks were either in my hands, or in my son's, while I was absent from Bath. The note or notes taken, I cannot say whether made payable to me or to me and my order: I think it was payable to me or order, but am not certain. I think my son took the note or notes from Mr. Williams in my absence, in obedience to my directions. The note or notes were delivered Mr. Benjamin Riggs, but whether I endorsed it or them or not, cannot say. He has it or them now in his possession, and it was, I think, given to him by my son. The amount I believe, of my official bond, is ten thousand dollars. My last quarterly account was made up including the fifteenth day of May last. I cannot say when it was forwarded, but think it was a month or two after that day. My

accounts are usually made up in the course of ten or twenty days after the quarter; that ending the thirty-first of March last, was rendered in April, and I have the comptroller's receipt of the same. The accounts rendered up to the thirty-first of March have been rendered both to the register and to the comptroller; the account since that period has not been rendered to the comptroller; but the one to the register has been. Owing to the difficulties about these bonds, the account has not been made up for the comptroller. I cannot give the balance on outstanding bonds on the thirty-first of March, but should think it exceeded fifty thousand dollars; the balance of my cash account at that time was between three and four thousand dollars; not far from four thousand dollars. I do not render a monthly account of bonds taken. I would not say that there was a bond of Williams's dated September eighth, eighteen hundred and twenty-eight. All bonds of these defendants, which were not handed over to Mr. King, were settled for by these defendants with me or my son. The bonds, settled with these defendants, were either discharged by myself, as collector of the port of Bath, or by my son as deputy-collector; and presume they were given up to them thus discharged and cancelled. I think the bonds were executed by Johnson Williams & Co., and J. Williams, attorney to Simeon Mathews; that the bonds of these defendants were usually executed in this manner, I had a power of attorney in the office authorizing Mr. Williams to sign for Mr. Mathews. I do not know that Mathews is a partner in the house of Johnson Williams & Co. It has been my uniform practice while collector, to receive checks in payment of bonds; and to discharge and cancel bonds upon the receipt of checks. Not more than five hundred dollars, I should think, was paid in specie while I was collector. Some gentlemen have frequently paid their bonds before they became due. I think the form of the bond used in that office is payable "on or before" a certain day. I should think that I had been near thirty years in the employment of the custom-house at Bath. This has been the uniform mode of payment at the office since the bank has been established—before that time drafts were taken. I have been deputy-collector from eighteen hundred and four or five, and until I was appointed collector. I have been called as a witness by the district attorney, in behalf of the United States, in their suit against Johnson Williams and others, pending in the district court of the United States, September term, eighteen hundred and twenty-nine. I delivered up the office to Mr. King after office hours, on the fifteenth day of May last; from that period he has assumed the duties of the office. The bond now exhibited to me of date September 8, 1828, and payable June 8, 1829, is one of the bonds which I referred to as being settled by me or my son, and was discharged, as appears on the back, on the 12th day of May last by my son.'"

The plaintiffs next called Denny McCobb, who being duly sworn, testified as follows:

"Johnson Williams told me that he had received the bond of Mr. Swanton, upon giving his check for the amount. I understood him to refer to the bond in suit. That afterwards, Mr. Swanton or Mr. Swanton's son, brought him the check and took his note for the amount, payable to Mr. Swanton, and not to his order. This was stated last evening at the public house in this town. Mr. King was present. Mr. Williams said that Mr. Swanton would say the same. Mr. King requested Mr. Williams to state to me the circumstances, as he, Williams, was going away. Mr. Williams did not state whether the check was a memorandum check or not."

And thereupon the defendants being called upon by the district attorney to produce the bond declared upon in the writ, did produce the same, with the endorsement or obliteration thereon, as the same is now, and which is set forth in evidence, as follows:

"Manifest, No. 50.

"Good for $739 56.

"Know all men by these presents, that we, Johnson Williams & Co. of Bath, Simeon Mathews of Waterville, state of Maine, are held, and firmly bound unto the United States of America, in the sum of ten thousand dollars, to be paid to the said United States; for the payment whereof we bind ourselves, our heirs, executors, and administrators, jointly and severally, firmly by these presents; sealed with our seals. Dated this eighth day of September, in the fifty-third year of the independence of the said United States, and in the year of our Lord one thousand eight hundred and twenty-eight. The condition of this obligation is such, that if the above bounden Johnson Williams & Co. and Simeon Mathews, or either of them, or either of their heirs, executors, or administrators, shall do, on or before the eighth day of June next, well and truly pay, or cause to be paid, unto the collector of the customs for the district of Bath, Maine, for the time being, the sum of twenty hundred dollars, or the amount of duties to be ascertained as due and arising on certain goods, wares, and merchandise, entered by the above bounden Johnson Williams & Co., imported in the brig Elizabeth, P. Higgins, master, from St. Eustatia, as per entry, dated this date, then the above obligation to be void, otherwise to remain in full force and virtue.

"Signed, sealed, and delivered in presence of J. B. Swanton."

"Collector's Office, Bath, Maine, May 12, 1829. Received of Johnson Williams & Co. the sum of seven hundred thirty-nine dollars and $^{56}/_{100}$ in full of the within bond. J. B. Swanton, Jr., Dep. Collector."

And thereupon the defendants called Parker McCobb, who being duly sworn, testified as follows:

"I have been concerned in navigation for the last twenty years, and have been interested in bonds given to the custom-houses in Bath, Boston, and New York. All the bonds that I have taken up at Bath, have been paid at the custom-house, and by checks in all instances, that I recollect. Bonds at Boston and New York were paid at the branch of the United States Bank, by checks or by bills; either checks on the branch, or some other bank in the city. When I have given my check, I have taken my bond."

The defendants' counsel then read the following letter from the comptroller of the treasury, to John B. Swanton, to wit:

"Treasury Department, Comptroller's Office, July 10, 1829. Sir—Having been informed by the collector at Bath, that you had not yet delivered over to him the duty bonds remaining unpaid on the 15th May, 1829, the date of his oath of office, it will become my indispensable, although unpleasant duty, if the transfer alluded to be further delayed, to report your case for suit. I have also to request that you will lose no time in depositing in the Branch Bank of the United States at Portland, to the credit of the treasurer of the United States, the cash remaining in your hands, and forward the cashier's receipt therefor. Respectfully, Joseph Anderson, Comptroller.

"John B. Swanton, Esq."

The plaintiffs, by the district attorney, then read the authenticated copy of the following letter, from the same to the same, to wit:

"Treasury Department, Comptroller's Office, April 21, 1829. Sir—William King, Esq. having been appointed collector of the customs, and inspector of the revenue, for the port of Bath, Maine, you will deliver to him, on application, all the public property (cash excepted) in your possession, together with the books of entry, forms and instructions, with which you have been furnished by this department, for all which you will take duplicate receipts, (specifying every article,) and forward one of them to this office. Any public moneys you may have in your hands, you will deposit in bank, to the credit of the treasurer of the United States, and forward the cashier's receipt for the same. Respectfully [Signed] Joseph Anderson, Comptroller.

"John B. Swanton, Esq."

"Treasury Department, Register's Office, Sept. 3, 1829. Pursuant to an act entitled "An act to provide more effectually for the settlement of accounts between the United States and receiver of public money,' I, Thomas L. Smith, register of the treasury, do hereby certify that the within is a true copy of a letter from Joseph Anderson, comptroller of the treasury, to John B. Swanton, late collector of the customs for the district of Bath, in the state of Maine, dated the 21st of April, 1829, on record in this department. T. L. Smith, Register."

"Be it remembered, that Thomas L. Smith, Esq., who has signed the within certificate, is now, and was at the time of doing so, register of the treasury of the United States, and that to all such his official attestations, due faith and credit is, and ought to be given. In testimony whereof, I, Samuel D. Ingham, secretary of the treasury, have hereunto set my hand and caused to be affixed the seal of this department, at Washington, this third day of September, in the year one thousand eight hundred and twenty nine. S. D. Ingham, Secretary of the Treasury."

And also the following letter from the same, to William King, dated May twenty-eighth, eighteen hundred and twenty-nine, to wit:

"Treasury Department, Comptroller's Office, 28th May, 1829. Sir—I have received your letter of the 16th inst. enclosing your official bond and oaths of office, together with copies of two lists of bonds transferred to you by your predecessor in office. The bonds specified in these lists amount to $29,310 $^{04}/_{100}$; but having, in consequence of your suggestion that he had withheld some bonds from you, had reference to his last returns, it appears that his balance in bonds amounted to $19,350 $^{02}/_{100}$. It is evident therefore, that he has still in his possession bonds to a large amount, which ought to be delivered to you. If his object in retaining them be to collect the money, the course is irregular and improper; such having been decided by the supreme court in the case of Sthreshley v. U. S., 4 Cranch [8 U. S.] 169. You will therefore again apply to him to deliver over to you the bonds still retained by him, instructions to which effect will be given to him by this department. Should he decline doing so, you will be pleased to inform this department thereof without delay, and notify the obligors that any payment made to him will not be valid in law. In examining the official bond executed by you, I discover that the clerk erroneously styled you 'collector of the customs and inspector of the revenue for the port of Bath;' whereas it should have been 'collector of the customs for the district, and inspector of the revenue for the port of Bath.' I have therefore to request you to execute another bond, for which purpose the enclosed blank is transmitted to you. Should the same sureties who signed your former bond join you in this, it will be unnecessary to procure another certificate touching their sufficiency. Respectfully, Joseph Andrews, Comptroller.

"William King, Esq., Collector, Bath, Maine."

And also the following letter from the same to the same, dated July the tenth, eighteen hundred and twenty one, to wit:

"Treasury Department, Comptroller's Office, July 10, 1829. Sir—In consequence of the representation in your letter of the 29th ultimo, the following lists have been obtained from the auditor's office, and are forwarded for your information, viz.: 1. List of bonds in suit. 2. Ditto, ditto, due on or be-

fore the fifteenth day of May, 1829, (the date of your oath of office,) and remaining unpaid on that day. 3. Ditto, taken before, but which did not become due until after the fifteenth of May, 1829. Mr. Swanton's returns end with the 31st December, 1828, and the above mentioned list having been prepared from the records of those returns, the treasury has no knowledge of what bonds due before the 15th May last may have been paid to him either before or after that day. There can be no doubt, however, that any payments made to him subsequently to that day, will not exonerate the parties from their responsibility to the United States, for the duties for which such bonds were given. Mr. Swanton will again be directed to place in your hands the bonds remaining unpaid on the day mentioned, and if he delays a compliance, his case will immediately be reported for suit. Respectfully, Joseph Anderson, Comptroller.

"William King, Esq."

And also a letter from John B. Swanton to William King, dated May the fourth, one thousand eight hundred and twenty-nine, as follows:

"William King, Esq.—Sir: I will be in readiness to give you an abstract of bonds payable, and those in suit, together with the public property in my hands, by the fifteenth instant. Your obedient servant, J. B. Swanton.

"Bath, 4th May, 1829."

And also the commission of William King, duly signed, and under the seal of said states, dated April twenty-first, one thousand eight hundred and twenty-nine. And the qualification of said King endorsed on the back thereof, dated the fifteenth day of May, in the year of our Lord one thousand eight hundred and twenty-nine, appointing said King collector of the customs for the district, and inspector of the revenue for the port of Bath, in said district.

To this evidence there was a demurrer on the part of the United States, and a joinder in demurrer.

Mitchell & Longfellow, for plaintiffs in error.

Mr. Shepley, Dist. Atty., for the United States.

On the plea of non est factum, Mitchell & Longfellow cited Cutts v. U. S. [Case No. 3,522.] On the plea of payment, they cited [Sheehy v. Mandeville] 6 Cranch [10 U. S.] 264; [Buddicum v. Kirk] 3 Cranch [7 U. S.] 293; Phil. Ev. 161; Wallace v. Agry [Case No. 17,096]; 10 Mass. 155.

The district attorney also cited on the plea of payment: Act 1799, c. 128, § 74; [1 Story's Laws, 635; 1 Stat. 680, c. 22]; 2 Pick. 204; Van Reimsdyk v. Kane [Case No. 16,871]; 5 Mass. 299; 6 Mass. 143, 358; 11 Mass. 359. As to a receipt being a discharge without payment, he cited 5 East, 230; 11 Mass. 263; U. S. v. Spalding [Case No. 16,365; Riggs v. Tayloe] 9 Wheat. [22 U. S.] 483; [Renner v. Bank of Columbia] Id. 581. As to act of agent binding principal, and how far, he cited [Hodgson v. Dexter] 1 Cranch [5 U. S.] 345; [Penhallow v. Doane] 3 Dall. [3 U. S.] 57; [Mechanics' Bank of Alexandria v. Bank of Columbia] 5 Wheat. [18 U. S.] 337; 11 Madd. 72, 88; 2 Ld. Raym. 930, 2 Salk. 442; 5 Mass. 37. As to acts of public officers, how far binding, he cited 7 Mass. 460; 8 Mass. 84; U. S. v. Hayward [Case No. 15,336]; The Francis [Id. 5,036]; The Margaretta [Id. 9,072]; U. S. v. Lyman [Id. 15,647; Lee v. Munroe] 7 Cranch [11 U. S.] 369.

STORY, Circuit Justice. This case comes before the court upon a writ of error, founded on a judgment in favour of the United States, upon a demurrer to evidence, preferred in behalf of the United States, and joined in by the other party. The general nature and operation of such a demurrer has been expounded with great force and correctness in the opinion delivered by Lord Chief Justice Eyre, in the case of Gibson v. Hunter, 2 H. Bl. 187. The supreme court of the United States has also, on various occasions, been called upon to discuss the nature and effect of the proceeding. But I shall do no more at present, than to refer to some of the leading cases, not meaning to comment on them. Young v. Black, 7 Cranch [11 U. S.] 565; Fowle v. Common Council of Alexandria, 11 Wheat. [24 U. S.] 320; United States Bank v. Smith, Id. 171. The result of the whole is, that the party demurring is bound to admit not merely all the facts which the evidence directly establishes, but all which it conduces to prove. The demurrer should state the facts, and not merely the evidence of facts; and it is utterly inadmissible to demur to the evidence, when there is contradictory testimony to the same points, or presumptions leading to opposite conclusions, so that what the facts are remains uncertain, and may be urged with more or less effect to a jury. The court, however, will, in favour of the party, against whom the demurrer is sought, as it withdraws from the jury the proper consideration of his case, make every inference for him, which the facts in proof would warrant a jury to draw. But if the facts are so imperfectly and loosely stated, that the court cannot arrive at a satisfactory conclusion, that the judgment can be maintained upon the actual presentation of the evidence of these facts, then the course is to reverse the judgment, and to award a venire facias de novo. 2 H. Bl. 187, 209; [Fowle v. Common Council of Alexandria] 11 Wheat. [24 U. S.] 320.

In considering the evidence in the present case, I have felt very great difficulties in satisfying my own mind, that the facts are so stated, that the court can found any just conclusion as to the law applicable to the case. Under such circumstances, the proper

course would be to award a venire facias de novo, in order to bring the facts more perfectly before the court. But as no exception was taken by either side at the argument, and there was an implied waiver of any such exception; and as I am given to understand, that there are several cases depending upon the general questions discussed at the bar, I shall proceed at once to deliver my opinion upon them, passing by any farther consideration of the manner, in which they are presented on the record. It may be taken as a fact, though it is no where directly averred, that Swanton, the witness, was the collector of the customs for the district, at the time when the bond in controversy was given, and that he acted as collector de facto at the time of the supposed payment of the duties, and that the receipt was signed by his deputy de facto in the office. The bond, according to the condition, was payable on or before the 8th day of June, 1829; and the payment is supposed to have been actually made on the 12th of May, almost a month before the duties could have been demanded. It may be taken also as conceded by the parties, that William King was appointed collector, and duly approved by the senate on the 21st of April, 1829, upon the removal of Swanton from the office by the president; that Swanton had due notice of his removal, and of King's appointment, at least as early as the 4th of May; and that arrangements were made between them for the surrender of the papers and public property belonging to the office to King, as early as the 15th day of the same month; and of course, that the transaction, which gave origin to the present suit, took place in the intermediate period between the notice and the actual induction of King into office, which may be presumed to have been on the latter day.

A question very fairly open upon the record (which has, however, been expressly waived by the parties at the argument) is, whether by the appointment of King to the office, and due notice thereof to Swanton, the latter was not virtually removed from office, so as to cease, at least from that notice, to be collector de jure; and if so, whether all his acts as such, if not absolutely void, were not voidable by the government. That is a question of very grave importance, with which I should not choose to meddle unnecessarily. The collection act of 1799, c. 128, §§ 1, 21, 22 [1 Story's Laws, 573; 1 Stat. 627, c. 22], while it provides for the appointment of collectors, and for the manner of executing the duties of their office in cases of their death, and disability, and absence, (section 22), has left the case of a removal from office wholly unprovided for. And the act of 1820, c. 102 [3 Stat. 582], limiting the term of office of certain officers, and, among others, of collectors, has also left the case of a vacancy in office, produced by the expiration of such term, in the same posture. The great case of Marbury v. Madison, 1 Cranch [5 U. S.] 137, great, not only from the authority which pronounced it, but also from the importance of the topics which it discussed, contains much reasoning, which might aid us in such an inquiry. It is there, among other things, said, "that when a person appointed to any office refuses to accept that office, the successor is nominated in the place of the person who has declined to accept, and not in the place of the person who had been previously in office, and had created the original vacancy." From this remark it might perhaps be thought, that the removal of the actual incumbent from office was complete by the new appointment, independent of any acceptance by the new appointee.

But waiving all consideration of this question, let us see what are the grounds, upon which the case was rested at the argument. And first, as to the plea of non est factum, it is admitted, that the bond was originally executed by the defendants, and was sufficiently binding in its legal operation. But the argument of the defendants is, that it is no longer a subsisting obligation; it is no longer their deed, having been cancelled, and being produced by them, in that state, in court, the issue ought to be found in their favour. When a deed is once legally cancelled, it is doubtless functus officio, and cannot again be set up as a subsisting deed. And doubtless the production of it in a cancelled state, is prima facie evidence to support the plea of non est factum. But every cancellation does not, per se, operate a destruction of the legal validity of a deed. If the cancellation be by mistake, or accident, or fraud, against the intention, or without the co-operation of the obligee, I have no doubt, that it may still be declared on as a subsisting deed by the obligee. In the case of Cutts v. U. S. [Case No. 3,522], which has been cited at the bar, I had occasion to examine the doctrine inculcated by the old authorities upon this subject. It does not appear to me, that there is any sufficient authority, upon which to found a different doctrine from that which I now express. If there are dicta, or even cases, looking somewhat at variance with it, they do not, in my humble judgment, entitle themselves to any serious regard, when compared with others, which contain more rational principles, consistent at once with common sense, and the just analogies of the common law.[2] If by mistake of the parties one bond is cancelled, instead of another; if by accident a seal is torn off or destroyed; if by fraud a name is erased, or any obligatory clause obliterated, it seems difficult to imagine, that, in any rational system of jurisprudence, such circumstances should be held to discharge the

[2] See Shep. Touch. c. 4, p. 66, § 6. Com. Dig. "Fait," 1, 2; Vin. Abr. "Faits," X. 1, 2, as to the general doctrines on this subject in the old cases.

obligation. But at all events there can be no doubt, that where a cancellation or destruction of the deed has taken place by the mistake or connivance or fraud of the obligor himself, without any assent of the obligee, the instrument itself may still be declared on as a subsisting deed. The authorities referred to in Cutts v. U. S. [supra], fully support this position.

In the present case no doubt exists, that the cancellation was made with the entire privity and consent of the obligors. If it has been wrongfully made, they cannot avail themselves of the fact to escape from their original personal responsibility. And the question, therefore, really resolves itself into the point, whether there has been a cancellation under circumstances, to which the law attaches validity. It is admitted, that the receipt of the deputy-collector de facto is genuine, and if payment was in fact made of that bond, as it purports to be in that receipt, the bond was legally extinguished, and the cancellation justifiable. There is no pretence to say, that the bond has been extinguished in any other manner; and we need not meddle with any other foreign considerations. If no payment has been in fact made, is the cancellation nevertheless to be deemed valid? In the first place, it is to be considered, that this is not an act done by the obligee in the bond with the privity of the obligors, but by an agent of the obligee; and that agent not a private agent, but one whose duties and powers are defined and limited by law. The obligors cannot plead ignorance of the limitations of such duties and powers prescribed by law; but they are bound, as all citizens are, to take notice of them. If a private agent were, by connivance with the obligors, to cancel an obligation contrary to the known instructions of the obligee, such an act would not bind the latter. Such an act, call it by however gentle a name we may, would be, in contemplation of law, a fraud upon the obligee. A fortiori, the act of a public officer in violation of the duties of his office, which duties constitute a part of the vital arrangements of the government, cannot be permitted to have any legal effect by way of defence to those who have participated in the violation, and encouraged and aided it. I hold it most clear, that the acts of a public officer beyond the scope of his powers, and in violation of his public duties are, in such cases at least, utterly void. A different doctrine would lead to the most alarming and mischievous consequences, and unsettle some of the best established principles of the law of agency. I, for one, do not incline to retract a syllable which was uttered on this subject in the case of U. S. v. Lyman [Case No. 15,647], and the case of The Margaretta [Id. 9,072]. Then, could the collector or his deputy lawfully cancel the present bond without an actual payment of the money due for the duties? Clearly not, unless we are at liberty to disregard the whole objects as well as the express words of the act of 1799, c. 128 [1 Story's Laws, 573; 1 Stat. 627, c. 22], for the collection of duties. I meddle not with cases of discharges from debts by other officers, as by sheriffs upon executions, without payment, which may, for aught I know, be open to the government of other principles. Sheriffs are officers of the law, and not mere agents of private persons, or of the government; and how far their acts would be upheld in plain violation of their duty, and in fraud of the law, it is not now necessary to consider. In the case of collectors, there is an express provision of law to which this court must listen; and it would be monstrous to say, that the whole duties accruing to the government from importers, might be evaded by connivance with him in fraud of the law.

Then, it is said, that here the court cannot go into the consideration of the fact of payment, because the receipt of a public officer is an estoppel to the government to deny the payment. That proposition is liable to many objections. In the first place, the general principle in relation to governments is, that they are not bound by estoppels, under instruments created by themselves, although they may be where the estoppel is derivative from another under whom they claim a title. See Carver v. Jackson, 4 Pet. [29 U. S.] 1. In the next place, the act of an agent never can bind his principal by way of estoppel, unless it is within the scope of his agency. And in the next place, receipts, not under seal, do not belong to that class of instruments which are affected by the doctrine of estoppels. They have been solemnly adjudged to be open to contradiction and denial. See Harden v. Gordon [Case No. 6,047]; 1 Johns. Dig. Ev. 11, § 150; Veale v. Warner, 1 Saund. 325, and note; 11 Mass. 27, 143, 359; 17 Mass. 249; 3 Starkie, Ev. pt. 4, p. 1271. The receipt is, indeed, prima facie evidence of payment; but it is no more. If it has been signed by mistake or by fraud, or by other improper contrivances, without actual payment, it is not conclusive upon the government. Then, has there been any actual effective payment which can give support to the cancellation on the first issue, or establish the material allegations of the second issue? The admitted facts are, that there was no actual payment made in money; that the cancellation was made upon a check, being given by Williams & Co., or on their behalf, on the Lincoln Bank; that the check was never presented for payment at the bank, but a few days afterwards the check was given up to Williams, who gave in lieu thereof, the notes of Williams & Co. for the amount of the check, payable to the collector, or to him or his order; and by the collector put into the hands of one of his sureties, on his official bond to the government, by way of indemnity. Neither the check nor any equivalent fund ever came

into the hands of the new collector. Whether the check so received was a memorandum check (that is, a check given as a mere memorandum of the amount of a debt, and not a business check to be presented immediately at the bank for payment) or not, does not appear from the evidence. The collector states in his testimony, that he cannot say, whether it was or was not, though he considered memorandum checks as best, because the cashier would not be likely to pay them to a third person. That a jury would infer from these circumstances that it was a memorandum check, can admit of very little doubt; that a court upon this proceeding ought to infer it, is a matter of more question and difficulty. Upon the plea of payment, the onus probandi is upon the defendants; and therefore, if the evidence left the matter in doubt, that would be decisive against them upon that issue. To say the least, the prima facie evidence of payment, stated in the receipt, would be brought into most serious doubt by such a posture of the accompanying facts

But it is said, that payment by a check is a good payment; that this is the doctrine of the local law; and it is supported by the general custom of merchants in the payment of duty bonds. And it is farther contended, that the local law, and the custom, are equally obligatory upon the United States. I am not prepared to admit either position. It is not competent for the state legislation to regulate the rights of the United States, in respect to payments by their debtors. The general government has a right to prescribe its own rules on this subject. And as to the custom of merchants it can clearly have no operation to make law, much less to supersede the actual provisions of the law, in respect to the sovereign rights of the government. Without doubt, a common practice exists, founded upon the mutual convenience of the collector and the debtors at the custom-house, to receive the checks of the latter in payment of duty bonds. This, however, is a mere affair of private confidence; but if the check is not paid at the bank, it does not amount to a payment of the duty bond, or compromit the rights of the government, for the plain reason that the laws nowhere recognise any such right in the collector, to receive such checks in payment. Both he and the debtor, act, in such cases, at their own peril; the former in delivering up the bond, the latter in receiving it without actual payment. This is true in respect to checks received ordinarily in the course of business by the collector, where an immediate demand and payment thereof is intended and expected by the parties. But suppose the collector should keep the check until the bank had failed, or the party should afterwards, by other checks, withdraw his funds from the bank, so that when presented, payment should be refused, would it be contended that the government were bound, or had made the check its own, by the improper act of its officer? I hold, clearly not. The seventy-fourth section of the collection act of 1799, c. 128 [chapter 22], declares, that all duties to be collected shall be payable in money of the United States, or in foreign gold or silver coins, at certain rates stated in the section; and even foreign coins are not receivable, which are not by law a tender, unless by a special proclamation of the president of the United States. This is a plain provision, which admits of no controversy. How can any collector, by any arrangement, not to say by any connivance with a public debtor, supersede it? If such debtor do concert an evasion of it with the collector, is it not a fraud upon the law? If so, a fortiori, a memorandum check would be no payment. Would there be any pretence to say that the collector had a right to receive any goods, or lands, or collateral securities in payment? Where are we to stop, if we do not stop at the plain terms of the act? But it is by no means clear, even by the local law, that taking a check in payment of an antecedent debt, is to be deemed a payment of the debt, unless it has been presented for payment and paid, or the creditor has made it his own by his conduct. The case of Dennie v. Hart, 2 Pick. 204, looks strongly the other way. And it is manifest that in our local law, varying in this respect from the general commercial law, a negotiable check or note is not deemed absolute payment; but it is open to be rebutted by any circumstances which establish that the parties did not so intend it. In the case now before us, it does not even appear that the debtors had any funds in the Lincoln Bank; the check was never presented or paid, and the drawers afterwards received it back without any payment. Under such circumstances, it would be difficult to maintain, before a jury, that the parties ever originally intended that it should be deemed an absolute payment, even if the case could be brought (as I think it cannot) within the reach of the local law.

Upon the whole, looking at this case with reference to the points made, and so elaborately discussed at the argument, and at those only, I am of opinion that the judgment upon the demurrer ought to be, as it was in the court below, in favour of the United States; and the judgment ought to be affirmed accordingly.

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JOHNSON (UNITED STATES v.). See Cases Nos. 15,482–15,488.

JOHNSON (WALKER v.). See Cases Nos. 17,073–17,075.

## Case No. 7,420.

JOHNSON v. WASHINGTON.

[5 Cranch, C. C. 434.] [1]

Circuit Court, District of Columbia. March Term, 1838.

TAVERN LICENSES—COLORED PEOPLE—SUITS AGAINST WOMEN.

1. The corporation of Washington has power to prohibit the granting of tavern licenses to colored persons.

2. The justices of the peace have jurisdiction in cases against women.

Appeal from the judgment of a justice of the peace who had rendered judgment against the appellant [Harriet Johnson, a negress] for a fine for keeping a tavern without license.

Mr. Dandridge, for appellant, contended that the corporation had no right to discriminate between white persons and free colored persons, by prohibiting the granting of tavern licenses to the latter; and relied upon the opinion of this court in Carey's Case, at November term, 1835. [Case No. 2,404.] He also contended that the charter did not give the corporation authority to restrain taverns, but only to license, regulate, and tax them.

Mr. Bradley, contra, relies on the same opinion to show that the corporation has authority thus to discriminate and restrain.

THE COURT (MORSELL, Circuit Judge, not giving any opinion) was of opinion that the corporation has a discretion to prohibit the granting of tavern licenses to colored persons.

THE COURT also (CRANCH, Chief Judge, giving no opinion) decided that justices of the peace have jurisdiction in suits against women, in cases not exceeding fifty dollars in value.

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JOHNSON (WILSON v.). See Case No. 17,813.

JOHNSON (WRIGHT v.). See Case No. 18,082.

JOHNSON (YUENGLING v.). See Case No. 18,195.

JOHNSON, The BRADICH. See Case No. 1,770.

JOHNSON COUNTY (BRIGGS v.). See Case No. 1,872.

JOHNSON COUNTY (FOOTE v.). See Case No. 4,912.

JOHNSON COUNTY (JANUARY v.). See Cases Nos. 7,218 and 7,219.

JOHNSON COUNTY (MAY v.). See Case No. 9,334.

JOHNSON COUNTY (THAYER v.). See Case No. 13,869.

JOHNSON COUNTY (UNITED STATES v.). See Case No. 15,489.

JOHNSON, The EMMA. See Case No. 4,465.

[1] [Reported by Hon. William Cranch, Chief Judge.]

JOHNSON, The HANNAH M. See Cases Nos. 6,030, 6,031, and 6,451.

JOHN STEPHENS, The (STILES v.). See Case No. 13,443.

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## Case No. 7,421.

In re JOHNSTON et al.

[8 Ben. 191; [1] 12 N. B. R. 345.]

District Court, S. D. New York. July, 1875.

COSTS — MARSHAL'S FEES — POWER OF SUPREME COURT TO FIX FEES IN BANKRUPTCY.

1. Under a warrant in a proceeding in involuntary bankruptcy, the marshal deputed N., who took possession of the bankrupt's goods in two stores and put P. in charge of them. N. also employed P. and W. and B. and D. to assist him in making an inventory of the property. N. was also at the store on almost every day while the property was in his possession. An assignee having been appointed, the property was turned over to him, and N. and P. were employed several days in assisting the assignee to verify the inventory, which contained 75 folios, and a copy of which was furnished to the assignee. While the property was in the possession of N., he received checks and drafts belonging to the estate, on which the marshal collected $6,600. The cost of the merchandise was $70,000. The affairs of the bankrupts' estate were thereafter settled, and the property was returned by the assignee to one of the bankrupts, subject to the payment of the marshal's fees. The marshal's bill for his fees was taxed by the clerk. Both parties appealed from the taxation. All the marshal's services were rendered prior to April 12th, 1875, when the new general order in bankruptcy No. 30 was adopted: *Held*, that, under sections 4990, 5126, and 5127 of the Revised Statutes, and the eighteenth section of the act of June 22, 1874 (18 Stat. 178), the power of the justices of the supreme court to prescribe fees, commissions, charges and allowances for the officers, agents, marshals, messengers, assignees and registers, in cases of bankruptcy, is plenary, with the limitation that the fees cannot exceed the rate allowed by law, at the time of the enactment of the Revised Statutes, for similar services in other proceedings.

2. Under general order No. 30, adopted April 12th, 1875, the marshal's fees for services are to be the same as are prescribed by section 829 of the Revised Statutes, for "similar services," as modified by section 5126, including the additional distinct fees allowed by section 5126. The fees are to be specific fees prescribed by statute and the general order, and the power of the court to make further discretionary allowances is taken away.

[Cited in Re Burnell, Case No. 2,171; Re Carstens, Id. 2,469.]

3. As regards the custody of property by the marshal, except as regards his personal attention, actual disbursements only are to be allowed, to be passed upon by the court.

4. For the custody of the property in this case, the marshal was entitled to the amount necessarily actually paid to a keeper or keepers, not exceeding $2.50 a day.

5. That amount, having been so paid for the services of P., was to be allowed; but a similar amount paid for the services of N. was to be disallowed.

6. Nothing could be allowed for the services of W., B. or D., except in taking the inventory.

[1] [Reported by Robert D. Benedict, Esq., and Benj. Lincoln Benedict, Esq., and here reprinted by permission.]

7. No charge of custody fees, by way of commissions on the value of the property, could be allowed.

8. The service of the marshal, in respect to the $6,600, was a similar service to that which he renders on an attachment in rem in admiralty; and he was entitled to a fee of one per cent on the first $500 of it, and one half of one per cent on the $6,100; and he was entitled to a similar fee on the value of the merchandise.

[Cited in The Captain John, 41 Fed. 151. Followed in The Mary H. Brockway, 49 Fed. 162.]

9. He was entitled, under general order No. 30, to $1 an hour for the time occupied in making the inventory, and the time spent in this work by P. was to be charged for, although P. was at the time acting as keeper of the property.

10. No allowance was to be made for time spent in verifying the inventory with the assignee, nor for "personal attention," the marshal himself not having given any such personal attention.

11. The marshal was entitled to 10 cents a folio for the inventory furnished to the assignee, and also to a commission of two per cent. on disbursements.

[In the matter of John J. Johnston and Edward J. Hale, bankrupts.]

James C. Carter, for the marshal.
Henry Stanton, for John J. Johnston.

BLATCHFORD, District Judge. In this case, which is one in involuntary bankruptcy, a provisional warrant was issued to the marshal on the 21st of December, 1874. On the same day one Newcome was deputed by the marshal to execute the warrant, and took possession thereunder of the property of the bankrupts contained in their stores, being the first floors and basements of two buildings, and the second floor of one of those buildings. At the time Newcome took possession of such property, it consisted of a large stock of merchandise, being hats, caps, furs, gloves, umbrellas, parasols, travelling bags, millinery goods, &c., and the fixtures and furniture of the stores, and $79.81 in cash. The cost of the merchandise was said to be $70,000. The two buildings were occupied in part by other tenants, whose apartments were separated from the apartments of the bankrupts by a board partition, which extended about three-quarters of the distance from the floor to the ceiling of said apartments. Said stores were also accessible by doors and windows opening upon two streets. Newcome, on the day he so took possession of the property, placed one Poinier in charge of it, to assist him in watching and taking care of it. Poinier remained in charge of it, with Newcome, until the 19th of February, 1875. During all that time Poinier faithfully discharged the duty required of him. After taking possession of the property, Newcome employed Poinier and three persons named West, Butler and Draper, to assist him in taking an inventory of the property. Newcome and those four persons were so employed on nine days in December and January, Newcome and Poinier being so employed for ten hours on each of said nine days, West for eight hours on each of said nine days, and Butler and Draper for not less than six hours, on an average, on each of said nine days. In addition, Newcome was at the stores of the bankrupts on every day, except eight days, until the 13th of February, while the property was in his possession, including Christmas and Sundays. On each and all of such days, including Christmas and Sundays, Newcome was actually and necessarily employed in giving his personal attention to the proper care of the property of the bankrupts. for two hours of each day. On the 13th of February, Newcome, with the assistance of Poinier, commenced to turn over the property to the assignee in bankruptcy, and to assist the assignee in verifying the inventory of it which Newcome had taken, and was so employed for six days, on each of which Newcome and Poinier were actually and necessarily employed for ten hours. The inventory contained 75 folios, and a copy of it was furnished to the assignee. While the property was in the custody of Newcome, he received various cheques and drafts representing money due to the estate of the bankrupts, which were collected by the marshal, to the amount of $6,600, and which money was afterwards turned over to the assignee.

The affairs of the bankrupt estate having been settled, and the property having been returned by the assignee to the bankrupt Johnston, subject to the payment by him to the marshal of the fees of the marshal for his services in the matter, a bill of such fees has been taxed by the clerk, under a special order. Each party appeals.

Item 1. The clerk disallowed a charge for 61 days' services of Newcome in taking care of the property, from December 21st to February 19th, at $2.50 per day—$152.50. The objections taken to it were, that it was not warranted by the fee bill in force at the time of the taxation, May 28th, 1875, and that it was, in fact, an item for taking an inventory. The clerk sustained the objections and the marshal appeals. The marshal contended, before the clerk, that the bill should be taxed under the provisions of law and the rules in force at the times the several services were rendered, all of them having been rendered prior to the 12th of April, 1875, when the new general orders in bankruptcy were adopted. For Johnston, it was contended, before the clerk, that the bill should be taxed entirely under the provisions of rule 30 of the new general orders. The clerk ruled that the proceedings in bankruptcy were still pending, and that, therefore, the taxation must be controlled by the provisions of law, and the general orders, in force at the time of the taxation.

Item 2. The bill charged $152.50 for like services of Poinier with those charged for Newcome in item 1. The clerk allowed $115

of the item, and disallowed $37.50, such disallowance being for 15 days' services, at $2.50 per day, and being based on the ground that such services were included in items 7 and 8 for taking inventory and verifying inventory. Both parties appeal. The grounds of objection taken to the allowance of any part of the item were those taken to item 1, and, also, that the services were not necessary, and that Poinier rendered no services as keeper.

Item 3. The clerk disallowed a charge of $20 for the services of West, one of $10 for the services of Butler, and one of $10 for the services of Draper. The marshal appeals. The grounds of objection taken to the allowance of any part of this item were those taken above; and, also, that the services were included in the item for taking inventory.

Item 4. The clerk disallowed a charge of $1,100 for custody of property,—being 2½ per cent on $5,000, $125; and 1½ per cent on $65,000, $975. The marshal appeals. The ground of objection taken to the allowance of any part of this item was, that it was not authorized by the new general orders.

Item 5. The clerk allowed $166 as commissions on money received, being $6,600, as follows: $1,000, at 5 per cent., $50; $4,000, at 2½ per cent., $100; $1,600, at 1 per cent., $16. Johnston appeals. The ground of objection taken to this allowance was, that the charge was not authorized by the law, or by the new general orders.

Item 6. The clerk disallowed a charge of $352.50, as commissions on the value of the property, at $70,000, as follows: $500, at 1 per cent., $5; $69,500, at ½ per cent., $347.50. The marshal appeals. The objection to this item was a general one.

Item 7. The clerk allowed $360 for taking inventory, being 360 hours, at $1 per hour. Johnston appeals. The ground of objection taken to this item was, that it was subject to a deduction of the amount before allowed to Poinier. The clerk ruled that the time of Poinier included in this item was deducted from his allowance.

Item 8. The clerk allowed $120 for verifying inventory with assignee, being for 120 hours, at $1 per hour. Johnston appeals. The objection taken to this item was, that it was not provided for by the law or the new general orders. The marshal explained that the item was a more full specification of the personal attention of the marshal in taking care of the property. He referred, probably, to item 9.

Item 9. The clerk allowed $60 for personal attention, for 60 hours, at $1 per hour. Johnston appeals. The objection taken to this item was, that no personal attention had been proved, other than what had been allowed for. The only other allowance for personal attention is what is embraced in some one or more of the foregoing items.

Item 10. The clerk allowed $7.50 for copy of inventory, being for 75 folios, at 10 cents per folio. Johnston appeals. No ground of objection to this item was stated.

Item 11. The clerk allowed $4.82, being 2 per cent. commission on $241 allowed for disbursements. Johnston appeals. No ground of objection to this item was stated.

The Revised Statutes were in force when the services in this case were rendered. Section 5126 provides as follows, in regard to fees to the marshal, as messenger, after prescribing, in three items, specific fees to him, for service of warrant, and for travel, and for written notices to creditors: "Fourth. For custody of property, publication of notices and other services, his actual and necessary expenses, upon returning the same in specific items, and making oath that they have been actually incurred and paid by him, and are just and reasonable, the same to be taxed and adjusted by the court, and the oath of the messenger shall not be conclusive as to the necessity of such expenses. For cause shown, and upon hearing thereon, such further allowance may be made, as the court in its discretion may determine."

Section 4,990 of the Revised Statutes, as amended by section 18 of the act of June 22d, 1874, provides that the justices of the supreme court may, from time to time, subject to the provisions of the title in regard to bankruptcy, rescind or vary any of the general orders in bankruptcy theretofore adopted by them, as then existing, and may frame, rescind or vary other general orders "for regulating the fees payable, and the charges and costs to be allowed, with respect to all proceedings in bankruptcy before such courts," (the district courts in bankruptcy), "not exceeding the rate of fees now allowed by law for similar services in other proceedings."

Section 5,127 of the Revised Statutes provides that the enumeration of the fees in section 5,126 shall not prevent the justices of the supreme court from prescribing a tariff of fees for all other services of the officers of courts of bankruptcy, or from reducing the fees prescribed in section 5,126, in classes of cases to be named in their general orders.

Section 18 of the act of June 22, 1874, provides that, from and after its passage, "the fees, commissions, charges and allowances, except actual and necessary disbursements of, and to be made by, the officers, agents, marshals, messengers, assignees and registers, in cases of bankruptcy, shall be reduced to one-half of the fees, commissions, charges and allowances heretofore provided for or made in like cases; provided that the preceding provision shall be and remain in force until the justices of the supreme court of the United States shall make and promulgate new rules and regulations in respect to the matters aforesaid, under the powers conferred upon them" by sections 4,990 and 5,127 of the Revised Statutes,

"and no longer, which duties they shall perform as soon as may be."

Under these provisions the power of the justices of the supreme court to prescribe fees, commissions, charges and allowances for the officers, agents, marshals, messengers, assignees and registers, in cases of bankruptcy, is plenary, with the limitation, that the fees cannot exceed the rate allowed by law, at the time of the enactment of the Revised Statutes, for similar services in other proceedings. Prior to the enactment of section 18 of the act of June 22d, 1874, their power in this respect was further restricted, so that they could not alter the fees established by the statute or by law, but that restriction was removed by that section.

Under the power thus conferred upon them, the justices of the supreme court promulgated, on the 12th of April, 1875, a new general order No. 30, in regard to fees, which provides as follows: "The fees of the marshal shall be the same as are allowed for similar services by the general fee-bill, in section 829 of the Revised Statutes, as modified by section 5126, including additional fees allowed by the latter section for distinct services; but no allowances shall be made under the last clause of section 5126, commencing with the words: 'For cause shown.'" The new general order No. 30 then goes on to prescribe specific fees for three other distinct services of the marshal, and then adds: "No other allowance to be made for custody of property, except for actual disbursements, which shall, in all cases, be passed upon by the court."

The provisions in regard to the fees of the marshal are thus entirely plain. His fees for services are to be the same as are prescribed by section 829 of the Revised Statutes for "similar services," as modified by section 5126, including the additional distinct fees allowed by section 5126. The expression "similar services," according to the use of those words in section 4990 of the Revised Statutes, means, in the new general order No. 30, "similar services in other proceedings." But the fees to be allowed are all to be specific fees prescribed by statute and by the new general order No. 30, and the power of the court to make further discretionary allowances is taken away. Furthermore, in respect to custody of property by the marshal, (except as regards the marshal's personal attention, hereafter referred to), actual disbursements only are to be allowed, to be passed upon by the court. The items in question in this case must be disposed of according to these rules.

Item 1. The 61 days' services of Newcome, charged for at $2.50 per day, were for custody of the property. The marshal cannot be allowed anything for the services of a keeper or deputy in taking care of property, unless he has actually paid it. But it does not follow that he can be allowed all he has paid, or that he can be allowed anything merely because he has paid it. The taking of property under a provisional warrant in bankruptcy is an analogous or similar service to that of serving an attachment in rem on a libel in admiralty. Section 5126 allows $2 for the service of a warrant. Section 829 allows $2 for the service of an attachment in rem on a libel in admiralty. Section 829 allows for the necessary expenses of keeping property attached or libelled in admiralty, not exceeding $2.50 a day. For the keeping or custody of property taken under a provisional warrant in bankruptcy, the marshal is, therefore, entitled to be allowed what is necessarily and actually disbursed and paid by him to a keeper or keepers; but the entire amount cannot exceed $2.50 a day. By the vouchers rendered, the marshal appears to have actually paid to Newcome $152.50, and to Poinier $152.50, being for 61 days' services of each, in taking care of the property, from December 21st to February 19th, at $2.50 per day. On the proof offered, the services of a keeper seem to have been proper and necessary. But, at the rate of $2.50 per day, which is the rate the marshal adopted, allowance can be made for the services of only one keeper. This allowance should be for 61 days, and amounts to $152.50. But, on the evidence, that amount should be allowed for the services of Poinier as keeper, and not for any services of Newcome as keeper. Item 1 was, therefore, properly disallowed.

Item 2. I think the entire amount of $152.50 should be allowed for the services of Poinier in taking care of the property. If Poinier was employed during any part of the same time in taking an inventory, and is entitled to be paid for taking the inventory, that ought not to diminish his allowance for taking care of the property.

Item 3. The $40 covered by item 3 was properly disallowed. Nothing can be allowed for any services of West, Butler or Draper, except in taking the inventory, and the allowance therefor must be made under that head.

Item 4. The charge of $1,100 for custody of property, by way of commissions on its value, at $70,000, was properly disallowed. It was not a disbursement, nor is it a charge by the hour for personal attention of the marshal in taking care of the property. Its allowance is, therefore, expressly forbidden by the provisions of the new general order No. 30, before cited.

Item 5. The clerk appears to have allowed commissions on the $6,600 at the rate allowed by section 5,100 of the Revised Statutes, to assignees, as an allowance for their services, in the shape of a commission on moneys received and paid out by them. I can find no warrant for this allowance. If there is a fee allowed by section 829 of the Revised Statutes for a similar service, such fee is allowable for receiving and paying over the $6,600.

Section 829 allows to the marshal for serving final process, seizing or levying on property, advertising and disposing of the same by sale, or otherwise, according to law, receiving and paying over the money, the same fees and poundage as are or shall be allowed for similar services to the sheriffs of the states, respectively, in which the service is rendered. Here there was no final process, and no sale, and nothing to which the term "poundage," as that word is properly understood, is applicable. So, too, section 829 allows to the marshal for the sale of property in admiralty, and for receiving and paying over the money, 2½ per cent. on any sum under $500, and 1¼ per cent. on the excess of any sum over $500. But here there was no sale of property. Section 829 also provides, that, "when the debt or claim in admiralty is settled by the parties without a sale of the property, the marshal shall be entitled to a commission of one per centum on the first five hundred dollars of the claim or decree, and one-half of one per centum on the excess of any sum thereof over five hundred dollars, provided that, when the value of the property is less than the claim, such commission shall be allowed only on the appraised value thereof." The theory of this allowance is that the marshal, in an admiralty suit in rem, has attached the property, and holds it, and that then, without a sale of the property by the marshal, the controversy is so disposed of by the parties, that the marshal is called upon to give up possession of the property, so that he loses the fees for selling it and for receiving and paying over the money. In such a case he is allowed a commission, which is intended as a compensation for his risk and responsibility, just as the poundage allowed on final process, and the percentage allowed on a sale of property in admiralty, are each of them a compensation for risk and responsibility, not merely in selling the property, but in holding possession of it under process. Personally he can have no other compensation for keeping safely the property; for, the expense of keeping it, not exceeding $2.50 a day, can be allowed only when paid to a keeper. The new general order No. 30 superadds compensation by the hour, for personal attention, when actually and necessarily employed in taking care of the bankrupt's property. I think that the service of the marshal in this case, in respect to the $6,600, is a similar service to that he renders in admiralty in regard to property of like value which comes into his hands under an attachment in rem, and that he is entitled to a like fee, being commission on the $6,600, of one per cent. on the first $500, and one-half of one per cent. on $6,100. The commission is given by section 829 for the service of the marshal in respect to the property which he relinquishes, in taking the risk and responsibility which he takes in regard to it while he holds it. The allowance to him should, therefore, have been $35.50 instead of $166.

Item 6. The views stated under the head of item 5 apply to the merchandise, valued at $70,000, as well as to the $6,600 collected, and the charge of $347.50 ought to be allowed.

Item 7. The new general order No. 30 provides, that "the marshal shall be allowed for each hour necessarily employed in making inventory of bankrupt's property," one dollar. The evidence shows that 360 hours were employed in taking the inventory. The marshal has a right to be allowed one dollar per hour for the time of persons whom he employs to take an inventory, which is necessarily employed in taking it. I see no reason why the marshal should not be allowed for the 90 hours during which Poinier was employed in taking the inventory, even though Poinier be allowed fees as keeper for the same time. Poinier supplied, in taking the inventory, the place of another person, and was discharging the duties of keeper at the same time.

Item 8. I see no authority for the allowance of the charge for time spent in verifying the inventory with the assignee.

Item 9. I do not think anything should be allowed for personal attention. The allowance given by the new general order No. 30, is an allowance to "the marshal for each hour actually and necessarily employed in personal attention in taking care of bankrupt's property." This is, I think, an allowance to be made only when the marshal himself, in person, actually and necessarily gives his personal attention in taking care of the bankrupt's property, and that it does not cover personal attention by a deputy. If it could be construed to cover personal attention by a deputy, several deputies might be detailed to take care of property, and might give their personal attention and show that they were actually and necessarily employed, and the allowance therefor at $1 per hour, for day and night, would swell to an extravagant amount what would really be an allowance for custody of property and for the expense of keeping property, when such allowance is, as has been shown, carefully restricted by other provisions. In the present case it is not shown that the marshal himself gave any actual personal attention in taking care of the property.

Item 10. I think the copy of the inventory furnished to the assignee was properly charged for, at 10 cents a folio. Section 829 of the Revised Statutes allows to the marshal for copies of papers furnished at the request of any party, ten cents a folio. In this case the copy was furnished to the assignee, and, as he received it, it must be regarded as having been furnished at his request.

Item 11. Section 829 of the Revised Statutes allows to the marshal for "disbursing moneys to jurors and witnesses, and for other expenses, two per centum." This authorizes the charge of a commission of 2 per cent. on the disbursements made by the marshal for the items of expenses allowed in the bill as taxed. The clerk allowed 2 per cent. on $241, that

being the amount of disbursements he allowed. The disbursements I allow are $279.32, on which a commission of 2 per cent. is $5.59. From the foregoing conclusions it results that the bill should be taxed at $1,067.36 instead of $992.09, and I have so taxed it.

## Case No. 7,422.

In re JOHNSTON.

[See Case No. 7,421.]

## Case No. 7,423.

In re JOHNSTON.

[14 N. B. R. 569.] [1]

Circuit Court, N. D. Illinois. Nov., 1876.

BANKRUPTCY—ISSUANCE OF A COMMISSION TO ANOTHER STATE—POWER OF CIRCUIT COURT OF SUCH STATE OVER WITNESSES.

When a commission is issued by the bankrupt court and sent to another state, the circuit court in such state may compel a witness to testify or punish for a refusal to testify.

[In the matter of John J. Johnston, a bankrupt.]

In this case, on application of the assignee, a commission was issued out of the United States district court for the Northern district of New York, to take the testimony of one Frederick L. Fake, at Chicago, "with reference to all matters relating to the disposal or condition of the property of the bankrupt Johnston, or any other matter or thing provided for by section 5086 of the Revised Statutes of the United States;" and a summons, issuing out of the circuit court of the United States for the Northern district of Illinois, was duly served by the marshal upon the witness, and his fees tendered him. The witness appeared before the commissioner, with counsel, at the time and place appointed, and, under the advice of counsel, refused to testify. The commissioner certified the facts to Judge BLODGETT, whereupon a rule to show cause why an attachment for contempt should not issue was entered. In response to the rule, counsel for the witness denied the authority of the district court of New York to issue a commission of this nature, and also the authority of this court to enforce the attendance of the witness, or to punish for contempt in case of refusal to answer.

Tenneys, Flower & Abercrombie, for witness.

Becker & Dale, for assignee.

BLODGETT, District Judge. Under sections 5003, 5087, Rev. St., such commission may issue, and the attendance of the witness before the commissioner enforced, or the witness punished for contempt in case of refusal to testify.

[1] [Reprinted by permission.]



## Case No. 7,424.

In re JOHNSTON.

[25 Pittsb. Leg. J. 141.]

District Court, W. D. Pennsylvania. Jan. 29, 1878.

INSOLVENCY—AGREEMENT FOR EXTENSION—INTERPRETATION—BANKRUPTCY—PRIVATE SALE BY ASSIGNEE—OBJECTIONS TO EXPENSES—EXECUTION—LEVY ON GOODS IN BONDED WAREHOUSE.

[1. A merchant, being largely indebted to a certain firm, gave them notes secured by bond and mortgage, under an agreement that they would continue to sell him goods for two years, and, so long as he performed his covenants, would not issue scire facias on the mortgage, or enter judgment on the bond; reserving the right, however, on default in payment of any one of the notes for 30 days, to consider the bond and mortgage payable forthwith, and proceed to collection; the debtor to have the right, at any time before sale, to have the writ stayed, on paying the notes then due, with costs. Afterwards, the debtor became embarrassed, and procured from his creditors an extension agreement, giving them notes payable in one, two, three, and four years, with the stipulation that the rights of any creditors upon any securities held by them should not be affected, except to postpone their remedies thereon until default upon the notes given under the extension agreement. The firm holding the bond and mortgage signed the agreement, with an express reservation of all remedies thereon, except that they would not proceed thereunder "until default on one of the notes given under the extension." Default was made on the first extension note, at which time all the notes secured by the bond and mortgage had become due. *Held*, that the firm was entitled to immediately proceed under the bond and mortgage to collect their whole debt, for the provision for a stay upon payment of the amount due referred only to the original notes, and not to the extension notes.]

[2. Where the court authorizes the assignee in bankruptcy to sell property at private sale, creditors who assent to the order cannot object to the expenses naturally incident to that method, unless they are unreasonable. If they did not consent, their proper remedy was to obtain a review of the order by the circuit court, and, where they fail to do so, they cannot be heard to complain.]

[3. Goods in a bonded warehouse under the revenue laws are in possession of the sovereign, and no lien can be obtained thereon by a creditor levying an execution. Harris v. Dennie, 3 Pet. (28 U. S.) 292, applied.]

In bankruptcy.

By SAMUEL HARPER, Register:

To the Honorable Winthrop W. Ketcham, Judge of Said Court:

When the petition for adjudication in bankruptcy against James H. Johnston was filed, his personal property was under levy by virtue of an execution issued on a judgment in favor of Joseph C. Grubb & Co., for the real debt of $20,000. Proceedings under the execution were enjoined, and after the appointment of an assignee, he was allowed, by order of court, to sell the personal property at private sale. The sale having been completed, he filed his account in court, which was referred to me to ascertain and liquidate the liens against the fund and prepare a schedule of distribution. The only lien against it is that of Joseph C. Grubb & Co., above referred to. Two questions arise on

this alleged lien: First, that the creditor is only entitled, if entitled to anything, to the first instalment falling due under the terms of the bond; and, second, that under the circumstances of the case the levy was a fraudulent preference under the bankrupt law, and therefore void.

On the 16th of December, 1874, an agreement under seal was executed between Joseph C. Grubb & Co. and the bankrupt, with a preamble showing that the bankrupt was indebted to Grubb & Co. on several promissory notes, and had given them his bond for $20,000, to secure the payment of which he had executed a mortgage upon certain property in Allegheny county and assigned a policy of insurance upon his life, issued by the Connecticut Mutual Life Insurance Company, by which agreement Grubb & Co. agreed to continue to sell goods to the bankrupt from time to time for the period of two years, to an amount not exceeding $20,000; the securities to cover any indebtedness arising out of any subsequent transactions connected with the subject of the agreement. The bankrupt on his part agreed to conform to the terms specified in the agreement governing such sales, that he would not sell or assign any of the property embraced in the securities except in the ordinary way of his trade; that he would not permit any judgments to be recovered or suits to be brought against him except in contested cases. Grubb & Co. further agreed that so long as the bankrupt performed his covenants they would not issue scire facias on the mortgage, enter judgment on the bond or issue execution, but reserving the right upon Johnston's default for thirty days to pay any one of said notes, to consider the bond and mortgage due and payable forthwith, and to proceed to collection; but in such case "said James H. Johnston may at any time before sale, on payment of the notes then due, and on payment of the costs, have said writ stayed, and said Joseph C. Grubb & Co. agree to stay said writ on such payment."

Some time afterwards Johnston became so embarrassed that he applied to his creditors for an extension. An agreement having that for its object was prepared, under date of September 13, 1875, and was signed by many of his creditors. It provided for a four years' extension, four notes to be given to each creditor—one for fifteen per cent., payable in one year; one for twenty-five per cent., payable in two years; one for twenty-five per cent., payable in three years; and one for thirty-five per cent., payable in four years,—and all without interest. It further provided, that in case of failure to obtain the signatures of ninety per cent. of the business creditors by October 1, 1875, the agreement should become void. One clause I quote at length: "And it is further agreed that this agreement, and the receipt by creditors of notes under the same, shall not disturb or in any way affect any securities that the creditors may have for their claims, except to postpone their remedies upon the said securities until default is made by the said James H. Johnston in the payment of the notes given by him as aforesaid." This extension agreement was signed by Joseph C. Grubb & Co., but they attached to their signature this note: "For our debt of $20,000, secured by bond and mortgage, reserving all our rights under said bond and mortgage, and agreeing only to issue no writ of execution or of scire facias thereon until default be made in payment of one of the notes given under this extension." Whether this note in any manner varied the terms of the agreement or not, it was known to all the creditors, as Grubb & Co. appear as the first signers of the extension. Grubb & Co. entered their bond in judgment on the 5th day of September, 1876, and issued the execution on which the levy enjoined was made. At that time the bankrupt was indebted to them about $24,000. The notes given to the creditors under the extension agreement were dated September 1, 1875, and the first one had a year to run. It will be recollected that, under the original agreement between the bankrupt and Grubb & Co., the latter were at liberty to proceed upon their securities after thirty days in the bankrupt's default to pay any one of the notes they might hold. In the extension agreement it was expressly provided that the securities held by the creditors should not be disturbed or in any way affected, "except to postpone their remedies upon the said securities until default is made by the said James H. Johnston in the payment of the notes given by him as aforesaid." And to emphasize this point, Grubb & Co., in signing the extension agreement, added to their signature a note reserving all their "rights under the bond and mortgage, and agreeing only to issue no writ of execution or of scire facias thereon until default be made in payment of one of the notes given under this extension." The first note given under the extension fell due September 4th, 1876, and default was made by the bankrupt in its payment, and under the provisions of all the agreements Grubb & Co. had a perfect right to enter judgment and issue execution on September 5th, as they did. But now it is contended that Grubb & Co. are only entitled to payment of so much of their claim as was actually due at that date, because Johnston had a right to pay the amount then due before sale, and Grubb & Co. were bound on such payment to stay the writ. It is a sufficient answer to this to say that Johnston did not pay what was then due,—that is, the first of the extension notes,—nor did he offer to pay it. Such a claim can no more be made now than it could have been made by Johnston himself had no bankruptcy proceedings been had, and his property had been sold and an auditor appointed to make distribution. However, if there were any foundation for this claim, it could not be suc-

cessfully maintained. The debt owing to Grubb & Co. was all due on the 5th of September. Grubb & Co. retained all of their rights under the bond and mortgage, and merely agreed that they would not issue process to collect until default in the payment of any one of the extension notes. One of their rights was to issue after a default of thirty days to pay one of the original notes, and to consider the whole indebtedness due. During the year following the extension agreement, all of the original notes became due by the expiration of the time they had to run, and the right of Grubb & Co.to issue execution was only qualified by the bankrupt's prompt payment of his extension notes. The provision that the bankrupt might obtain stay of the writ related only to the original notes actually due, and not to the extension notes. Even had Johnston tendered payment of the first extension note before sale, he was not entitled to a stay of the writ. In no view of the case can the execution and levy of Grubb & Co. be limited to the amount of the first extension note. I understand the assignee as claiming that the lien of the levy can only extend to such of the original notes as may have been due on the 5th of September, 1876, each one of them having been extended by the extension agreement. I cannot concur in that view. The proper construction to be placed upon the several papers in evidence is that Grubb & Co. reserved all rights belonging to them before the extension agreement was executed, and merely suspended their right to enforce collection until the bankrupt defaulted in his extension notes, and when such default took place the extension agreement as to them became wholly void and inoperative, and their rights and those of the bankrupt must now be determined as though that agreement never had an existence. It follows from this that their entire claim against the bankrupt, under the bond, having been more than thirty days over-due, their proceedings to collect it were fully authorized by the agreements between them, and neither the bankrupt nor his assignee could rightfully claim a stay of proceedings without the payment of the entire claim. This disposes of the first question.

The second question is more easily answered, as I do not find in the evidence a single fact or allegation that justifies me in discussing it. Upon the part of Grubb & Co. a very different question is raised and very earnestly urged. A deputy sheriff of Allegheny county was called, and testified that had the sheriff sold on his writ without delay and realized $14,000, the costs would have been $206.95, not including attorney's commissions. The point is made that out of the gross sum realized by the assignee no more costs can be deducted than would have been incurred by a sheriff's sale. There is no sound reason alleged why this point should be sustained, and I can see none. It does not appear, nor is it even alleged, that the sheriff could have realized $14,000 out of the property; could that be made to appear, the point would have more in it. Sheriff's sales are forced public sales to the highest bidder. At such sales it is notorious that but few persons are present, owing to the very limited notice a sheriff is required by law to give. In this matter, however, the court by its order authorized the assignee to sell the goods at private sale. Of course, such an order would not have been made had not the court been satisfied that a much larger amount would be realized than by a forced public sale. A private sale involves heavier expenses for rent, clerks, advertising, circulars and many other purposes; and such expenses must of course be paid. It would not be just to charge the general fund, if there were one with them, and allow the greatly increased amount realized to go in full to the secured creditor. The universal rule is that every fund must be charged with the expenses properly incurred in producing it. In this matter there is no exception to any particular item charged by the assignee as expenses, and I am at liberty to consider them as proper, and the amounts as reasonable. I have of course examined the account carefully; and while there was no testimony given to explain the reason for every item, I could not fail to observe that the principal expenditures were for rent and clerk hire; and that of the rent, $2,373.19 was paid under an order of court, and included rent due at the time Grubb & Co.'s execution was issued, and would consequently be paid in preference to the execution creditor. But I consider this point settled by the order of court authorizing the private sales. In making the order, the court was undoubtedly governed by the fact, that a larger sum would be realized by such a sale, or no such order would have been made. I do not know, nor does it alter the question whether the order was made by the consent or in opposition to the wishes of the creditors. If made with their consent, of course it does not stand in their mouths now to object to the expenses; and if made in opposition to their wishes, they had their remedy by a bill of review to the circuit court. As long as the assignee acted in accordance with the order of court,—and of that there is no question,—the creditors are bound by his expenditures, unless they are improper and unreasonable. They enjoy the advantage of the increased results, and cannot avoid bearing the increased expenses. It would be inequitable and unjust to allow them all the advantages and compel the general fund to pay the expenses fairly incurred in realizing them.

A more difficult question yet remains to be considered. The assignee's account shows that his gross receipts at private sale amounted to $9,840.78, and his expenditures to $4,298.98, leaving a balance of $5,541.80, to

which he adds the proceeds of his public sale, $3,653.79, making a total of $9,195.59. He claims credit for his commissions and compensation $562.54, leaving in his hand a balance of $8,633.05. This is the result of the sales at the bankrupt's place of business. The account also shows that he received from the sale of goods in the United States bonded warehouse $1,089.90, and two other items of property, $25.00, making a total of $1,114.90. He claims credit for his commissions and compensation $12.34, leaving a balance of $1,102.56. Grubb & Co. contended that their execution was a lien upon the goods in the bonded warehouse as fully as upon the goods in the bankrupt's store. The assignee resists this position, and claims that, as the goods were in the possession of the United States, they were not subject to the lien of this execution. It is true that a sheriff may levy upon and sell the interest of a debtor in personal property, though the immediate possession and the right to it be in another. Srodes v. Caven, 3 Watts, 258; Welsh v. Bell, 32 Pa. St. 12; Meyers v. Prentzell, 33 Pa. St. 483. Where the United States marshal has levied on the defendant's goods to an amount more than sufficient to pay the executions in his hands, an execution will bind the surplus in the hands of the marshal. Bayard v. Bayard [Case No. 1,129]. These are the authorities cited to support the claim, but they do not reach the vital question involved. This is a case in which the sovereign had the custody of the goods and until the actual payment of the duties, even the bankrupt himself could not claim their delivery to him. The authorities first cited refer to persons, and not to the sovereign, who is not bound even by legislative acts, unless specially named. In the last authority cited, the reason of the decision is apparent. The marshal had levied and sold under one writ, and realized a balance after paying the debt and costs, and subsequently a second writ against the same defendant was placed in his hands; but between the first and second writ an execution against the same defendant was placed in the hands of the sheriff of the county. The contest was between the two execution creditors, and the right of the sheriff to the fund was recognized on the ground that the marshal was justified in levying upon so much property only as would satisfy the writ, and that the balance remaining in his hands was not properly in his possession, but belonged to the debtor, and was subject to the writ in the sheriff's hands. The United States marshal, however, is not the United States, and his custody of that fund was not the custody of the United States. In this case, on the contrary, the custody of the revenue officer is that of the United States.

I have not been able, after a very diligent search, to find any authority upon the express point raised, but Harris v. Dennie, 3 Pet. [28 U. S.] 292, seems to me sufficiently clear to decide it. Dennie, deputy sheriff of Suffolk county, Mass., attached twenty-three cases of silk for a debt due by importers and owners, he offering at the time to give security to the collector for the payment of the duties. Seventeen days afterwards, the goods being in the customhouse stores, the storekeeper executed an agreement, in which he said: "I hold the above-described twenty-three cases of silk subject to the order of James Dennie, Esq., deputy sheriff." Harris was the United States marshal for the district, and attached and took the goods on several writs in favor of the United States, founded on bonds given by the owners, amounting to a sum much larger than the value of the merchandise on which duties were due and unpaid when the goods arrived. Dennie brought trover against Harris. In the opinion of the court it was said: "The other point is one of far more importance, and in our opinion, deserves a serious consideration. If, consistently with the laws of the United States, goods, in the predicament of the present, were not liable to any attachment by a state officer, it is very clear that the present suit could not be sustained, and that judgment ought to have been given upon the special verdict in favor of the original defendant. And in our opinion, these goods were not liable to such an attachment. In examining the revenue collection act of 1799, c. 128 [1 Story's Laws, 573, 1 Stat. 627, c. 22], it will be found that numerous provisions have been solicitously introduced, in order to prevent any unlivery, or removal of any goods imported from any foreign port in any vessel arriving in the United States, until after a permit shall have been obtained, from the proper officer of the customs for that purpose. These provisions not only apply to vessels which have already arrived in port, but to those which are within four leagues of the coast of the United States. The sections of the act from the twenty-seventh to the fifty-eighth are in a great measure addressed to this subject. From the moment of their arrival in port, the goods are, in legal contemplation, in the custody of the United States; and every proceeding which interferes with, or obstructs or controls that custody, is a virtual violation of the provisions of the act. Now, an attachment of such goods by a state officer presupposes a right to take the possession and custody of those goods, and to make such possession and custody exclusive. If the officer attaches upon a mesne process, he has a right to hold the possession to answer the exigencies of the process. If he attaches upon an execution, he is bound to sell or may sell the goods within a limited period, and thus virtually displace the custody of the United States. The act of congress recognizes no such authority, and admits of no such exercise of right. No person but the owner or consignee or, in his absence or sickness, his agent or factor in his name, is entitled to enter the goods at the customhouse, or give bond for

the duties, or pay the duties. Sections 36, 62. Upon the entry, the original invoices are to be produced and sworn to; and the whole objects of the act would be defeated by allowing a mere stranger to make the entry, or take the oath prescribed on the entry. The sheriff is in no just or legal sense the owner or consignee (and he must, to have the benefit of the act, be the original consignee); or the agent or factor of the owner or consignee. He is a mere stranger acting in invitum. He cannot then enter the goods, or claim a right to pay the duties, or procure a permit to unlade them; for such permit is allowed in favor only of the party making the entry, and paying or giving bond for the duties. Sections 49, 50. If, within the number of days allowed by law for unlading the cargo, the duties are not paid or secured, the goods are required to be placed in the government stores, under the custody and possession of the government officers. And at the expiration of nine months, the goods so stored are to be sold, if the duties thereon have not been previously paid or secured. Section 56.

The only difference between that and the case in hand is, that in this it is attempted to bind the interest of Johnston in the goods after the payment of the duties; but the difference is more apparent than real, for in that case the deputy sheriff tendered security for the payment of the duties, and if the payment of the duties was all the United States had a right to demand, it would seem that the sheriff was entitled to the possession of the goods. But there was something more required. The owner and consignee, or his agent and factor, in his name and for him, was and still is required by the law to make the entry, give bond or pay the duties. No one else can do it. It was there expressly decided that the sheriff could not do it, being a stranger, acting in invitum. If that be so, how could the sheriff's vendee do it? If the sheriff in this case had been allowed to proceed and had sold the bankrupt's interest in these goods, what would the purchaser have taken? As he would not be allowed to give a bond or pay the duties, he certainly would not have been able to obtain possession.

It would not be difficult to assign reasons why the claim contended for should not be allowed. Were it true that a vendee at such a sale would be entitled to pay the duties and obtain possession of the goods, it is apparent that the United States would be put to the annoyance and oftentimes perplexity of ascertaining the identity not only of the consignee but also of the vendee, and that the person whose interest was sold was in point of fact the owner of the goods. Certainly such a result cannot be permitted. Again, if the goods were sold by the United States for the payment of duties, how could the sheriff's vendee compel the payment to him of the balance realized by the sale? The United States cannot be made a garnishee, and as an execution attachment would not lie, I am unable to see how, in any manner, the goods or the owner's interest in them can be realized by an execution. Without further elaboration of the subject, I conclude that the goods in the government warehouse were not bound by the lien of the execution of Grubb & Co.

From the report attached to the assignee's account, it appears that Alexander King, the owner of the building occupied by the bankrupt, claims the sum of $270.83 for rent for the month of March, 1877. No formal claim has been presented by Mr. King, nor has a formal appearance been entered on his behalf, although his counsel called at my office in reference to the matter. I deem it proper, however, to pass upon the claim as though formally presented. The assignee is allowed to retain possession of the premises occupied by the bankrupt, for a reasonable time for the purpose of disposing of the assets, and it is the practice in this district to allow compensation to the owner in the nature of storage, rather than as rent. There must be more than that to amount to an acceptance of the lease by the assignee, and nothing more has been alleged here. The owner has been paid in full for all the time the assignee retained possession of the premises, at the full rate of the lease; the account showing that $2,914.86 has been paid to him. In no case within my knowledge has the landlord been allowed his rent for any time beyond that in which the assignee retained possession of the premises. I cannot, therefore, make any appropriation to the claim.

JOHNSTON (BRACKEN v.). See Case No. 1,761.

JOHNSTON (CHAPMAN v.). See Case No. 7,378.

## Case No. 7,425.

JOHNSTON et al. v. CHARLOTTESVILLE NAT. BANK.

[3 Hughes, 657; 25 Int. Rev. Rec. 385; 2 Browne, Nat. Bank Cas. 199; 14 Am. Law Rev. 86.] [1]

Circuit Court, W. D. Virginia. Fall Term, 1879.

ACCOMMODATION PAPER—COLLATERAL SECURITY—AUTHORITY OF NATIONAL BANK TO LEND ITS CREDIT.

1. Where a party knowingly takes as collateral security drafts of a national bank drawn for the accommodation of a customer, he cannot recover in a suit against the bank in the hands of a receiver.

2. A national bank has no authority to lend its credit on personal security.

In assumpsit.

William A. Fisher, for plaintiff.

Charles Case, for defendant.

BOND, Circuit Judge. This cause having been submitted to the court by writing duly

[1] [Reported by Hon. Robert W. Hughes, District Judge, and here reprinted by permission. 14 Am. Law Rev. 86, contains only a partial report.]

executed and filed, waiving the intervention of a jury, as well upon the facts as upon the law, and having been argued by counsel, the court doth find the facts to be as follows:

Johnston Brothers & Co., the plaintiffs, claim to recover against the defendant, the Charlottesville National Bank, upon five bills of exchange in their declaration mentioned. The partners constituting the firm of Johnston Brothers & Co. are citizens of the state of Maryland, and are bankers in the city of Baltimore. The defendant bank was, on the 16th of April, 1875, a banking association and body corporate carrying on the business of banking at Charlottesville in the state of Virginia, under the provisions of the act of congress known as the "National Bank Act" [13 Stat. 99]. N. H. Massie was a director and president of the defendant bank. B. C. Flanagan, of the firm of B. C. Flanagan & Son, was also a director, and W. W. Flanagan, also of that firm, was a director and cashier of the bank. Each continued his official relations to the bank until its failure, which occurred about the 28th of October, 1875, when the bank went into the hands of a receiver, in whose hands it now remains. Prior to the 13th day of April, 1875, the bank had, at sundry times, discounted paper for the Flanagans to an amount aggregating more than $50,000, which paper at the date first above mentioned had not matured, but much of this paper had been re-discounted for the use of the Bank of Charlottesville by other banks in New York and Baltimore. Flanagan & Son were in straitened circumstances on the 13th day of April, 1875, and, though in possession of sundry and numerous bills receivable, they were drawn payable upon such long time that they were available only as collaterals, and not for the purpose of present discount in bank. They also had certain bonds designated as "Jordan Alum Springs" bonds. The Flanagans applied to the defendant bank for a loan of $25,000, but the bank declined to make such loan, because it was out of funds to do so. On the 13th April, 1875, Flanagan & Son applied to the plaintiff for a loan of $25,000, stating they might have got it from the defendant bank, but it was not in funds. The plaintiffs required them to submit their proposition in writing, which they did in the words following:

"We propose to borrow $25,000 until next fall, say November 20th, and to pledge as collateral for same, say $30,000 bills receivable, $25,000 Jordan Alum Springs ten per cent. bonds. The bills receivable above are given to us for guano and provisions furnished merchants by us, and in many cases are secured to us by a pledge as collateral of planter liens, and indorsed by Flanagan, Abell & Co. The Springs bonds are secured by a first mortgage on all the property, both real and personal. The cost of said property is $150,000, and the amount of the mortgage is $60,000. The bonds bear ten per cent. J. Ran. Tucker and John B. Minor are trustees, and the mortgage can be foreclosed on failure to pay interest. We will give our note for same and interest, but will wish any notes which are held as collateral and maturing before maturity of above loan to be credited on same, with rebate of interest. As an alternative, if preferred by you, we believe, by depositing the Springs bonds with the Charlottesville National Bank, we can give its indorsement. It is proper, however, to state the proposition is contingent on the bank's willingness to indorse, which has not been submitted to the directors thereof."

The plaintiffs then took the written proposition under advisement, promising to give notice of its acceptance or non-acceptance in due time and, accordingly, on the 14th April, 1875, the plaintiffs addressed to Flanagan & Son the following letter:

"Baltimore, April 14th, 1875. Messrs. B. C. Flanagan & Son, Charlottesville, Va.—Dear Sirs: In reply to the memorandum handed us yesterday, we have to say, that we will advance you twenty thousand dollars on the following collaterals: Forty thousand dollars of bills receivable from new and fresh sales of this season (no renewals of old paper to be included), and four drafts of five thousand dollars each of the Charlottesville National Bank on the Citizens' National Bank of this city, payable on the 30th of November next, 'acceptance waived,' said drafts to be received by us in lieu of the Jordan Alum Springs bonds, which are to be deposited by you with the bank as security for these drafts as above. You forgot to mention in your memorandum the rate of interest and commissions you were willing to pay. If this be made satisfactory, we will make the advance as herein stated. Perhaps you had better come down in person to conclude the arrangement. Respectfully, Johnston Brothers & Co."

Upon receipt of this letter, on the 16th day of April, 1875, B. C. Flanagan requested Massie, the president of Charlottesville Bank to sign and issue drafts, that they might use them as collateral security, in part, for the loan from plaintiffs, with which request Massie, the president, on the 16th of April, 1875, complied, without submitting the matter at any time to the board of directors of the bank; but he required that Flanagan & Son should submit to him a written proposition for the loan, which they did in the following words:

"To N. H. Massie, President Charlottesville National Bank: We are greatly in want of certain accommodations to extend some liabilities of our firm until next autumn, and, if we can procure them through the aid of this bank, will be enabled then to meet them without, we are persuaded, any doubt, and are able to cover the amount by

collateral security in the shape of good business paper not maturing early enough for our present purposes, but of unquestionable solvency and reliability. It is, of course, not worth our while to say to you that our liability in many different ways to the bank, incurred through a course of years in the two banks before their consolidation, partly as principal and partly as indorser, we being ourselves individually the owner of a very large part of the stock of both banks, is of such an amount that even the most temporary disaster to us would seriously inconvenience the present bank, even to use no stronger language. What we ask now is aid to the extent of five drafts extending till November, amounting in the aggregate to twenty-five thousand dollars."

Having obtained the bills of exchange, Flanagan & Sons, on the 17th of April, called on the plaintiffs at Baltimore, and obtained from them the loan of $25,000, giving the plaintiffs their promissory note, payable on the 30th of November then next, for the amount of the loan, and interest added, at the rate of eighteen per centum per annum, amounting to the sum of $27,912.50; and as collateral security indorsed and delivered to the plaintiffs said five bills of exchange, and transferred bills receivable to the amount of $26,106.24, which last amount they increased to $46,000 in a month thereafter. The plaintiffs were aware at the time they received them that at the time of drawing those bills the bank had no funds with which to make discounts, and that, however obtained from Massie, they were to be used by Flanagan & Son as collateral security for the loan made by them. The plaintiffs were not aware of the arrangements made with Massie by Flanagan & Son to obtain the five bills, except so far as is above stated, and by the correspondence between Flanagan and the plaintiffs, and in the application of the 13th April, 1875, made by Flanagan & Son for a loan. On the 16th day of April, 1875, the Citizens' National Bank of Baltimore, upon which the five drafts were drawn, was and had been the correspondent bank and reserve redemption agent of the Charlottesville National Bank, keeping two accounts with it: one general account as its correspondent, and another account exclusively pertaining to its redemption agency; and the reserve fund of the Charlottesville Bank remaining in the Citizens' Bank. On the 16th of April, the date of the drafts, there was to the credit of the Charlottesville Bank in the Citizens' Bank, on its reserve account, a balance of $15,000, but at the same time the Charlottesville Bank owed the Citizens' Bank upon general account, $14,088.84, which indebtedness was increased on the 17th of April, 1875, to $15,337.35; the reserve account remaining as it was.

The bills of exchange were drawn by the Bank of Charlottesville on the Citizens' National Bank of Baltimore, each payable to the order of B. C. Flanagan & Son, the first payable on the 20th of November, "fixed"; the second and third were drawn payable on the 25th and 30th days of November, "fixed"; and the fourth and fifth were drawn payable on the 6th and 10th days of Dec., "fixed"; and each of said bills was drawn and expressed, "acceptance waived." The word "fixed" in said bills means without grace. Neither of the bills was paid at maturity, though presented, and due notice of protest was sent to drawer and indorser. When the money was obtained from the plaintiffs by the Flanagans, it was deposited in the Bank of Charlottesville subject to the order of Flanagan & Son. Neither of said bills was drawn against money actually on deposit to the credit of the Bank of Charlottesville in the Citizens' Bank, nor upon any money thereafter to become due from the Citizens' Bank to the Bank of Charlottesville, upon the maturity of said bills. It was expected by the plaintiffs and the Charlottesville Bank and Flanagan & Son that the latter would protect the drawer from any liability upon the bill by paying their note given to the plaintiffs, as above stated, when the same matured. And the court finds, further, that it is not in the ordinary course of business, or usual with national banks, to draw time bills of exchange upon each other without grace, acceptance waived. And the court finds as matter of law that upon these facts the issuing of the bills of exchange in question was not a discount, because the Bank of Charlottesville had no funds with which to discount paper presented for discount, but that it was merely a loan of the bank's credit to Flanagan & Son. And it further finds that the plaintiffs, knowing the said drafts or bills of exchange were issued to the Flanagans as collateral security, and that they were drawn for that purpose, it makes no difference whether the same were given to Flanagan & Son for a note deposited by them with the bank at the time, secured by the collateral security, or not; the said drafts were but the accommodation paper of the Bank of Charlottesville, and as such were void in the hands of the plaintiffs, who took them with such knowledge of their character. And the judgment is given for the defendant with his costs.

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JOHNSTON (CHESHIRE PROVIDENT INST. v.). See Case No. 2,659.

JOHNSTON (CLARKE v.). See Case No. 2,856.

JOHNSTON (DOE v.). See Case No. 3,958.

JOHNSTON (HARRIS v.). See Case No. 7,388.

JOHNSTON (McCLINTICK v.). See Case No. 8,700.

JOHNSTON (MAGNER v.). See Case No. 8,954.

JOHNSTON (UNITED STATES v.). See Case No. 15,490.

## Case No. 7,426.

### JOHNSTON v. VANDYKE.

[6 McLean, 422.] [1]

Circuit Court, D. Michigan. June Term, 1855.

DOWER—COMMON LAW—FORCE OF—SETTING OFF.

1. The common law of England, except so far as modified by statute, was the law of property in the late territory of Michigan.

2. At common law the widow was entitled to dower in all lands of which her husband was seized at any time during coverture.

3. A and B were married in the territory of Michigan in 1810. A was seized of certain real estate in 1816, which he sold and moved out of the territory, and continued a non-resident until his death in 1850. In 1846 the state of Michigan restricted, by statute, the right of dower to lands of which the husband, died, seized; but providing expressly, that no right which had already attached or vested, should be affected thereby. *Held*, that the right of dower was an inchoate right during coverture, only made consummate by the death of the husband, and was embraced within the saving clause of the restrictive statute.

[Cited in Noel v. Ewing, 9 Ind. 56; Bennett v. Harms, 51 Wis. 257, 8 N. W. 222; Blevins v. Smith, 104 Mo. 597, 16 S. W. 213.]

4. The dower to be set off, must include all casual and natural enhancement from circumstances, and excluding all improvement actually made by the tenant.

5. The mode indicated by the statute of the state as a judicial process for setting off dower, will be pursued in the United States court.

[Cited in Ex parte McNiel, 13 Wall. (80 U. S.) 243.]

[Cited in Greiner v. Klein, 28 Mich. 15.]

[This was an action by Phillis Johnston, widow of George Johnston, against James A. Vandyke.]

Campbell & O'Flynn, for plaintiff.

Frazer & Emmons, for defendant.

Before McLEAN, Circuit Justice, and WILKINS, District Judge.

WILKINS, District Judge. A special verdict was rendered in this case, finding that the George Johnston, mentioned in the declaration, was married to the plaintiff in the year 1810; that about that time they resided on the premises in question; that the husband was seized of the same on the 24th of Sept., 1816, and from that time continued so seized until the 28th of Oct., 1816, when he sold, and conveyed the same to one Stephen Mack, and that the defendant now owns and holds the same by mesne conveyances from said Mack. The verdict furthermore finds that the said Johnston and his wife removed and settled in the territory, and now state of, Wisconsin, in the year 1820, where they continued to reside until the year 1850, at which time the said George Johnston, the husband, died, and that the plaintiff removed to this state in the fall of 1853, subsequent to the institution of this suit. The verdict further finds that the premises described were in October, 1816—the time of alienation—worth the sum of $1,800, and embracing the improvements since made, are now worth the sum of $40,000; that the improvements made are worth $8,000; that dower was demanded on the 31st of March, 1851, and in May, 1852, according to the allegations in the declaration. Upon this verdict, the plaintiff now moves that judgment be entered in her favor, assigning her dower in the premises demanded, and declaring the defendant guilty of withholding the same: and that the court appoint three disinterested and respectable freeholders commissioners for the purpose of making the admeasurement of the dower of the plaintiff, out of the lands described in the record, according to the provisions of the fifty-fifth section, of part 3, tit. 3, and chapter 2 of the Revised Statutes of the state of Michigan of 1838, p. 479; and that, in making such admeasurement, the said commissioners be directed to admeasure the same to the plaintiff, irrespective of any improvements made by the defendant, and allowing to the widow all advances in the value of the said premises arising from extreme circumstances since the alienation.

In resisting this motion, two objections are urged: 1st. That the plaintiff, when this action was brought, was a non-resident widow; and, therefore, not entitled to recover dower, her husband not being seized of the same at the time of his death. 2d. That, conceding the existence of her right, yet her dower is to be set off according to the value of the premises when they "were aliened" by her husband, according to the provisions of the Revised Statutes of Michigan of 1846.

1. The Revised Statutes of Michigan of 1846, tit. 14, c. 66, pp. 267, 270, in relation to estates in dower and estates by the courtesy, provides:

"Section 1. That the widow of every deceased person, shall be entitled to dower, or the use during her natural life, of one-third part of all the lands whereof her husband was seized of an estate of inheritance at any time during the marriage, unless she is lawfully barred thereof"—and by section 21: "That, a woman being an alien, shall not on that account be barred of her dower; and any woman residing out of the state, shall be entitled to dower of the lands of her deceased husband, lying in this state, of which her husband died seized, and the same may be assigned to her or recovered by her, in like manner, as if she and her deceased husband had been residents within the state at the time of his death." These provisions are not in conflict. They are parts of the same statute; and, while the first section is general, recognizing the right of "the widow of every deceased person," whether resident or non-resident, to dower of all lands whereof her husband was seized during marriage; the 21st section cannot be fairly construed as restrictive of or limiting such right to

[1] [Reported by Hon. John McLean, Circuit Justice.]

any particular class of widows, or to a certain classification of lands. For this section (the 21st) must be considered in connection with the eight preceding sections, and as especially descriptive of those who shall not be barred of dower. The statute declares elsewhere that dower may be barred by voluntary conveyance or jointure, and then, in this section further enacts, that an alien, "on that account shall not be barred;" and, that a non-resident widow shall have dower assigned her, of the lands of which her husband died seized, in like manner, as if she had been a resident within the state at the time of her husband's decease. But the statute no where creates, as to the right of the widow, a distinction between lands aliened during the life-time of the husband, and lands of which he died seized: her right of dower, as to both the one and the other being clearly embraced within the general provisions of the statute. The 21st section certainly does not confine the alien widow to such limitation; and it is not to be reasonably inferred as the intention of the legislature, by the terms employed, to favor in this respect, the resident alien, more than the non-resident citizen. Wherefore should the legislature establish a distinction between the resident and the non-resident, which in the same section is repudiated as between the alien and the resident? But, as provision is made in the 8th section, that, "When a widow is entitled to dower in lands, of which her husband died seized, and when her right of dower is not disputed, that she may have it assigned to her, in whatever counties the lands may lie by judge of probate of the county in which the estate is settled:" it would seem that this 21st section was alone intended to extend to the non-resident and alien widows, the same privilege with the resident, of having dower assigned and recovered, and not to deprive her of a right conferred by the contract of marriage, and not subsequently barred by any act on her part. It is true, that the statute speaks of "a married woman, residing within the state barring her dower by deed of conveyance" according to a specified form; and "a woman" without defining her residence, accepting a jointure before marriage in lieu of dower; and "a woman residing out of the state, having dower assigned," and also of "lands of which the husband died seized," and lands held "during marriage;" but, it is not perceived how this difference of phraseology, in the connection in which the same is employed, marks any distinction with reference to whom the right of dower pertains, or, as to the estate to which it shall apply. The legislature never intended that a non-resident widow, whose husband, during coverture, was seized of lands, and who sold the same without her consent, as required by the 13th section, should be barred of her right of dower, merely by the fact of her non-residence at the time of her husband's decease. If such was the intention, it would make the existence of the right of every married woman to dower in her husband's lands, contingent upon his continued residence within the territorial limits of the state, defeat the beneficent policy of the law, by enabling him at all times capriciously to bar the wife's dower by a removal, and consequently make this sacred right of the widow dependent upon his will. This would be inconsistent with the other provisions of the statute, which most carefully protect the interest of the wife, whether resident or non-resident, and requires that where she joins in any conveyance of lands by her husband, the acknowledgment of the act shall be before some public functionary—under certain prescribed solemnities, and with the evidence of the act being voluntary and without the coercion of the husband. This statute, then, in providing that "any woman residing out of the state shall be entitled to dower in the lands of which her husband died seized, and that the same may be assigned her as if she had been resident within the state," is not considered as restrictive of the right of a non-resident widow in the recovery of dower, or, as inhibiting the same as to lands sold during coverture.

But giving the construction contended for by the defendant's counsel, and holding that a non-resident, under the statute, is only entitled to dower in land of which her husband died seized—the facts presented by the verdict, are such as render this statute inapplicable. The marriage occurred in 1810, seizen and alienation in 1816; the death of the husband in 1850. By the common law of England, the widow was entitled to be endowed of all lands and tenements, of which her husband was seized in fee simple or fee-tail at any time during coverture, and if the seizen was in the husband but for a single moment, the right of dower attached. Cro. Eliz. 503; Co. Litt. 31. No statutory provision of the late territory of Michigan contravened this rule of property, and the Revised Statutes of the state of 1838 and 1846, expressly declare that every woman shall be entitled to her dower, as at common law. The ordinance of 1787 saves in all cases to the widow of an intestate the 3d part of the real estate for life, and declares "that the law relative to dower shall remain in full force, until altered by the legislature." As the law treats marriage in no other light than as a civil contract, between parties able and willing to contract, and although the husband and the wife are as one person as to many legal consequences of their union, yet, the latter is at the time of the contract, vested with a personal individual interest in her husband's real estate, which the law shields and protects for her exclusive benefit. This right is always implied, and in many ecclesiastical nuptial celebrations, it is expressed "in totis verbis;" "of all my worldly

estate, I thee endow," cannot be considered as mere words of ceremony without substantial meaning. It is a right inchoate then at the time of marriage, suspended during coverture, yet untransferable without her consent, attaching to the realty as a valid title of an estate for life, on the death of the husband, and can only be barred by her own act, and not by subsequent legislative provisions. But the act of 1846 was not designed to operate retrospectively. Such a construction is apparent from its terms. The future tense is used throughout, wherever the right in the process to secure it, is indicated. The phrases "shall be entitled,"—"shall purchase lands during coverture,"—"shall be entitled to an election," &c., and phraseology of like prospective import, are the terms employed. And where there is no positive enactment, or, a clear, unavoidable inference of a retrospective intention, as in this statute of 1846; the rule of interpretation is adverse to a retroactive operation, especially where civil rights will be thereby affected. Such the doctrine of Dash v. Van Kleeck, 7 Johns. 477; Given v. Marr, 27 Me. 212; White v. White, 5 Barb. 474; Mundy v. Munroe, Man. [1 Mich.] 69; Sayre v. Wisner, 8 Wend. 661. Not a word in this statute applies to the past or affects in any way the right of dower, previously vested; and the repealing clause, at the close of the volume, expressly protects every right which had accrued antecedent to the adoption of this revised code of 1846. But had such been the obvious intention, the law would have been invalid; for this right of dower vests in the woman, whenever marriage and seizure combine. On this principle, and to avoid dower, must the woman join in the conveyance by her husband, and her joint execution of the deed as a voluntary act be made manifest on the instrument itself. If such a right was not a vested right, wherefore the necessity of the provisions in regard to barring dower? The wife's execution of the deed, separate and apart from her husband is for some purpose; it does, or does not transfer a right. If the latter, the act is an useless form; if the former, then the right was vested in her during coverture. 1 Greenl. Cruise, 198; Kelly v. Harrison, 2 Johns. Cas. 29; 8 Wend. 661. In Kelly v. Harrison, the court in New York held, "that the right of dower was an inchoate right, and deemed so sacred, that no revolution or change of government could affect it." From 1810, the period of her marriage, to 1816, when the estate was sold by her husband, the plaintiff was vested with this inchoate right of dower, and the property being transferred without her consent, this right remained suspended until the death of her husband in 1850. The law of 1846 could not, and did not design to interfere with a private right so vested. It is saved by the ordinance of 1787, and it is protected by the provisions of the existing statute.

2. But, it is contended, that by the 7th section of the act of 1846, the plaintiff is only entitled to dower, to be assigned her according to the value of the lands in 1816, when they were aliened by her husband. This section declares that, "when a widow shall be entitled to dower out of the lands, which shall have been aliened by the husband in his life time, and such lands shall have been enhanced in value after the alienation, such lands shall be estimated in setting out the widow's dower, according to their value at the time when they were so aliened." Now, whatever right was acquired by the marriage and seisin, was certainly a right vested in the widow antecedent to the statute of 1846, and could not, therefore, be affected by any of its provisions. The legislature could change the process by which the right was ascertained, such as directing the mode of setting off dower, but could not curtail or diminish the right itself. The title is to a life estate in one-third of the lands of which the husband was seized. Such was the common law title. And such was the title vested in the plaintiff in 1816. It was not a right to one-third of an estimated value in dollars and cents at any period, but an absolute right to the enjoyment and possession of so much of the real estate, according to quality, as should be set off by metes and bounds.

At common law, where improvements have been made by the heir, or where the estate has been impaired in value by the heir or tenant, the widow is endowed according to the value at the time of the assignment of dower; because in the one case the heir improves with a knowledge of the widow's rights, and in the other, the assignment being by metes and bounds, she must resort, for the damages sustained, to another form of action. Co. Litt. 32a. But should a feoffee improve the land, the widow shall only be endowed according to the value at the time of the feoffment, and not according to the value when dower is assigned; because the increased value is the consequence of the labor and expenditure of the feoffee. Whatever right existed in the widow, it was inchoate, dormant and contingent during coverture, becoming only consummate on the death of the husband. It was a right that could not be realized in any form, or be applied or attached to the land, as long as the husband lived; and in case of her prior death the right ceased, and could never attach. It had then no specific appropriation when the property was aliened in 1816, and none at any subsequent period up to 1850, when the husband died; and she was then entitled to have dower set off in the premises, and not before. The jury find that in 1816 the farm was worth but $1,800; that it has been improved by its various proprietors to the amount of $8,000, and is now worth $40,000, inclusive of these improvements. Had the husband died before the statute of 1846, and

the property had been so far enhanced in value from like improvements and the corresponding advance of the country around, the widow's dower then attaching, would, under the existing law, have been one-third set off by metes and bounds, exclusive of the improvements made by the vendees. She claims no more in this action. And if the law then allowed her this, as her right of dower, it may well be asked can the law of 1846, or rather does it impair or diminish it? But she does claim that the assignment of her dower, shall be with reference to the enhanced value of the land, arising from the circumstances of the gradual advance of the country in population and prosperity. To this she is entitled. Her right pertained and was incidental to the tenure of the land. She never parted with her right. It was connected and concurrent with the estate,—was even manifest in the chain of title, and as circumstances, independent of and uncontrolled by the present proprietor or his vendors, increased the value of the premises, there is no reason why she alone of those having a legal interest in the same, should not reap her share in the common blessing. To assign her dower according to the value of the lands when aliened, would be depriving her of the benefits in which all the inhabitants of the country, and especially landholders, have participated; and to allow her the advantage of the improvements made by the various vendees, would be giving her a share in the labors of others, made, to be sure, with a presumed knowledge that their chain of title was incomplete, (and allowed at common law,) but inconsistent with the settlement and advance of a new country, and consequently not recognized in the United States. At common law the widow was not excluded from improvements of any kind, whether made by the heir or the vendee. This has been authoritatively settled by Lord Denman, in Riddell v. Gwinnell, 41 E. C. L. 728.

In the United States a distinction is held in several of the states between improvements made by purchasers, and the natural rise in value of the property from other causes. In Massachusetts the widow is not excluded from this casual advance. In Powell v. Monson & Brimfield Manuf'g Co. [Case No. 11,356], Mr. Justice Story, after a full review of the English and American cases, declares that the common law never excluded the widow from any improvements, and that, in the United States, she is only excluded from improvements actually made by the tenant or purchaser. This learned jurist was not aware, at the time he gave this able review of the English and American law, of the case, in 41 E. C. L., just cited. He says, that "the doctrine that the widow was thus entitled to the value, at the time her dower shall be assigned her, stands upon solid principles and the general analogies of the law. If the land has, in the intermediate period between alienation and assignment, risen in value, the widow must receive the benefit; for, if it had depreciated, she must sustain the loss. Her title is consummate by her husband's death, and that title is, in the language of Lord Coke, 'to the quantity of the land, viz: one-third part.'" This case may well be considered the leading American case. In it, the judge fully reviews all the preceding cases, and especially considers the cases of Humphrey v. Phinney, 2 Johns. 484, and Hale v. James, 6 Johns. Ch. 258, holding the contrary doctrine of "the value of the land at the time of the alienation." In the first case, the court based its opinion upon the statute of New York, (which, by express provision, restrained dower to the time of alienation), intimating at the same time, that such was the rule of the common law, and re-asserting the same views in the last case. It is only necessary to observe, in support of the opinion of Mr. Justice Story, that since Chancellor Kent decided Hale v. James, 6 Johns. Ch. 258, the court of queen's bench, in Great Britain, has settled the controversy as to what was the common law of England, in Riddell v. Gwinnell, and the fact that there is no legal process known to the common or to the statute law by which the value of improvements made is to be ascertained, strongly strengthens the view of the common law rule as given in [Case No. 11,356]. Judge Story strongly approbates, as "high authority," the learned judgment of the supreme court of Pennsylvania, in Thompson v. Morrow, 5 Serg. & R. 290, and states that, had that case earlier fallen under his observation, he would have been spared the laborious research he had given to the question. Most carefully was the point examined and considered by Judge Tilhman in Thompson v. Morrow; tracing the common law to its source, searching through the year books from 1 Edw. to Hen. VIII., and the ancient elementary works of Littleton and his massive Commentator, and leaving no preceding American case without a full examination. All the New York cases already alluded to were revised, and the rule adjudged to be "that the widow must be endowed, according to the value of the lands, at the time her dower shall be assigned her, exclusive of the improvements made by the purchaser."

The reasoning of the judge applies to the facts in this case. I repeat his language. He says: "Dower is a right favored both by court of law and equity. A right founded on marriage, and marriage is so highly regarded as to constitute a valuable consideration for the settlement by jointure of property on the wife. Without jointure, the law gives to the wife, in case she survives her husband, one-third of his real estate seized during coverture for her life. It is inchoate at the marriage, and not consummate until the death of the husband. No act of the husband can lessen or defeat this right; neither can she be deprived of it, but by her own voluntary act,

for which the law makes many salutary provisions to prevent fraud and coercion. Her dower is in the land as found when her title is complete at the death of her husband. Where the husband has aliened during coverture, and the alienee has improved, in this country, she takes her third without estimating the improvements, and this, for two reasons: 1st, because, had the husband never aliened, the improvements might not have been made, and, 2d, because a contrary admeasurement would affect the prosperity of the country, and discourage improvements in building and agriculture." Such is the clear language of the court in this case, and adopted by Judge Story. The subsequent Pennsylvania case in 3 Pen. & W., does not conflict, but is deemed in direct affirmance of Thompson v. Morrow. With the exception of New York and Virginia, wherever the point has been raised, the same rule has been established in the other states. Ohio, Maine, Kentucky, Delaware, Mississippi and Indiana, have maintained the doctrine as deduced by Justice Story and Tilhman, so that it may be said, "that the preponderance of authority is with the rule," that the widow has her dower, according to the value of the lands, when it is assigned. 6 Ohio, 76; 2 Har. (Del.) 336; 1 Dana, 348; 3 Shepley [15 Me.] 371; 28 Me. 509; 3 How. (Miss.) 360; 5 Black, 406. The cases in New York, have already been considered in connection with the Pennsylvania and Massachusetts cases, and the case in Virginia. 4 Leigh, 509, from its being the opinion of a divided court, and mainly founded upon a statute, and the prior decisions in New York, is not of sufficient authority to shake the well considered adjudications of Powell v. Monson & Brimfield Manuf'g Co., and Thompson v. Morrow, [supra].

As this case is an ejectment for dower, and the judgment of the court is moved upon the special verdict, that judgment must not only embrace the declaration of the rule, but the process by which the rule is to be enforced. The motion calls for judgment of dower in the premises demanded, and for the appointment by the court of commissioners to admeasure the same. This appointment of commissioners is but a mode prescribed by the law of the state, of assigning the dower as declared by the judgment of the court. It is properly the process of execution. And as a question of practice, must be settled by the existing rules of the court. By the seventieth rule, the practice of this court is governed by the Revised Statutes of 1848, in all cases where no special provision is made; and these statutes direct (section 55, p. 479) that: "If an action be brought to recover the dower of any widow, which shall not have been admeasured to her, before the commencement of such action, instead of a writ of possession being issued, the court upon the record of judgment, and upon the motion of the plaintiff, shall appoint three disinterested freeholders, as commissioners to make the admeasurement of dower to plaintiff, out of the lands described in the record. And the said commissioners shall proceed in like manner and with like obligations, as commissioners appointed by a judge of probate, to set off dower and report their action to the court for confirmation, &c., suppose such confirmation, a writ of possession, issues, &c." These commissioners inspect the premises, determine their value, and set off one-third of the same to the widow. So much, then, of the special verdict, as finds the value of the land in 1816, and in 1850, is immaterial as unnecessary. The issue, for the jury, was, whether or not the plaintiff was entitled to dower, and their finding the marriage, and seizure and death of husband, and demand of dower, comprehended their entire duty. It is for the commissioners to admeasure the value of the premises. Such was the judgment in Powell v. Monson & Brimfield Manuf'g Co. [supra], the United States court, carrying into execution the process appointed by the statute of the state. In that case it was decreed, 1st. That the widow should have her dower, exclusive of the increased value of the lands, arising from the improvements made by the alienee. 2d. Reasonable damages for the detention of dower, which (in the state ——) is a proceeding indicated by statute. St. 1838, 471, and 477. 3d. That the plaintiff recover legal costs, &c., and, 4th. That commissioners be appointed to admeasure and report as soon as practicable, setting off the widow's dower by metes and bounds according to present value.

McLEAN, Circuit Justice. As I do not entirely agree to some of the views presented by my brother judge in this case, I have thought proper to state, succinctly, my opinion. This action is brought to recover dower in a tract of two hundred and seventeen acres of land near the city of Detroit. A patent from the government to Antoine Shapeto, as appears by the county records of deeds, was offered in evidence. This was objected to as not the best evidence. The court said, the original patent or a certified copy from the land office at Washington, was the best evidence, and that as the patent was not required to be recorded in the county where the land lies, a certified copy of it could not be received in evidence. But a confirmation of the title by congress, on the report of commissioners, as appears from the 1st volume of American State Papers, published under an act of congress, was received as showing title in Shapeto. A conveyance to Santabart from Shapeto, indorsed on the copy of the patent, was then offered in evidence. To this, objection was made for want of certainty as to the tract conveyed, but the court held, that although the indorsement on its face was defective in not

describing the land, yet, by reference to the description of the land in the copy on which the indorsement was made, there was the requisite certainty, and the deed was admitted in evidence. A deed from Santabart to Johnston, the husband of the plaintiff, was then given in evidence.

The facts being submitted to the jury, it found the following verdict: "That the said George Johnston was married to the plaintiff in the year 1810; that they lived on the farm in question for one or two years, about the year 1810; that said George Johnston was seized of the property in question on the 24th of September, 1816, until the 28th of October, 1816: that he then sold and conveyed the same to Stephen Mack, and that the defendant now owns the same by mesne conveyances from said Mack; that said Johnston and wife, about the year 1820, removed and settled at Green Bay, then in the territory of Michigan, but now in the state of Wisconsin, where they remained until 1850, when said Johnston died; that the plaintiff removed to this state in the fall of 1853; that the said farm at the time of alienation was worth the sum of eighteen hundred dollars, and is now worth, embracing the improvements made since said alienation, the sum of forty thousand dollars, and that said improvements, so made after alienation as aforesaid, were worth eight thousand dollars; that said dower was demanded of defendant on the 1st of May, 1851, and also the 31st of March, 1851, according to the allegations in said declaration; and under the facts aforesaid, so found, the jury submits to the court, what judgment should be rendered on the verdict." Should the plaintiff be entitled to dower, it becomes important to inquire to what extent she may claim. Does her right extend to the improvements made on the land by the purchaser, or is she limited to the value of the premises at the time her husband aliened; or is she entitled to the increased value of the land, excluding all improvements, at the time dower was demanded?

The decisions of the courts in the different states have not been uniform on this subject. In some instances the statutes adopted may have influenced the decisions referred to, but in others the differences seem to arise from views of the common law, and the notions of policy which were entertained. In New York, in the case of Dorchester v. Coventry, 11 Johns. 510, the court laid down the rule without qualification, that the dower of the widow was limited to the value of the land at the time of the alienation, though it had risen greatly in value afterwards, exclusive of buildings erected thereon by the alienee. The same doctrine was sanctioned afterwards in Shaw v. White, 13 Johns. 179; Walker v. Schuyler, 10 Wend. 480. In Tod v. Baylor, 4 Leigh, 498, the court of appeals of Virginia held, that in equity as well as at law, the widow was to take for dower the lands according to the value at the time of alienation, and not at the time of the assignment of dower; and that she was not entitled to any advantage from enhancement of the value by improvements made by the alienee, or from general rise in value, or from any cause whatever. Where the husband died, seized of the land, and the claim of the dower is made from the heirs, it would seem to be reasonable and just that the widow should have the proceeds or possession of one-third of the premises as improved. But where the estate by the deed of the husband passed into the hands of a purchaser, the dower cannot, in justice, extend to improvements made by him; but the claim should embrace the enhanced value of the land, exclusive of improvements made by the occupant. This increase of value arises from the general progress and improvement of the country, and applies to land unimproved. This is conformably to the principles of the common law, and is the rule adopted by the courts of most of the states. It appears to be the settled rule in England, Massachusetts, Pennsylvania, Ohio, and many other states. In the queen's bench, Riddell v. Gwinnell, 41 E. C. L. 728; Powell v. Monson & Brimfield Manuf'g Co. [Case No. 11,356]; Thompson v. Morrow, 5 Serg. & R. 289. This is in accordance with the views of Chancellor Kent and Professor Greenleaf; 4 Kent. Comm. 68, and notes 1 Greenl. Cruise, 193. The decisions in Ohio, Indiana, and other states of the same import might be cited; but it is not deemed necessary. It is made a question in the case, whether the claim of dower is governed by the revised acts of 1838 or 1846. If the rule of decision be found in the former act, which gives dower to the widow as at common law, in the lands of her husband, and places upon the same footing persons who live out of the state as those who live within it, there must be an amount of dower under the rule above stated, and this is claimed by the plaintiff. The 21st section of the act of 1846 declares, "That a woman being an alien, shall not, on that account, be barred of her dower, and any woman residing out of the state shall be entitled to dower of the lands of her dec'sd. husband, lying in this state, of which her husband died seized." The 24th and 25th sections of the same act define, to some extent, the dower rights; but if the 21st section governs the case, there can be no dower, as the husband lived in the state of Wisconsin at the time of his death, and was not seized of the premises in controversy. From the finding of the jury, it appears that George Johnston, the husband of the plaintiff, was seized of the premises from the 24th of September, 1816, to the 28th of October following, making one month and four days; that Johnston sold the land to Mack, and about the year 1820, he removed to Green Bay, with his family, then in the territory of Michigan, but which was afterwards included in the state of Wisconsin, where the husband died in 1850.

Two grounds are urged by the plaintiff's counsel, as showing the inapplicability of the act of 1846: 1st. It is said that law has not been adopted by any act of congress, or by any rule of this court. 2d. That the act of 1846, from its language, was not intended to operate retrospectively, and that if such were the intentions of the legislature, this court would not give effect to it. The first objection is answered by saying, that the 21st section of the act of 1846 is not a rule of practice, but of property, and as such is obligatory on this court, without adoption. The 34th section of the judiciary act of 1789 provides, "That the laws of the several states, except where the constitution, treaties or statutes of the United States shall otherwise provide, shall be regarded as rules of decisions in trials at common law in the courts of the United States, in cases where they apply." The second objection urged, if the right arises under the 21st section, is not without difficulty. Dower existed under the common law, and to establish the right, it was necessary to show seizen of the husband, his marriage with the claimant, and his death. But almost all the states of the Union have regulated dower by statute. It is not easy to define the right of dower before the death of the husband. In his Commentaries (volume 4, p. 50), Chancellor Kent says: "Dower is a title inchoate, and not consummate till the death of the husband; but it is an interest which attaches on the land as soon as there is the concurrence of marriage or seizen." Marriage without seizen would not create this right, nor would seizen without marriage create it. Both these must concur, to give the incipient right to dower. But still it is not only an inchoate right, but contingent. It depends upon the death of the husband. If he survive his wife, she has no right transmissible to her heirs, nor during the life of her husband can she give it any form of property, to her advantage; nor even after the death of the husband, can she convey her dower, until it shall be assigned to her. It is true the statute gives the wife an interest in the land of her husband, on the contingency that she shall survive him, and of which no act of the husband can divest her. But still it is not, in a proper sense, a vested right. So long as the husband shall live, it is only a right in legal contemplation, depending upon the good conduct of the wife and the death of the husband. Until the death of the husband, the right, if it may be called a right, is shadowy and fictitious, and, like all rights which are contingent, may never become vested. The marriage, seizen, and the death of the husband, must concur to create a right in the wife, which can be reached by any legal principle, for her protection. And the question is argued, whether this right be of a character to place it beyond the reach of legitimate action. If Johnston and wife had remained residents of Michigan until the death of the husband, the wife, it is admitted, would have had a right of dower in the land; but thirty years before the death of the husband, they removed to a remote part of the territory, and which is beyond the state of Michigan, and for many years has been within the territory or state of Wisconsin. The 21st section of the act of 1846 so far modified the right of dower as to limit it to lands of those who live out of the state of Michigan, and who own lands within it, so as to require seizen in the husband at the time of his death. No objection is made to this law in regard to subsequent rights of dower, but it is earnestly contended it cannot operate in any case where marriage and seizen concurred before the law was passed.

There is nothing in the constitution of the United States which prohibits a state from passing a retrospective law. In Saterlee v. Matheson, 2 Pet. [27 U. S.] 380, it was held, that no part of the constitution of the United States applies to a state law, which divested rights vested by law. That was a case in which, on an action of ejectment, the supreme court of Pennsylvania held that the relation of landlord and tenant could not exist between persons holding under a connectical title in that state. The legislature of Pennsylvania declared by an act, that such relation should be held to exist, and the supreme court of Pennsylvania reversed their former decision, and held that the relation of landlord and tenant did exist under the law. This case was taken to the supreme court of the Union, which affirmed the judgment of the state court. Similar doctrines have often been advanced in the supreme court. The mode of relinquishing dower is provided for by statute, and varies in the different states. A statute of Pennsylvania declares valid all deeds made prior to September 1st, 1836, though the certificate of acknowledgment be defective. A similar statute was passed in South Carolina (Purd. Dig. 205). both of which have been held valid by their respective courts. Retrospective laws have been passed in many of the states, and in all cases, it is believed, effect has generally been given to them where they did not impair the obligation of contracts, and in some cases, as in the instance above cited, these laws have modified vested rights. I am aware of the impolicy and, indeed, danger of such legislation, and I have been opposed to it, except where the acts were more clearly just and related to the remedy. Where an objection to such laws is made, it is necessary to consider what effect must be given to them, as on that their validity may depend. But the decision of this point is unnecessary, as the repealing clause in the laws of 1846 provides that the acts repealed by it "shall not affect any act done, or right accrued or established, or any proceeding, suit or prosecution had or commenced in any civil case previous to the time when such repeal shall take effect; but every such act, right and proceeding, shall remain as valid and effectual as if the provision so re-

pealed had remained in force." The concurrence of marriage and seizen, having taken place long prior to the law of 1846, those acts are within the reasoning, and of course, the rights growing out of them are not affected by the repealing act. The dower in this case will be in one-third of the land, exclusive of the improvements, whether it be assigned in the land or by an estimate of its annual rents. Judgment for dower as estimated, and the appointment of commissioners, &c.

JOHNSTON HARVESTER CO. (KETCHUM HARVESTING MACHINE CO. v.). See Case No. 7,741.

## Case No. 7,427.

The JOHN STUART.

[4 Blatchf. 444.] [1]

Circuit Court, S. D. New York. Aug. 17, 1860.[2]

COLLISION—KEEPING TO COURSE—WIND.

1. A vessel close-hauled on her port tack held not liable, in a case of collision, for keeping her course, as against a vessel having the wind free.

2. The collision having occurred on a night dark and hazy and drizzling with rain, and the vessels not having discovered each other till the collision was inevitable, or they were so near as to prevent the adoption, with deliberation, of any proper measure to avoid it, and the close-hauled vessel having, at or near the moment of collision, luffed into the wind, while the vessel having the wind free, on discovering the other vessel, starboarded her helm: *Held*, that the former was not in fault.

[Cited in The Florence P. Hall, 14 Fed. 415; The Rebecca Shepherd, 32 Fed. 927.]

3. A vessel which has the wind free, or is sailing before or with the wind, must get out of the way of a vessel that is close-hauled; and it is the duty of the close-hauled vessel to keep her course.

[See The Argus, Case No. 521.]

[Appeal from the district court of the United States for the Southern district of New York.]

This was a libel in rem, filed in the district court, against the ship John Stuart, to recover damages for a collision with the bark Green Point. That court dismissed the libel [Case No. 3,952a], and the claimants appealed to this court.

Edwin W. Stoughton and John J. Latting, for libellants.

Washington Q. Morton and Francis R. Coudert, for claimants.

NELSON, Circuit Justice. The collision in this case occurred in the Pacific Ocean, between the Chincha Islands and Callao, in the night of the 2d of August, 1853. The bark Green Point was laden with some 800 or 900 tons of guano, and was on her way to the port of Callao. The ship John Stuart was in ballast, had left Callao, and was going to the islands for a cargo. The wind was south south east. The bark was heading about north west by west, some of the witnesses say north west by north, and the ship about south west, on her port tack, close-hauled to the wind. It is agreed, that the bark had the wind free, or nearly so. The collision occurred between nine and ten o'clock at night. The night was dark, drizzly and hazy. The vessels were not discovered by each other till within a half or a quarter of a mile. There is some dispute among the witnesses on that point. The bark, on discovering the ship, starboarded her helm. The ship kept her course till at or near the moment of the collision, when she put her helm hard down, and luffed into the wind.

I am inclined to think, upon the whole of the evidence, that the better opinion is, that the two vessels, which, from the courses given, were crossing each other's track at nearly right-angles, in a night dark and hazy upon the water, with drizzling rain, did not discover each other until the collision was inevitable, or, at least, until they were so near as to prevent the adoption, with deliberation, of the proper measure, if any could have been adopted, to avoid it. I am also of the opinion, that, under the facts and circumstances, as shown in the proofs, the ship was not in fault for not taking measures to avoid the disaster, or for not adopting the right manoeuvre at the last moment, conceding that she did not. For the rule is settled, that a vessel which has the wind free, or is sailing before or with the wind, must get out of the way of a vessel that is close-hauled; and it is the duty of the vessel close-hauled to keep her course. St. John v. Paine, 10 How. [51 U. S.] 557, 581; The Catharine v. Dickinson, 17 How. [58 U. S.] 170, 176; The Rose, 2 W. Rob. Adm. 1; The Chester, 3 Hagg. Adm. 316, 318. The complaint here is, that the ship kept her course till it was too late to adopt the proper movement to avoid the disaster; in other words, that she adhered to the nautical rule till it was hopeless to attempt to remedy the consequences of the delay. I am not satisfied that the ship could have adopted any course consistent with the rule of navigation, after the vessels discovered each other, that would have prevented the collision, or that there was any culpable negligence on the part of either vessel, taking into consideration their courses and the thick, hazy weather, in not discovering the other sooner. I agree with the court below in dismissing the libel, and affirm the decree.

JOHN STUART, The (DODGE v.). See Case No. 3,952a.

## Case No. 7,428.

The JOHN TAYLOR.

[Affirming Case No. 7,429. Nowhere reported; opinion not now accessible.]

[1] [Reported by Hon. Samuel Blatchford, District Judge, and here reprinted by permission.]

[2] [Affirming Case No. 3,952a.]

## Case No. 7,429.

The JOHN TAYLOR.

[6 Ben. 227.] [1]

District Court, S. D. New York. Nov., 1872.[2]

COLLISION IN NORTH RIVER—STEAMBOATS CROSSING.

1. A ferry-boat, bound from New York to Jersey City, left her slip, on an ebb tide, under a port helm in order to get a good offing, so as not to be carried so far down as to be below a proper point from which to reach her slip on the opposite side of the Hudson river. Out in the river, and below her, was a propeller, coming up the river and having the ferry-boat on her starboard hand. When the ferry-boat cleared the line of the piers, her pilot, perceiving the propeller, blew one whistle. Receiving no reply, he blew another single whistle, to which the propeller responded with a single whistle. The propeller immediately slowed, stopped and backed her engine and put her wheel hard a-port, while the ferry-boat kept on without slowing, till her pilot saw that the propeller would hit the ferry-boat, when he starboarded his helm, changing the course of the ferry-boat, but not contributing to the collision which ensued, the propeller striking the ferry-boat on the port side nearly amidships: *Held*, that as the courses of the vessels were crossing, and the propeller had the ferry-boat on her starboard hand, it was the duty of the latter to keep her course, and the duty of the propeller to avoid her.

[Cited in Greenman v. The Narragansett, 4 Fed. 252; The Emma Kate Ross, 46 Fed. 874.]

2. The propeller had no right to suppose that, as the ferry slip on the Jersey side was lower down the river than the one on the New York side, therefore the ferry-boat would drop down the river, and go under the stern of the propeller, because, the course taken by the ferry-boat was the usual one on such a tide.

3. The ferry-boat was not in fault in keeping on without slowing, especially under the signals given.

4. The propeller was solely in fault for the collision.

In admiralty.

W. R. Beebe and J. C. Jackson, for libellants.

C. Van Santvoord, for claimants.

BLATCHFORD, District Judge. This libel is filed by the owners of the ferry-boat John S. Darcy, against the propeller John Taylor, to recover for the damages sustained by the libellants in consequence of a collision which took place between the two vessels on the 31st of October, 1867, in the Hudson river, just below the ferry slip at the foot of Desbrosses street, New York, out of which the ferry-boat had gone, on one of her regular trips to the foot of Montgomery street, Jersey City. The propeller was bound up the river. The ferry-boat blew a long blast of her steam whistle before leaving her slip, and, as the tide was strong ebb, and the wind was northwest, increasing the set down of the ebb tide, and a large steamboat was backing around the upper end of the pier next below the ferry slip, the ferry-boat went out under a port helm, to get a good offing and not be carried down by the tide, either into dangerous proximity to the steamboat referred to, or so far down as to be below a proper point from which to reach her opposite slip in such a tide. No sooner had the ferry-boat cleared the line of the piers, than her pilot, perceiving the propeller, blew one blast of his steam whistle, to indicate that he would hold his course to the right, the propeller being then on his port hand and down the river. Receiving no response to this, he blew another single blast. To this the propeller responded by a single blast. The propeller immediately slowed, stopped, and backed her engine, and put her helm hard a-port. The ferry-boat kept on, without any change of course, and without slowing, stopping or backing. When the pilot of the ferry-boat saw that the propeller would hit him, he starboarded, and produced some change in the course of the ferry-boat before the blow, but the starboarding was in the jaws of peril and had no effect to produce the collision. The ferry-boat did not slow, stop or back till after the collision. The propeller made considerable change in her course, by her porting, towards the ferry-boat, before the blow. The stem of the propeller struck the port side of the ferry-boat, a few feet abaft her side wheel on that side, and crushed in her guard, and opened a hole in her hull so that she soon afterwards sank. The propeller had the ferry-boat on her own starboard side. The collision took place about twenty minutes past five o'clock in the afternoon. There was daylight enough for each boat to see the other.

On these facts there can be no doubt that the propeller is solely responsible for this collision. It was her duty to keep out of the way of the ferry-boat, and it was the duty of the ferry-boat to keep her course. It is insisted that the courses of the two boats were not crossing, for the reason that, if the ferry-boat had dropped down with the tide, and gone between the propeller and the New York shore, the courses of the two vessels would not have crossed each other, and that, as the ferry slip on the Jersey side was lower down the river than the slip on the New York side, the propeller had a right to suppose that the ferry-boat would take that course. The answer is, that it is shown that the course the ferry-boat took was the usual course taken on such a tide, and that she maintained it from the moment she left her slip until the collision was unavoidable. As such a course crossed the course of the propeller, if it involved risk of collision, as is shown by the result, the propeller, in discharge of her duty to keep out of the way of the ferry-boat, ought to have stopped and reversed long before she did. There would then have been no collision. It is also insisted that

[1] [Reported by Robert D. Benedict, Esq., and here reprinted by permission.]

[2] [Affirmed by circuit court; case unreported.]

the ferry-boat should have slowed, stopped and backed before she did. But she would have been in fault if she had done so, especially after the single blast in response from the propeller, which indicated that the propeller expected the ferry-boat to keep going on in the course she was on.

It was conceded by the counsel for the propeller, in argument, that, if the propeller had paid no attention to the signal from the ferry-boat, and had kept on her course without slackening her speed or porting her helm, there would have been no collision. The propeller was free to choose the means of keeping out of the way of the ferry-boat, and was not bound to port her helm, because of the single blast from the ferry-boat.

There must be a decree for the libellants, with costs, with a reference to a commissioner to ascertain the damages sustained by the libellant.

This decision was affirmed by the circuit court, on appeal, in January, 1874 [case not reported].

JOHN TAYLOR, The (CARTWELL v.). See Case No. 2,482.

## Case No. 7,430.

The JOHN T. MOORE.

[3 Woods, 61; 7 Ins. Law J. 207; 4 Am. Law T. Rep. (N. S.) 406; 23 Int. Rev. Rec. 295; 9 Chi. Leg. News, 417; 2 Cin. Law Bul. 217; 4 Law & Eq. Rep. 505.] [1]

Circuit Court, D. Louisiana. April Term, 1877.

SHIPPING—REGISTRATION OF CLAIMS FOR REPAIRS IN LOUISIANA—MORTGAGES ON VESSELS—WHAT ARE MARITIME LIENS.

1. Under the local law of Louisiana, claims for materials and supplies furnished a vessel in her home port are a lien on the vessel, if recorded in the proper parish. Without such registry they have no privilege or priority over subsequent mortgages recorded by authority of the act of congress, or claims of later date recorded by authority of the state law.

[Cited in The J. E. Rumbell,, 148 U. S. 18, 13 Sup. Ct. 502.]

2. Claims for materials and supplies furnished in the home port, even if duly recorded, are postponed to maritime liens.

[Cited in The General Burnside, 3 Fed. 230; The Josephine Spangler, 9 Fed. 775; The Madrid, 40 Fed. 678; The Lillie Laurie, 50 Fed. 221.]

3. The registry of a mortgage on a vessel, to be effectual, must be made in the custom-house of her home port.

[Cited in The Pulaski, 33 Fed. 384; The Augustine Kobbe, 37 Fed. 701.]

4. Where the mortgagee of a mortgage on a vessel, which was recorded in the proper custom-house, had notice of a prior unrecorded mortgage, his mortgage was postponed to the unrecorded mortgage.

5. Where A had an unrecorded mortgage on a vessel, and B had a mortgage on the same vessel of later date, duly recorded under the act of congress, but had actual notice of the mortgage of A, and C had a lien by virtue of the registry of his claim under the state law, subsequent in date to the mortgages of both A and B, but C had no notice of the mortgage of A, and the claim of either A or B was sufficient to absorb all the proceeds of the sale of the vessel: *Held*, that said proceeds should be first applied to the mortgage of A.

[Criticised in The De Smet, 10 Fed. 485, 486.]

6. The fact that a mortgage on a vessel has not been acknowledged before a notary public, or other officer authorized to take acknowledgment of deeds, precludes its registry, but does not render it void as against the mortgagor, nor postpone it to the recorded mortgage of a subsequent mortgagee who had notice of such unrecorded mortgage.

7. The wages of a watchman employed on a vessel while lying-up in port are not a maritime lien.

[Cited in The Champion, Case No. 2,584; The Erinagh, 7 Fed. 234.]

8. There is no maritime lien for the premium due on a policy of insurance taken on a vessel by her owners.

[Cited in The Illinois, Case No. 7,005; The Jennie B. Gilkey, 19 Fed. 131; Re Insurance Co. of Pennsylvania, 22 Fed. 115; Insurance Co. of Pennsylvania v. Proceeds of Sale of The Waubaushene, 24 Fed. 560; The Paola R., 32 Fed. 175; The Hope, 49 Fed. 279.]

The judge of the United States district court, in which this cause was pending, having been of counsel for one of the parties, the cause was transferred to this court by virtue of the provisions of section 601, Rev. St. U. S. The steamboat John T. Moore, whose home port was New Orleans, was libeled in the United States district court for the district of Louisiana, by A. M. Simonds and others, was seized and sold, and the proceeds of sale, amounting to $24,000, paid into the registry of the court. The case was referred to J. Ward Gurley, as master, to report a tableau of distribution of the proceeds of the sale of the boat. He made a report by which he allowed as mariners' wages the sum of $3,150.97, and as costs $2,190.15, leaving a balance of $18,658.88. The master then reported that there was due to various persons who had furnished supplies, materials, and repairs to the steamer in her home port, New Orleans, the sum of $32,251.45, which was more than sufficient to absorb the residue remaining in the registry of the court after the payment of the mariners' wages and costs. He reported these claims as a first lien next after the costs and mariners' wages upon the fund remaining in the registry. Swift's Iron & Steel Works, of Cincinnati, Ohio, and Dennis Long, of Louisville, Kentucky, claimed the said residue of the proceeds of the sale, by virtue of a mortgage executed to them jointly upon the steamer, dated January 27, 1871, and recorded in the custom house at Cincinnati on February 8, 1871, whereby the sum of $21,902.98 was secured to Swift's Iron & Steel Works, and the sum of $9,206.52 was secured to Dennis Long. These debts were contracted for work done and materials sup-

[1] [Reported by Hon. William B. Woods, Circuit Judge, and here reprinted by permission. 4 Law & Eq. Rep. 505, contains only a partial report.]

plied in the construction of the boat. The commercial firm of John T. Moore & Co., of New Orleans, claimed to be first paid out of the fund remaining in the registry of the court next after the payment of seamen's wages and costs, by virtue of a mortgage upon the boat, executed to secure to them the sum of $14,669.22, dated January 3, 1872, and recorded in the United States custom house at New Orleans on January 4, 1872. The commercial firm of W. G. Coyle & Co., of New Orleans, claimed to be paid out of said proceeds so remaining in the registry, by virtue of a claim for $4,032.73 for supplies furnished said boat in her home port, and recorded in the office of the recorder of mortgages for the parish of Orleans on January 9, 1874. Exceptions were taken to the report of the master by the several claimants of the fund, and upon these exceptions the cause was heard.

M. M. Cohen, for the mariners whose wages had been rejected by the master.

B. Egan, for the furnishers of materials, supplies, and repairs.

R. De Gray, for Swift's Iron & Steel Works and Dennis Long.

C. B. Singleton, for John T. Moore & Co.

James McConnell, for W. G. Coyle & Co.

WOODS, Circuit Judge. It is conceded that the $24,000, the proceeds of the sale of the John T. Moore, is first subject to the payment of the costs and seamen's wages, amounting as reported by the master to the sum of $5,341.12. The residue, $18,658.88, is insufficient to pay all the claims preferred against it. It therefore becomes necessary to decide what claims are entitled to precedence. The first contest is between the claims for supplies, materials, and repairs furnished the boat in her home port, and the mortgages (above mentioned) to Swift's Iron & Steel Works and Dennis Long, and to John T. Moore & Co., and the recorded claims of W. G. Coyle & Co. The claims for materials and supplies furnished, and repairs done in the home port, cannot take precedence over the mortgage of John T. Moore & Co., and the recorded claims of Wm. G. Coyle & Co., for the supplies, etc., were furnished in the home port of the boat, and the claims therefor were not recorded under the state law so as to acquire a lien as against third persons. By article 3273, Rev. Civ. Code, debts due to creditors for supplies, labor, repairing, victuals, armament, and equipment are privileged on the price of ships and other vessels. But by article 3274 no privilege shall have effect against third persons unless recorded in the manner required by law in the parish where the property to be affected is situated.

The claims under consideration were never recorded, and, therefore, can have no effect as privileged claims over those creditors who have liens either by the maritime law, or who have liens by the fact that their claims have been recorded under either the laws of the United States or the state of Louisiana: The Lottawanna, 21 Wall. [88 U. S.] 558. In fact, it seems to be held in the case of The Lottawanna that such claims have no lien at all unless recorded. Even if recorded they must be postponed to the maritime lien. The mortgage claim of John T. Moore & Co., which was duly recorded according to law in the office of the collector of customs at New Orleans, will, with interest, be sufficient to absorb the entire fund remaining in the registry for distribution. As John T. Moore & Co. are entitled to priority over the claims for materials, supplies and labor furnished in the home port, and not recorded as required by the state law, these claims, represented by Simonds, original libelant, and certain intervenors, may be considered as out of the case. As the mortgage to John T. Moore & Co. was recorded long before the claim of W. G. Coyle & Co. was filed for record in the mortgage office of the parish of Orleans, the latter claim may also be considered as out of the case.

The next contention is between the mortgage claims of Swift's Iron & Steel Works and Dennis Long on the one hand, and the mortgage of John T. Moore & Co. on the other. As already seen, the mortgage to Swift's Iron & Steel Works and to Long was recorded in the office of the United States collector of customs at Cincinnati, on February 28, 1871. The mortgage to John T. Moore & Co. was recorded in the office of the United States collector of customs in New Orleans, the home port of the vessel, on January 4, 1872. So far as priority of record is concerned the mortgage to Swift's Iron & Steel Works and Long has the advantage. But in reply to this it is claimed by John T. Moore & Co. that as their mortgage was recorded in the custom house at the home port of the boat, and the other was not, their mortgage is the better one. This position is sustained by the act of congress, which declares that "no bill of sale, mortgage, hypothecation, or conveyance of any vessel or any part of any vessel of the United States shall be valid against any person other than the grantor or mortgagor, his heirs and devisees, and persons having actual notice thereof, unless such bill of sale, mortgage, hypothecation, or conveyance is recorded in the office of the collector of customs where such vessel is registered or enrolled:" Rev. St. § 4192. And in the case of White's Bank v. Smith, 7 Wall. [74 U. S.] 646, the supreme court in construing this law declared that "the home port of the vessel is the port in the office of whose collector the bill of sale, mortgage, etc., should be recorded." So that it seems that the recording of the mortgage to Swift's Iron & Steel Works and Long, in the office of the collector of customs at Cincinnati, which was not the home port of the boat, was ineffectual as a record, and, so far as the record of these contending mortgages is con-

cerned, that of John T. Moore & Co., which was recorded in the proper office, has the advantage. But Swift's Iron & Steel Works and Dennis Long reply to this that conceding that the mortgage to John T. Moore & Co. has the advantage in registry, yet their mortgage is valid even if it had never been recorded as against the mortgagor and against persons having actual notice thereof, and that John T. Moore & Co. had actual notice of the mortgage to Swift's Iron & Steel Works and to Long before the execution or registry of the mortgage to them. An examination of the record upon the question of notice satisfies me that the decided preponderance of proof is in favor of the proposition that John T. Moore & Co. had notice of the mortgage to Swift's Iron & Steel Works and Long, before they took their mortgage from the owners of the John T. Moore. Under the terms of statute, and by the decisions of the courts, actual notice is equivalent to notice by registry: Patterson v. De La Ronde, 8 Wall. [75 U. S.] 292; Mills v. Smith, Id. 27; Cordova v. Hood, 17 Wall. [84 U. S.] 1; King v. Young Men's Ass'n [Case No. 7,811]; Planters' Bank of Georgia v. Allard, 8 Mart. (N. S.) 136; Bell v. Haw, Id. 243; Rachal v. Normand, 6 Rob. [La.] 88; Swan v. Moore, 14 La. Ann. 833; Smith v. Lambeth, 15 La. Ann. 566. As, therefore, John T. Moore & Co. had actual notice, before the execution of the mortgage to them, of the existence of the mortgage to Swift's Iron & Steel Works and to Long, their mortgage must be postponed to the latter one.

But counsel for John T. Moore & Co. claim that the mortgage to Swift's Iron & Steel Works and Long was not acknowledged before a notary public, or other officer authorized to take acknowledgment of deeds, and that the law (Rev. St. § 4193), having declared that "no bill of sale, mortgage, hypothecation, etc., of any boat shall be recorded" unless so acknowledged, the said mortgage is ineffectual to postpone the claim of John T. Moore & Co., even though they had notice of the same. I do not think this position can be defended. The law prescribes no formalities for the execution of a mortgage on a vessel so as to bind the mortgagor, or to postpone those having actual notice. This mortgage was for a debt contracted by her owners in the building of the vessel. The debt secured by it is confessedly just, the mortgage to secure it was executed by the owners of the boat in the presence of witnesses, and the contesting creditors, John T. Moore & Co., had notice of it. In my judgment it is binding on the mortgagors and those having notice of it without any registry. The acknowledgment before a notary is only necessary to secure registry. If the mortgagee is content to stand upon his mortgage without registry he can do so, and his mortgage is good against the mortgagor and all having actual notice. Until it is declared by law that a mortgage not acknowledged before a notary or other officer shall be void, a mortgage without such acknowledgment must be held good against the mortgagor and those having notice. By all the authorities, so far as the binding effect of the mortgage is concerned, subsequent incumbrancers with notice are placed on the same footing as the mortgagors themselves. In my judgment, therefore, the mortgage to Swift's Iron & Steel Works and Dennis Long is entitled to precedence over the mortgage to John T. Moore & Co.

This disposes of the main controversy in the case. The point decided is this: John T. Moore & Co. have a mortgage on the vessel sufficient in amount to absorb the fund remaining in the registry of the court. This mortgage has precedence over the unrecorded claims for materials and supplies furnished in the home port, and over the recorded claims for materials and supplies of Wm. G. Coyle & Co. If there were no other claims in the case, John T. Moore & Co. would be entitled to the entire fund remaining in the registry of the court. But Swift's Iron & Steel Works and Dennis Long have a mortgage ineffectually recorded, and, therefore, in effect, not recorded at all, which is older than the mortgage of John T. Moore & Co., and of which John T. Moore & Co. had notice before the date of their own mortgage. This fact of notice gives the mortgage to Swift's Iron & Steel Works and Long precedence over the mortgage of John T. Moore & Co., and entitles it to priority of payment over all the claims, even though, as between the mortgage to Swift's Iron & Steel Works and Long, and claims inferior to the mortgage of John T. Moore & Co., the latter would be entitled to priority if the mortgage of John T. Moore & Co. were out of the case: Brazee v. Lancaster Bank, 14 Ohio, 318; Holliday v. Franklin Bank of Columbus, 16 Ohio, 533.

Exception has been taken to the disallowance, by the master, of the claims of certain watchmen. The wages of these watchmen were earned, as appears from the report of the master, while the vessel was lying up. These wages do not, therefore, constitute an admiralty lien, and the master was right in rejecting their claims as liens upon the vessel: Phillips v. The Thomas Scattergood [Case No. 11,106].

Exception is also taken to the report of the master because he rejected claims of certain insurance companies for premiums on certain policies of insurance taken on the John T. Moore by her owners. I know of no law which gives a lien upon a vessel for the premium for an insurance taken on her by her owners for their own benefit. It is a contract with the owner for his own benefit. It does not aid the vessel. In case of loss the maritime liens upon the vessel are displaced and do not follow the insurance money. The money goes to the owner for his own benefit, and not to the lienholder who may insure his own interest: Thayer v. Goodale, 4 La. 221;

Steele v. Franklin Fire Ins. Co., 17 Pa. St. 290; Turner v. Stetts, 28 Ala. 420; White v. Brown, 2 Cush. 412; Stilwell v. Staples, 19 N. Y. 401; Slark v. Broom, 7 La. Ann. 337. The master was right, therefore, in deciding that the claims of the insurance company for premiums were no lien upon the vessel.

Let a decree be entered in accordance with the views above expressed.

## Case No. 7,431.

### The JOHN TUCKER.

[5 Ben. 366.] [1]

District Court, S. D. New York. Nov., 1871.

COLLISION AT PIERS—ICE—INEVITABLE ACCIDENT—HARBOR REGULATION.

1. The ship J. T. was brought in between two piers in the East river, in order to avoid peril from ice, which was then running. Those in charge of a steamboat, lying in the slip, warned her that there was not room for her to come in without doing damage, and, after she came in, warned her that there was danger of her being carried away from the pier when the tide turned, and doing injury. When the tide turned, a cake of ice struck the stern of the ship, which projected beyond the pier at which she lay, and carried away her fastenings, and her jib-boom, which projected between the pilot-house and the smoke-stack of the steamboat, carried away the pilot-house: *Held*, that the case was not one of inevitable accident.

[Distinguished in The Transfer No. 2, 56 Fed. 315.]

2. As the attention of those in charge of the ship had been called to the position of the ship and the probable danger, it was her duty to have guarded against it.

[Cited in The Anerly, 58 Fed. 795.]

3. The fact that the steamboat was lying head out, while there was a rule of the harbor masters that vessels should lie head in, furnished no defence to the ship.

In admiralty.

Benedict & Benedict, for libellants.
Abbott Bros., for claimants.

BLATCHFORD, District Judge. The libel in this case alleges, that, on the night of the 11th and 12th of February, 1871, the steamboat Sylvan Glen, owned by the libellants, was lying at the lower side of pier 24, East river, that being her regular pier of landing on the East river, properly and securely made fast for the night, with her stern as far in the slip as she could get, with her fan-tail close against the vessel lying at her stern, and with her bow heading out of the slip, though a long distance inside of the end of pier 24; that, while she was lying in that position, the ship John Tucker was towed to the slip for the purpose of coming in between piers 23 and 24, to be made fast in the slip; that, when her purpose was observed by those in charge of the Sylvan Glen, she was hailed by them, and informed that there was not room for her in the slip, and that, if she came there and made fast, there was danger of her doing damage to the vessels already moored therein; that, notwithstanding such remonstrances, the John Tucker was brought into the slip, with her bow heading in, and made fast outside of two vessels lying at the upper side of pier 23, she being the third vessel from the pier; that, when the John Tucker had been made fast, her stern projected out into the river some thirty feet beyond the end of pier 24; that, at the time she came into the slip, a large quantity of ice was moving with the tide up and down the river, so that it was extremely dangerous for a vessel to lie with her stern projecting beyond the end of the pier, and her master was informed that, when the ebb tide made, the ship would be caught by the ice, and would do the steamboat serious injury; that, at about half past four o'clock on the morning of the 12th of February, and at the strength of the ebb tide, a large quantity of the floating ice in the river caught the stern of the ship, which was projecting out into the river beyond the end of pier 24, and slewed her stern around, and broke her fastenings, and brought her bow around violently against the steamboat, so that the flying jib-boom of the ship swept over the steamboat, carrying away her pilot-house, and doing other damage to her; that such damage resulted from the want of care and negligence of those in charge of the ship, in coming into a slip already crowded with vessels, and where there was no room for her, against the remonstrances of those on board of the steamboat, and when she could have gone to some other pier in the port, where there were many that she could moor at in perfect safety, and in lying in the slip with her stern projecting out into the river beyond the end of pier 24, exposed to the full sweep of the tide and the ice, and in not being made fast securely and properly; and that such damage was not caused by any fault or negligence of those on board of, and in charge of, the steamboat, she being entirely helpless in the slip, and unable to move.

The answer denies that the steamboat was lying with her stern as far in the slip as she could get, and that her fan-tail was close against the vessel lying at her stern, and that it was dangerous for a vessel to lie in the position in which the ship was made fast. It alleges, that, when the ship was made fast, her stern did not project over ten feet beyond the end of pier 24; that, about half-past three o'clock on the morning of the 12th of February, a large cake of floating ice in the river struck the ship on her quarter, and caused her to haul the bitts or break the bitts out of the chock of the ship next to her to which she was fastened, and swing suddenly around, so that her flying jib-boom came in contact with the steamboat, carrying away her pilot-

[1] [Reported by Robert D. Benedict, Esq., and here reprinted by permission.]

house; that the ship was engaged for upwards of two hours, on the night of the 11th, in searching for a proper berth, although the large quantity of floating ice in the river rendered it difficult and dangerous so to do; that the rapidly increasing quantity of ice in the river made it impossible longer to continue such search; that no other berth was found where the ship could be moored for the night; that the steamboat could easily have been hauled much further into the slip, so as to enable the ship to haul further in, and wholly away from the force of the tide and the ice floating in the river at the time, and so that the steamboat would be out of reach of, or danger from, the ship; that the persons on board of, and in charge of, the ship, requested those on board of, and in charge of, the steamboat, to have the steamboat hauled further into the slip, and offered to assist them in so doing; that those in charge of the steamboat refused so to do, or to allow those in charge of the ship to assist them in so doing; and that the collision was caused by the fault and negligence of those on board of, and in charge of, the steamboat, in lying in the slip so as to block up the same, and prevent the ship from wholly coming into the slip, and in not hauling out of the reach of the ship when requested so to do, by those on board of, and in charge of, the ship.

On the issues raised by the libel and the answer, the case is, on the proofs, wholly with the libellants. The ship came into the slip and was moored while the tide was running flood. Everything was safe while the tide continued to run flood. But pier 24 did not project into the river as far as pier 23, and the stern of the ship, which did not project substantially beyond the end of pier 23, and was thus protected by it from the running of the flood tide, did project so far beyond the end of pier 24, that, when the tide changed and ran ebb, the floating ice was borne by such ebb tide against the starboard quarter of the ship with such force as to throw her stern towards pier 23, and break away her fastenings, and throw her bow towards the steamboat, and do the mischief that was done. This probable condition of things was called to the attention of those on board of the ship, while they were mooring her, by those on board of the steamboat, but, notwithstanding that, she was moored so as to have her jib-boom project some feet over the deck of the steamboat, and run between the smoke-stack of the steamboat and her pilot-house.

The only defence set up in the answer, namely, that the steamboat could have moved further into the slip and refused to do so, fails. The weight of the evidence is, that the steamboat had backed as far into the slip as she could, not only with reference to her proximity to other vessels in her rear, but with reference to the packed condition of the ice in her rear, and to safety to her rudder. She had made, before the ship came there, a vigorous effort, by the aid of steam, to back into the slip as far as possible, and had backed in to the extent of her power.

On the trial, the case was sought by the claimants to be put on the ground of inevitable accident, arising out of the perils of navigation—a view not suggested in the answer. But the circumstances do not bring it within the category of a case of inevitable accident. Union Steamship Co. v. New York & V. Steamship Co., 24 How. [65 U. S.] 307; The Morning Light, 2 Wall. [69 U. S.] 550; The Louisiana, 3 Wall. [70 U. S.] 164; Vantine v. The Lake [Case No. 16,878]; The Moxey [Id. 9,894]; The Brooklyn [Id. 1,939]; The Baltic [Id. 823]. The movement of the ice, with the ebb tide, which was the cause of the damage, was not a thing that arose suddenly and unexpectedly, but was to be anticipated and guarded against by the ship, even if her attention had not been specially called to it by the steamboat. It was not a vis major, in the sense of the rule. The ship was bound to secure herself so that her fastenings would not be broken or torn away, when the tide should change.

As to the point, not raised in the answer, but urged on the trial, that the steamboat was in fault in lying with her head towards the outer end of the pier, and in not lying with her head towards the inner end of the pier, in violation of rule 7 of the rules and regulations of the board of harbor masters of the port of New York, of May 3d, 1870, which requires all vessels lying at the wharves or piers, or in the basins or slips, to lie, unless otherwise directed, with their heads up the docks, I do not think it can avail the claimant. The view urged is, that, if the steamboat had been lying with her stern towards the outer end of the pier, the jib-boom of the ship would have projected over the hurricane deck of the steamboat, into an unobstructed space, and would not have hit the pilot-house. In addition to the considerations growing out of the ruling in the case of The Russia [Case No. 12,168], that it is shown by the evidence that it was customary for the steamboat to lie with her head towards the outer end of the pier that she was in her proper berth, that her lying as she did was not forbidden by any state law or city ordinance, that it is not shown that those in charge of her had been notified of the regulation in question, or directed by the harbor masters not to lie as she did, that it is not shown that it was unsafe or improper, as respected the navigation or movements of other vessels for her to lie as she did at the time, and that, under the terms of rule 7, it is proper to presume that she had been allowed, and thus, in substance, directed, by the harbor masters, to lie with her head down the dock—in addition to these considerations, I think that

the ship, by mooring herself as she did, with the steamboat lying as she did, made herself responsible for all damage which should come to the steamboat in her then actual predicament, arising from any fault on the part of the ship, and cannot impute it as a fault to the steamboat, that the steamboat was, in fact, in such predicament.

The ship was in fault, and, such fault not being excused, and no fault being shown on the part of the steamboat, there must be a decree for the libellants, with costs, with a reference to a commissioner to ascertain the damages sustained by the libellants.

## Case No. 7,432.

The JOHN WALLS, JR.

[1 Spr. 178; [1] 12 Law Rep. 24.]

District Court, D. Massachusetts. March, 1849.

MARITIME LIENS—REPAIRS—COSTS.

1. Necessary repairs made in Massachusetts, upon a vessel belonging to another state, may create a lien, both by the general maritime law, and by the Massachusetts statute of 1848 (chapter 290).

2. Where a term of credit is given, the lien cannot be enforced, until after the expiration of the credit.

3. Where the libel was sustained for only a small part of the amount demanded, costs were refused.

4. When the marshal holds a vessel, by virtue of two warrants to arrest, in different suits, the custody fees are to be charged equally upon the two suits.

[Cited in The Circassian, Case No. 2,725.]

[This was a libel in the admiralty, to enforce the lien of material men. The libellants [Nathaniel C. Jackman and others] had furnished a quantity of copper nails, marks, dove-tails, and other copper fastenings, to be used in repairing the vessel libelled at Salem. When the proceedings were commenced, it was thought that she was a domestic ship, but it appeared from the answer that she was owned in the state of Maine. The vessel, when the warrant was issued, was in Boston, but twenty days had not elapsed since her departure from Salem. The libel contained an allegation, that by a statute of this commonwealth (St. 1848, c. 290), the libellants' claim constituted a lien upon the vessel, and contained no allegation as to her citizenship, whether foreign or domestic. The demand upon which the libellants founded their claim for a lien, was set forth in a long account, in which the "bark John Walls, Jr., and owners" were charged in detail for copper nails and other materials. They were credited by a certain amount of old copper, &c. The respondent [John Walls, Jr.] did not dispute the items and amount claimed by the libellants, but contended that a six months' credit was given, and as that time had not expired, the libel ought to be dismissed. The libellants sustained their charges by their own books, and the evidence of the ship-carpenter who repaired the bark, and contended that it was a sale for cash. The claimant produced an agent, who testified that a conversation took place between said agent and one of the libellants, in which the latter promised to furnish nails on the same terms which he had furnished spikes for the vessel once before, namely, twenty-two cents, six months; it appeared by the books of the libellants, and the testimony of one of them, that such a sale of spikes on six months, was made some time previously. The agent also testified that one of the libellants told him that that was "as cheap as they could be got in Boston." This was contradicted by a workman in the libellants' shop, who testified that he was present and must have heard the whole conversation. He testified that the libellants said they should charge "twenty-two cents per pound, as cheap as they could be obtained in Boston." He said he heard no more, and that he was in a position where he thinks he must have heard every thing. A Boston merchant testified that his six months' price was twenty-two cents. The counsel for the libellants also submitted the question whether this action to enforce the lien might not be sustained, before the term of credit had expired. The language of the Massachusetts statute is "Whenever a debt is contracted," &c.][2]

S. H. Phillips, for libellants.

Isaac Story, Jr., for respondent.

SPRAGUE, District Judge. As this vessel was owned in another state, a lien for necessary repairs is given, both by the general maritime law, and by the Massachusetts statute of 1848 (chapter 290). The most difficult question here is one of fact. Was there a credit of six months? [There is a direct conflict of evidence, and under such circumstances the principle of law requires that the affirmative evidence of the agent must be credited rather than the negative evidence of the workman. By the testimony of the former, it appears that there was a contract to furnish "nails" at twenty-two cents per pound, and on a credit of six months. Consequently, as to the "nails" this proceeding was premature. But as to the other articles (marks, dove-tails, &c.) it was not premature.] [2] I think a credit of six months was given for the greater portion of supplies, and for such portion no libel can be sustained until after the expiration of the credit. The Nestor [Case No. 10,126]; The Chusan [Id. 2,717]. But for the residue, so far as it remains unpaid, a lien may now be enforced.

Certain payments have been made, which

[1] [Reported by F. E. Parker, Esq., assisted by Charles Francis Adams, Jr., Esq., and here reprinted by permission.]

[2] [From 12 Law Rep. 24.]

are to be appropriated to the extinguishment of the libellants' claim, which first became due. This will leave only $14.76, for which the libellants can now have a decree. As they did not limit their demand to this small amount, they cannot have costs.

A question of the mode of taxing costs subsequently arose. It appeared that this vessel was in the custody of the marshal, upon a previous libel, when this suit was instituted, and that it had been the practice of the marshal, where he held property by virtue of two warrants of arrest, to charge the whole custody fees in the first suit; but THE COURT directed that they should be apportioned equally, charging one-half to each suit.

## Case No. 7,433.

The JOHN WESLEY.

[9 Adm. Rec. 160.]

District Court, S. D. Florida. Jan. 10, 1866.

SALVAGE.

[For saving a cargo of cotton, the court awarded 15 per cent. on the dry cotton, appraised at 42 cents per pound, and amounting to $121,826; and 33⅓ per cent. on the damaged cotton, appraised at $75 a bale and less, and amounting to $39,967.50; and on the portion dived for 45 per cent. on 56 bales and 16 half bales, appraised at $4,460, and 50 per cent. on 30 crates, appraised at $750.]

[Cited in Baker v. The Slobodna, 35 Fed. 543.]

[This was a libel in rem by Joseph Lowe and others against the cargo and materials of the bark John Wesley, for salvage.]

Homer G. Plantz, for libellants.

W. C. Maloney, for respondent.

Before BOYNTON, District Judge.

The property was saved from a wrecked bark laden with cotton. It having been appraised at the sum of $161,793.75, except the saved portion of the materials, which were sold for the sum of $2,774.04, it was ordered, adjudged, and decreed that after deducting the costs, charges, and expenses, and $100 to be paid to petitioner Adams for carrying information, the libellants and petitioners recover for their services as follows: On a portion of the cargo appraised at $121,826.25, being that portion appraised at 42 cents per pound, 15 per cent.; on the remainder of the cargo, appraised at $39,967.50, all of which is reported as damaged, and appraised at $75 per bale and lower rates, and on the proceeds of the materials of the vessel, 33⅓ per cent. And, further, that on payment of the said costs, expenses, charges, and salvage, the saved property be restored to the claimant. It was further decreed, January 15, 1866, that on the appraised value of 56 bales, 16 half bales, and 30 crates of cotton, dived up and saved since the rendering of the former decree, there be allowed the salvors, after deducting costs, charges, and expenses on the bales and half bales, appraised at $4,460, 45 per cent., and on the 30 crates, appraised at $750, 50 per cent. It was further decreed, January 29, 1866, that on four bales, one bag, and one lot of loose cotton (damaged) dived up and saved since rendering of the decree in the cause, and which has been sold as appears by the marshal's account sales for the sum of $808, there be allowed the salvors, after deducting the costs, charges, and expenses, 50 per cent. of the said proceeds of sale.

JOHN W. GANDY, The (RED BANK CO. v.). See Case No. 11,626.

## Case No. 7,434.

The JOHN WURTS.

[Olc. 462;[1] 16 Hunt, Mer. Mag. 383.]

District Court, S. D. New York. Feb., 1847.

SALVAGE—AMOUNT AND KIND OF SERVICE—COMPENSATION.

1. An indispensable ingredient of a salvage claim is that the service has contributed immediately to the rescue or preservation of property in peril at sea.

[Cited in The Tolomeo, 7 Fed. 500.]

[Cited in Eads v. Brazelton, 22 Ark. 499.]

2. How far a person must be directly employed aiding the recovery of a wreck to constitute him a salvor? quere.

3. But the title of salvor arises from actual possession of property in peril, with power to save it, and the actual employment of means to that end.

4. The rate of compensation is governed by no determinate rules of law. The principle sought to be enforced is to make a fair division of the salved property between its owners and the salvors.

5. In case of absolute derelict, the habit of maritime courts favors an equal partition of what is saved, one moiety to the salvor, the other to the owner, after deducting the costs of suit.

This was a cause of salvage. The action was brought in the name and favor of James Curtis, master of schooner Elizabeth, for himself, the owners and crew thereof, and also for the respective owners, masters and crews of the schooners David Cromwell and the Vineyard, and the sloop Hickory, and all others entitled. The libellant Curtis alleges that he was master and part owner of the schooner Elizabeth, of 65 tons burden, having a crew of three men and a boy; that she was employed in the coasting trade to and from New-York; that the schooner David Cromwell was a vessel of 30 tons burden, with a crew of two men, and the schooner Vineyard was of 45 tons burden, with a crew of two men, all three registered at Amboy, New-Jersey; that the sloop Hickory, a small fishing vessel, with a crew composed of her master and one boy, on or about the 9th of November last, discovered a large

[1] [Reported by Edward R. Olcott, Esq.]

schooner, the John Wurts, floating on the lower or Sandy Hook Bay, bottom up, dismantled and filled with water and deserted; that the sloop not being able to tow the wreck, came to where the above-named schooners were lying, and it was agreed that they and the crew of the sloop should proceed to the wreck and tow her into port. He further alleges that various articles necessary to this purpose were immediately procured at considerable expense. He further alleges that the captains and crews of the vessels applied themselves from the afternoon of Monday until Wednesday morning upon said wreck, and for some days more, when finding it impossible, on account of the bad weather, to get said wreck into port, they employed the steamboat Telegraph to assist them; that after working all one day they succeeded in bringing the wreck to the shore at Staten Island. He further alleges that the vessel was wrecked about the 10th of September in a storm, when all hands on board perished; that she had from that time until the 9th of November, been drifting about at the mercy of the winds, and would soon have been broken and gone to pieces. He further alleges that it was with the greatest difficulty and exposure that the wreck was finally saved by libellant. Thomas Bell, Joshua and Charles Jones, owners of the schooner Excelsior, also intervened and alleged that they were entitled to salvage in said wreck, alleging that having been informed of the wreck of the John Wurts by the wreckmaster, they proceeded about the 10th of November, and found her sunk in about ten fathom water, bottom upwards; that after attempting to raise her, they were obliged to leave on account of the very bad weather; that afterwards the steamer Jacob Bell, in the employment of the agent of the owners, came and assisted in towing her; that they towed her about ten miles towards Sandy Hook; that afterwards they were informed by the owners that the owners would employ one of their own vessels to save her. They further allege that the owners being unable to save her, agreed with libellants that they would allow the one-half of the proceeds of the said John Wurts and cargo, if they would renew their efforts and bring her into port. They further allege that, in pursuance of this arrangement, they prepared themselves with a heavy chain and a large wheel cast expressly for the occasion, and employed Captain Bennett, who was experienced and skilful in raising vessels, to go with them to the wreck; that they visited the wreck, but were prevented by the weather from continuing their work. That another trip was made by the Excelsior and the schooner Union and her crew, employed by libellants, and again without success, owing to adverse winds, which increasing to a gale, drove them away, and in which the bows of the John Wurts, striking violently against the bottom, she was opened, and her cargo chiefly or wholly discharged, and she was blown off to sea. They further allege that for three or four weeks they were in active pursuit of her, but could not find her, until they saw her in New-York Bay, in the possession of the libellant, to whom they gave notice of their claim for salvage. Jesse Richards, intervening as owner, admits in his answer the wreck of the John Wurts, as alleged, and that she was found by libellants about the 9th of November, but he is informed that she was found within the bar at Sandy Hook, and there was but little difficulty and no danger in towing her to the shore at Staten Island. He admits that she was found dismantled, bottom up and totally deserted. In answer to the claim of Joshua T. Jones, owner of the schooner Excelsior, he denies that he is entitled to salvage; that his agents entered into the following agreement with the said Jones for his services: "It is hereby agreed between Joshua T. Jones, and Warrington & Richards, that the said Jones will take the schooner John Wurts, and what cargo is on board of her, at a salvage of fifty per cent., (and to deliver her in the vicinity of Jersey City,) for saving the same, and all that has been saved by the schooner Excelsior at the same rate; and Warrington & Richards shall not be at any charge for what Captain Bell has done with the schooner Excelsior previous to this contract for the schooner nor for any materials. Warrington & Richards, Joshua T. Jones." The claimant alleges, that though frequently urged to go on with their work, and bring in the schooner, that they delayed it for other employment, for several weeks, being engaged in raising other vessels. He denies that they are entitled as co-salvors to compensation as claimed.

The original libel in this case was filed by James Curtis, for himself and others, to recover salvage compensation for saving the schooner John Wurts, and contains appropriate allegations to that end, and is substantially supported by the evidence. After the action was instituted, Joshua T. Jones and others, owners of the schooner Excelsior, by leave of the court, intervened in the suit and claimed a share of such salvage as should be awarded by the court for saving the schooner. The material facts in proof are these: The John Wurts, owned by the claimant, in New-Jersey, was wrecked in a gale on the 8th or 9th of September, a few miles below Sandy Hook, on a voyage from the North river and New-York to her home port, and all on board perished. The claimant was also owner of most of the cargo, and shortly after her loss employed the schooner Excelsior and other vessels, with a steamboat, to endeavor to save the wreck and cargo. They succeeded in raising her and towed her several miles, when she escaped from them and again sunk in ten fathoms water, her bows in the sand and her stern just out of water. All the expenses of

these proceedings were paid by the claimant, except those of the schooner Excelsior. On the 24th of September an agreement in writing was entered into between the claimant and Joshua T. Jones, managing owner of the Excelsior, that he would undertake the salvage of the vessel and cargo, and deliver them near Jersey City, for fifty per cent. on the amount saved, and that allowance should also be in full compensation of services already rendered by his vessel and crew under the employment of the claimant. About the 6th or 7th of October the Excelsior proceeded to the wreck, with apparatus prepared to raise it, and passed a large chain under its stern, but she had not force enough to move it; the chain was secured around the wreck and the Excelsior and her crew went back to the city for further assistance. They had been engaged about twelve hours in this service. On the 13th of October the Excelsior and another vessel started to go to the wreck again, but were driven off by a heavy gale of wind. The schooner is supposed to have been moved by the same gale, as a day or two after she was seen drifting to the eastward, past Fire Island, and was subsequently reported off the east end of Long Island. After a heavy blow from the eastward she was again seen drifting to the westward, past Fire Island, towards the New-Jersey shore. When information was received of this last movement of the wreck, the Excelsior was sent to Fire Island to search for it, but could discover nothing of it. The Excelsior was then engaged by her owners in another wrecking adventure near Fire Island. The Excelsior was after that further dispatched to New-York Bay in search of the schooner, but without success. The agent of the claimant, after the agreement of September 24th, repeatedly urged Jones to pursue with promptitude the undertaking to raise the wreck. Jones, at the time of the agreement, declared he should be able to complete the salvage in two days, and ten days or more after this agreement he excused himself when pressed on the subject—the weather being particularly fine and favorable—by saying he was engaged in other business, or had arrangements to make before going to the wreck. On the 9th of November, the libellants, Curtis and others, fell in with the schooner, grounded on the Great Kill shoals in Sandy Hook Bay, bottom upwards, filled with water, her bows bilged, her rigging and masts all gone, the principal part of her cargo out, and her bulwarks and stanchions mostly carried away. Immediate and active exertions were applied to saving her; and by aid of several small vessels, with chains and other appropriate apparatus, and a steamboat to tow her, she was got off the shore and moved towards Amboy, but grounded several times before she could be got to Staten Island. A good deal of difficulty and some danger was incurred in keeping her afloat. The weather was thick, cold and severe, and nearly a fortnight was occupied constantly by all the libellants and their vessels before the salvage was accomplished—at times the crews being kept at work all night. They were compelled to float her bottom upwards and stern foremost, at great disadvantage and risk, and to the hazard of her turning over on the small vessels supporting her and crushing them. The ordinary incidents of breaking chains in securing and saving her, and injuries to the vessels employed, were experienced. The wreck sold for about $1,300, and the fragments of her cargo remaining with her for about $50.

J. C. Hart, for libellants, Curtis and others.

Burr & Benedict, for Jones and his associates.

J. M. Mason, for claimants.

BETTS, District Judge. Upon the facts in this case the claim of Jones and owners of the Excelsior to salvage cannot be allowed. It lacks the indispensable ingredient of a salvage service: that of having contributed immediately to the preservation or rescue of the property in peril at sea. The circumstances in proof do not demand of the court a decision upon the point, how far a person must be directly employed aiding the recovery of a wreck to constitute him a salvor. Nor am I disposed to lay down the rule that he must make it certain the property was saved by his assistance; but I am not aware of any principle which invests him with the rights and privileges of a salvor, until it is rendered reasonably probable upon the evidence that his labor or skill have contributed towards protecting property exposed to instant peril at sea from ultimate loss or further damage. An impression seems to have obtained, that one who finds derelict property under water or afloat, acquires a right to it by discovery, which can be maintained by a kind of continued claim, without keeping it in possession or applying constant exertions for its preservation and rescue. There is no foundation for such notion.

The right of a salvor results from the fact that he has held in actual possession or has kept near what was lost or abandoned by the owner or placed in dangerous exposure to destruction, with the means at command to preserve and save it, and that he is actually employing those means to that end. The finder thus becomes the legal possessor, and acquires a privilege against the property for his salvage services which takes precedence of all other title. Lewis v. The Elizabeth & Jane [Case No. 8,321]; The Bee [Id. 1,219]; Wilkie v. Two Hundred and Five Boxes of Sugar [Id. 17,662]. The law will protect him against all interference by others, even the true owners, until he is adequately rewarded or opportunity is allowed to bring the property to a place of safety, and have his compensation secured him by the judg-

ment of the proper tribunals. The fact that property is found at sea or on the coast in peril, without the presence of any one to protect it, gives the finder a right to take it in his possession; and the law connects with such right the obligation to use the means he has at control, and with all reasonable promptitude, to save it for the owner. He can therefore be no otherwise clothed with the character of salvor than whilst he is in the occupancy of the property, and employing the necessary means for saving it. Notorious possession, with the avowal of the object of such possession, are cardinal requisites to the creation or maintenance of the privileges of a salvor; where they do not exist, any other person may take the property with all the advantages of the first finder.

This is the clear policy of the law. It rewards with liberal generosity a meritorious salvor, but counts first in the order of his meritorious acts a prompt use of sufficient means, both in getting at property needing relief and abiding with it until its salvage is completed. The value of his services is enhanced and their compensation augmented proportionally to the danger and loss to the salvor accompanying such exertions and their benefit to the owner. No one of these cardinal qualities appears in support of this claim. The most that is proved in favor of the owners of the Excelsior is, that being in port after having left the wreck, they directed apparatus to be prepared here to aid in raising it. A fortnight or three weeks were consumed awaiting such preparations, the wreck in the mean time being left deserted, with the exception that the Excelsior and crew were once alongside of it for about twelve hours. Under those circumstances, any other persons going to the wreck and effecting its saving would have been entitled to the rights of sole salvors. The claim becomes infinitely weaker, when set up after the wreck had been forced from the place where it grounded, and was driven by the winds and waves for nearly a month to and fro out at sea, and along the coasts. I accordingly pronounce against the claim of the owners of the Excelsior, and only refrain imposing costs on them because of the loss and expense incurred by them in making their preparations and efforts, amounting to $120 or $130, independent of the time employed by the Excelsior and her crew in their fruitless efforts. If they have any right to compensation for services rendered prior to the written agreement, it cannot be enforced in this action. They must look to the owner personally on his contract with them. The right of the other libellants to a reasonable reward is not denied by the owner; but he seeks by his defense to prove that one or two hundred dollars would be a full compensation for the time occupied and assistance given by the libellants on the occasion.

It is unnecessary to repeat the principles entering into the determination of a salvage reward; they have been too often discussed and stated in the decisions of maritime courts to leave any important illustration of the doctrines unexplained. There can be no doubt of the rightful authority of the court to regulate the award of compensation very much at discretion; but all judicial tribunals find fixed rules of adjudication, when at all applicable to the subject, more useful and satisfactory in operation than mere discretionary allowances, however discreetly they may be allotted. Tyson v. Prior [Case No. 14,319]. Accordingly, maritime courts, when not governed by positive law in this respect, have, by a kind of common concurrence, favored an allowance, if in cases of derelict, of from one-third to three-quarters of the salved property to the salvors, varying the amount between these points by regard to the special nature of the services, the peril and toil incurred and value of property saved, and hazard to property employed in making the salvage. The Jubilee, 3 Hagg. Adm. 43, note; Abb. Shipp. (Story's Ed. 1829) p. 398. The growing preference, however, to determinate rules of compensation in salvage cases, has so far settled upon a moiety as the proper rate of division in cases of absolute derelict, that it may almost be termed the habit of courts to give that proportion when no imperative consideration induces them to deviate from it. The Henry Ewbank [Case No. 6,376]; Bond v. The Cora [Id. 1,620]. The extraordinary merit of the services may augment the share awarded, or the large value of the property saved diminish the allowance. No sagacity could hope to select a fixed amount, which would in every instance be an appropriate compensation. A moiety, however, approximates sufficiently near to accomplish most of the important benefits which salvage rewards were designed to subserve, comprehending the general interest of maritime commerce and a reasonable partition of the imperiled property between the owner and the party instrumental in recovering and restoring it. Courts accordingly are inclined to countenance that method of fixing the reward, unless special circumstances call for a discriminating valuation. The Waterloo [Id. 17,257]; The Galaxy [Id. 5,186]. I think none such exists in this case, nor on a careful estimate of the services rendered, with a view to the small value of the property saved, and the probability that little or nothing could be realized from the adventure and the actual benefit to the owner, do I regard six or seven hundred dollars a disproportionate compensation to be specifically awarded the libellants for what was performed by them.

I therefore decree in their favor the costs of suit, first to be paid out of the proceeds in court, and then, that they receive the moiety of the residue for the salvage services rendered in this case. Unless the mode of distribution between the libellants is adjust-

ed amongst themselves, it must be referred to a commissioner to ascertain and report the proportion payable to each, and to each vessel employed in rendering the salvage service.

## Case No. 7,435.

JOICE v. ALEXANDER.

[1 Cranch, C. C. 528.] [1]

Circuit Court, District of Columbia. Dec. Term, 1808.

TRIAL—JURORS—CHALLENGE—EVIDENCE—REPUTATION.

1. The two jurors first sworn in a cause, are the proper triers of a challenge for favor.

2. The court will not permit counsel to argue to the triers upon a challenge for favor.

3. The challenged juror cannot be examined as a witness to the triers.

[Cited in Matilda v. Mason, Case No. 9,280.]

4. Witnesses may be separated, and examined each out of hearing of the others.

5. The reputation which can be given in evidence, must be a reputation among free white persons who are dead, or whose death may be presumed.

6. A deposition of a deceased person taken in another cause, may be read in this, as hearsay.

Petition for freedom [by Clem Joice, a negro]. Four jurors having been sworn, Matthew Wright was called as a juror, and challenged for favor; whereupon the two jurors first sworn, were sworn as triers, and having heard testimony as to Wright's declarations that "they had better not summon him on negro causes, for he would free them all," were directed by the court to withdraw to consider of their verdict, and having done so, attended by an officer of the court, they returned and declared that Matthew Wright did not stand indifferent between the parties.

THE COURT (DUCKETT, Circuit Judge, absent) refused to suffer counsel to argue the case before the triers; but at the request of the defendant's counsel, instructed the triers that the question for them to decide was, whether Matthew Wright stood as a fair, indifferent, unbiased, unprejudiced juror between the parties. On the trial before the triers, the counsel for the petitioner offered to swear Matthew Wright himself, to state what he did say, but THE COURT refused, as the question was whether he was indifferent, and if partial as a juror, he might be supposed not a proper witness. (Quaere de hoc?) See Trials per Pais, 192, 200.

A record of a case from the general court of Maryland was produced, in which it appeared that only the two first sworn jurors were sworn as triers, although five had been sworn.

CRANCH, Chief Judge, thought that all the jurors sworn, should be triers of the challenge. Trials per Pais, 199.

F. S. Key, for defendant [Robert Alexander], suggested that the witnesses for the petitioner were of bad character, and believed they would not testify fairly if permitted to hear each other's testimony, and moved the court to direct that all the plaintiff's witnesses but one should be excluded from the court room, which THE COURT granted; CRANCH, Chief Judge, doubting very much as to the propriety of such a practice as a general rule, without some further evidence of combination or corruption.

Mr. Key stated, that in the case of Rutherford v. Moore [Case No. 12,174], for slander, at Washington, in June, 1807, the court had made a like order. But although the court had notes of that case, they had no note of such a decision.

Mr. Caldwell, for petitioner, asked the witness what was the general reputation of the neighborhood as to the condition of Ann Joice, who was alleged to have been brought into this county by Lord Baltimore, viz., whether she was a free white woman.

Mr. Key objected to the question, and THE COURT refused to permit it to be asked, and said that evidence of general reputation of a fact, can only be given when the reputation was among free white persons who are dead, or presumed from the length of time to be dead.

F. S. Key, offered a record of the Prince George's court, of the petition for freedom by the mother of the petitioner against N. Young, under whom the defendant claims property, which record stated that the petitioner "no further prosecuted her petition."

THE COURT refused to admit it in evidence, it being wholly immaterial to this issue, whether such a petition were dismissed or not, although it be proved that the petitioner in that case was the mother of the present petitioner, and that the present defendant claims under N. Young.

Mr. Key having proved that Thomas Lane was dead, offered to read his deposition, contained in a record from the general court of Maryland, in a suit between Mahony and Ashton, as the declaration of a person now dead.

Mr. Hiort, Mr. Caldwell, and Mr. Morsell objected. If this cannot be used as a deposition, it is no evidence of his declaration. This is not in the handwriting of Lane; he has not signed it. The deposition is not a matter of record; this is only a copy made by the clerk from a paper filed in his office. It is not his duty to certify such papers. His certificate is not better evidence than that of any other person; even if the original deposition could be evidence, a copy is not. The magistrate, before whom the deposition was taken, might be examined as to the declarations of Mr. Lane. The present petitioner has no opportunity of cross-examination. M'Nally, 390. The petitioner

[1] [Reported by Hon. William Cranch, Chief Judge.]

might, perhaps, show that he was interested. The deposition appears on the face of it to have been read by consent.

Mr. Key, in reply. The original deposition cannot be had out of the court. It is made part of the record, by a bill of exceptions. The record is offered to the court (not to the jury) to satisfy the court that it is the deposition of Lane. The clerk is bound to record all depositions filed in a cause. They make a part of the record. The entry in the record is, "that the said John Ashton, by his attorney, comes here into court and files the following deposition."

(No bill of exceptions made the deposition a part of the record. The question, therefore, was whether a certified copy of a deposition filed in the office of the clerk of the general court of Maryland, be evidence of the declaration of Lane. The certificate of the clerk was authenticated by the chief justice of the court.)

THE COURT (DUCKETT, Circuit Judge, absent, and CRANCH, Chief Judge, doubting) admitted the copy of the deposition to be read in evidence to the jury, as the declaration of a deceased person.

Verdict for defendant.

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JOICE (FOSTER v.). See Case No. 4,974.

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## Case No. 7,436.

In re JOLIET IRON & STEEL CO.

[10 N. B. R. (1874) 60.] [1]

District Court, N. D. Illinois.

INVOLUNTARY BANKRUPTCY — AMENDMENT—NUMBER OF CREDITORS.

In all petitions pending in involuntary bankruptcy commenced since December 1, 1873, where no adjudication has been had, the petitioner must file a sworn amendment to his petition, alleging on information and belief, that the petitioners represent one-fourth in number and one-third in amount of the creditors of the bankrupt.

[Cited in Re Comstock, Case No. 3,077; Re Mann, Id. 9,033.]

In bankruptcy.

BLODGETT, District Judge. I must confess that the question raised is not entirely free from doubt in my own mind. But there are some provisions of the law that are exceedingly clear. The 39th section of the original bankrupt act of March 2d, 1867 [14 Stat. 536], is substantially and practically repealed, and a new section enacted in place of it. The new section enumerates the acts which shall constitute acts of bankruptcy, and for which a party may be forced into involuntary or compulsory bankruptcy, and proceeds as follows: "And subject to the conditions hereinafter prescribed shall be adjudged a bankrupt on the petition of one or more of his creditors, who shall constitute one-fourth thereof, at least, in number, and the aggregate of whose debts provable under this act amounts to at least one-third of the debts so provable." Now this must be done on the petition of that number of creditors. It is manifest, then, that from the time this becomes a law no person can be adjudged a bankrupt unless the requisite number of creditors join in the petition, because it must be upon their petition; and it is very clear to me, that the practice as indicated by the whole tenor of this law, in respect to cases hereafter commenced, is that the petition must affirmatively show that the requisite number of creditors in number and amount have united in the petition. I do not think, as has been argued, that this allegation as to the number of creditors must necessarily be so positive that the party could be prosecuted for perjury upon it. It may be stated (and I shall so hold, until some higher court lays down the contrary), upon the information and belief of petitioning creditors, that they do constitute one-fourth in number and one-third in amount of the aggregate creditors, because we all know that creditors are very liable to be imposed upon by debtors as to the extent of their (the debtors') indebtedness. Cases have been developed, and, indeed, occur almost daily in practice, in which debtors have represented to their creditors that they owed a very small amount of debts, but in which, when the facts came to be developed, their entire indebtedness largely exceeded the amount stated. Creditors, of course, in preparing petitions in the first instance, speak according to the light they possess at that time. I think, therefore, it will be a sufficient compliance with the provisions of the law that they state on their information and belief that they do constitute one-fourth in number and one-third in amount of the creditors of the debtor named. Then the law provides that if the debtor wishes to traverse this allegation he can do so by a statement made in writing, that the requisite number of creditors have not joined in the petition, whereupon the court shall require the debtor forthwith to file a schedule of his creditors with the court, which, of course, must be, so far as he is concerned, conclusive; and if the creditors succeed, within the time limited by statute, in obtaining the consent of the requisite number of the creditors mentioned in the schedule filed by the debtor himself, the proceedings can go on; otherwise the proceedings must lapse. So that I see no difficulty in administering the law under the amendment, in respect to cases commenced hereafter.

The only question that has given me trouble has been how to apply the law to cases already pending which had been commenced since 1st December last. Taking all the points together, it appears to me that it has become necessary, since the passing of the amendatory act, that the creditors who wish

[1] [Reprinted by permission.]

to prosecute this class of cases should apply to the court for leave to amend their petitions and join the requisite number of creditors in the prosecution of the cases. Otherwise we must hold as nugatory and of no application some part of the language of this section. After providing, in the way I have already read, that the person guilty of any of the several acts of bankruptcy enumerated, may be declared a bankrupt on the petition of the requisite number of creditors, the law then provides that, "in all cases commenced since the 1st day of December, 1873, and prior to the passage of this act, as well as those commenced hereafter, the court shall, if such allegation as to the number or amount of petitioning creditors be denied by the debtor, by a statement in writing to that effect, require him to file in court forthwith a full list of his creditors, with their places of residence and the sums due them respectively, and shall ascertain, upon reasonable notice to the creditors, whether one-fourth in number and one-third in amount thereof, as aforesaid, have petitioned that the debtor be adjudged a bankrupt." This clause applies as well to cases to be commenced as to cases commenced since 1st December, 1873; and, as was remarked in the discussion of this case, it is contrary to all our experience, to the rules of our proceedings, and to the logic of the process on which this class of discussions is carried on, that a party should be called upon to deny a statement which has not been made against him. The language of the law is: "If such allegation as to the number or amount of petitioning creditors be denied by the debtor." There must be an allegation somewhere, then. The creditor, before he can require the debtor to file a schedule of his debts, has alleged, in substance, that one-fourth of the creditors in number and one-third in amount have joined in the petition, or do unite in the petition, and in the request to have the debtor adjudicated a bankrupt. There must be some allegation of that kind before he can be called upon to deny it. And I can see no special hardship in this. There is no difficulty to a creditor who has already filed a petition against the debtor, and who wishes to continue the prosecution of it, obtaining the consent of the requisite number of creditors to a continuance of those proceedings. It seems to me that the fact on which the court has the right to proceed is that the requisite number of creditors have acceded to the continuance of proceedings. The court, indeed, loses jurisdiction over the case unless it is made to appear affirmatively by the petitioning creditors that the requisite number of creditors request and demand the adjudication of the debtor as a bankrupt. The allegation (as I stated at the outset) that the requisite number of creditors have joined in the petition, makes a prima facie case, makes a case on which the court can grant a rule to show cause, and the debtor is allowed the privilege of coming forward and showing that the requisite number of creditors have not joined in the petition. But it also imposes on the debtor the obligation of disclosing the number of his creditors, their places of residence, the amounts of their debts, so that their assent can be obtained within a reasonable time. I see no special hardship in this, on creditors who have already commenced a case, more than on creditors who contemplate commencing one hereafter.

Further, I derive some support in this view of the case from the clause of the act which reads: "And if it shall appear that such number and amount have not so petitioned, the court shall grant reasonable time, not exceeding, in cases heretofore commenced, twenty days, and in cases hereafter commenced, ten days, within which other creditors may join in such petition." Here is a difference of ten days given in favor of creditors who have already initiated proceedings, in the time granted within which to obtain the consent of the requisite number of creditors to the continuance of the proceedings. It seems to me that this clause was placed there on purpose to enable a creditor who has already instituted proceedings to take the initial step to amend his petition, and seek the co-operation of such number of creditors as was necessary to give the court jurisdiction. It cannot be supposed from the whole language of the statute, taken together, that congress intended to legislate this class of cases out of court entirely. The court cannot put that construction on the law. The only question is, did congress intend that where a petition had been filed since 1st December, 1873, by a single creditor, representing perhaps not over two hundred and fifty dollars, he should be allowed to proceed and prosecute that case to a conclusion, unless the debtor himself should come in and object and file a statement of the names of his creditors, and amounts of their respective debts, together with their residences, so that the creditor could obtain their assent? Taken with the clauses I have read, I do not think that can be construed to be the intention of the act; but it seems to me that the debtor is entitled, first, to an allegation placed upon the record that the requisite number of creditors do desire an adjudication. He may then deny that allegation and show that the requisite number of creditors do not desire his adjudication in bankruptcy. And when he has made that statement, the petitioning creditor has the right to take twenty days in which to obtain the assent of the requisite number. The reason for making a distinction between the time allowed in cases already petitioned, and in cases hereafter brought is manifestly this: Where creditors bring a case after the law was passed they are supposed to act in the light of what has already transpired, and have some information upon the extent of

the indebtedness of the debtor. They are supposed to have investigated, so far as opportunities would enable them, the financial condition of their debtor, and ascertained approximately the facts in the case. With respect to cases commenced before the amendment went into force, they are supposed not to have made such investigation. Therefore, extra time is given them before they will be put out of court, or required to make their final showing as to the number of creditors who do assent, upon the return of the debtor. Now, the creditor, under the practice suggested, in cases which are pending, could come into court and ask leave to amend his petition in the respect I have indicated. On the request being granted and the amendment made, the debtor will have the privilege, as in cases hereinafter brought, of denying that the requisite number of creditors have assented. Then he will be required to file his schedule. The argument of inconvenience is one which the court cannot consider. The bankrupt law is a stringent provision for taking a man's business from his own control, and placing it in the hands of the courts, or his creditors, for the purpose of closing his affairs. If creditors wish to do this they must do it in the terms of the bankrupt law. The only question is, from whom shall the objection first come, or by whom shall the allegation be first made, that the requisite number of creditors have not joined in the petition for adjudication? Taking the whole scope of the act, it seems to me that in all petitions where adjudication has already been passed, the allegation must come from the petitioning creditors, and it must be made to appear affirmatively that the requisite number do join in the petition. Now, take section 13 [18 Stat. 182], which is an amendment of section 40 of the original act. It reads as follows: "And if, on the return day of the order to show cause as aforesaid, the court shall be satisfied that the requirement of section 39 of said act as to the number and amount of petitioning creditors has been complied with, or if, within the time provided for in section 39 of this act, creditors sufficient in number and amount shall sign such petition so as to make a total of one-fourth in number of the creditors, and one-third the amount of provable debts against the bankrupt, as provided in said section, the court shall so adjudge, which judgment shall be final; otherwise it shall dismiss the proceedings, and in cases hereafter commenced, with costs."

Now, it becomes a matter of inquiry for the court to ascertain, and adjudge upon, whether the requisite number of creditors have joined; and the reason of that is very obvious. By other provisions in this same amendment to the law, a bankrupt who is forced into bankruptcy under the compulsory clauses of the act is discharged without reference to the amount of dividend which he pays, while a bankrupt who goes into voluntary bankruptcy must pay a dividend at the rate of thirty per cent. It is to guard against collusive proceedings on the compulsory side of the docket that this provision is made, and it is made the duty of the court to inquire and investigate whether the requisite number of creditors had joined in the proceedings, and whether the proceedings are in good faith. The naked allegation in the petition also would seem to necessitate such action, and the court be satisfied as to the good faith of the debtor, and that he is not acting in collusion with his creditors in regard to the number who signed the petition for adjudication. The amendment must be made by a sworn petition to the court, and must be joined in by the requisite creditors in number and amount.

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JOLIET MANUF'G CO. (ADAMS v.). See Case No. 56.

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## Case No. 7,437.

JOLLIE v. JAQUES et al.

[1 Blatchf. 618; [1] 9 N. Y. Leg. Obs. 11; Cox, Manual Trade-Mark Cas. 57; 3 Am. Law J. (N. S.) 402.]

Circuit Court, S. D. New York. Oct. Term, 1850.

COPYRIGHT—REQUISITES—MUSICAL COMPOSITION—TITLE.

1. Under the copy-right act of February 3, 1831 (4 Stat. 436), there are three preliminary steps requisite to the securing of a valid copy-right: (1) The deposit of a printed copy of the title of the work before publication, with the clerk of the district court; (2) notice to the public, by printing, in the place designated, the fact of the entry, in the form prescribed by the statute; and (3) the deposit with the clerk of a copy of the work, within three months from the date of publication.

2. Section 10 of the act of August 10, 1846, establishing the Smithsonian Institution (9 Stat. 106), does not make the delivery of copies of a work to the librarian of the institution, and to the librarian of the congress library, a prerequisite to a title to a copy-right for the work. As, however, some doubt must rest upon this question, until it is settled by paramount authority, it is most prudent meanwhile for authors to conform to the provisions of the act of 1846.

3. A musical composition, to be the subject of a copy-right, must be substantially a new and original work; not a copy of a piece already produced, with additions or variations which a writer of music with experience and skill might readily make.

[Cited in Daly v. Palmer, Case No. 3,552.]

4. The composition of a new air or melody is entitled to protection, and the appropriation of the whole or of any substantial part of it is a piracy.

5. Where, on an application for an injunction to restrain the infringement of a copy-right for a musical composition, the defendant alleged that the basis of the composition was taken from one before published abroad, and was a substantial copy of it, and that the plaintiff had only, by ordinary skill and experience, adapted to the pianoforte a melody that had been arranged for the clarionet, and the evidence on that point was conflicting, so that the court could not determine

[1] [Reported by Samuel Blatchford, Esq., and here reprinted by permission.]

the question of fact, a decision on the motion for an injunction was suspended, and an issue at law directed, the defendant to keep an account of sales and report them monthly under oath to the clerk.

6. In a suit founded on the copy-right act, where both parties are residents of New-York, and the plaintiff fails to make out a title to his copy-right, the question whether the court will interfere to prevent the use of the title of the work, upon principles relating to the good will of trades, cannot be entertained, as the court has no jurisdiction of such a question.

7. A copy-right is given for the contents of a work, not for its mere title. There need be no novelty or originality in the title. The title is an appendage to the work, and if the latter is not protected by a copy-right, the former is not.

[Cited in Osgood v. Allen, Case No. 10,603; Donnelley v. Ivers, 18 Fed. 595; Estes v. Williams, 21 Fed. 189; Trow City Directory Co. v. Curtin, 36 Fed. 829.]

8. Whether, in case of a valid copy-right for a work, and a piracy of the title, the court would not have jurisdiction to interfere and protect the copy-right under the act, quere.

This was an application [by Samuel C. Jollie] for a provisional injunction to restrain the defendants [John D. Jaques and James M. Jaques] from an alleged violation of a copyright for a musical composition.

[The bill alleged that George Loder, in his capacity as musical director of Burton's Theatre, had re-arranged, and adapted for the purposes of the dance, a German musical composition, known as the Roschen Polka, which had never been re-published in this country; and had arranged the same for the piano, giving to his adaptation and re-arrangement the title of "The Serious Family Polka"; that he had taken out a copy-right for this piece of music, and had assigned it to the complainant; and that the defendants were violating that copyright by the publication and sale, under the same title, of a piece of music, which was alleged to be a copy or colorable imitation of the one published and copyrighted by Loder. The defendants denied that the one published and sold by them was such a copy, claimed that it was an original and different adaptation of the same German air; and that neither the piece of music published by the complainant, nor its title, was entitled to the protection of the copyright law.

[James W. Gerard and Thomas C. T. Buckley, for defendants, cited act of 1831, § 1 (4 Stat. 436); Curt. Copyr. pp. 145, 281, 296, 298; D'Almaine v. Boosey, 1 Younge & C. Exch. 288.

[Benjamin F. Butler and John C. Devereux, for complainant, cited Curt. Copyr. pp. 170, 293, 294, 295, 298; 17 Ves. 215; Gadson, Copyr. 215; Emerson v. Davies [Case No. 4,437].[2]

NELSON, Circuit Justice. This is a bill filed to restrain the defendants from an infringement of the plaintiff's copy-right in a musical composition known as "The Serious Family Polka, &c., arranged by George Loder." The author assigned his interest in the same to the plaintiff, who, on the 19th of February, 1850, deposited the title of the piece with the clerk of the district court for the Southern district of New-York, and on the next day the musical composition itself, in pursuance of the act of congress of the 3d of February, 1831 (4 Stat. 436), for the purpose of securing the copy-right.

1. The first section of that act provides, among other things, that any person, being a citizen of the United States, or resident therein, who shall be the author of any book or books, map, chart, or musical composition, and the legal assigns of such person, shall have the sole right and liberty of printing, publishing, and vending such book, &c., or musical composition, in whole or in part, for the term of twenty-eight years from the time of recording the title thereof. The fourth section prescribes, that no person shall be entitled to the benefit of the act, unless he shall, before publication, deposit a printed copy of the title of such book, &c., or musical composition, in the clerk's office of the district court of the district wherein the author or proprietor shall reside; and it is made the duty of the clerk to record the same in a book kept for that purpose; and the author or proprietor shall also, within three months from the publication, deliver or cause to be delivered a copy of said book, &c., or musical composition, to the clerk of said district; and it is also made the duty of the clerk, at least once in each year, to transmit a certified list of all such records, together with the several copies of books, musical compositions, &c., deposited, to the secretary of state, to be preserved in his office. The fifth section prescribes, that no person shall be entitled to the benefit of the act, unless he shall give information of the copy-right being secured, by causing to be inserted in each of the several copies published during the term secured, on the title page or the next page, if a book, or on the face, if a musical composition, the words: "Entered according to act of congress, &c., by A. B, in the clerk's office of the district court, &c."

It will be seen, therefore, by the provisions of this act, that there are three preliminary steps requisite to the securing of a valid copy-right: (1) The deposit of a printed copy of the title, before publication, with the clerk of the district court; (2) notice to the public, by printing, in the place designated, the fact of the entry, in the form prescribed by the statute; and (3) the deposit with the clerk of a copy of the book or musical composition within three months from the date of publication.

The tenth section of the act of congress passed August 10, 1846 (9 Stat. 106), establishing the Smithsonian Institution, provides that "the author or proprietor of any book,

[2] [From 3 Am. Law J. (N. S.) 402.]

map, chart, musical composition, &c., for which a copy-right shall be secured under the existing acts of congress, or those which shall hereafter be enacted respecting copy-rights, shall, within three months from the publication of said book, &c., deliver, or cause to be delivered, one copy of the same to the librarian of the Smithsonian Institution, and one copy to the librarian of congress library, for the use of the said libraries."

No penalty is declared in the act, as a consequence of the omission to comply with the provision; but it is insisted by the counsel for the defendants, that a construction should be given to the section, making the delivery of the copies a prerequisite to a title to the copy-right under the act of 1831, as otherwise the provision would be practically ineffectual to accomplish the object intended.

The law may be defective in this respect, for want of a penalty to enforce it; but we are unable to perceive how the construction contended for can be supported, upon any sound view of the section. It is found in an act establishing the Smithsonian Institution, and does not purport to be an amendment of the act of 1831 providing for the copy-right of authors. And besides, the duty is imposed upon the author or proprietor of any book or musical composition, "for which a copy-right shall be secured under the existing acts of congress, or those which shall hereafter be enacted;" thereby necessarily excluding any implication that it was intended to make the delivery to the respective libraries a condition to the vesting of the title to the copy-right. The duty is enjoined upon those who have already acquired the right, and upon those only, and no forfeiture is declared in case of a non-compliance. It would be a violent construction of the provision to annex this penalty by judicial interpretation. Every sound rule in the construction of statutes is against it. Courts lean against the enlargement of penal statutes beyond the fair and necessary import of their terms; much more will they lean against the creation of a forfeiture by implication, in the absence of any words indicating such intent.

In the case of Wheaton v. Peters, 8 Pet. [33 U. S.] 591, 663, 665, which arose under the acts of congress passed May 31, 1790 (1 Stat. 124), and April 29, 1802 (2 Stat. 171), it was decided by a divided court, that the publication of a copy of the record, as entered in the clerk's office of the district court, in the newspaper, within the two months, and the delivery of a copy of the book to the secretary of state within the six months prescribed by the third and fourth sections of the former act, were prerequisites to the title to the copy-right. But these acts were parts of the system, and steps required to be taken by the author or proprietor, to entitle himself to the exclusive right granted under it. And besides, the language of the first section of the act of 1802, which was supplementary to that of 1790, was regarded by a majority of the court as having, in terms, made the publication in the newspaper and the delivery to the secretary essential to the vesting of a complete title. But, even in that case, two of the learned judges dissented, maintaining that the title to the copy-right vested immediately on the deposit in the clerk's office of a copy of the title of the book, and the insertion upon the title page of the fact that an entry had been made according to the act of congress; that the subsequent steps prescribed by the statute were only declaratory; and that the omission of them did not work a forfeiture.

The question here is very different from the one decided in that case. The provision is found in a separate act—one relating to a different subject, and not referring to or purporting to be an amendment of the copy-right act of 1831, nor embracing within it any language indicating an intent to make the steps prescribed a condition of the title. The delivery of the book or musical composition is simply a duty enjoined upon the author or composer who has secured and is already in the enjoyment of his copy-right under existing acts of congress. The obligation to deliver does not attach till the right is secured.

It is very probable that congress designedly omitted to annex any penalty in case of neglect to furnish the librarians with the copies, intending that the provision should be declaratory only, leaving it optional with authors to deliver them or not. The expense in this case, and in many others, would be of no great importance; but in the case of elaborate and expensive works, and on the renewal of the copy-right of a series, after the expiration of the twenty-eight years, the tax would be heavy and exceedingly onerous. It would deserve grave consideration on the part of congress, if the question were before them, whether it would be expedient or just to impose this burthen upon authors.

As this question is one of considerable interest to authors and proprietors of works, the property in which depends upon a compliance with the requirements of the copy-right act, it is to be regretted that any provision of that act involving the title should be open to observation. Although we are quite clear that the view above taken is a sound one, and supported by the application of well settled rules of construction, yet it cannot be denied that some doubt must rest upon the question, until it is settled by paramount authority. In the meantime, it will doubtless be most prudent for authors to conform to the provisions of the act of 1846.

2. The bill of complaint charges, that one George Loder, a musical director in Burton's Theatre, prepared the music performed in

connection with and as part of the comedy called and known as "The Serious Family," particularly the music for the polka dance in said comedy; that he expended much labor, time, and musical knowledge and skill, in preparing and producing the same; that he took as the basis of said musical polka, a certain composition of a German musician published in Europe, but not republished in the United States until selected by the said Loder; that said Loder made a new application and use of said German music for the purposes of this comedy, and, with a view to a further publication, re-arranged the said composition, and, by improvements and additions, and new forms and combinations, adapted the same to the dance forming part of the comedy; that the said Loder also arranged the said musical polka, as performed at the theatre, for the piano-forte, for publication and for public and general use, and assigned his interest in the same to the plaintiff in this suit, who, on the 19th of February, 1850, took out a copyright under the title already stated; that the music was in great demand, and the sales very profitable, until the piracies committed by the defendants, also set forth in the bill. The bill prays for an injunction and an account, &c.

The defendants, in opposition to the motion for an injunction, deny that they have published or are engaged in selling any polka which is similar in plan or matter to, or is a substantial copy of that published by the plaintiff, or that they have adopted, used, or embodied, in the one published by them, either the matter, arrangement, or additions of the musical composition contained in that of the plaintiff; that the polka called "The Serious Family Polka," published by them, was composed and written in a different key, and contains eight bars of original matter; that the only similarity consists in the melody, which, in both publications, was taken from a German composition, called "The Roschen Polka," which was well known and had been played by various bands in the city of New-York, and especially by a band known by the name of "Munck's Band," before the publication of the plaintiff; and that Loder had made no change in the melody of the Roschen Polka, nor had he added any new matter to the composition, or to the combination of the materials of the original air, but had simply adapted the old melody to the piano-forte.

It is further shown by an expert, who had examined and compared the two pieces of music, that the one published by the defendants is not only written in a different key, but that the first, third, fourth, fifth, seventh and sixteenth bars of the first part of the two editions, differ in the arrangement of the treble and bass notes of each bar; that in the second part, the first, third and fifth bars differ in the arrangement of the bass notes, the second, fourth and sixth bars in the arrangement of the treble notes, and the seventh bar in the arrangement of both treble and bass notes; that the portion marked trio in the defendant's edition, containing eight bars, is different in all respects from the same part of the polka published by the plaintiff; that to the finale of the defendants' polka are added eight bars of original matter not found in any portion of the plaintiff's edition; that the music of his edition is, in the melody, taken substantially from the "Roschen Polka," the only difference being that the latter was arranged for the clarionet, and the former, by Loder, for the piano-forte; and that the adaptation to one instrument of the music composed for another, requires but an inferior degree of skill, and can be readily accomplished by any person practised in the transfer of music.

The act of congress of February 3, 1831, authorizes the grant of a copy-right to the author of a "musical composition," and the principal question in the case is, whether the adaptation of the music in the "Roschen Polka," already composed and in public use, to the "Serious Family Polka," is or is not a musical composition within the meaning of the statute. It is not claimed that Loder is the author of the melody or air; but simply that, by skill and labor, he has adapted it to a new use, or to a new instrument, the piano-forte for instance, instead of the clarionet.

Under the statute of 8 Anne, c. 19, in England, it was held that a musical composition was protected by a copy-right within the words "books or other writings;" and now, under the act of 5 & 6 Vict. c. 45, § 2, it is declared that in the construction of the act, the word "book" shall be construed to mean and include "every volume, part, or division of a volume, pamphlet, sheet of letter press, sheet of music, &c." Under these acts, it has been determined in effect, that the adaptation of a well known air, either by changing it to a dance, or by transferring it from one instrument to another, is not a work entitling an author to a copy-right. D'Almaine v. Boosey, 1 Younge, & C. Exch. 288.

The composition of a new air or melody is entitled to protection; and the appropriation of the whole or of any substantial part of it without the license of the author is a piracy. How far the appropriation might be carried in the arrangement and composition of a new piece of music, without an infringement, is a question that must be left to the facts in each particular case. If the new air be substantially the same as the old, it is no doubt a piracy; and the adaptation of it, either by changing it to a dance, or by transferring it from one instrument to another, if the ear detects the same air in the new arrangement, will not relieve it from the penalty; and the addition of variations makes no difference. The original air requires genius for its construction; but a mere mechanic in music, it is said, can make the adaptation or accompaniment.

The musical composition contemplated by

the statute must, doubtless, be substantially a new and original work; and not a copy of a piece already produced, with additions and variations, which a writer of music with experience and skill might readily make. Any other construction of the act would fail to afford the protection intended to the original piece from which the air is appropriated. The new arrangement and adaptation must not be allowed to incorporate such parts and portions of it as may seriously interfere with the right of the author; otherwise the copy-right would be worthless. That portions may be taken and mixed up in the new arrangement and composition, cannot probably be denied; and there may be great difficulty in distinguishing between those new compositions that do, and those that do not absorb the merit of the original work. Each case must depend upon its own particular facts and circumstances. Persons of skill and experience in the art must be called in to assist in the determination of the question. It may often be a very nice one.

It is admitted in the bill in the case before us, that the basis of the arrangement in the "Serious Family Polka" was taken from a German musical composition; and it is further insisted by the defendants, that it is nothing more than a substantial copy of that piece, the whole of the air being the same, with slight and unimportant variations, which any person of ordinary skill and experience in music could have made.

The evidence on this part of the case is conflicting, and not sufficiently full to enable us to determine on which side the truth lies. We shall therefore suspend the decision on the motion for the injunction, and direct an issue at law upon the question; and that, in the meantime, the defendants keep an account of their sales, and report to the clerk monthly under oath.

3. It has been argued on the part of the plaintiff, that the name or title of his piece of music is original in the connection in which it is used, and that, conceding the musical composition itself not to be within the protection of the statute, still he is entitled to the injunction to restrain the defendants from the use of the same name in their publication.

It must be remembered that this is a suit founded upon the copy-right act, (see the act of February 15th, 1819, 3 Stat. 481, in connection with the act of February 3, 1831), and that in order to maintain it, the plaintiff must make out a title to sue, under his copy-right. Independently of this ground we have no jurisdiction of the case, as both parties are residents in, and, for aught that appears, citizens of New-York. The question, therefore, whether the court will interfere to prevent the use of the title in fraud of the plaintiff, upon principles relating to the good will of trades, is not before us, as it cannot be entertained in this suit. The act of 1831 grants a copy-right to the author of a "musical composition," provided he complies with the requisites therein prescribed, and, among others, deposits the title with the clerk of the court, who shall record it at length, and afterwards deposits a copy of the work within three months. The right secured is the property in the piece of music, the production of the mind and genius of the author, and not in the mere name given to the work. That is, indeed, essential, as well in taking out the copy-right, as in identifying the composition protected; and is sometimes, doubtless, the source of as much profit as the intrinsic merit of the work itself. But it is not the thing protected or intended to be protected. There need be no novelty or originality in it, nor need it even be the production of the author, for anything contained in the act; it may be taken from the suggestion of a friend, or picked up from any source, as the author may desire. The title or name is an appendage to the book or piece of music for which the copy-right is taken out, and if the latter fails to be protected, the title goes with it, as certainly as the principal carries with it the incident.

We do not say how the question might be decided in the case of a valid copy-right of the work, and an infringement of the title by the defendants. That would be a different question. It may be that the title should be considered as falling within the purview of the statute, and that to protect the work the court would be required to secure the title from piracy. But we express no opinion on this question. Our proposition assumes that the piece of music is not protected within the statute; and, if so, we think the name also is not. It must abide the result, in this respect, of the thing to which it is attached.

## Case No. 7,438.

JOLLY v. BLANCHARD.

[1 Wash. C. C. 252.] [1]

Circuit Court, D. Pennsylvania. April Term, 1805.

ARBITRATION AND AWARD—FACTOR—LIEN.

1. The court will not set aside the report of referees, merely because they might not have drawn the same conclusions from the evidence, which the referees have deduced.

[Cited in James v. Schroeder, 61 Mich. 30, 27 N. W. 850; Sanborn v. Murphy, 50 N. H. 71.]

2. An agent or factor, who is ordered by his principal to ship goods in his possession, has no right to retain more than enough to secure any lien he may have upon the goods.

3. He may do this, and obey the order to ship the balance; or, he may ship the whole of the goods, consigning them to a third person, with orders to deliver them to the owner on payment of the sum due to him.

4. If he retains the whole, because of a lien for a small sum, and any loss follows his breach of orders, he will be liable for the same.

[1] [Originally published from the MSS. of Hon. Bushrod Washington, Associate Justice of the Supreme Court of the United States, under the supervision of Richard Peters, Jr., Esq.]

This cause having been referred to arbitrators, under a rule of this court, and a report being made; Duponceau, for the defendant [B. Blanchard], moved to set it aside; because, the arbitrators had manifestly erred, both in matter of law and fact; in awarding to the plaintiff 1,009 dollars, the value of a quantity of goods, consigned by the plaintiff [Charles Jolly] to the defendant in St. Domingo; upon the prinicple, that he had retained them after he had received orders to send them back, in consequence of which, they were seized and destroyed by the brigands: whereas the orders he received were not peremptory, but left the defendant at liberty to return, or retain, the goods, as he pleased; and, independent of this, the defendant had made advances for the plaintiff, to the amount of about 400 dollars, which gave him a lien, of which he could not be deprived, or blamed for not surrendering.

The arbitrators were examined, as to the grounds of their decision; who stated, that they were of opinion, that the defendant ought to have sent back the goods as soon as he received the plaintiff's orders; and that it was in his power to do so: that, the only reason assigned by the defendant before them, for not having sent back the goods, was his lien. But, the arbitrators thought, that he might have retained enough to satisfy his advances, and should have returned the others, or sent them here to his own consignee, to be delivered to the plaintiff, on being satisfied for his advances. The arbitrators met three or four times, devoted much time to the investigation, and always had the parties before them. They allowed the plaintiff the value of the goods here, had they been returned, after deducting insurance and all expenses. They agreed, that the defendant relied very little upon any other ground, for his conduct, than the one above mentioned. The arbitrators decided upon the papers laid before them, and what fell from the defendant.

By the correspondence laid before the arbitrators, it appears, that, on the 14th of April, 1803; the plaintiff wrote the defendant that he had seen some of his accounts of sales sent into another house, and hopes that he will receive more favourable accounts of the sales of his cargo. That, if there be not a probability of selling them, rather than make so great a sacrifice, or any thing like it, he would prefer having them sent back. He adds: "You will, therefore, I hope, study our interest very attentively." On the 16th of June the plaintiff, in another letter, expresses his apprehension, that war will take place between England and France; and, supposing that property at the Cape would be more safe from brigands, in the hands of an American, than a Frenchman; suggests the policy of depositing his goods in that way; but, leaves every thing to his discretion, in full confidence of his doing the best for plaintiff's interest. On the 8th of July, the plaintiff wrote to the defendant as follows:— "It is now certain, that war has commenced between England and France. Upon the slightest danger of the French evacuating St. Domingo, ship my goods to America; but, I hope, before this, they are sold." In his letter of the 17th September, he informs the defendant, that, as he had refused to make an advance on the goods, and had not complied with his request, he should hold him liable if any accident befell them. The plaintiff's letter of the 14th April, got to hand the 9th of June; and, the defendant states, in answer, that, after having paid high duties on the goods, it would not be to the interest of the plaintiff to re-ship them. He hopes to sell, now and then, by small parcels. He says, however, that if the plaintiff insists upon the goods being re-shipped, he, the defendant, will do so. On the 25th of July, the plaintiff's letter of the 16th June, got to hand; and defendant, in answer, says: that he does not know if war is positively declared, though it may be considered as certain, many hostilities having been committed on our coasts; speaks of the consequent distresses of the island; that he will neglect nothing in his power, to make the plaintiff's goods safe, by putting them into the hands of an American merchant, as requested. November 11th. The defendant sends plaintiff a bill, for the amount of such goods as he had then sold.

WASHINGTON, Circuit Justice. The letters from the plaintiff left, in my opinion, a great deal to the discretion of the defendant. If they could not be sold without sacrifices being made, the defendant was bound to re-ship them; and, in case of war, he advised, that the goods should be placed under the care of some American merchant. This is the substance of the two letters, of the 14th of April and 16th of June. The letter of the 8th July, is more positive in ordering the goods to be re-shipped, in case of danger that the French would evacuate the island. The defendant's answer to the plaintiff's first letter, seems to assign a plausible, if not a satisfactory reason, for retaining the property; and the new order, contained in that of the 14th of June, the defendant promises to obey, in his answer of the 29th of July. When the defendant received the plaintiff's letter of the 8th of July, does not appear; neither does it appear, when the prohibition took place. But, it is obvious, from the defendant's letter of the 29th of July, that, although he had not certainly heard of a declaration of war between England and France, yet, that partial acts of hostility had occurred, on the coast of St. Domingo; and he states the commercial embarrassments they had produced, in pretty strong colours. But, whether, under all circumstances, it would have

been most prudent to ship the plaintiff's goods to America, or to retain them, might be extremely questionable. If I were called upon to decide upon the correspondence, I might probably differ in opinion from the arbitrators. But ought I, for this reason, to set aside their award?

In the case of Walker v. Smith [Case No. 17,087], the court refused to grant a new trial, although we were not satisfied with the verdict, and where we had heard the whole evidence laid before the jury. But, in this case, the arbitrators had the advantage of hearing the observations and acknowledgments of the defendant himself, as to the motives of his conduct, and it appears that they were, in some measure, governed in their opinions, by this species of evidence.

It was, perhaps, not going too far for the arbitrators to conclude, from the excuse so entirely relied upon by the defendant, that no other existed; and that, if it had not been for his claim upon the goods, for securing his advances, made on account of the plaintiff, he would have considered himself bound, by the order he had received, to return the goods. But, this excuse was by no means a sufficient one; and, I think the opinion of the arbitrators upon this point, was perfectly correct. An agent has a lien upon the property of his principal, for any balance due him; but, if he is ordered to part with the possession of such property, shall be disobey these orders, and retain goods, to a large amount, in order to satisfy an inconsiderable debt? This defendant might have retained such a part of the goods, as would have been sufficient to secure him; or he might have consigned the whole to his friend here, to deliver them up, on being paid what was due.

Upon the whole, I do not think that the arbitrators have been guilty of those obvious mistakes, in matters of law or fact, which ought to invalidate their report.

## Case No. 7,439.

JOLLY et al. v. The NEPTUNE.

[2 Pet. Adm. 345.] [1]

District Court, D. Pennsylvania. 1804.

PRIZE—ILLEGAL CAPTURE AND CONDEMNATION.

The brigantine Neptune, belonging to the libellants, was captured by a French privateer and condemned by a court held on board a French vessel at sea, and having been purchased by the respondent, was brought into the port of Philadelphia. The district court ordered her to be restored to her former owners.

To the Honourable Richard Peters, Esquire, Judge of the District Court of the United States, in and for the Pennsylvania District:

The libel of John Jolly and Richard Keys, of the city of Baltimore, in the state of Maryland, merchants, and William Manson, of the same place, mariner, respectfully sheweth, that your libellants are citizens of the United States of America, resident in Baltimore, in the state of Maryland, and are joint-owners of the brig Neptune of Baltimore, a duly registered vessel of the United States, as will more fully appear by an authentic copy of the certificate of her registry, hereunto annexed, bearing date the seventh day of July, in the year of our Lord one thousand eight hundred and two. That the said brig, owned as aforesaid, and commanded by the said William Manson, sailed from the port of Baltimore on or about the thirteenth day of September last past, with a cargo on board belonging to your libellants, on a voyage to Surinam, from thence to the West Indies and back; that while she was peaceably and lawfully pursuing her said voyage on the high sea, the said brig and her cargo on or about the ninth day of December last past, were tortiously, forcibly and piratically seized, taken possession of and detained, by a French privateer called "The Serpent," Henry Anderson, commander, and the said brig sent into St. Jago de Cuba, where, as your libellants have been informed and believe, the cargo was sold or disposed of. That since the seizure as aforesaid, the said brig has been brought into the port of Philadelphia in the district of Pennsylvania, and within the jurisdiction of this honourable court, where she now lies, by a certain Paul Coulon, and other persons, to your libellants unknown. That your libellants, thereupon, pray the aid of the process of this honourable court to arrest and attach the said brig, and that the same be decreed to be restored to them, together with such damages to be paid by the said Paul Coulon and others, for the said seizure, detention and spoliation of the said brig and cargo, as to this honourable court shall seem just and proper. John Hollowell, for libellants.

In the matter of the suit civil and maritime in the district court of the United States, for the district of Pennsylvania, by John Jolly and Richard Keys, of the city of Baltimore, in the state of Maryland, merchants, and William Manson, of the same place, mariner, against the brig Neptune, her tackle, apparel and furniture, the claim of Paul Coulon, in all humble manner, sheweth, that on the sixth day of November, in the year of our Lord one thousand eight hundred and three, and for a long time before and continually since, the island of St. Domingo in the West Indies, belonged to and was lawfully a colony of the French republic, and was subject to its laws, regulations and ordinances, and that at the same time, and long before and continually since, there existed a rebellion in the said island against the said French republic, and certain revolted negroes in the said island openly opposed by force of arms the jurisdiction

[1] [Reported by Richard Peters, Jr., Esq.]

and authority of the said republic over the said island, and that in order to suppress the said insurrection and rebellion, certain laws, ordinances and regulations had been duly made and promulgated by the said republic or her agents thereunto lawfully authorized, whereby all manner of intercourse, trade and dealing was prohibited to persons foreigners to the said French republic, with any other part of the said island but the two ports of Cape François and Port Republican, and all foreign vessels entering or attempting to enter any other port of the said island than the said two ports before mentioned, for any purpose of intercourse with the said revolted negroes, were declared to be liable to confiscation. And your claimant further sheweth, that on or about the said sixth day of November in the same year, the said brig was employed by a certain William Manson the master or commander of her, in carrying on prohibited trade and intercourse with the said revolted negroes in the said island, and for that purpose did enter or attempt to enter the port of Jacmel in the said island (being a port in the said island other than the said ports of Cape François and Port Republican), and was then sailing on the high seas, bound to Les Cayes, another prohibited port in the said island, and was in the prosecution of such her unlawful voyage, when she was arrested and captured by a certain armed cruiser, called "Le Serpent," commanded by a certain Henry Anderson, who was duly authorized and commissioned by the French republic for that purpose, and by the said Henry Anderson impleaded and prosecuted for such unlawful trade, and duly condemned and adjudged to be forfeited therefor, by a competent tribunal, acting under the authority of the said French republic, and by the same authority duly sold to the said Paul Coulon, for a full and valuable consideration. And the said Paul begs leave to state that by reason of the premises he became, and ever since the ninth day of February, in the year one thousand eight hundred and four hath been, and yet is, the lawful owner of the said brig, her tackle, apparel and furniture, and has laid out considerable sums of money in equipping and ameliorating the said brig. Wherefore he prays, that the said libel of the said John Jolly, Richard Keys and William Manson, may be dismissed, and that the said brig may be restored to him with his costs and charges and all damages in this behalf most wrongfully sustained. P. Coulon. Mr. Levy, for claimant.

The above P. Coulon being solemnly sworn, doth depose and say, that what is contained in this his answer, as far as concerns his own act and deed, is true of his own knowledge, and that what relates to the act and deed of any other person or persons he believes to be true. P. Coulon.

The reply of John Jolly, Richard Keys and William Manson, libellants, to the claim of Paul Coulon, exhibited and filed in this cause. These repliants saving and reserving to themselves all and all manner of exceptions to the manifest uncertainties, imperfections and insufficiencies in the said claim contained, for reply thereto, aver, propound and say, that the said brig Neptune was employed by her said owners, the libellants, in a voyage from the port of Baltimore, in the state of Maryland, to Surinam, thence to the West Indies, and back to the said port, as in their said libel is set forth. But they deny that the said brig was so employed in carrying on any unlawful trade and intercourse, to or at the island of St. Domingo, or to or at any port or place in the said island, or that she was in the prosecution of an unlawful voyage, when she was arrested and captured by the French privateer, called, "The Serpent," as in and by the claim of the said Paul Coulon is most untruly stated and alleged. And these repliants further propound, aver, and say, that they have heard and believe, that an insurrection, or revolt had taken place among certain negroes in the said island of St. Domingo, the same being then a colony of the French republic, though they do not know at what time such insurrection or revolt commenced, how long it has lasted, or to what parts of the said island it extended. But these repliants deny, that either at the time of the sailing of the said brig from the said port of Baltimore as aforesaid, or at the time of the said arrest and capture of the said brig by the said French privateer on the high seas as aforesaid, or at any time before, or since, to their knowledge, any laws, ordinances or regulations had, or have been duly made and promulgated by the said French republic, or her agents thereunto lawfully authorized, whereby all manner of intercourse, trade and dealing was prohibited to persons, foreigners to the said French republic, with any other port of the said island but the two ports of Cape François, and Port Republican: and whereby all foreign vessels entering or attempting to enter, any other port of the said island, than the said two ports, for any purpose of intercourse with the said revolted negroes, were declared to be liable to confiscation. And these repliants further propound, aver and say, that although true it is that the said brig Neptune did, in the course of her said lawful voyage, enter the port of Jacmel in the said island of St. Domingo, to wit on or about the —— day of ——, in the year 1803, yet she did not enter the same for any purpose of intercourse or prohibited trade with the said revolted negroes, nor was she bound to Les Cayes (another prohibited port of the said island as in the said claim is alleged, but which is not hereby admitted,) when she was arrested and captured by the said French privateer as aforesaid. And these repliants further propound, aver and say,

that if any such laws, ordinances and regulations were made as in the said claim of the said Paul Coulon is stated and alleged (but which these repliants do by no means confess or admit) the same were not duly notified, and were altogether unknown to them, and more particularly to the said William Manson, commander of the said brig, as well at the time of her sailing from the said port of Baltimore on her voyage aforesaid, as at the times respectively of her entering the said port of Jacmel as aforesaid, and of her being arrested and captured by the said French privateer as aforesaid. And these repliants further propound, aver and say, that the said French privateer called "The Serpent," commanded by the said Henry Anderson, was not duly authorized and commissioned by the said French republic, to arrest and capture the said brig Neptune as aforesaid: and that the said Henry Anderson did not in due form of law, and according to the convention subsisting between the United States of America and the said French republic, prosecute the said brig Neptune; and that the same was not duly condemned and adjudged to be forfeited by a competent tribunal, according to the law of nations and the said convention. Nor was the said brig by such competent authority duly sold to the said Paul Coulon for a full and valuable consideration; nor did the said Paul Coulon on the ninth day of February, in the year 1804, or at any other time before or since, become the lawful owner of the said brig, her tackle, apparel and furniture; nor has he laid out considerable sums of money in equipping and ameliorating the same. But these repliants aver, that the said brig and her cargo were falsely, forcibly and piratically seized, taken possession of, retained and disposed of, by the said French privateer, as in and by their said libel is stated and alleged; and thereupon they pray that the said claim of the said Paul Coulon may be dismissed with costs, and that the said brig be decreed to be restored to them, together with such damages to be paid by the said Paul Coulon for the said seizure, detention and spoliation of the said brig and cargo, as to this honourable court shall seem just and proper. John Hollowell, for respondents.

PETERS, District Judge. The statement of this case may be collected, in detail, from the proceedings. The brig in question and her cargo were said to have been captured by the privateer Serpent, commanded by a certain Henry Anderson, averred to have been commissioned by the French republic on a voyage, as it is alleged then performing by the brig Neptune, from a port of St. Domingo, to another port of that island, both interdicted by the military commander in that island; all intercourse being prohibited with any other than two ports, viz. Cape François and Port Republican. The port (Jacmel) at which the brig had been, or that to which she was said to be destined (Les Cayes) were not licensed, but prohibited ports, in possession of the blacks, who are stated to be forbidden by certain ordinances of the authorized agents of the French republic in St. Domingo, as well to neutrals as to French vessels.

The facts stated in the libel and other proceedings by the libellants are shortly these—the brig Neptune, an American registered vessel, and her cargo, belonged to the libellants, residents in Baltimore and citizens of the United States; and was employed in lawful commerce, on a voyage from Baltimore to Surinam, thence to the West Indies and back to the port of Baltimore. They deny that she was in the prosecution of any unlawful trade or intercourse, to or at the island of St. Domingo, or to or at any port in that island. They deny also that they knew of any laws, ordinances or regulations made or promulgated by the French republic prohibiting intercourse with any other than the two ports before mentioned: and although she had touched at Jacmel, with no intention to carry on any prohibited trade or intercourse, yet she was not bound to Les Cayes when she was arrested and captured by the Serpent. They deny that the privateer was duly commissioned, aver that the brig, being tortiously captured, was not prosecuted and impleaded according to the convention subsisting between the United States and the French republic. That the said brig was not condemned by a competent tribunal, or sold to the claimant, Paul Coulon, for a full and valuable consideration, by lawful and competent authority, &c. That the vessel was a registered vessel of the United States, and belonged to the libellants at the time of her sailng from Baltimore and capture, are in proof and not denied. The pretended condemnation of this vessel is attempted to be proved, by alleged copies of the proceedings of a tribunal sitting on board a French vessel at sea, on board whereof were the military commander of part of the island of St. Domingo, together with two others, who style themselves officers of the court of prizes established under the French republic, at the Mole, in the island of St. Domingo. By this alleged tribunal, in which M. de Noailles, a French general presided, a proceeding was had, in the absence of the captured vessel, which had been sent for a port in the island of Cuba. This proceeding began at seven o'clock in the morning of the day on which it was finished: the commencement and conclusion of the cause occupied but a few hours, under the idea of the necessity of urgency, as therein stated. It appears on the face of the copies of these proceedings, that they were had at sea, and far beyond any jurisdictional limits claimed by any country. The French part of the island of St. Domingo had been abandoned by the officers civil and military of the French republic. Those who were then on board of the vessel carrying these officers, who held the supposed court, were driven from the

place wherein their authority had been exercised, and were then flying from the blacks, who had gained possession of the scene of their former alleged jurisdiction.

There is no other proof of any facts alleged by the claimant than that contained in the exhibits purporting to be copies of these proceedings. And whether this alleged court and its proceedings are lawful, and such as I am bound to respect, is the main question in this cause.

I have no hesitation in declaring that in my opinion, that pretended court was unlawful. It was not warranted by the usage and laws of nations, or the convention between the United States and France. It would be an unnecessary waste of time to shew by any reasoning or authorities, that that court was illegitimate. The officers then composing it—the place where it was held, and the circumstances attending the whole transaction—the haste and informality, and (it being an unauthorized tribunal) I may add the injustice of its proceedings, afford ample data to justify me in rejecting all proofs, or legal effects, claimed under its allegations or decrees: sufficient evidence to warrant every objection, appears on the face of its proceedings.—There is no proof therefore, before me, that the property of the vessel in the libel mentioned has been lawfully divested from her American owners. I do therefore adjudge, order and decree, that the said brigantine Neptune with her tackle, apparel and furniture be restored to the libellants with costs and charges.

[A claim for salvage was made by the purchaser, Coulon, after this condemnation, he having brought the vessel within the power of her former owners. The claim was dismissed. Case No. 3,273.]

## Case No. 7,440.

JOLLY v. RANKIN.

[1 Cranch, C. C. 372.] [1]

Circuit Court, District of Columbia. Dec. Term, 1806.

BAIL.

The plaintiff's affidavit was that a certain sum, charged as the balance, "is just and true, to the best of his knowledge and belief." *Held* not sufficient to hold to bail—(nem. con.).

[Cited in Clarke v. Druet, Case No. 2,850.]

## Case No. 7,441.

JOLLY et al. v. TERRE HAUTE DRAW-BRIDGE CO.

[6 McLean, 237; [2] 3 Am. Law Reg. 29.]

Circuit Court, D. Indiana. Nov. Term, 1853.

NAVIGABLE WATERS—OBSTRUCTIONS—NATIONAL JURISDICTION—BRIDGES—HEIGHT.

1. Under the grant of power to congress, to regulate commerce among the several states, as given by the constitution of the United States, the general government has jurisdiction over navigable streams, so far as may be necessary for commercial purposes.

[Cited in The Montello, 20 Wall. (87 U. S.) 443.]

[Cited in Sweeney v. Chicago, M. & St. P. Ry. Co., 60 Wis. 68, 18 N. W. 756.]

2. A steamboat, enrolled and licensed pursuant to the act of congress, is entitled to the protection of the general government, while engaged in carrying on commerce between different states; and her owners have a right to use the navigable streams of the country, free from all material obstructions to navigation.

3. In relation to the states carved out of the N. W. Territory, the guaranty in the ordinance of '87, as to navigable streams, is still in force.

4. The courts of the Union, having jurisdiction of the parties in a civil suit, are competent to administer the common law remedy for an injury sustained by reason of an unlawful obstruction in a navigable stream, without any express legislation by congress, giving the remedy, and prescribing the mode of its enforcement.

5. The national jurisdiction over navigable streams does not deprive the states of the exercise of such rights over them, as they may deem expedient, subordinate to the power granted by the constitution of the United States.

6. A bridge of sufficient elevation, or with a proper draw, is not necessarily an impediment to navigation; neither is any structure or fixture such an impediment which facilitates commerce, instead of being a hindrance.

[Cited in Macomber v. Nichols, 34 Mich. 218; Benjamin v. Manistee R. I. Co., 42 Mich. 634, 4 N. W. 483.]

7. The inquiry in this case is, whether the bridge with the draw erected by the defendant at Terre Haute, is a material obstruction to the navigation of the Wabash river. If it occasions merely slight stoppages and loss of time, unattended with danger to life or property, it is not such an obstruction. The Terre Haute bridge was built under a charter from the state of Indiana, which required a "convenient draw" in the bridge. This imports a draw which can be passed without vexatious delay, or risk; and, if not such a one, the charter is violated; but if it meets the requirement of the act of incorporation, and is yet a material obstruction, the act is a nullity, for the want of power in the legislature to pass it.

[Cited in Missouri River Packet Co. v. Hannibal & St. J. R. Co., 2 Fed. 290; Assante v. Charleston Bridge Co., 41 Fed. 365.]

[Cited in Illinois River Packet Co. v. Peoria Bridge Ass'n, 58 Ill. 476.]

8. If the jury find the bridge is a material obstruction, but that the injury sustained by the plaintiff's boat was the result of recklessness, or want of skill in those having charge of her, the bridge company are not liable; and evidence of the good professional reputation of the pilot will avail nothing, if, in this particular case, he was reckless and unskilful.

9. If the jury find for the plaintiffs, they may include in the damages given, the probable earnings of their boat, for the time she was delayed in repairing the injury sustained.

[Cited in The Mayflower, Case No. 9,345.]

[Cited in Missouri River Packet Co. v. Hannibal & St. J. R. Co., 79 Mo. 492.]

[Appeal from the district court of the United States for the district of Indiana.

[This was an action by William Jolly and others, owners of the steamer American Star,

[1] [Reported by Hon. William Cranch, Chief Judge.]

[2] [Reported by Hon. John McLean, Circuit Justice.]

against the Terre Haute Draw-Bridge Company, for damages sustained by collision.]

O. H. Smith and S. Yandis, for plaintiffs.

R. W. Thompson and J. P. Usher, for defendant.

LEAVITT, District Judge. This suit is brought by the plaintiffs, as owners of the steamer American Star, to recover damages sustained by that boat in passing through the draw of the bridge across the Wabash river, at Terre Haute. The material facts presented to the jury by the evidence are, that the Star, a stern-wheel boat, duly enrolled and licensed at the port of Cincinnati for the coasting trade, with the usual complement of officers and men, under the command of William Jolly as master, also a part owner, was engaged in the navigation of the Wabash river, making regular trips for the conveyance of passengers and freight, from Cincinnati to the highest point of navigation on said river; that in March, 1852, the water being at a high stage, as she was descending the river, in passing through the draw of the Terre Haute bridge, bow foremost, and partially laden, she struck with considerable violence against one of the piers of the bridge, her guards on one side being thereby broken, the top of the pilot-house carried away, and one of her chimneys thrown down, with some other minor injuries; that as the result of the collision, the boat was detained nearly two days at Terre Haute, in making the necessary temporary repairs, to enable her to prosecute her trip, and one week at Cincinnati, in making permanent repairs; the actual cost of which is proved to have been $371; that owing to her crippled condition after the injury, she was unable to receive freight offered below Terre Haute, to the amount of some $150 or $200; and that one entire trip was lost, the usual and estimated profit of which is stated at $1,000. The bridge was a wooden structure, with a draw having a space between the piers of about sixty feet, and at the top of the draw, when raised, of thirty or forty feet. It was erected by the defendant, under an act of incorporation granted by the legislature of the state of Indiana, containing a provision requiring the corporators to construct "a convenient draw" in the bridge. This brief outline of the case will suffice as preliminary to the consideration of the questions of law, which have been presented and argued with great ability by counsel, and upon which the instructions of the court have been requested. It is not controverted by the counsel for the bridge company, that the Wabash is a navigable stream; nor is it denied that the plaintiffs' boat, at the time the alleged injury was sustained, was employed in carrying on commerce between ports and places lying in different states. But, it is insisted, that as this bridge was erected under the authority of the state of Indiana, and in conformity with the charter granted by the state, it cannot be deemed an obstruction to navigation, in the sense of entitling the plaintiffs to compensation for the injury complained of.

The constitution of the United States contains an explicit grant of power to congress, to regulate commerce among the several states. Under this grant, there can be no question of the competency of congress to exercise jurisdiction over all the navigable streams, to the extent that may be necessary for the encouragement and protection of commerce between two or more states. This doctrine is so well settled by the uniform legislation of congress, and the frequent adjudications of the supreme court of the United States, as to render its discussion here wholly unnecessary. It is regarded as equally clear that the boat, the owners of which in this case are seeking compensation for an injury sustained, having been duly enrolled and licensed by the proper officer, in pursuance of an act of congress, was rightfully employed in the navigation of the Wabash river, and that her owners, while she was so employed, had a right to the free use of that river, and were entitled to protection against all unlawful obstructions to its navigation. It follows, that for any injury attributable to such obstructions, the law will give the needful redress. Nor is it necessary for this purpose, that there should be any express legislation of congress giving the remedy, and regulating the manner of its enforcement. The courts of the Union, if the plaintiff is a citizen of a state other than that in which he brings his suit, have jurisdiction, and are competent to administer civil remedies for such injuries, upon the principles of the common law, without any statutory enactment for that purpose. This doctrine is clearly established by the decisions of the supreme court of the United States, in the Wheeling Bridge Case, 13 How. [54 U. S.] 518.

There is another ground on which the right of every citizen of the United States to the free and unobstructed navigation of the Wabash river. may be confidently asserted. The state of Indiana is one of the states carved out of the North Western Territory, and therefore subject to the operation of that article of the compact contained in the ordinance of 1787, which declares that "the navigable waters leading to the Mississippi and the St. Lawrence, and the carrying-places between the same, shall be common highways," &c. While it is admitted that some of the articles of compact in that ordinance have been superseded by the admission of the states within the North Western Territory into the Federal Union, it has been held by repeated judicial decisions, that the solemn guaranty referred to is still in full force, and is a perpetual inhibition to such states from authorizing any impediments or obstructions to the free navigation of the water-courses within its scope. Spooner v. McConnell [Case No. 13,245]; Palm-

er v. Cuyahoga Co. [Id. 10,688]; Hogg v. Zanesville Canal & Manuf'g Co., 5 Ohio, 416.

But, in maintaining the paramount jurisdiction of the national government over navigable streams, and the operative force of the guaranty in the ordinance of '87 in regard to them, it does not follow that the states are deprived of all power of legislation. Judge McLean, in the case above cited [Palmer v. Cuyahoga Co.], says: "A state, by virtue of its sovereignty, may exercise certain rights over its navigable waters, subject, however, to the paramount power of congress to regulate commerce among the states." This principle is distinctly recognized in all the cases referred to, whether arising under the commercial power of the general government, or the ordinance of '87. It has never been claimed that the states do not rightfully possess jurisdiction upon and over the navigable water-courses within their limits. Such a claim is clearly in derogation of the sovereignty of the states, and therefore, wholly inadmissible. But, while the right of the states is thus conceded, it is well settled that, in the exercise of their jurisdiction, they shall not infringe on that granted to the national government by the constitution of the United States; and that in reference to the states formed from the North Western Territory, they cannot disregard the provision of the ordinance referred to. This limitation of the power of the states is not inconsistent with their claim of sovereignty; nor does it involve necessarily any conflict of jurisdiction between them and the government of the Union. The states have all the power over their water-courses, which is necessary for local or state purposes. The right of a state to punish crimes committed on its streams, and to authorize and enforce such police regulations as may be necessary for the protection of its citizens, has never been questioned. It is equally clear that a state may adopt such measures, in reference to its water-courses, as are required by its citizens in facilitating trade and commercial intercourse. Hence, they properly execise the right of establishing and licensing ferries, and authorizing the construction of wharves. They may also sanction an apparent obstruction of a navigable stream, by authorizing the erection of dams and locks; for the obvious reason that these are not hindrances to navigation, but are promotive of its benefits. Nor can there be a doubt that it is competent for a state to authorize the erection of a bridge across a navigable stream within its limits. But in all the cases referred to, the power must be exercised subject to the restriction, that the right of free navigation is not essentially impaired. If a bridge is erected, it must be sufficiently elevated to admit of the safe and convenient passage of such boats or vessels as are most advantageously used for the conveyance of travelers or freight upon the river or water-course spanned by the bridge; or, if not thus constructed, there must be a draw of such size and structure as not materially to infringe the right of free and unobstructed navigation.

It is, however, a question not clear of doubt, whether it is practicable to place a draw-bridge across a stream, subject to high floods, and with a rapid current, as is the fact in reference to the Wabash, without materially impairing its safe navigation. This description of bridge is obviously better suited to tide-water streams, or such as have little or no current, in reference to which they may be used with little hindrance to navigation. The jury, however, in this case, may properly limit their inquiry to the question, whether the Terre Haute bridge, with its draw of the size and structure proved, at the time and under the circumstances in which the injury to the plaintiffs' boat was sustained, was an essential impediment to the navigation of the Wabash; and this leads necessarily to the further inquiry, what constitutes such an impediment?

Without going at length into the consideration of this question, it may be stated that slight difficulties occasioning short stoppages, and some loss of time, such as proceed from ferries, locks, dams, and even bridges, as already intimated, are not to be viewed as material obstructions. But, if these involve much loss of time in passing them, or danger of accident or injury to life or property, or the use of extraordinary caution, they do essentially impair the right of free navigation, and subject those placing such obstructions in a navigable stream, to damages for the injuries which they occasion. In reference to the Terre Haute bridge, it will be proper for the jury to give due weight to the evidence of the witnesses, who have had much experience in steamboat navigation on the Wabash, and who say that in their judgment this bridge, especially in descending the river, is a serious obstruction to navigation. There is also a clear preponderance of proof to the effect that it is the more usual practice in descending the river, to round to, some distance above the bridge, and thus by means of a rope made fast at the shore, to let the boat descend stern foremost, slowly through the draw. This process, as stated by some of the witnesses, occupies from ten to thirty minutes; and by some, it is stated the detention is an hour, and sometimes an hour and a half. The court has no hesitation in saying, if the difficulties presented by this bridge are of a character requiring this precaution and this loss of time, it is a material obstruction to navigation. In the Wheeling Bridge Case, before referred to, it appeared that of the great number of steamers upon the Ohio river, there were but seven which could not safely pass under the bridge at ordinary stages of water, without lowering their chimneys. These seven boats could let down their chimneys, but the operation was attended with delay and some danger; or they could navigate the river, though with less speed, with chimneys considerably reduced in height; and yet the supreme court of the United States held, that the bridge was an

essential impediment to navigation—in fact, a public nuisance; and decreed that unless so altered as not to impede the passage of any of the boats used on the Ohio, it must be abated. This decision, emanating from the highest court of the Union, is obligatory on this court, and must be received as the law, so far as applicable to the present case.

Having reference to the principles here stated, it will be the duty of the jury to pass upon the question, whether, from the evidence, the Terre Haute bridge is an impediment to the navigation of the Wabash river. It is insisted by the counsel for the bridge company, that the structure has been erected in compliance with the charter granted by the state of Indiana, and therefore, that the company are not liable for the injury complained of. The charter, as before stated, authorizes the erection of the bridge, with "a convenient draw." This clearly implies that it shall be such a draw as may be used without vexatious delay or loss of time; and also with safety to persons and property. Nothing less than this will meet the requirement of the act of incorporation. And if the jury find the charter has not been complied with, it cannot shield the defendant from liability for the injury sustained by the plaintiff in passing the bridge. Or, if the jury come to the conclusion from the evidence, that the bridge and draw are in accordance with the charter, and yet a material obstruction to navigation, the company are liable, if ordinary skill and care were used in navigating the plaintiffs' boat through the draw. For reasons already stated, it was not competent for the legislature of Indiana to authorize a structure across the Wabash, which would be an essential hindrance to its navigation; and any law conferring such authority, is a nullity. It will therefore be a proper inquiry for the jury, whether the plaintiffs' boat, in passing the bridge, was managed with ordinary skill and caution. For, conceding the bridge to be an unlawful obstruction, yet if the plaintiffs' injury is clearly referable to the reckless and unskilful management of the plaintiffs' boat, the company are not responsible for such injury. On this point, as on all others involving the weight and credibility due to the witnesses, the jury are the exclusive judges. If the evidence of the pilot who was at the wheel, and of others connected with the boat, is entitled to credit, the proof is satisfactory that the boat was managed with skill and caution. She was not let down stern foremost by a rope, as was the more usual way of passing the draw; nor is it regarded as essential to the plaintiffs' right to recover for an injury sustained in passing the draw, that such a precaution should have been used. Some of the witnesses express the opinion that this is the safer course, while others, having skill and experience in the navigation of the Wabash, say that neither prudence nor safety requires it. The pilot of the boat has testified very intelligently, and with apparent candor, and says he did not consider it necessary to pass the draw stern foremost. He also says that great care and caution were observed in passing through the draw, and that the injury to the boat was not the result of either carelessness or want of skill. He thinks the boat would have passed safely through the draw, but for a strong wind which suddenly struck her, and caused her to veer from the course he was steering. In this statement the pilot is corroborated by several of the plaintiffs' witnesses, while most of the witnesses for the defendant say they have no recollection that there was any wind, exceeding a moderate breeze. This is not viewed as a material point in this case, as the liability of the bridge company is in no way affected by the state of the wind, or its influence in causing the collision. If the bridge is an unlawful obstruction, and the plaintiffs used ordinary care and skill in passing it, the company are responsible for the injury, irrespective of the agency of the wind. And this for the obvious reason that, wind or no wind, the injury could not have been sustained, but for the fact that the bridge was there.

It is proper here to remark, in reference to the pilot of the plaintiffs' boat, that the evidence is satisfactory as to his professional character. He had served in that capacity for some years, on the Wabash, and it is in proof that he is esteemed a safe, prudent and skilful pilot. But notwithstanding this evidence of general good professional reputation, if in this particular case he evinced recklessness and want of skill, and the injury to the plaintiffs' boat is attributable to that cause, they must bear the consequences of his misconduct. In this case, a large proportion of the evidence for the plaintiffs is in the form of depositions of persons who were on the boat at the time of the accident, and of others experienced in the navigation of the Wabash, who have been examined as experts. These depositions were taken at Cincinnati, without previous notice to the opposite party, and without the attendance of his counsel. This mode of taking testimony is expressly authorized by an act of congress. It is liable to the objection that the opposite party is precluded from the opportunity of cross-examining the witnesses, and thus testing the truthfulness of their statements. It is, however, the right of the party against whom depositions thus taken are to be used, to re-call and re-examine the same witnesses, if he deems it necessary. The defendants in this case have not availed themselves of this right; and the plaintiffs' depositions are therefore committed to the jury, as taken by the other party, without any cross-examination by the defendant. Under these circumstances, it is insisted by the defendant's counsel that these depositions should be viewed with suspicion, and that they are entitled to very

little weight by the jury. On this point, it is only necessary to remark, that these depositions are by law admissible to the jury as evidence; and, although they would be entitled to greater weight, if taken upon notice to the other party, and with an opportunity for cross-examination, they are nevertheless entitled to credit, unless otherwise impeached.

It has been before noticed that a part of the evidence for the plaintiffs in this case, consists in the opinions of experts—those experienced in and familiar with the navigation of the Wabash—as to the practical effect of the Terre Haute bridge upon the navigableness of that river, and the correctness of the professional conduct of those entrusted with the management of the plaintiffs' boat in passing the bridge. In reference to this description of evidence, it is only necessary to remark that, for obvious reasons, that those best acquainted with any particular art, profession or business, in all matters directly concerning them, are accounted more satisfactory and reliable witnesses, than those who have no such skill or experience. Hence it is well settled, that the testimony of intelligent and credible experts is entitled to the most respectful consideration. The principle here stated applies as well to navigation as to any other art or occupation.

It only remains for the court to say, that if the jury find the plaintiffs are entitled to their verdict, the amount of damages to be awarded is wholly with them. The actual expenses of repairing the injury sustained by the plaintiffs' boat forms, of course, an element in estimating the amount. But it is moreover proper to bring to the notice of the jury, a late decision of the supreme court of the United States,[2] having a direct bearing on the question of damages in this case. That court has held, that in an action for an injury by collision with another boat, the boat of the plaintiff not being in fault, he was entitled to compensation, in damages, for the profits his boat would have made during the time necessarily lost in repairing the injury sustained. No reason is perceived why the same principle does not apply to the present case. If, therefore, the jury find for the plaintiffs, they should include in their verdict, the amount of the probable earnings of the plaintiffs' boat during the time she was delayed in making the repairs necessary to refit her for service. This amount will be settled by the evidence before the jury, on that point.

The jury returned a verdict for the plaintiffs, assessing their damages at $1,000. A motion for a new trial by the defendants was overruled.

[2] The case referred to is that of Williamson v. Barrett, 13 How. [54 U. S.] 101. The same principle was decided in that case by the circuit court of Ohio. Barrett v. Williamson [Case No. 1,051.]

## Case No. 7,442.

In re JONAS.

[16 N. B. R. (1878) 452.] [1]

District Court, D. California.

INVOLUNTARY BANKRUPTCY—INTERVENTION OF CREDITOR.

Any creditor whose interests are directly affected by the proceedings, may intervene and contest the allegations of the petition with regard to acts of bankruptcy, notwithstanding the debtor fails to appear on the return day.

In November, 1876, a petition was filed against J. Jonas by creditors claiming to constitute one-fourth in number of all his creditors, and to represent one-third of his aggregate indebtedness. At the return day of the order to show cause the debtor made default, but certain creditors who had attached his property intervened in the cause and denied the jurisdictional averment with respect to the quorum of creditors, and also the commission of the acts of bankruptcy alleged in the petition. The case was referred to the register to take proofs. His report shows that the petition is signed by the requisite quorum of creditors. The questions argued were: (1) Whether an attaching creditor has a right to intervene after default of the debtor and contest the commission of the alleged act of bankruptcy. (2) Whether the proofs in the case show that the alleged acts of bankruptcy were committed.

HOFFMAN, District Judge. It is not denied by the counsel for the petitioning creditors that attaching creditors have the right to intervene and contest the adjudication where fraud or collusion between the petitioning creditors and the debtor is alleged, or where the former are alleged not to constitute the requisite quorum of creditors, or where the jurisdiction of the court is denied. In re Boston, H. & E. R. Co. [Case No. 1,677]; In re Bergeron [Id. 1,342]; In re Mendelsohn [Id. 9,420]; In re Hatje [Id. 6,215]; In re Jack [Id. 7,119]; In re Derby [Id. 3,815]; Clinton v. Mayo [Id. 2,899]; In re Williams [Id. 17,706]; Fogarty v. Gerrity [Id. 4,895]; In re Scrafford [Id. 12,557]. It is contended, however, that this right to intervene does not extend to cases where default has been "made to appear pursuant to the order," and where the intervening creditor merely desires to contest the commission by the debtor of the act of bankruptcy alleged. In support of this position the provisions of the forty-second section of the act [of 1867 (14 Stat. 537)], are chiefly relied on. That section provides "that if the facts set forth in the petition are found to be true, or if default be made by the debtor to appear pursuant to the order, upon due proof of service thereof being made, the court shall adjudge the debtor to be a bankrupt," etc. It is insisted that by these provisions "the default

[1] [Reprinted by permission.]

of the debtor to appear, pursuant to the order," is made equivalent to a voluntary petition filed by him, and that the adjudication follows as the necessary consequence. No authority is cited in support of this construction of the act. In some of the cases above referred to the debtor appears to have made default, but that circumstance is not alluded to by either court or counsel. In re Jack; In re Hatje, supra. The right to intervene is placed either on the express provisions of the amendment to section 39 or upon the more general considerations stated by Mr. J. Woodruff in the Case of Boston, H. & E. R. Co. [supra]. These are that a petition in involuntary bankruptcy is not a mere suit inter partes, "but rather partakes of the nature of a suit in rem, in which any actual creditor has a direct interest, and that a party claiming to be a creditor, and who is able to satisfy the court that he is a creditor, and that his purpose is a meritorious, and not a purely officious one, ought to be allowed to intervene and object to the proceeding." In the case of In re Williams [supra], it was claimed, as in this case, that though the attaching creditor may intervene to contest the jurisdiction of the court, he cannot put in issue the act of bankruptcy. But Mr. J. Brown observes: "On the contrary, however, in the case of Brewster v. Shelton, 24 Conn. 140, the attaching creditor was permitted to come in and claim that the proceedings were collusive as to him, precisely what is claimed in this case and In re Mendelsohn [Case No. 9,420]. In the case of In re Jack [Id. 7,119], the attaching creditor was permitted to test the question of merits. No distinction in principle is perceived. The creditor has an interest to protect. "By the adjudication his attachment is ipso facto dissolved, and he has a right to inquire whether an act of bankruptcy has, in fact, been committed, as well as whether the court has jurisdiction to entertain the petition. Underlying all the discussion on this subject is the general principle of law that no man shall be deprived of his property without the opportunity of being heard. An assumption of this kind is at war with our whole system of jurisprudence." In re Williams [Id. 17,706]. It will be observed that though the learned judge alludes to alleged collusion in the proceeding, he places the right to intervene on the broad ground that any creditor who will be directly affected by the proceeding has a right to be heard. Indeed, in almost every case where the debtor admits the commission of an act of bankruptcy, which in fact he has not committed, in order to defeat an attachment, he may be said to be acting in collusion with the petitioning creditor, and such is said to be the fact in the case at bar. In the Case of Jack, above cited, the collusion was of the same nature. The debtor omitted to resist the adjudication on the merits, and intervening judgment creditors were allowed to do so. In the Case of Boston, H. & E. R. Co., above cited, although fraud and collusion were alleged, the decision turned on the fact that proceedings were pending in another district against the debtor, and this a creditor, who had not proved his debt, was allowed to show in abatement of the second proceedings. Nor was the decision placed on the ground that the court had no jurisdiction over the second proceeding, for the direction given to the Connecticut court was to stay the proceedings until the court in Massachusetts "had made some adjudication on the petition pending before it, nor should the proceeding be even then necessarily dismissed. It might be advisable to continue it, to fall back upon if the Massachusetts decree should, for any reason not applicable to the Connecticut proceedings, prove unavailing or erroneous." In this case, also, the debtor appears to have made default.

The foregoing authorities show that the right to intervene is not confined to the cases to which the counsel for the petitioning creditors restricts it—on the contrary, it is placed on the broad ground of the right of a party to be heard in a proceeding by which his interests will be directly affected; and, further, it appears that the collusion alleged in several of the cases was precisely of the kind claimed to exist in the case at bar, viz., the tacit confession by the debtor of an act of bankruptcy, which, in fact, he had not committed. But, independently of the authorities, I should be of the opinion that the terms of the forty-second section do not require the literal construction contended for. Its language is: "If the facts set forth in the petition are found to be true, or if default be made by the debtor to appear pursuant to the order, upon due proof of service thereof being made, the court shall adjudge the debtor to be a bankrupt," etc. The legislature is here prescribing in general terms the proceedings to be had on the return day of the rule to show cause. Of course, if no one appears to contest them, the allegations of the petition are taken pro confesso. But it was not the design of the section to prescribe who should be allowed to appear and oppose the adjudication. By the very letter of the section the bare appearance of the debtor might take the case out of its operation; but it is obvious that he must not only appear, but must deny the allegations of the petition, or must otherwise show cause why he should not be adjudged. The phrase, "If the facts set forth in the petition shall be found to be true," evidently contemplates an investigation, and by the elementary principles of law and justice all persons to be directly affected by its result have the right to be heard. I cannot think that the succeeding clause, which contemplates the default of the debtor, should be construed to take away that right. It is urged that as by a voluntary petition the

debtor could procure an adjudication, notwithstanding the opposition of his creditors, it is no greater hardship upon them to treat his default as equivalent to the filing of a voluntary petition by him. There might be force in the argument if the proceedings were or could be made the equivalents of each other. But they are not so. In voluntary cases, the debtor, to obtain his discharge, must procure the assent of a certain proportion of his creditors in number and value, or his assets must amount to a certain percentage of his debts. In involuntary cases he is entitled to his discharge, irrespective of either of these requirements. In voluntary cases preferences are avoided, if made within four months. In involuntary cases they are valid, unless made within two months. The reasons for this discrimination it is not easy to conjecture. By an apparent oversight the period within which attachments are avoided has been allowed in both classes of cases to remain as originally fixed, viz., four months. It may thus happen in an involuntary case that creditors who have openly, and in the fair prosecution of their legal rights, obtained liens by attachment within four months of the bankruptcy, will be deprived of them by the adjudication and assignment, while other creditors, who have obtained secret preferences more than two months prior to the proceedings, will be protected. The attaching or other creditors may thus have the strongest interest to compel the proceedings to assume the voluntary form, where all will be placed on the same footing, and where the preferred creditor will have no greater protection than the attaching creditor.

In the case at bar the denial to the intervening creditor of the right to contest the commission of the alleged act of bankruptcy would be a peculiar hardship. That act is the procuring by the bankrupt of his property to be taken on legal process by the intervening creditor. The latter is therefore in effect charged with fraudulent collusion and combination with the bankrupt to obtain a preference. If his right to intervene be disallowed, he will practically be convicted of this charge by the mere omission of the bankrupt to appear, and with no opportunity afforded him to deny or disprove it.

On full consideration of the whole matter, I feel compelled to hold that any creditor whose interests are directly affected by the proceedings, has a right to intervene and contest the allegations of the petition with regard to the acts of bankruptcy alleged, notwithstanding that the debtor has failed to appear on the return-day, pursuant to the order. With regard to one of the acts of bankruptcy alleged, no adequate proof is produced. It is claimed that the denial of its commission by the intervention is insufficient. But the general denial is in the form prescribed by the supreme court for the debtor himself, and no reason is perceived why the same form should not be used by the intervening creditor seeking to raise the same issues. The special denial is a little inexact in language, and possibly an exception to it in the nature of a special demurrer might have been sustained. But the objection comes too late after the issue is accepted and a trial had on the merits. Mr. J. Woodruff observes, with respect to a similar intervention: "The proceeding is summary and in a high degree informal, and it should be free from technical embarrassment." I am inclined to think that the objection could at no stage of the cause have been available. The other act of bankruptcy, and which is chiefly relied on, is alleged to have been the procuring by the debtor of his property to be taken on legal process. I do not think it necessary to recapitulate the proofs. I agree with the register in the opinion that the evidence does not disclose any collusion or complicity between the debtor and the attaching creditors, or any knowledge or expectation on the part of the former that the attachment was to be levied. He can in no sense be said to have procured it. The petitioning creditors have therefore failed to establish the act of bankruptcy alleged in the petition. Had it appeared that the debtor advised or even suggested the levy, the case might have been different. "Very slight evidence of an affirmative character of the existence of a desire to prefer one creditor will be sufficient to invalidate the transaction." Wilson v. City Bank, 17 Wall. [84 U. S.] 473. It may seem strange that the mere existence of a desire to prefer, evidenced by a mere suggestion to the creditor to sue or attach, should have such a controlling effect upon the consequences of the proceeding. But such appears to be the law, and it makes no difference whether the question arises in a proceeding, like that in the case last cited, to set aside a levy on execution alleged to have been "procured or suffered" by the debtor, or, as in the case at bar, an inquiry whether the debtor has "procured his property to be taken on legal process," and thereby committed an act of bankruptcy.

The practical effect of the decision which I feel compelled to make is to give to the attaching creditors the whole or the greater part of the assets of the debtor, to the exclusion of the other creditors. The chief object of the act is thus defeated by the inability of the creditors to prove the act of bankruptcy necessary to bring the debtor within its operation. It may be suggested that this anomalous result would have been avoided if the mere fact that the debtor's property has been taken on attachment or execution for a valid debt, and has remained under seizure a prescribed period, had been declared, by the law, an "act of bankruptcy," irrespective of any "desire" or procurement on the part of the debtor. It is not impossible that such may have been the intention

of the framers of the original act when the words "procure or suffer his property to be taken" were adopted; not that, as has been argued, he must be deemed to have "suffered" the seizure because he did not prevent it by going into voluntary bankruptcy, but that he has "suffered" it because, by not paying his debt, he has put it into the power of his creditor to attach his property. By the existing provisions of the act, the arrest and imprisonment of a debtor for a provable debt for more than twenty days is declared to be an act of bankruptcy. No reason is perceived why the seizure and detention of his property for a like period might not be similarly regarded. I also venture to suggest for consideration the inquiry whether there is any good reason for discriminating between liens acquired by attachment and those obtained by judgment and levy on execution. If the creditor is obliged to surrender his lawfully acquired lien in the one case, why not in the other? There seems to be no reason why a lien by attachment for a just debt should be any less respected than a lien by levy after judgment, for the same debt, and as the law now stands opportunities for fraud are afforded. If the creditors attach and the debtor is desirous of suffering one of them to obtain a preference, he has only to delay the other's proceedings by dilatory pleas, or otherwise, until the favored creditor has obtained a judgment and levy on execution, unopposed. He may then go into bankruptcy. The lien of the attaching creditor who has obtained no judgment will be dissolved, while that of the judgment creditor will be respected—unless collusion can be shown—which is always difficult of proof, and which, in fact, may not have existed. If judgment and attachment liens were put on the same footing, the perplexing, uncertain, and often subtle inquiries into the debtor's motives and "desires," whether there has been "collusion" between the parties, and whether the judgment has been obtained by the debtor's instigation or procurement, would be avoided, the rights of the assignee and the creditor would be clearly fixed by law, and the expense of much uncertain and often fruitless litigation would be saved.

## Case No. 7,443.

Ex parte JONES.

[4 Cranch, C. C. 185.] [1]

Circuit Court, District of Columbia. Oct. 21, 1831.

EXECUTORS AND ADMINISTRATORS — ALLOWANCE OF DEMANDS—SALE OF STOCKS—LOSS.

An executor may be allowed credit for a loss upon the sale of stocks sold, although the sale was made without the order of the orphans' court.

[1] [Reported by Hon. William Cranch, Chief Judge.]

Appeal from the orphans' court for Washington county.

BY THE COURT. This cause originated in a petition by [J. A. Jones] the executor of Edward Jones to the orphans' court, for leave to settle a second account, and to be allowed a credit for the loss upon certain stock sold for $75.96 less than its appraised value. The judge of the orphans' court being of opinion that the executor was not entitled to an allowance for such loss, the stock having been sold without an order from that court, refused to permit him to settle a second account and to allow him credit for the loss. The petition was accompanied by an affidavit of the executor, verifying the account of sales by Thomas Biddle & Co., and averring that the sales were fair and bonâ fide, and at the full market price, and that he believes that no more could have been got for the stock; and by an affidavit of W. S. Nicholls, a respectable broker in this district, that the sales were at the then market price at Philadelphia, and that the Philadelphia market was as good a market for the sale of stock as any other in the United States; and that Thomas Biddle & Co., the brokers who sold the stock, are brokers of the highest repute for integrity and fairness in their dealing; and that, in his opinion, no better evidence of the true market price of stock could be given, than their bills. It does not appear that there were any debts or claims against the testator outstanding and unpaid at the time of the sale, or any other cause which required an application to the judge for an order to sell. As between the executor and his vendee, the sale was valid without such an order; and it does not appear that any person interested has objected to the sale. If it was a fair and bonâ fide sale for the purpose of settling the estate, and if, in fact, the stock was sold for its full market value, although less than the appraised value, there has been an actual "decrease" of the estate when compared with the appraisement; or, in other words, a loss by decrease, which, under the express provision of the testamentary act of 1793 (chapter 8, § 2), is not to be sustained by the executor; and the same section provides that "he may be allowed for such decrease, on the settlement of his final or other account." The law having expressly declared that the loss shall not be sustained by the executor, and that he may be allowed for it in his account, it seems to follow, that if such loss has happened, the judge ought to have allowed it, and to have opened the account for that purpose, or permitted the executor to settle a second account, if the loss was ascertained after the settlement of the first account. Then the only remaining question is, whether there was an actual decrease in the value of the stock when compared with the appraised value. Upon

this question the affidavit of Mr. Nicholls, which does not appear to have been objected to by the judge on the ground of informality, or incredibility, ought, in our opinion, to have been satisfactory. It appears to us, that the judge erred in supposing that there could be, upon a sale, no loss, or no satisfactory evidence of loss, by decrees, unless the sale were made under an order of the orphans' court. The only effect of the want of such an order of sale, in a case like the present, we think, is to throw the burden of proof upon the executor, to satisfy the court that the thing was sold for its full market value.

It is, therefore, ordered and decreed by this court, on this 21st day of October, 1831, that the order of the orphans' court, in this cause, "that the said executor be not allowed to settle a second account, and credited for the said loss as prayed, and that the petition be dismissed with costs," be, and the same is hereby, reversed. And it is hereby further ordered and decreed, that the said petition be sustained; and that the said orphans' court permit the said executor to settle a second account, and allow him therein a credit for the sum of $75.96 for the loss upon the sale of the stock in the petition mentioned. And it is further ordered, that this decision and decree be certified under the seal of this court, by the clerk thereof, and transmitted to the said orphans' court of Washington county.

## Case No. 7,444.

In re JONES.

[6 Biss. 68;[1] 9 N. B. R. 556; 6 Chi. Leg. News, 271.]

District Court, W. D. Wisconsin. April 21, 1874.

HUSBAND AND WIFE — WIFE'S PROPERTY — HUSBAND NOT COMPETENT WITNESS — SECURITIES — USED BY HUSBAND — ESTOPPEL — CREDIBILITY OF WIFE'S TESTIMONY — TITLE OF PROPERTY DEVISED FOR DISTRIBUTION — OPERATION OF PROPERTY ACT ON VESTED RIGHTS — RECEIPT OF INCOME OF WIFE'S ESTATE — ACCOUNT.

1. In Wisconsin the husband is not competent as a witness for his wife; this incompetency rests on grounds of public policy, and is not removed by the statute removing the disqualification of interest.

2. Securities taken in wife's name will not pass to her as her saparate property, if they were so drawn simply for convenience; it must clearly appear that they were intended as a settlement upon her.

3. Where such securities are used and collected by the husband with the wife's consent, this conduct disproves the claim that they were intended as a settlement upon her.

4. The wife having allowed him to enjoy the credit of such securities and their proceeds, cannot afterwards claim them as against creditors who have trusted him on the faith of such apparent ownership.

5. If she joins him when embarrassed in conveying his property to their children, making no claims for herself, she cannot afterwards set up a claim when such conveyances are about to be set aside.

6. Where this is defective and contradictory, particularly about the most material matters, her statements as to the amount of her claim should be looked upon with suspicion.

7. Where property is willed to executors to convert into a fund, and keep and distribute, etc., the title remains in them until it is actually distributed; and where a discretion is to be exercised before a distribution, the ultimate distributee has no vested interest in the property until such discretion has been exercised.

8. A note given to her for money loaned by her while unmarried, and prior to the passage of the married woman's property act, passes to the husband under the common law rule, and his vested interest therein cannot be abrogated by any subsequent act of the legislature; and though he receives the money thereon, she cannot prove the amount against him as a debt in bankruptcy.

[Cited in Fleitas v. Richardson, 147 U. S. 555, 13 Sup. Ct. 497.]

9. A married woman may bestow upon her husband the income of her separate estate; and where the husband, with the consent of the wife, is in the habit of receiving such income and profits, this shows her voluntary choice to thus dispose of them for the use and benefit of the family, and the husband will not be required to account therefor, beyond the amount received during the last year.

[Cited in Denny v. Denny, 123 Ind. 243, 23 N. E. 519.]

10. A claim founded upon such receipt of income and profits will not be allowed against the husband's estate.

11. The fact that no account was kept by either party as to the money thus received strengthens the presumption of law that there is no agreement to repay it.

Motion by the assignee of David W. Jones to expunge the proof of debt filed by Emily Jones, his wife, and proven up at the amount of $39,412.63.

Gregory & Pinney, for assignee.
Vilas & Bryant, for Mrs. Jones.

HOPKINS, District Judge. At the hearing, the creditor, Mrs. Jones, offered her husband, David W. Jones, as a witness in her favor. He was objected to by the counsel for the assignee as incompetent, and the court sustained the objection, following the construction given by the supreme court of this state to the statute relating to evidence. Farrell v. Ledwell, 21 Wis. 182.

The court there hold that the exclusion of husband and wife as witnesses for each other in civil suits, is not based solely on interest, but rests upon principles of public policy, and as the statute only removes the ground of interest, the ground of public policy still renders them incompetent. White v. Stafford, 38 Barb. 419; Hasbrouck v. Vandervoort, 5 Seld. [9 N. Y.] 153.

I thought it best to notice my ruling on that question with a reference to the authority upon which I relied before going into the merits of the case.

The proof filed states that the bank-

[1] [Reported by Josiah H. Bissell, Esq., and here reprinted by permission.]

rupt collected and received money belonging to her as her separate estate, at various times, from the 25th of March, 1865, to the 10th of July, 1871, amounting in the aggregate to $31,662.82, which, with the interest up to the adjudication of bankruptcy, amounted to the sum of $39,412.63; and further states that no part had been paid except $1,267.22, which he paid to her in notes of other parties.

It is further stated in the proof that he purchased certain real estate with the money, in this state and Iowa, but took the title in his own name, and which had been transferred to the assignee; so that all she had ever received to be applied upon said sum was the $1,267.22 above mentioned, which she claims should be applied thereon.

The way this proof is drawn, it throws very little light upon the real transaction as it appears from the evidence submitted on the hearing before me. And in order to understand the case and my conclusions upon the testimony, it becomes necessary to give a brief statement of the facts proven.

Col. Jones, the bankrupt, in November, 1845, married the claimant, a daughter of John Dunn, deceased, of the state of Kentucky, where the marriage was celebrated. The claimant's father died several years before that time, leaving a will by which he directed his executors to convert his personal property, except slaves, into money, to be equally divided between his son Frank and his four daughters, and when his daughters married, directed that the portion of such one should be put into her possession or into the hands of a trustee or trustees for her benefit, at the discretion of the executors; that as to the slaves, it provided that the executors should place an equal proportion of them in the possession of such daughter or into the hands of trustees for her benefit, or should continue to hire the same out for her benefit, and pay to her the hire yearly, but this distribution was not to take place until after the death of the wife of the testator, who was to have the use during her life. She died in 1850. Soon after their marriage they removed to Wisconsin, where they have ever since resided.

The share of each distributee under the will was ascertained, and settled June 13, 1852, to be $2,079. The claimant's portion had all been paid to her before her marriage (and spent, according to the testimony), except $100 paid to her Nov. 28, 1846, $101.95, Dec. 1, 1846, $100, Jan. 13, 1847, and $453.14 paid to her husband in 1853. She receipted for the first three sums, and her husband for the last. There is no direct evidence as to what she did with the amount thus paid to her. She may have intended to have conveyed the idea in her testimony that she handed it over to her husband, but she does not say so, and what she does say in reference to it is so confused and uncertain that I cannot place any reliance upon it. Soon after the parties removed to this state, Col. Jones commenced buying real estate, and shortly became a very extensive land-owner, and as early as 1856 had the reputation of being a man of large property.

Among other property, he bought what was called the "Belmont Farm," consisting of about 1,300 acres of land, for which he paid, as appears by the consideration expressed in the deeds, about $6,000. He lived upon and cultivated and improved this farm for several years before 1857, at which time he left it. He was elected secretary of state in 1856, and in 1857 removed with his family to Madison, where he continued to reside for about four years. He bought a house in Madison valued at about $3,000 or $4,000. After his term of office expired he returned to Mineral Point, and continued to rent his farm aforesaid. In 1865 he sold this farm to one Owen Wright, for $25,000 —$1,000 cash down, and notes and mortgage for $24,000. These notes and mortgage were made payable to the claimant, Mrs. Jones, and, as I understand the case, the debt proven is based upon the idea that this mortgage and the money secured thereby became hers, and that as Mr. Jones afterwards collected the money and used it himself, she proves up against his estate the amount thus collected of principal and interest. On the hearing she predicated her right to the money upon the grounds, first, that the property was originally purchased and paid for with her separate property, upon the agreement or understanding that it should be hers; and second, that Col. Jones advanced and settled that amount upon her as and for her separate estate.

As to the first ground, it is sufficient to say the testimony is insufficient to support it. The portion of her separate estate received by her husband was only $453.14, and that was in 1853, after the most of this land was bought, and as it cost about $6,000, the insignificant amount of her separate estate would not go far towards paying for it. Indeed, the case is destitute of any satisfactory testimony to support this ground of her claim. Her own testimony, vague and uncertain as it is, does not establish a semblance of a case to sustain that ground.

As to the second ground, it is undoubtedly the well-settled law that a husband out of debt may settle upon his wife such portion of his estate as he pleases, if done in good faith, and not to defraud subsequent creditors. Sexton v. Wheaton, 8 Wheat. [21 U. S.] 229. So it becomes necessary to consider the testimony, and see whether this was in fact a settlement or not.

I do not think the evidence sustains the claim that this Wright mortgage of $24,000, given for the "Belmont Farm," was intended as a settlement by the bankrupt upon his wife, and the evidence as above stated is altogether insufficient to show that the farm was originally purchased with her separate

funds, as showing any reason for such an act on his part. There was no language used by any one at the time the mortgage was given, to justify the conclusion that it was designed as an advancement to her. The reason assigned by him for taking the mortgage in her name, as Mr. Wright testifies, was that he was going south, and if he should die she could settle her own business better without having any administration about it, as he said he had seen considerable swindling in settling up estates, and Mr. Read, the counsel of the claimant, says he heard him say he took it in her name to secure her for the money he had that belonged to her.

This is all the testimony on that subject, except some vague statements of Mrs. Jones, and there is not enough evidence to support the claim that it was intended as a settlement of that amount upon her.

The subsequent conduct of the parties negatives also any such idea. It does not appear that she ever had the notes or mortgage in her possession. Col. Jones collected the money and used it as his own, deposited it with his other money in the bank, and purchased land with some of it and took the title thereto in his own name, and used it as he saw fit. About $4,000 of it was paid to Mrs. Jones at one time in his absence; she gave a receipt for it in his name, and then deposited it to his credit in the bank. Over $20,000 of that money was deposited with Mr. Henry, the banker, in Col. Jones' name, and no intimation was ever made to him, or to any one else, that it belonged to his wife, and neither of them kept any account of the time or amount of the payments. This conduct disproves the claim that it was intended as a bona fide payment to, or settlement upon, the wife, even laying out of view the claims of creditors. But when considered with reference to the rights of parties dealing with and crediting Mr. Jones, after that transaction, it presents a case that can not receive the approval of any court. She allowed him to collect, deposit, and use the money when collected as his own, and to enjoy the credit and reputation that the reception and use of the money necessarily gave him; and after parties have dealt with him, supposing and believing he was the owner of such money, she can not be heard to assert her right to it, and thus defraud honest creditors who have trusted him, relying upon the truth of appearance of ownership which she permitted him to present. Nor is this all that militates against the verity of this claim. After he had gone into business and obtained large credit, and became embarrassed and unable to pay his debts, she, instead of asserting her claim, joined with him in deeds of conveyance of all his real estate to his children, and thus attempted to aid him in placing his property in the names of his children, to defraud his creditors, and keep it in the family, instead of trying to get it to pay her claim; and after he had thus fraudulently conveyed his property, he absconded, taking with him some considerable money obtained upon notes and securities of the firm of D. M. Platt & Co., which were transferred to him to collect and pay over to the creditors of that firm. As far as Mr. Jones is concerned, the evidence shows, beyond question, that he attempted to cheat and defraud his creditors, and the creditors of D. M. Platt & Co., out of their debts. Certainly, as to Mr. Jones, the fraud is clearly proven, and it is equally as plain that his wife co-operated with him in accomplishing it.

Neither of them pretended that she had a claim of this kind until after the scheme adopted to defraud the creditors by such deeds had been foiled by the institution of proceedings in bankruptcy. But when it became apparent that the grantees in those deeds could not hold the lands from the creditors, this new claim or pretense was set up. Then it was first given out that he owed a debt to his wife for money he had received, belonging to her, and that this mortgage was intended as an advancement.

The case shows that they were not lacking in resources and schemes to accomplish what they had manifestly undertaken, to wit., to defraud the honest creditors of Mr. Jones and of D. M. Platt & Co. In arriving at this conclusion I have to disregard a good deal of the testimony of Mrs. Jones, but I feel justified in so doing. It is so contradictory, inconsistent, and unnatural in many of the most material points, that I feel compelled to reject and discredit it. [Her recollection is so defective and imperfect about matters that would seem to have been of such a nature as to be indelibly fixed upon the memory, such as, for instance, the amount she received from her father's estate, and as to whether it was paid to her or her husband. These, together with many other important discrepancies and contradictions, force me to totally discredit and reject her evidence when it is not corroborated. It may be that she has not intended to testify to anything but the truth; that the inconsistencies result from her impaired and imperfect memory of the facts of the case which she attempts to relate, and I am inclined to adopt this as an excuse or explanation in her behalf; but it nevertheless renders her testimony incredible. I therefore, upon the evidence, must reject her claim to the $24,000 mortgage of Owen Wright, and hold that it was the property of D. W. Jones and not hers, and that it was not settled upon her as and for her separate property, but simply taken in her name to provide against the contingency of his death while on his contemplated trip south.] [2]

This brings me to a consideration of the claim, based upon the theory that Col. Jones received certain property and money belong-

[2] [From 9 N. B. R. 556.]

ing to her that came from her father's estate. The counsel for the assignee examined with a great deal of learning and ability, the will of Mrs. Jones' father, under which she received the property, for the purpose of showing that it was given to her directly, and not to trustees for her benefit and use; or, rather, to show that the executors had a discretion as to whether to deliver it to her or to her and her husband, and that, as the case showed they delivered to Mr. Jones, after the marriage, the portion belonging to her, they thereby executed that discretion in favor of the husband, and that it was not therefore to be regarded as her separate property, but as the property of Mr. Jones. In this case the parties were married before the married woman's act of Kentucky was passed, and after the death of the testator. But I do not consider it important to pass upon those quesions, for, as to a portion of the estate, she did not become possessed of it until after removal to this state, nor until after the married woman's act was adopted here. Indeed as it appears, all that her husband received was after the passage of that act; and as by the terms of the will the executors were to convert the personal property into a fund, to keep it and distribute it, etc., I think the title remained in the executors until it was distributed, and if so, it did not come to her until after the passage of that act, which gave it to her free from the claim or control of her husband. Burr v. Sherwood, 3 Bradf. (Sur.) 85. The counsel of the assignee claimed that the husband's right to it had attached before the passage of that act, and that the act, so far as his right was concerned, was unconstitutional, and cited to that effect the case of Westerveldt v. Gregg, 12 N. Y. 202. Without questioning the correctness of the doctrine laid down in that case, I think this case is distinguishable from it in this: In that case there was an unqualified bequest to the wife, and it was held that such a legacy was to be regarded as a chose in action, like a promissory note, and that, as a husband has a right to reduce his wife's choses in action to possession, and to assign them before so doing, that he had such a vested right as the legislature could not cut off, by declaring that it should be the separate property of his wife. But in this case the trustees were to first determine whether to pay the portion to the daughter or to trustees, or to her and her husband, and, hence, until they had exercised that discretion, the husband had no vested interest in it. The right of the husband was in abeyance, awaiting the decision of the executors upon this question, as to whom the money should be paid, and this discretion was not exercised until after the passage of the married woman's act in this state. So I think, under the terms of this will, the husband had not such a vested interest in the wife's distributive share as the constitution would protect from the operation of that act.

But the case of Westerveldt v. Gregg, supra, disposes of the claim for the amount of the Frank Dunn note. The evidence shows that Mrs. Jones, before she was married, loaned to her brother Frank $436.80, for which he gave her his note, and that he afterwards paid it to Col. Jones. I think that the husband had such a vested interest in that note, by virtue of the marriage contract, that the legislature could not take it away from him, and declare it to be the sole and separate property of the wife, without violating the provision of the constitution which declares that no person "shall be deprived of his property without due process of law." That being the case, it was his property, and he is not liable to her for it, nor can she prove the same against his estate in bankruptcy. The testimony further shows that on the 31st of March, 1863, $182 was paid to Col. Jones by the executors, as his wife's share of the proceeds of certain lands belonging to the estate, which were sold by the executor. This, together with the $453.14, paid in 1853, amounting in all to the sum of $635.14, I think properly chargeable to the estate of D. W. Jones, and I authorize her to prove a debt for that amount against his estate.

The claim for the hire of her two slaves, from January, 1851, to December, 1865, when they were emancipated, I do not think is sustained by either the evidence or the law. It appears that in January, 1851, two slaves were apportioned to her, and that the executor kept them and hired them out for her benefit under the authority and directions in the will hereinbefore mentioned. The executor says they earned from $100 to $150 each annually, and that he remitted the proceeds after paying taxes and expenses to Mr. David W. Jones. These slaves were clearly her separate property, and the hire was for her benefit and use, but she permitted her husband to receive it and use it for a period of over fifteen years, and never kept any account of the amount or time of its reception, and, indeed, according to her testimony, she did not seem to have any idea of what this hire amounted to, for she swears it was $500 a year, when, as before stated, it did not exceed $250.

The doctrine in equity is too firmly established to be now questioned, that a married woman may bestow the income of her separate property upon her husband, at least, when done freely and without undue influence; and the rule is equally well settled, by a long and almost unbroken line of decisions in both this country and England, that where the husband, by the consent of his wife, is in the habit of receiving the income, profits and dividends of her separate estate, such facts and transactions are regarded as showing her voluntary choice to thus dispose of them for the use and benefit of the family, and the law will not require him to account therefor beyond the amount received during

the last year. 2 Story Eq. Jur. § 1396; Methodist Church v. Jaques, 3 Johns. Ch. 1; Parkes v. White, 11 Ves. 225. [Perry, Trusts, § 665; Squire v. Dean, 4 Brown, Ch. 326.] [3]

This doctrine effectually disposes of the claim for hire of the slaves, and any claim for interest on the principal paid to her husband. But, as I have before said, the fact that no account was kept by either party of the amount of the money received from that source for so long a period, strengthens the presumption of the law that the wife intended her income to be used for the benefit of the family. In such case the law does not imply an agreement to repay it.

This rule, it will be observed, applies only to the income of her separate estate. But for the amount of $635.14, received by the husband as a part of the principal, I think a different rule prevails. In re Bigelow [Case No. 1,398]; In re Blandin [Id. 1,527]; Jaycox v. Caldwell, 51 N. Y. 395. She admits in her proof that she has received notes and mortgages for $1,267, to apply on her indebtedness. If so, the above sum of $635.14 should be deducted from that, and she should pay the balance to the assignee; but I will not definitely determine that question at this time, but will leave it open for the claimant and assignee to make such disposition of it as they may deem just and proper. Her debt proven is ordered expunged from the list of creditors.

As this claim of the wife for the amount proven is so groundless and destitute of any semblance of justice or merit, I deem it but just, and as my duty to the creditors of the estate, to charge her with the costs of this proceeding, to be taxed, including a docket fee of $20 to the attorney for the assignee.

NOTE. See, further, as to the vested interest of the husband in his wife's property not defeasible by the "married woman's act," Briggs v. Mitchell, 60 Barb. 288; Coombs v. Read, 16 Gray, 271; Quigley v. Graham, 18 Ohio St. 42. In Illinois the "married woman's law" has been held not to divest the husband of his estate by courtesy which had vested before passage. Noble v. McFarland, 51 Ill. 226. The acquiescence of the wife in her husband's use of her estate as his own from twelve to nineteen years, without any accounting or memorandum, does not constitute such a trust or settlement as can stand against the rights of antecedent creditors. Briggs v. Mitchell, 60 Barb. 288.

## Case No. 7,445.

In re JONES.

[2 Dill. 343; [1] 6 West. Jur. 71; 4 Chi. Leg. News, 66.]

Circuit Court, D. Kansas. Nov. Term, 1871.

BANKRUPT ACT—EXEMPTION—LOCAL STATUTE.

1. A merchant tailor, who is a practical workman and who cut and fitted garments for customers and superintended their manufacture, is entitled as against the assignee in bankruptcy to have exempt from execution goods to the value of four hundred dollars, under the statutes of Kansas in force in 1864.

2. This is a fixed and determinate right given by statute, and is not dependent upon the discretion of the assignee, and where it is claimed by the bankrupt before the sale of the goods by the assignee and illegally refused, it may be asserted against the proceeds of the goods while in the hands of the court for distribution.

3. The effect of a chattel mortgage on the stock in trade upon the right to an exemption and what property falls within the phrase "stock in trade," as used in the exemption statute, considered.

[In review of the action of the district court of the United States for the district of Kansas.]

Jones, the bankrupt, is a practical tailor, and for many years had been engaged at Leavenworth, in this state, as a merchant tailor. That is, he kept a stock of cloths on hand for the purpose of manufacture, and not for sale. His stock embraced some furnishing goods. Jones himself cut and fitted garments, and superintended the manufacture in the rooms over the store, as well as attended in the room below, where the goods were kept and customers waited on. The value of the stock in Leavenworth at the time Jones was thrown into bankruptcy was about $1,800, on which there existed a chattel mortgage to secure a debt to one Eaves, for $1,400, which debt has since been proved before the register. At the time proceedings in bankruptcy were commenced against Jones, he had a branch of his business at Omaha, Nebraska. The goods at Omaha were worth about $2,000, were taken possession of by the assignee, brought to Leavenworth, mixed with the other goods, and by an order of the district court sold, and the proceeds, $2,700, deposited in that court, where the money yet remains for distribution to those entitled. The goods at Omaha were free from liens or mortgage. Before the assignee made sale of the goods the bankrupt applied to have set off to him as exempt under the bankrupt act [of 1867 (14 Stat. 517)] and the laws of Kansas goods to the value of $400, which the assignee refused to do. After the sale the bankrupt filed in the district court a petition setting forth the foregoing facts, and praying that the sum of $400 be paid to him from the proceeds of the goods. An order was made to this effect, to reverse which the assignee has filed in this court the present petition.

Mr. Britton, for assignee.
Sherry & Helm, for bankrupt.

DILLON, Circuit Judge. In 1864, the laws of the state of Kansas, in which the bankrupt had his domicile, contained and still contain the following provision in regard to the exemption of property: "Eighth. The necessary tools and implements of any mechanic, miner, or other person, used and kept for the purpose of carrying on his trade or

[3] [From 9 N. B. R. 556.]

[1] [Reported by Hon. John F. Dillon, Circuit Judge, and here reprinted by permission.]

business, and, in addition thereto, stock in trade not exceeding four hundred dollars in value." Exemption laws founded upon the humane policy of making provision for the support of the poor man and his family are to be liberally rather than strictly regarded. They should receive such fair construction as will best promote the beneficent intention of the legislature.

In argument, the counsel for the assignee contends that the order under review is erroneous, 1. Because Jones was a merchant, and not a mechanic or person such as is contemplated by the Kansas statute above quoted. 2. Because, conceding that Jones was entitled to the exemption, the right, although claimed before the sale, not having been recognized by the assignee or established by the court, is waived or lost. 3. Because the mortgage upon the stock in trade destroys the right to the exemption, not only as against the mortgagee, but the assignee.

Neither of these positions is well taken. Jones, as a practical workman, not selling goods as merchants usually do, but manufacturing them for customers upon special orders, under his own superintendence, is fairly within the language and clearly within the purpose of the local exemption statute. That he did not do all the work himself, but employed workmen, makes no difference. In the reverse he has met, he has need of the provision which the law makes, as much as if he had done business on a scale so small that he did all the work with his own hands.

As to the second position of the assignee, I remark that the exemption to the amount of $400 is a fixed and determinate right not dependent upon the discretion of the assignee or court. The assignee ought to have recognized this right when it was claimed by the bankrupt before the sale, and the right may be asserted against the proceeds of the goods in the hands of the court for distribution.

As to the other point. The mortgagor does, as against the mortgagee, waive the exemption, but not as against the assignee, if there should be a surplus beyond the amount required to pay the mortgagee's debt. The proposition that the mortgage absolutely destroyed the exemption, seems to have been the very one that was relied on in the district court. But the record here discloses the facts appearing in the statement, and it is suggested that the Leavenworth goods did not sell for enough to pay the mortgage debt, and hence there is no surplus as to those goods, and the Omaha goods having been out of the state, where the bankrupt was domiciled, cannot be considered as any part of his stock in trade within the meaning of the local exemption act.

It is true that the two stocks were mingled, and that it is impossible now to ascertain how much each portion brought at the sale. It does not appear from the record before me whether the mortgagee is entitled to a lien on the proceeds for the amount of his debt or not. But aside from these considerations, which would lead to an affirmance of the order of his honor below, I am of the opinion that the Omaha stock, having been brought into this state and mixed with the other, without any fault of the bankrupt, the two should be taken as together constituting the stock in trade of the bankrupt within the meaning of the local exemption statute, and that out of this stock in trade he is entitled to claim and hold as exempt the amount of $400 in value. The order complained of is affirmed. Affirmed.

As to homestead exemption in Kansas, see In re Tertelling [Case No. 13,842]; Rix v. Capitol Bank [Id. 11,869].

## Case No. 7,446.

In re JONES.

[2 Lowell, 451; [1] 13 N. B. R. 286.]

District Court, D. Massachusetts. Dec., 1875.

INVOLUNTARY BANKRUPTCY—GROUNDS FOR DISCHARGE—FRAUD.

1. It seems, that congress has not expressed the intent that a fraud, committed before the bankrupt act [of 1867 (14 Stat. 517)] was passed, should be ground for refusing discharge.

[Cited in Re Wolfskill, Case No. 17,930; Re Condict, Id. 3,094.]

2. A fraud at common law, or under the statutes of the state, may be objected to a discharge, if it was committed so recently that it would affect any of the creditors who can come in under the bankruptcy.

[Cited in Re Signer, 20 Fed. 236.]

[In the matter of Oliver L. Jones, a bankrupt.]

I. T. Drew, for bankrupt.

W. J. Copeland, for objecting creditors.

LOWELL, District Judge. Jones was made a bankrupt in the district of Maine upon a petition of a creditor, and was there examined very fully. The proceedings were afterwards dismissed, and Jones came to Massachusetts, and, after his residence here had been long enough, filed a voluntary petition, which has been proceeded with, and objections to his discharge have been specified and argued.

It is thought by the objecting creditors that the dismissal of the former proceedings was made for the very purpose of getting rid of the objection that preferences had been made within four months of the petition in that case; and it said that no notice was given to creditors of the proposed order to dismiss. If so, it must have been an accident; for the law has always been, until lately, that a man once in bankruptcy cannot go out again without the consent of every creditor. The importance of that rule is shown by this case. Now, by the statute of 1874, proceed-

[1] [Reported by Hon. John Lowell, LL. D., District Judge, and here reprinted by permission.]

ings may be dismissed with the written consent of the debtor, and not less than one-half of his creditors in number and amount, if, after notice to the other creditors, the court shall approve. 18 Stat. 182. But the court would not be likely to approve a dismissal, if its effect would be to obviate valid objections to the bankrupt's discharge.[2]

As the case stands here, mere preferences cannot be set up in opposition to granting a discharge, which were given without regard to this bankruptcy, and more than six months before the petition. The objecting creditors, however, allege that certain conveyances which were made by the bankrupt, and which are admitted to have been preferences, were likewise fraudulent conveyances, and as such may be objected to the discharge, though they were made long before the bankruptcy. It has been held that such a fraud, though committed before the bankrupt law was passed, may be availed of for this purpose.

There is no doubt of the power of congress to make the discharge dependent upon any conditions it chooses to establish; but I have always been of opinion that it has not expressed an intent that a fraud committed before the law was passed should be ground for refusing the discharge. That point is not important here. The true construction of the statute does seem to me to be that a fraud at common law, or under the statutes of the state, may be objected, if it was made at a time so recent that it would affect any of the creditors who can come in under the bankruptcy.

It appears to me, upon examination of the evidence here, that one at least of the conveyances proved to have been made by the bankrupt was not only a preference, but an actual fraud; that is to say, though there was the consideration of a debt, there was likewise an intent to conceal and withdraw the property from creditors, and not a simple and bona fide intent to pay or secure the debt. In another of the transactions there was a secret reservation of a benefit to the debtor, if the property should be more than sufficient to pay the debt; and, though this did not prove to be so, the fraud was complete before the result was determined.

The legal effect of such evidence depends on Rev. St. § 5110, cl. 5, under which, as I have intimated, a preference probably means, either one that would have been voidable by the assignee in this case, or at least one that was made in contemplation of this bankruptcy. But the fraudulent payment, conveyance, or loss by gaming do not appear to be thus limited, and seem to include all such payments, conveyances, and losses as have diminished the assets, which otherwise would have come to the assignee. Discharge refused.

[2] I am informed by Judge Fox that the case in Maine had not been dismissed, and could not be, under his practice, without notice. If this had been proved, the whole proceedings here would have been quashed, since there can never, or very rarely, be two bankruptcy proceedings against the same person at the same time.

## Case No. 7,447.

In re JONES.

[2 N. B. R. 59 (Quarto, 20).] [1]

District Court, D. Virginia. 1868.

BANKRUPTCY—CREDITORS—RIGHTS OF—ASSIGNEE—REMOVAL OF—TRUSTEE.

Rights of creditors arise and accrue after proof of their claims. A creditor, after his claim has been duly proved, has the right to ask that the petitioner amend any defect in his petition or schedule. Such claims as are of a questionable or doubtful character may be postponed until after an assignee is appointed. After an assignee has been appointed, at a subsequent meeting of creditors, they may make an arrangement by trust deed to have assignee removed and a trustee appointed in his stead.

[Cited in Re Montgomery, Case No. 9,729; Re Heller, Id. 6,339; Re Blaisdell, Id. 1,488; Re Brinkman, Id. 1,884; Re Bininger, Id. 1,421.]

[In the matter of Decatur Jones, a bankrupt.]

On the first meeting of creditors, before John F. Cobbs, register, the following questions arose and were contested: First. That the schedules were defective, and not in conformity with the act [of 1867 (14 Stat. 517)]. Second. That the notice to creditors was insufficient and not in conformity with the act. Third. That a creditor making the usual affidavit is entitled to vote for assignee. Fourth. That an arrangement made by trust deed cannot be effected on first meeting of creditors.

Upon these several questions the register expressed the following opinion:

The register is not compelled to express an opinion nor to certify any question that by legal construction cannot by possibility arise, up to the present stage in the proceedings; he is therefore of the opinion, that all other disputed questions in this matter should be discarded, and the four foregoing questions alone certified for the opinion of the court. Rights of creditors arise and accrue after admitted proof of claim in all bankruptcy proceedings. The right of any creditor, after his claim has been duly proven and admitted, to ask that the petitioner be compelled to amend any defect in his petition or either schedule thereunder, seems most reasonable and is clearly just and equitable, and the register is further of the opinion, that it is his duty, either upon motion or otherwise, when he is satisfied that the petition or schedules thereunder are defective, to certify the fact; and that an order of the court should afterwards be made thereon compelling the petitioner to meet the requirements of the law—otherwise the

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register will be compelled to certify that which he knows not to be in conformity with the act, before a petitioning debtor will be able to obtain his discharge. General Orders 5, 7, 33. Schedule A 4, is defective and should be amended. Schedule B discloses the fact that McClish, Rives & Co., have a lien for twelve thousand dollars on five hundred and thirty-nine acres of land listed, and they should have been put in Schedule A, with the list of other creditors holding securities, and more clearly entitled to notice. Second. The notice is defective in that it does not specify all the names and the several amounts admitted to each creditor, to which each creditor respectively is entitled to notice, for obvious reasons, the form for which will be seen by reference to general orders, and with which this does not correspond. Third. The claim of Ayres, Son & Co., is in the usual form of affidavit made by a member of the firm, but is founded upon a large open account between the parties, and evidently of a questionable character, being in dispute between the litigants (contested and denied, and now in suit,) as appears from the evidence. By section 23 of the act, such claims as are of a questionable or doubted character may be postponed until after an assignee is appointed, to be investigated by him. The claim therefore is postponed, but not rejected, and the firm, as a creditor, denied a vote at this meeting. Fourth. The right of creditors to choose one or more assignees at the first meeting cannot be disputed or denied under the expressed provisions of section thirteen of the act, and under section forty-three provision is made for a change from bankruptcy to arrangement. Two modes are thus given creditors, by either of which they may choose to wind up and settle the estate of the bankrupt; the usual manner being through the intervention of an assignee, and the other by the aid of trustees acting under advisement of a committee, preparatory to a final distribution of the bankrupt's effects among his creditors. It is further provided, that even after an assignee has been duly appointed, at a subsequent meeting of creditors, they may elect to arrange by trust deed, have the assignee removed, and in his stead trustees substituted and appointed. Were it not for express provision made in section forty-three, that at the first meeting of creditors, the right to this last mentioned mode is given, the general rule that a greater cannot follow a lesser right would apply. But the right to choose between an assignee and an arrangement by trust deed, is clearly given to the creditors on the first meeting, and being clearly indicated and expressed in form, after the manner of the act, and in this matter fully determined, the register shall so certify.

Whereupon the contestants withdrew their claims and afterwards THE COURT made an order that the petitioner so amend his schedules as shall be in conformity with the act as above specified, and furnish the clerk of the court with a copy of the same, until which time the proceedings in said matter remain suspended.

## Case No. 7,448.

In re JONES.

[4 N. B. R. 347 (Quarto, 114).] [1]

District Court, E. D. Missouri. 1871.

BANKRUPTCY—SERVICES UNDER CONTRACT BEFORE BANKRUPTCY—COMPLETION OF—COMPENSATION.

When the bankrupt under a general contract has rendered partial service, but has not completed the contract prior to the filing of the petition, but subsequently fulfills the same, unless the contract for payment was contingent upon full performance of the services, the compensation will be apportioned between the assignee and the bankrupt, in proportion to the value of the services rendered before and after the bankruptcy.

This was a motion by the assignee to require the bankrupt to give the assignee the requisite authority to enable him to collect a fee of one thousand dollars which had been allowed the bankrupt for professional services in a partition suit. The bankrupt had been retained to bring and conduct a suit for partition of real estate, and to have the share of plaintiffs set off to them. There was no contract for the amount of the fee. Interlocutory judgment for partition was rendered June 22, 1869, and the petition was filed by the bankrupt in July, 1869. After the petition the bankrupt continued his attendance on the case, appeared before the commissioners, and procured the confirmation of the report, and in November, 1869, the court taxed in his favor, to be paid out of the fund, a fee of one thousand dollars. It was contended by the assignee that the fee was carried when the judgment of partition was entered, and that the subsequent proceedings were the work of the commissioner, whose duty it was to make the partition; while for the bankrupt it was urged that the contract was indivisible, and that nothing was really earned until all the services necessary to finally close the case had been rendered. Testimony was offered to show the value of the services rendered before and after the filing of the petition in bankruptcy.

TREAT, District Judge. The contract of the bankrupt appears to have been that of an ordinary retainer to conduct a cause, and his compensation was not contingent upon his final success, or upon the final proceedings in the petition. He was, therefore, entitled to be paid for his services as he rendered them. For the services rendered before filing his petition he had a claim upon his clients, and that passes to the assignee, but he was not compelled to work for the as-

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signee after the bankruptcy, and for the value of services subsequently rendered in the cause he is entitled to retain the compensation. Upon the evidence in this cause the assignee will be allowed three hundred dollars, and the remaining seven hundred dollars the bankrupt may retain, upon executing to the assignee the necessary orders to enable him to collect the three hundred dollars from the partition suit.

## Case No. 7,449.

In re JONES.

[6 N. B. R. 386.] [1]

District Court, E. D. Michigan. Feb. 6, 1872.

BANKRUPTCY—ATTACHMENT FOR CONTEMPT.

On the return of an order to show cause why the bankrupt should not be attached for contempt in disobeying an order requiring him to appear and be examined under section 26 of the bankrupt act [of 1867 (14 Stat. 529)] he put in an answer that he was fully discharged before the issuing of the order, and therefore not subject to the orders of the court. *Held*, that after a discharge has been granted, the power or means to discover assets by the examination of the bankrupt, under section 26, no longer remains, and that the power of examination will not be revived until the discharge has been set aside. Proceedings for contempt discharged.

[Cited in Re Dole, Case No. 3,964; Re Witkowski, Id. 17,920.]

This matter came on and was heard on an order on the bankrupt [G. C. Jones], to show cause why an attachment should not issue against him for contempt in not obeying an order made November twenty-second, eighteen hundred and seventy-one, requiring him to appear and be examined under section 26 of the bankrupt act. For cause the bankrupt sets up that he was fully discharged July eighteenth, eighteen hundred and sixty-eight, and claims that he was therefore not subject to the orders of the court at the time said order was made.

Mr. Atterbury, assignee, in pro. per.
Mr. Pond, for bankrupt.

LONGYEAR, District Judge. The provision contained in the first clause of section 26, "that the court may, on the application of the assignee in bankruptcy, or of any creditor, or without any application, at all times require the bankrupt, upon reasonable notice, to attend and submit to an examination," etc., must be read and interpreted in connection with, and as qualified by, the subsequent provision of the same section, that "the bankrupt shall, at all times until his discharge, be subject to the order of the court," etc. The bankrupt cannot be required to submit to an examination under the former provision except by an order of the court. But by the latter provision he is subject to the order of the court only until his discharge. Clearly, therefore, he cannot be so required after his discharge. In re Dean [Case No. 3,701]. Ample time is allowed for the examination of the bankrupt before he can even apply for a discharge, (see section 29,) and the power to subject him to such examination remains until the discharge is granted. In re Solis [Id. 13,165]. After this time has passed, however, and a discharge has been granted, the power or means to discover assets by the examination of the bankrupt, under section 26, no longer remains. But the assignee and the creditors are not therefore necessarily remediless. The ordinary process and means for the discovery and the recovery by the assignee of property which ought to come to his hands remain the same after as before discharge, and I apprehend that the functions of the assignee for that purpose remain so long as there are any assets, the title to which passed to him, remaining uncollected, subject only to the limitations and actions as fixed by the act or by the general laws. They may also, under section 34, contest the validity of the discharge at any time within two years after its date, and if they succeed in setting it aside, then the case will again stand as it did before any discharge was granted, and the power of the court to require the bankrupt to submit to an examination, under section 26, will be revived. The order of November twenty-second, eighteen hundred and seventy-one, for the examination of the bankrupt being, as we have seen, unauthorized, the same is invalid and void. The order to show cause why the bankrupt should not be attached for disobeying the said order of November twenty-second must therefore be discharged, and the proceedings, as for a contempt, must be dismissed.

[1] [Reprinted by permission.]

## Case No. 7,450.

In re JONES.

[7 N. B. R. (1873) 506.] [1]

District Court, D. Indiana.

BANKRUPTCY—PLEA IN ABATEMENT—SUBSTITUTION OF PARTIES.

B filed a petition in bankruptcy against A. Pending the adjudication B is himself adjudged a bankrupt, whereupon A files a plea in abatement setting out the bankruptcy of B, and claiming that thereby the proceedings against him are at an end. At this state of the proceedings B's assignees come in, produce evidence of their appointment and move the court to substitute them as the petitioners against A, and to strike the plea in abatement from the files. *Held*, that the first clause of the sixteenth section of the bankrupt act [of 1867, 524] authorizes the assignee to originate an action in bankruptcy for the recovery of a debt due the bankrupt, and that the second and third clauses of the same section transmit the right to prosecute pending actions from the bankrupt to the assignee, and from one assignee to another, in case of death or removal. Hence the assignee must be substituted for the bankrupt in this case.

In bankruptcy.

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GRESHAM, District Judge. On the 17th of October, 1870, William McEwen filed his petition in this court for adjudication of bankruptcy against Benjamin F. Jones. At the same time a petition was pending in the same court against McEwen, seeking adjudication of bankruptcy against him, and pending his proceeding against Jones, McEwen was himself adjudged bankrupt, and Joseph J. Irwin and three others were appointed his assignees. Thereupon, Jones filed his plea in abatement to the petition against him, setting out the bankruptcy of McEwen, and claiming thereby the proceeding against him was at an end. At this stage of the proceedings, Irwin and the other assignees of McEwen come in and produce evidence of their appointment, and move the court to substitute them as the petitioners against Jones, and to strike the plea in abatement from the files. The bankruptcy proceeding in the name of McEwen against Jones is, by the adjudication of bankruptcy against McEwen, abated, unless the bankrupt act provides that the suit may be continued in the name of his assignees. The first clause of section 16 of that act gives to the assignee of a bankrupt "the like remedy to recover all the estate, debts, and effects in his own name, as the debtor might have had if the decree in bankruptcy had not been rendered and no assignment had been made." The second clause of that section provides that "if at the time of the commencement of proceedings in bankruptcy an action is pending in the name of the debtor for the recovery of a debt or other thing," which ought to pass by the assignment, the assignee may procure himself to be admitted to prosecute such action just as if it had been commenced by him. The third clause of section 16 declares that no suit pending in the name of an assignee shall abate by his death or removal, and that the successor shall be admitted to prosecute it, as if it had been commenced in his name. Under the first clause of this section the assignee may originate a suit in bankruptcy against a debtor of the bankrupt. His remedies under the law are regulated by the same provisions that control the rights of other parties. If such a debtor is in failing circumstances, and the assignee has reason to know his condition, he cannot more than any other party, proceed to judgment and execution, or, in other words, he cannot secure by such method, or in any other way, a preference over other creditors for the estate which he is administering. He must adopt the only remedy which the law allows him in the performance of his duty to collect the assets of the bankrupt, and that is the filing of a petition in bankruptcy against his bankrupt's insolvent debtor. An action by a creditor against his debtor, by means of a proceeding in bankruptcy, is strictly "an action for the recovery of a debt or other thing which might or ought to pass to the assignee by the assignment," and, indeed, is often the only action that the creditor can resort to. All other remedies for the collection of debts are open to the assignee, and why not the remedy by suit in bankruptcy? If, then, the first clause of said section authorizes the assignee to originate an action in bankruptcy for the recovery of a debt due the bankrupt, it will hardly be questioned that the second and third clauses of said section transmit the right to prosecute pending actions from the bankrupt to the assignee, and from one assignee to another, in case of death or removal. It follows thereupon that the assignee must be substituted for the bankrupt.

## Case No. 7,451.

In re JONES.

[9 N. B. R. (1873) 491.] [1]

District Court, E. D. Michigan.

BANKRUPTCY—COMPENSATION OF ASSIGNEE—COUNSEL FEES OF PETITIONING CREDITOR.

1. An assignee, to entitle himself to the per diem allowed by section 17 of the act [of 1867 (14 Stat. 524)] must not only show he actually spent the number of days in attention to the business of his trust, but must also show the necessity for such attention.

2. For counsel fees, in an uncontested case, an allowance of fifty dollars to the petitioning creditor *held* proper and reasonable.

The register certified into court for decision, questions arising upon the allowance of the assignee's final account. It appears from the register's certificate that the assignee had charged the estate for disbursements by him for professional services the sum of four hundred and two dollars and seventy-five cents, which includes the services rendered in obtaining the adjudication of bankruptcy; services in two suits brought for the recovery of a sum held, as alleged, in violation of the provision of the bankrupt act (which resulted in a compromise by which the estate realized the sum of one thousand dollars); services in the re-examination of a claim proved against the estate, and for advice to the assignee. It also appears that the assignee had charged the estate, under the provision of the act (section 17) which allows him a reasonable compensation for his services under the discretion of the court, the sum of two hundred and ninety dollars for fifty-eight days, at five dollars per day.

By HOVEY K. CLARKE, Register:

It is proper that I should state briefly the reason of my hesitation to allow the account as presented.

As to the Assignee's Services.—The whole estate in this case, as realized by the assignee, amounts to $1,466 70, namely: Collected on accounts, $29 70; for goods sold, $357; for rent, $80, and by suit compromised at $1,000. The whole amount of expenses

[1] [Reprinted by permission.]

are stated in the assignee's account at $1,319 40, leaving a balance for distribution of $147 30. This result should have some influence in considering the accounts which present it. I know, indeed, how impossible it would be, in some cases, to allow a proper compensation for the services of an assignee, if such allowance were to be controlled by a commission on the amount which such services realized for distribution to creditors. That, the statute fixes by the commission which it allows upon sums collected and paid out. But the "reasonable compensation" in addition to commissions for which section 17 provides, and which is to be granted in the discretion of the court, I think should be fixed in view of all the circumstances which a prudent and intelligent business man would regard as proper to influence his action. It is difficult to see, for instance, what there was in this estate, whether as shown by the result, or as appears from any other facts set up to sustain the assignee's account, which would render it judicious to spend fifty-eight days of actual service by the assignee. And, while I think that assignees should be paid for the time necessarily devoted by them to the execution of their trusts, I think also that they should be held to some responsibility for the exercise of a reasonable judgment, as to the amount of time thus to be devoted. I think the charges by the assignee in this case were made under the impression that usage had established a per diem of five dollars as something in the nature of a statutory fee, rather than as for a compensation in each case for a service actually rendered. I concede the difficulty of prescribing a definite rule by which to settle such charges; and perhaps the greater difficulty of applying any such rule to the great variety of circumstances in each case. But I think, in this case, in view of the whole amount of the estate, as developed by the result, and of what might probably have been known about it, that one hundred and fifty dollars would be an adequate compensation for all the services really required.

As to Charges for Professional Services.—The gross amount paid by the assignee, for which he presents vouchers signed by Messrs. Dickinson & Dickinson, is $651 80. Of this $6 80 was paid for traveling expenses, $95 to register, clerk and marshal, $147 25 for fees of witnesses summoned for the trial of the suit which was compromised at the sum of $1,000, leaving the sum of $402 75 for professional services. The charge of $120 for obtaining the adjudication of bankruptcy is about double what is usually allowed for this service. The services rendered in the suit are fully set forth in the affidavit of Mr. J. G. Dickinson—they were rendered in a matter possibly within the recollection of the district judge, as the trial referred to in Mr. Dickinson's affidavit was before him sitting in the circuit court,—and therefore as to the proper allowance for these services I refrain from any recommendation.

LONGYEAR, District Judge. Assignees' Services.—As a convenient mode of getting at a proper allowance for services of assignees, an allowance by the day has usually been adopted. But this is hardly a fair mode where, as in this case, the time charged for is very large, and the estate very small. So, too, as to the per diem allowed. Five dollars is the maximum allowed in this court. It would not be reasonable to allow the highest compensation in a case like the present where the time charged for is unusually large and the estate is so small that the expenses of administration must, in any event, absorb much of the larger portion of it. Here, too, the assignee is himself a creditor, and he must submit to a sacrifice of something of his services for the common good. The opinion of the register, in its reasoning and conclusion in this regard, is approved.

Professional Services.—The usual allowance in this court for preparing petition, etc., and obtaining an adjudication when uncontested, is $50. No reason appears why more than that should be allowed in this case except for the extra services in making the necessary preliminary investigations, for which $25 additional must be allowed, making these items $75 in all, instead of $120, as charged. For services in the chancery suit $75 must be allowed instead of $100, as charged. The remaining items for professional services must stand as charged.

One of the chief reproaches brought against the bankrupt law is, that small estates are absorbed in costs and expenses; and it must be understood that when such cases are undertaken and prosecuted, charges for services will be limited to what the court considers a bare compensation, whether professional or otherwise.

## Case No. 7,452.

In re JONES et al.

[12 N. B. R. (1875) 48; [1] 7 Chi. Leg. News, 162.]

District Court, N. D. Illinois.

BANKRUPTCY—DISCHARGE—SPECIFICATIONS IN OPPOSITION TO—DEMURRER.

Specifications were filed in opposition to the bankrupts' discharge before the passage of the amendments of June 22, 1874 [18 Stat. 178]. After their passage the bankrupts demurred to the specification charging non-compliance with section 33 of the bankrupt act of 1867 [14 Stat. 533] commonly called the "fifty per cent. clause;" also to the one charging that the bankrupts, being insolvent, with intent to prefer said opposing creditor made an assignment for his benefit. *Held*, that the demurrer was well taken to both these specifications, and that they should be stricken out.

[This was a demurrer of the bankrupts [Jones and Hoyt] to certain of the specifica-

[1] [Reprinted from 12 N. B. R. 48, by permission.]

tions of opposition to their discharge.][2] The bankrupts were adjudicated, on petition of creditors, July 18, 1870, and specifications were filed by one creditor before the passage of the amendments of June 22, 1874. After their passage bankrupts demurred to the one charging non-compliance with the requirements of section 33, known as the "fifty per cent. clause," and also to the one which charged that, bankrupts being insolvent, etc., with intent to prefer said opposing creditor, made an assignment for his benefit.

A. S. Bradley, for bankrupts, cited In re Griffiths [Case No. 5,825]; In re Perkins [Id. 10,983]; In re King [Id. 7,781]. And as to the second point, In re Whetmore [Id. 17,508]; In re Schuyler [Id. 12,494]; also the maxims of the civil law, that no one can derive aid from his own wrong, or better his condition thereby; and of the common law, "Ex turpi causa, aut ex dolo malo, non oritur actio. In pari delicto potior est conditio defendentis."

W. F. Becker, for creditor, cited In re Francke [Case No. 5,046]; contending that, since a creditor who had taken his debtor's property on legal process could throw him into bankruptcy for that act, he might oppose his discharge for acts in which he had participated.

BLODGETT, District Judge, sustained the demurrer on both points, and struck out the specifications.

JONES (ADAMS v.). See Case No. 57.

## Case No. 7,453.

JONES v. AETNA INS. CO.

SAME v. INS. CO. OF NORTH AMERICA.

[7 Reporter, 644;[1] 19 Alb. Law J. 522; 8 Ins. Law J. 415.]

Circuit Court, D. Massachusetts. April 22, 1879.

INSURANCE — GENERAL AGENT WAIVING CASH PREMIUM — AGENT KEEPING ACCOUNT CURRENT — AGENT CHARGING HIS PERSONAL CREDITOR WITH PREMIUM.

1. A general agent of an insurance company may waive the condition of the policy for a cash premium. He may give credit for the premium.

2. An insurance agent may keep an account current with his company, and he may therein charge himself with any or all premiums.

3. In such case the agent may charge his personal creditor with the amount of his premium, and credit the company as against himself.

These cases were tried together. They were brought upon an oral promise to insure, which promise was denied by the defendants. The agent, who made the insurance, one Hyde, had been acting for these companies for many years and was a general agent intrusted with policies signed in blank, and he made such contracts of insurance as he deemed expedient and for the interest of the companies. He testified, among other things, that he was in the habit of giving credit to the various persons whom he insured, and that he settled a monthly account with the companies, charging himself with all the premiums whether he had collected them or not. The plaintiff's testimony about the premiums was that Mr. Hyde, the agent, owed him for beef, and that they agreed that Hyde should send in his account for premiums, and if there was a balance due from the plaintiff he should pay it in money. The defendant contended that such a contract, if made, was void upon its face as an attempt to pay the agent's debt with the principal's insurance. The judge ruled and instructed the jury upon this point that, while the defendant's position was a sound one, in the general law of principal and agent, an exception has been admitted in the law of insurance, and that, if the agent had agreed to give credit to the insured and himself to become the debtor to the company, the contract of insurance would not be rendered void by the fact that the agent had agreed to receive a credit on his own account instead of money for the premiums. The verdict was for the plaintiff, and a motion for a new trial was made by defendants. The ruling of the court chiefly objected to was that concerning the payment of premiums.

C. Allen, for plaintiff.

H. G. Parker and J. D. Bryant, for the different defendants.

LOWELL, Circuit Judge. Upon a review of the point, aided by the able and learned arguments on both sides, I am unable to see that the ruling was wrong. There was no question of actual fraud, or of the insolvency of either the agent or the plaintiff, and the decisions, it seems to me, make out such an exception as I referred to in the ruling. In certain classes of mercantile agencies the law founded originally in usage permits the agent to keep an account current with both sides and to settle with one of them by an offset, such as was agreed on in this case. Stewart v. Aberdein, 4 Mees. & W. 211; Catterall v. Hindle, L. R. 2 C. P. 368, 370. The power of insurance agents to make a contract of this sort is recognized in Chickering v. Globe Mut. Life Ins. Co., 116 Mass. 321, which illustrates the difference between insurance agents and partners in the point under discussion. Mississippi Valley Life Ins. Co. v. Neyland, 9 Bush, 430; Bouton v. American Mut. Life Ins. Co., 25 Conn. 542; Post v. Aetna Ins. Co., 43 Barb. 351. There are many cases in the supreme court as well as other courts which establish the general proposition of the plaintiff, that one who is given the powers which this agent

[2] [From 7 Chi. Leg. News, 162.]

[1] [Reprinted from 7 Reporter, 644, by permission.]

had is a general agent, and may waive the condition for a cash premium. Insurance Co. v. Colt, 20 Wall. [87 U. S.] 560; Angell v. Hartford Fire Ins. Co., 59 N. Y. 171; Hoffman v. Hancock Mut. Life Ins. Co., 92 U. S. 161. Motion for new trial denied.

JONES (ALABAMA & C. R. CO. v.). See Cases Nos. 126 and 127.

JONES (ARNOLD v.). See Case No. 559.

JONES (AULTMAN v.). See Case No. 657.

## Case No. 7,454.

JONES v. BACHE.

[3 Wash. C. C. 199.] [1]

Circuit Court, D. Pennsylvania. April Term, 1813.

BOND CONDITIONED FOR DELIVERY OF A GOOD TITLE—ACTION ON—PRIOR SURVEY—EVIDENCE—EFFECT OF ENTRY AND SURVEY.

1. Debt on bond, conditioned for the delivery of a good and lawful title to land in Virginia; to which the defendant pleaded performance.

2. The surveyors of the county, who officially know that certain lands are covered with prior surveys, are competent witnesses to prove the same.

3. A connected map of a number of surveys, which had been recorded in the county, is evidence, accompanied by the explanations of the surveyors, without producing the separate surveys.

4. An entry and survey do not, in Virginia, convey the legal estate in lands out of the commonwealth.

Action on a bond, dated 23d April, 1796, with condition that the defendant should procure, within eighteen months, and deliver to the plaintiff, a good and lawful grant from the state of Virginia, free and clear of all disputes and encumbrances whatsoever, for 1000 acres of land in Virginia, described in the condition. Upon oyer, the defendant pleaded performance, generally. Replication, that the defendant has not procured and delivered a good and lawful patent, free and clear of all disputes and encumbrances; that true it is, he did deliver a patent, but he says that the legal title to the land was not in Virginia at the time it issued, but was vested in one H. B. by treasury warrants, on which surveys were duly made and returned, and thereupon patents were granted to the said H. B. prior to the patent made to the plaintiff. Rejoinder, that the legal title was not in H. B. when the patent to the plaintiff was issued, and that no patent had issued to H. B. prior thereto. On this rejoinder, issue was taken. The plaintiff gave in evidence a patent issued to him as assignee of the defendant, for 1000 acres, dated 7th July, 1797, by metes and bounds; and then proved, by depositions, that this land was entirely covered by the prior entries and surveys of H. B. in the pleadings mentioned. The witnesses are the surveyor and deputy surveyor of the county in which the land lies; who annex to their depositions a connected map of the surveys of H. B. recorded in their office, to show the position of his land, and that they cover the land granted to the plaintiff; and add, that they believe that patents had issued to H. B. or others, for those lands. This testimony was objected to.

BY THE COURT. The witnesses profess to speak from their own knowledge of these lands, in their capacity of surveyors, as well as officially as to surveys recorded in their office; and they annex a connected map of certain surveys so recorded, to show the situation of the land; and they swear that the land contained in this map, covers the land in question. This is certainly good evidence, without producing the separate surveys, which could of themselves afford no information. Their belief as to patents having issued, is not evidence; as the patents should be produced.

The plaintiff having closed his evidence, the defendant moved for a nonsuit, the matter in issue not being proved.

WASHINGTON, Circuit Justice. The material matter for the plaintiff to have averred in his replication, was, that a good and lawful title, clear of all difficulties and encumbrances, had not been made to him—which he could have supported by the evidence. But the replication unnecessarily alleges, that the legal estate was in H. B., and that patents had issued to him; which averments, the defendant, by his rejoinder, has selected to form the subject of the issue; and issue is accordingly taken on them. But the evidence is against the plaintiff; for there is no proof that patents have ever issued to H. B. or any other; and an entry and survey do not pass the legal estate out of the commonwealth, according to the laws of Virginia. The plaintiff suffered a nonsuit.

JONES (BANK OF COLUMBIA v.). See Case No. 870.

JONES (BARNEWALL v.). See Case No. 1,027.

JONES (BECK v.). See Case No. 1,206.

JONES (BERLIN v.). See Case No. 1,343.

JONES (BRAMMER v.). See Case No. 1,806.

[1] [Originally published from the MSS. of Hon. Bushrod Washington, Associate Justice of the Supreme Court of the United States, under the supervision of Richard Peters, Jr., Esq.]

## Case No. 7,455.

JONES et al. v. BRITTAN et al.

[1 Woods, 667.] [1]

Circuit Court, S. D. Mississippi. May Term, 1872.

BILL IN EQUITY — FAILURE TO FILE REPLICATION —FINAL HEARING—DECREE—IMPEACHMENT COLLATERALLY — FRAUD — ABSOLUTE DEED—MORTGAGE—WANT OF PROPER PARTIES.

1. When a cause in equity is submitted for final decree upon the pleadings and evidence, and it turns out that no replication has been filed to the answers, but that the evidence has been taken as if it had been filed, the court will try the case on its merits, notwithstanding the want of replication, or allow one to be filed instanter.

[Cited in Re Thomas, 45 Fed. 787.]

2. A decree in equity will not be declared void for fraud because there may be suspicious circumstances connected with its rendition. Fraud will not be presumed. It must be satisfactorily shown.

3. When a case has been submitted to and passed upon by a court having jurisdiction, its decree cannot be collaterally impeached, except for fraud.

4. A deed, absolute on its face, will not be held to be a mortgage unless the grantee, as well as grantor, understood the purpose of the conveyance to be the security of a debt.

5. If, after objection is made to a bill in equity for want of necessary parties, the complainant neglects or refuses to bring them before the court, the bill will be dismissed.

[Appeal from the district court of the United States for the Southern district of Mississippi.]

This was a cause in equity, appealed from the district court. It was submitted for final decree on pleadings and evidence.

Wiley P. Harris and James Yerger, for complainants.

John D. Freeman, for defendants.

WOODS, Circuit Judge. The bill is in the nature of a creditor's bill. It avers, in substance, that complainant Jones, on December 17, 1866, recovered a judgment against the firm of Coleman, Brittan & Withers, in which the defendant Brittan was a partner, for $11,883.25, in the First district court for Hinds county, Mississippi. That the firm of John Watt & Co., of which complainant, Michael Musson, is surviving partner, recovered a judgment against the same firm of Coleman, Brittan & Co. on the law side of this court, on the 9th day of May, 1867, for the sum of $7,200. That executions were taken out on these judgments and were returned nulla bona, and that the judgments remained unsatisfied. That, notwithstanding the return on the executions, William J. Brittan was, at the rendition of the judgments and still is, seized and possessed of a valuable plantation in Issaquena county, which is subject to the lien of the judgments, and ought to be subjected to the payment of the same. That the firm of Coleman, Brittan & Co., at the date of the judgments, and for a considerable time prior thereto, was insolvent, and the defendant, William J. Brittan, being a member of the firm and knowing its insolvent condition, for the purpose of preventing the application of his individual property to the payment of the debts of the firm, procured a suit to be instituted against himself by his wife, the defendant Fannie A. Brittan, in the chancery court of Hinds county, in which she claimed that her husband was indebted to her in the sum of $20,625.86, for cotton, which she claimed was grown on her plantation between September 8, 1860, and April 4, 1861, and was shipped to the firm of Coleman, Brittan & Co., and by them sold, and that the same never was accounted for to her by her husband William J. Brittan. That the bill in the chancery court of Hinds county, and the answer of Wm. J. Brittan were filed on the same day, to-wit, on May 14, 1866, and the answer which admitted all the allegations of the bill was sworn to two days before it and the bill were filed. That on the 6th of June following, a decree was rendered as prayed in the bill against Wm. J. Brittan, for $27,023.81, on which execution was allowed to issue. That this proceeding was instituted solely upon the instigation and procurement of Wm. J. Brittan, and was not instituted by his wife, Fannie A. That the solicitor who drew the bill drew the answer, and was employed solely by Wm. J. Brittan, and not by his wife. That Brittan did not reside at the time of said suit in Hinds county, Mississippi, but in New Orleans, and that his object in having said suit brought in said county and remote from the city of New Orleans, where his creditors mainly resided, was to avoid scrutiny. That said proceedings were for the purpose of hindering, delaying and defrauding the complainants, and giving Fannie A. Brittan an unfair and inequitable advantage. That the alleged debt, upon which said decree was founded, was invalid and fraudulent, and the decree was procured by collusion between the said parties to the same. That said Wm. J. Brittan caused an execution to be issued on the same and levied on his plantation, in the county of Issaquena, containing 1,200 acres, and the same was sold by the sheriff and conveyed to his wife, Fannie A. Brittan. That since the rendition of the judgments above mentioned, Wm. J. Brittan has been adjudicated a bankrupt, but has not surrendered the lands so sold to Fannie A. Brittan, as part of his assets. Complainants claim their judgments to be liens on said lands, and pray that they may be declared assets of said bankrupt, and the judgments of complainants a lien thereon, and that the same may be sold and the proceeds applied to the payment of complainants' judgments, and the residue, if any, distributed according to justice and equity. Wm. J. Brittan and Fannie A. Brittan have filed separate answers under oath, in which

[1] [Reported by Hon. William B. Woods, Circuit Judge, and here reprinted by permission.]

they deny seriatim all charges of fraud, fraudulent practices or collusion, and deny the invalidity or fraudulent character of the claim on which the decree in favor of said Fannie A. Brittan was based, and aver the entire bona fides of the proceedings in chancery and the validity and honesty of the debt on which they were founded, and the solvency of Coleman, Brittan & Co. The answers are responsive to all the material allegations of the bill, and put the complainants upon proof thereof. To these answers the complainants have filed no replication. The defendants would therefore strictly be entitled to have the bill dismissed as a matter of course. See equity rule No. 66. But as both parties have proceeded to the taking of testimony as if the general replication had been filed, and no motion has been made to dismiss the bill for want of replication, it may be considered as filed, and the case considered on its merits, or a replication may be filed instanter.

After looking into the evidence, I am satisfied that the complainants have failed to make good their bill by their proof. The complainants have offered as testimony: (1) The records of their judgments against Coleman, Brittan & Co. (2) The record in the case of Fannie A. Brittan v. Wm. J. Brittan [unreported], in the chancery court of Hinds county. (3) The record of the proceedings in bankruptcy in Re Wm. J. Brittan [unreported], showing that he did not surrender said plantation as one of his assets, and there rested their case. This proof utterly fails to establish the charges of fraud and fraudulent practices and collusion made in the bill. In fact it does not tend to establish the charges of the bill. Fraud is never presumed. It must be affirmatively shown. If upon this proof we are asked to decree for complainants, we must presume that the decree in favor of Fannie A. Brittan v. Wm. J. Brittan was fraudulent and therefore void and without any proof save the mere record itself. The record does not establish the fraud. Unless, therefore, the defendants have supplied by their testimony the want of proof on the part of complainants, the case must fail. As the answers of defendants are under oath, they are, so far as responsive to the bill, evidence in the case, and to entitle the complainants to a decree, must be overcome by the oaths of at least two witnesses, or one witness and strong corroborating circumstances.

We have seen that the evidence introduced by the complainant does not, standing alone, tend to overcome the answers of defendants. The testimony of defendants so far from proving the case made in the bill tends to support the answers. It appears from the testimony that the plantation which is sought to be subjected to the payment of the complainants' judgments, was bought by Wm. J. Brittan in the year 1852, and paid for out of the proceeds of his wife's separate estate, and the deed inadvertently made to Wm. J. Brittan, without the knowledge or consent of his wife. In the year 1860, there was produced on another plantation, the separate property of Mrs. Brittan and by the labor of her own slaves, a crop of 540 bales of cotton which was during the winter and spring of 1861 shipped to the firm of Coleman, Brittan & Co., in New Orleans and by them sold from time to time, the last sale being made on April 4, 1861, and the aggregate amount of the sales being $20,628.86. The law of the state provides (Rev. Code Miss. 1857, p. 336, art. 24), that "the rents, issues, profits, products and income of either real and personal estate, or both, owned by any married woman at the time of her marriage or which may have accrued to her afterwards shall also enure to the wife as her separate property, and shall not be liable to be taken in satisfaction of the debts of her husband." So that the proceeds of the 540 bales of cotton was the property of Mrs. Brittan, and she had a claim on her husband therefor if he appropriated the same, unless she lost her right thereto by her own act or neglect. Id. p. 237, art. 28, provides, that "neither the husband nor his representatives shall be liable to account to the wife for the rents, profits or income arising from the separate property of the wife after the expiration of one year from the time of receiving the same." The evidence shows that the proceeds of the 560 bales of cotton were passed to the credit of Wm. J. Brittan on the books of Brittan, Coleman & Co., but precisely when this was done does not appear, but there is no proof that it was done prior to July 1, 1861. Within one year from the time of such appropriation Mrs. Brittan might claim said proceeds from her husband. It is claimed by complainants that as Mrs. Brittan did not assert her right to the proceeds of the cotton as against her husband until the 16th of May, 1866, she lost her right thereto, and her husband ceased to be liable to her on account thereof.

The facts in the case were fairly submitted to the chancery court of Hinds county, in the case of Fannie A. Brittan v. Wm. J. Brittan, and upon the facts the court decreed in favor of Mrs. Brittan. This is conclusive unless it is shown that by fraud and collusion between the parties the court was misled as to the true state of facts, and rendered a decree which it would not otherwise have made. No attempt is made to prove any such fraudulent practice. That court was possessed of the facts in the case just as they appear to the court here, and upon the facts it made its decree. There was no fraud, concealment or misrepresentation, and the decree of that court must stand. It is not enough to show that the court erred. The decree cannot be attacked in this collateral proceeding unless for fraud. But did the court err? Although we are not advised by the pleading or proof of the pre-

cise date when Brittan appropriated the proceeds of his wife's cotton by a credit therefor on the books of the firm, I cannot by the proof fix the date prior to the 1st of July, 1861. On the 5th of August, 1861, the courts of Mississippi were by the act of the legislature closed against the prosecution of such claims. Up to that date, four months and one day of the one year's limitation had elapsed, and it is not averred or shown that before the commencement of her suit in equity against her husband by Mrs. Brittan, the courts of the state had been open long enough to complete the bar of one year. The period during which the courts are closed is not to be counted in estimating the time when the bar of the statute intervenes. Hunger v. Abbott, 6 Wall. [73 U. S.] 532. So even if we were authorized, which we are not, to take note in this collateral proceeding of any error into which the chancery court of Hinds county may have fallen, it is not made to appear that the court fell into any error. The decree of that court was based upon what had once been a valid and just claim in favor of Mrs. Brittan against her husband, and the court, with all the facts before it, decided that the claim was still a valid and subsisting one. Its decree is, therefore, binding upon all persons until reversed in a direct proceeding, and cannot be here collaterally impeached except for fraud, and no fraud is shown. But even if the decree of the chancery court of Hinds county, and the proceedings and sale under it were void, the record in this case discloses an insuperable obstacle to the decree asked for by complainants.

It appears in the evidence that, on the 1st of November, 1865, William J. and Fannie A. Brittan, by a deed absolute on its face, and for a sufficient and valuable consideration, conveyed the plantation in controversy to Mrs. M. L. Johnson, the mother of Mrs. Brittan. The answer of William J. Brittan contains an expression which would indicate that this deed, though purporting to be absolute, was intended as a mortgage. In his deposition, however, Brittan says that the conveyance was not intended as a mere security, but as payment of a debt due by him to Mrs. Johnson; but, from the uniform kindness of Mrs. Johnson to her children, witness and his wife inferred a willingness on her part to accept of the money due at any time before she otherwise disposed of the plantation. Mrs. Johnson, the grantee, testifies that the conveyance to her "was intended as an absolute deed without the privilege of redemption." The deed being absolute on its face, unless the grantee understood and agreed that it should be a security for the debt, it must be held to be an absolute deed. It is clear that it was not so understood by both parties. Mrs. Johnson has then the legal title to the plantation in question, and the proof shows she is in possession. She is, therefore, a necessary party to the bill of complaint in this case. These facts were all brought out before the trial of the case in the court below. The complainants have neglected to make Mrs. Johnson a party. The objection was taken upon the hearing in this court. The rule upon this subject is as follows: If, after objection is made for want of necessary parties, the plaintiff neglects or refuses to bring them before the court, the bill will be dismissed. Singleton v. Gayle, 8 Port. (Ala.) 270; Bailey v. Myrick, 36 Me. 50, 54; Huston v. McClarty, 3 Litt. (Ky.) 274; Royse v. Tarrant, 6 J. J. Marsh. 567; Van Epps v. Van Deusen, 4 Paige, 64. So I am of opinion that the bill should be dismissed, at complainants' costs, (1) because the averments of the bill are not sustained by the proof; and (2) because the necessary parties are not before the court. Decree accordingly.

JONES (BROWN v.). See Case No. 2,017.

## Case No. 7,456.

JONES v. BUCHANAN et al.

[The case reported under above title in 5 Hughes, 40, is the same as Case No. 7,497.]

JONES (BULLOCK PRINTING PRESS CO. v.). See Case No. 2,132.

JONES (CHEONGWO v.). See Case No. 2,638.

JONES v. CINCINNATI COAL CO. See Case No. 7,458.

## Case No. 7,457.

JONES v. CLIFTON.

[2 Flip. 191; 17 Am. Law Reg. (N. S.) 713; 6 Reporter, 324; 7 Cent. Law J. 89; 18 N. B. R. 125.] [1]

Circuit Court, D. Kentucky. July, 1878.[2]

SETTLEMENT ON WIFE BY HUSBAND — POWER OF REVOCATION — SUCH POWERS AS DO NOT PASS UNDER THE BANKRUPT ACT OF THE ASSIGNEE.

1. If a husband, not contemplating bankruptcy, but wholly free from debt, convey lands to his wife, to her separate use free from his control, the deeds reserving to the husband a power of revocation in whole or in part, and a power of appointment by deed or will to any uses or persons he may designate, and he become bankrupt three years afterwards — such settlement will be upheld against the assignee in bankruptcy.

[See note at end of case.]

2. If it be omitted to insert a power of revocation in a voluntary settlement, this will be regarded in a court of equity as a suspicious circumstance.

[See note at end of case.]

3. A court of equity will protect a wife in a settlement made by a husband, when free of

[1] [Reported by William Searcy Flippin, Esq., and here reprinted by permission. 6 Reporter, 324, contains only a partial report.]

[2] [Affirmed in 101 U. S. 225.]

debt and not thereto induced by fraudulent motive, if it confer any benefit on her. And notwithstanding the deed may not contain every provision that a chancellor might direct to be inserted in a settlement ordered by himself, and, moreover, has in it reservations which impair the full benefit of the provision in favor of the wife, it will be sustained if any substantial benefit is conferred on her so long as she is in the actual enjoyment of the same

[Cited in Horder v. Horder, 23 Kan. 391.]

4. Under sections 5044 and 5046 powers of revocation and appointment to be exercised by the bankrupt do not pass to the assignee. Only the power to sell, manage, dispose of, sue for and recover, or defend the property and rights, passes.

[Cited in Mattocks v. Farrington, Case No. 9,298.]

[See note at end of case.]

In equity.

B. H. Bristow and Jas. A. Beattie, for plaintiff.

Bijur & Davie, for defendant.

BALLARD, District Judge. On the 3d of October, 1872, the defendant, Chas. H. Clifton, being then free from debt, and with a fortune probably exceeding two hundred and fifty thousand dollars, conveyed to his wife, without the intervention of a trustee, a small parcel of land, worth about seven hundred dollars, and assigned to her five policies of insurance on his life, each for ten thousand dollars, but at the time not worth more in the aggregate than twelve thousand dollars. On the 1st of April, 1873, being still free from debt, and with his fortune very little diminished, he made another conveyance to his wife, also without the intervention of a trustee, of two parcels of land, one situated in the city of Louisville and the other in the county of Jefferson. The first parcel was, at the time of this conveyance, and still is, incumbered by mortgage to probably its full value. The other parcel was the homestead of the ancestors of the grantor, and was estimated to be worth eighteen thousand dollars. On this parcel he afterwards erected a dwelling-house which cost eight thousand five hundred dollars.

By both deeds, and substantially in the same terms, the property was conveyed "to the said Nannie to hold to her and her heirs forever as her own separate estate, free from the control, use, and benefit of her husband." By both deeds, and substantially in the same terms, power and authority were conferred on the grantee to appoint the parcels of land and each or all of them, or part or parts of each, as often as she might choose to exercise the same, to such uses as she might designate by joint deed with her husband, or by a writing in the form of and to take effect as a devise under the statute of wills of Kentucky; and by both deeds, in substantially the same terms, the grantor expressly reserved to himself power to revoke the grants in whole or in part, and to appoint to any such uses or persons as he might designate either by deed or last will. In default of appointment, or to the extent that the grantor might fail to appoint, each of said parcels of land was to remain to the grantee and her heirs forever as her separate estate, with the powers conferred upon her as above stated.

On the 4th of December, 1875, Clifton filed his voluntary petition in bankruptcy, and was adjudged bankrupt thereon, and the complainant, Stephen E. Jones, was appointed his assignee. In October, 1876, the assignee brought this suit in equity, in which he seeks to have both of the above-mentioned deeds declared void, and thus the clouds removed from his alleged title to the parcels of land and policies of insurance mentioned therein.

The bill proceeds on three grounds, all more or less connected, but still so distinct as to require a separate statement: First—That the making of the two instruments was a contrivance and scheme on the part of Chas. H. Clifton to cheat, hinder and defraud his future creditors. Second—That the conveyances having been made by the husband to the wife, without the intervention of a trustee, are, because of this, and because of the reservations contained therein, especially the absolute power of revocation, void, and so passed no title or interest to the nominal grantee. Third—That by operation of the bankruptcy act the property described in the instruments, or, at least, the powers of revocation therein reserved, passed to the complainant as assignee in bankruptcy. I shall examine each of these grounds separately.

The complainant has offered no testimony whatever of the alleged fraudulent intent. He does not even allege that the grantor at the time the conveyances were executed owed anything. The uncontroverted proof is that he was then free from debt; that he was not then engaged in trade; that he did not contemplate engaging in trade or contracting debts; that he was an indiscreet young man, who, though possessed of a large fortune, might squander the whole in reckless gaming and dissipation; that the settlements were made at the suggestion of his more prudent wife, and did not embrace more than one-sixth of his estate.

That Clifton might, under these circumstances, by proper conveyances, have settled on his wife this amount of property, free from all claims proceeding from his future creditors, or from his assignee, is indisputable. The authorities everywhere sustain such settlements. Sexton v. Wheaton, 8 Wheat. [21 U. S.] 229; Hinde v. Longworth, 11 Wheat. [24 U. S.] 211; Haskell v. Bakewell, 10 B. Mon. 206; Loyd v. Fulton, 91 U. S. 485; Smith v. Vodges' Assignees, 92 U. S. 183. Authorities to the same point might be multiplied indefinitely.

The learned counsel of complainant them-

selves do not dispute that such settlements are generally unimpeachable. Their contention is that the settlements in controversy here were not made by proper conveyances; that the conveyances being made by the husband to the wife without the intervention of a trustee are void in law, and that by reason of the powers of revocation reserved they are void both in law and in equity.

It thus appears that the complainant does not now ask relief on the ground of the distinct fraud alleged. If he attaches any importance to the allegation of fraud contained in his bill, it is only because he considers that a deed made by a husband to his wife, containing a reservation of an absolute power to revoke it, is per se fraudulent. Thus considered, the complainant's first ground becomes blended with the second, and one and the same with it; and I proceed, therefore, to consider the second ground.

Under the common law system the husband and wife are, for most purposes, regarded as one person. As a result of this legal unity, their contracts with each other, whether executory or executed, in parol or under seal, are void. This doctrine, it must be confessed, has little foundation in reason. It is wholly unknown in that enlightened system of jurisprudence which, coming down to us from the ancient civilizations, now prevails on the continent of Europe, and it has only a faint recognition in the system of equity jurisprudence which in England and in this country, has grown up by the side of the common law. In equity the husband and wife are for many purposes treated as two persons. Whilst at law all the personal property of the wife becomes on marriage the property of the husband, and the entire management and profits of her real estate pass to him, in equity she may not only own and manage her real and personal estate, but she may dispose of it free from the control of her husband. True, it was at one time doubted whether any interest in either real or personal property could be settled to the exclusive use of a married woman, without the intervention of trustees; but for more than a century and a quarter it has been established in courts of equity that the intervention of trustees is not indispensable, "and that whenever * * * property * * * is settled upon a married woman, either before or after marriage, for her separate and exclusive use, without the intervention of trustees, the intention of the parties shall be effectuated in equity, and the wife's interest protected against the marital rights of her husband, and of his creditors also." 2 Story, Eq. Jur. § 1380.

Nor is it at all material whether the settlement is made by a stranger or by the husband himself. In either case the trust will attach upon him, and will be enforced in equity. It is now universally held that a settlement made by a husband on his wife by direct conveyance to her, will be enforced in the same manner and under the same circumstances that it will be when made by a stranger, or when made to a trustee for her exclusive use. Shepard v. Shepard, 7 Johns. Ch. 57; Jones v. Obenchain, 10 Grat. 259; Sims v. Rickets, 35 Ind. 192; Thompson v. Mills, 39 Ind. 532; Putnam v. Bicknell, 18 Wis. 335; Burdeno v. Amperse, 14 Mich. 91; Barron v. Barron, 24 Vt. 398; Maraman v. Maraman, 4 Metc. (Ky.) 84; Wallingford v. Allen, 10 Pet. [35 U. S.] 594.

All voluntary conveyances, whether made wholly without consideration or upon the meritorious consideration of love and affection, are scrutinized and regarded with some suspicion in courts of equity, when they are sought to be impeached by creditors. But I have been referred to no case, and I have found none which hints that a reasonable settlement made by a husband, free from debt, on his wife by direct conveyance to her, is any more impeachable than when it is made through the intervention of trustees. Settlements made in either mode, when uncontaminated by actual fraud, are unimpeachable by subsequent creditors.

It may be admitted that a power of revocation, inserted in an assignment made by a debtor for the benefit of his creditors, would render such assignment constructively fraudulent, and therefore void. Riggs v. Murray, 2 Johns. Ch. 576, 15 Johns. 571; Tarback v. Marbury, 2 Vern. 510. But such power of revocation has never been held to affect a family settlement. On the contrary, in the above case of Riggs v. Murray, Chancellor Kent expressly declares that "family settlements may often require such powers of revocation to meet the ever-varying interests of family connections." Moreover, it is the well-settled practice in England to insert such powers in such settlements, unless, indeed, the sole object of the settlement is to guard against the extravagance and imprudence of the settler. Indeed, ever since Lord Hardwicke's time, the failure of the conveyancer to insert a power of revocation in a deed of family settlement has been regarded as a strong badge of fraud. Huguenin v. Baseley, 14 Ves. 273.

In some of the later cases such settlements have been annulled at the suit of the settler, apparently on the sole ground that they did not contain a power of revocation. In Coutts v. Acworth, L. R. 8 Eq. 558, it was held that "the party taking a benefit under a voluntary settlement * * * containing no power of revocation, has thrown upon him the burden of proving that there was a distinct intention on the part of the donor to make the gift irrevocable." In Wollaston v. Tribe, L. R. 9 Eq. 44, the same rule is recognized and enforced. In Everitt v. Everitt, L. R. 10 Eq. 405, the chancellor in annulling a deed of settlement made by a young woman soon after she arrived at age, chiefly on the ground that it contained no power of revocation, says, in substance: "The sole object of the

settlement being to protect the settler and her children, if she married, had I been called on for advice, I should have said: 'Have proper trustees, give her a voice in the selection of new trustees, and give her a power of revocation with the consent of the trustees.'" In Phillips v. Mullings, 7 Ch. App. 244, the court of appeals recognized the same general rule, but in that case refused to annul the settlement, though it contained no power of revocation, on the distinct ground that the settlement was made by a young man of improvident habits to guard against his own folly, and "the deed was explained to him and the particular clauses brought to his notice." "Those who induce," said the lord chancellor, "a young man of this description to execute such a deed, are bound to show that the deed is in all respects proper, or, if the deed contains anything out of the way, that he understood and approved it. * * * It is not necessary to show that the usual clauses inserted by conveyancers were explained, but any unusual clauses must be shown to have been brought to his notice, explained and understood." In Hall v. Hall, L. R. 14 Eq. 365, the vice-chancellor regarded the rule as so firmly settled that he felt impelled to annul a settlement twenty years after its execution, simply because it did not contain a power of revocation. The same rule has been recognized and adopted in the United States. Russell's Appeal, 75 Pa. St. 269; Garnsey v. Mundy, 24 N. J. Eq. 243. Some chancellor has intimated that a voluntary settlement partakes very much of the nature of a last will, and that it should be scarcely less revocable.

I feel much difficulty in yielding assent to the extreme doctrine announced in some of these cases, and I am glad to observe that it is somewhat modified and limited by the late case of Hall v. Hall, decided by the court of appeal in chancery in 1873 (8 Ch. App. 430). I quite agree with what Sir W. M. James, L. J., says in this case: "The law of this land permits any one to dispose of his property gratuitously if he pleases, subject only to the special provision as to subsequent purchasers and as to creditors. The law of this land permits any one to select his own attorney to advise him, and it seems very difficult to understand how this court could acquire jurisdiction to prescribe any rule that a voluntary conveyance, executed by a person of sound mind, free from any fraud or undue influence of any kind, and with sufficient knowledge of its purport and effect, should be void, because the attorney of his own selection did not advise him to insert a power of revocation, or did not take his express direction as to the insertion or omission of such power." The true rule is that laid down by Lord Justice Turner, 3 De Gex, J. & S. 487, 491, that the absence of a power of revocation is a circumstance to be taken into account, and is of more or less weight according to the circumstances of each case.

In the case now before me I think it could not be seriously contended that, had powers of revocation been omitted from the conveyances made by Clifton, this fact would have been entitled to much, if any, consideration, in a suit brought by him to annul the settlements. To such a suit the chancellor might have said, as Chancellor Hatherly did in Phillips v. Mullings: "You were an exceedingly indiscreet and improvident young man. You made the settlements to guard against your own folly and extravagance. Of what advantage would it have been to place the money in this way, out of your control, and then give you power to destroy the limitations whenever you pleased."

But, whatever may be the true doctrine, all of the foregoing cases, and many more that might be cited, certainly do establish that it is ordinarily proper to insert a power of revocation in a voluntary settlement; nay, more, that the omission of such a power will subject the settlement to more or less suspicion. Certainly the practice in England for centuries has been to insert such a power in family settlements.

A practice which is thus approved by time, and which has received the sanction and encomium of courts of equity in both England and America, cannot be regarded as vicious or immoral. Should I hold that these settlements of Clifton are fraudulent and void as to his subsequent creditors simply because they contain powers of revocation, I should overturn an ancient practice and a long line of decisions; nay, I should hold that courts of equity have themselves advised frauds to be committed.

The fact that Clifton inserted powers of revocation in his settlements, so far from proving that he contemplated defrauding his future creditors, tends to show the contrary. Should he simply revoke the settlements, then, of course, the property conveyed would revert to him, and be liable at law for all his debts. And should he exercise the power of appointment for even the benefit of a stranger, then, according to an unbroken current of authority, the whole estate appointed would be liable in equity to his debts. Thompson v. Towne, 2 Vern. 319; In re Davies' Trusts, L. R. 13 Eq. 163; Williams v. Lomas, 16 Beav. 1; Petre v. Petre, 14 Beav. 197. If, then, he had meditated a fraud he would have omitted the power altogether. He would have relied altogether on the affection and beneficence of his wife to provide for him. To contend that he intended to defraud his creditors, and at the same time to exercise the power of revocation arbitrarily, is to maintain a contradiction, since, as we have seen, the exercise of the power would, ipso facto, render the property liable in equity for his debts, unless, indeed, we can assume that he was gifted with a foresight which none of the facts warrant. A man, it is true, might make a voluntary settlement on his wife, and, contemplating

that he might be adjudged a bankrupt in the future and be discharged from his debts, reserve a power of revocation for the very purpose of reinvesting himself in such contingency with the property, relying upon holding it free from debts contracted before bankruptcy. It is by no means certain that such a reliance would be safe. It is by no means certain that such a device would not be pronounced a fraud on the bankruptcy act. But assuming that it would not be fraudulent, there is nothing in the present case to suggest that the grantor had any such forethought or was actuated by any such motive. At the time of the settlements he was not only free from debt, but possessed of a large estate. He was not engaged in trade, and all the testimony shows that nothing was farther from his contemplation than bankruptcy. That he did in fact become bankrupt in the short space of two years is partly explained by the large shrinkage in the value of real property, and the decrease in its rents, but it is best accounted for by his frank confession that he has squandered much in reckless dissipation and gaming.

I do not mean to intimate that Clifton, having regard to the motive and circumstances which prompted these settlements, should not have reserved a power of revocation. Had he known his own habits as well as his acquaintances knew them, and had his motive been solely to guard against his follies, it would have been more consistent with that motive to deprive himself of all dominion over the estate settled. But he could not know himself as others knew him, and he doubtless had implicit faith that, even should misfortune overtake him, his affection for his wife would be a sufficient guaranty that he could not be persuaded to strip her of his bounty.

The settlements being of his own pure bounty, he might well wish to reserve to himself power to modify the limitations of them according to the future necessities and exigencies of his family. Then, too, the grantor has given reasonable explanation of the particular reservations contained in these deeds. He says that, at the time they were made, he contemplated removing to California, and that his object in reserving the powers of revocation was that he might change the investments from Kentucky to California. He did not expect to exercise the powers for his own benefit; he did not know that he could do so. He only contemplated settlements in California to the same uses declared in the original conveyances.

This suggestion derives additional force from the uncertainty in which the law of Kentucky stood at the time the conveyances were made in respect to the power of a married woman over her separate estate. The Revised Statutes adopted in 1852 had, in effect, destroyed separate estates. They had, in effect, provided that where real or personal property should be conveyed or devised to the separate use of a married woman she should not alienate the same by joining her husband in an ordinary conveyance or in the exercise of a power, except when the estate was a gift, and then it might be conveyed by the consent of the donor, or his personal representative.

This provision was so anomalous that it gave much perplexity to the legal profession and produced much litigation. It was frequently amended, but, even down to the date of the settlements in question, its precise meaning and operation were not determined. So uncertain was its construction that timid lawyers might have been found who would not have advised the acceptance of a conveyance from husband and wife of an estate conveyed by the husband to the separate use of the wife. At any rate, Clifton might well have thought it best to guard against the uncertainty by reserving to himself a power which would avoid all difficulty.

Every grantor in England has, by virtue of the second section of the statute of 27 Elizabeth, the substantial right to revoke and annul his voluntary conveyance, since such conveyance is declared by said statute to be fraudulent as to subsequent purchasers for value, with or without notice. Dolphin v. Aylward, L. R. 4 H. L. 486; Rob. Conv. 39–41. A grantor may, therefore, revoke or annul his voluntary conveyance at any time by conveying the property included in such conveyance to a purchaser for value. But the statute is limited in its remedial operation to purchasers, and, consequently, such settlements cannot be defeated by subsequent creditors. Dolphin v. Aylward, supra. So, also, the fifth section of the same statute, which makes all conveyances containing powers of revocation fraudulent and void as to subsequent purchasers, does not extend to creditors. Voluntary settlements, whether they do or do not contain powers of revocation, cannot be assailed by creditors unless they are fraudulent. They are revocable by the grantor either by virtue of the express power reserved or by virtue of a subsequent conveyance for value, but it has never been held that they are on this account fraudulent as to creditors.

But, say complainant's counsel, Mrs. Clifton's title is but the "ghost of a title;" that the legal title is or was in her husband, who reserved to himself absolute power to revoke or to appoint to new uses, and that, therefore, it is not such a title as a court of equity will uphold.

I know it is sometimes said that a court of equity will not enforce every deed made by a husband to his wife. Bish. Mar. Wom. § 717. The cases usually cited to support this view are Beard v. Beard, 3 Atk. 71; Moyse v. Gyles, 2 Vern. 385; Stoit v. Ayloff, 1 Ch. R. 33. Of all these cases it may be said that they were decided at a time when the rights of married women were not so

fully acknowledged or so zealously protected by courts of equity as they are at the present day. It is also to be observed that in the first case the gift was so extravagant as to excite just suspicion of fraud and undue influence. In the second the court refused to aid the defective grant on the ground that it was without consideration. In the third the contract was executory. None of these cases would at all impeach a grant containing no more than a fair provision for the wife, and if they would, they are opposed to the cases heretofore cited in this opinion, to the well-settled doctrine of the supreme court of the United States, and to the whole current of later authority.

When the settlement is made by a husband, free from debt, when it is induced by no fraudulent motive, when it makes no more than a reasonable provision for the wife, when it confers any benefit on her, I can conceive of no reason why a court of equity should decline to uphold it. Though the grant may not contain every provision which a chancellor would direct to be inserted in a settlement ordered by himself, though it contains reservations tending to impair the full benefit of the provision made for the wife, yet if the grant confers any substantial benefit on the woman, so long as she is in the actual enjoyment of that benefit, a court of equity should and will protect her.

Again, complainant's counsel, whilst they admit that a husband may, by direct conveyance to his wife, make a provision for her which will be enforced in equity; whilst they substantially admit that the provision made by Clifton for his wife was reasonable; whilst they admit that the grants made by him are not void, simply because of the powers reserved in them, yet they somehow insist that all these things combined vitiate the deeds. Their contention is that, as the legal title remained in the husband, notwithstanding the alleged conveyances, and that as this legal title is coupled with absolute dominion over the property, as a legal consequence of the reserved powers, the whole right and property remained in the husband, and passed on his bankruptcy to his assignee. But if, as we have seen, the husband may make a conveyance to his wife which will be upheld in equity; if, as we have also seen, the reservation of a power of revocation or of new appointment does not render such settlement void, it is impossible to conceive that the union of the two particulars in the same instrument would destroy it. It is inconceivable that the mere union of two objections, each of which is a phantom, can render the compound substantial.

It must not be overlooked that complainant himself has appealed to a court of equity. In this court Mrs. Clifton's title is as complete as if she had been a feme sole when the conveyances were made to her. The husband's right and interest are not recognized in this court. Every argument, therefore, which is founded on the notion that any substantial title or interest remains in him can have no force in this forum.

The last proposition of complainant's counsel is that by operation of the bankruptcy act the property embraced in these settlements, or at least the powers therein reserved, which might be exercised by the grantor for his own benefit, passed to his assignee in bankruptcy.

We have seen that the title which the bankrupt at the time of his bankruptcy held in the property claimed was held in trust for his wife. Now, by the express terms of the statute, property so held does not pass to the assignee in bankruptcy. Section 5053 of the Revised Statutes provides that "no property held in trust by the bankrupt shall pass by the assignment."

To ascertain what property does pass to the assignee in bankruptcy, reference must be had to sections 5044 and 5046. The first of these sections provides that "as soon as the assignee shall be appointed and qualified, the judge or * * * register shall * * * assign and convey to the assignee all the estate, real and personal, of the bankrupt, with all his deeds, books and papers relating thereto, and such assignment shall relate back to the commencement of the proceedings in bankruptcy, and by operation of law shall vest the title to all such property and estate, both real and personal, in the assignee." The second provides that "all property conveyed by the bankrupt in fraud of his creditors, all rights in equity, choses in action, patent rights and copyrights, all debts due him, or any person for his use, and all liens and securities therefor, and all his rights of action for property or estate, real or personal, and for any cause of action which he had against any person arising from contract or from the unlawful taking or detention or injury to the property of the bankrupt; and all his rights of redeeming such property or estate, together with the right, title, power and authority to use, manage, dispose of, sue for, and recover or defend the same, as the bankrupt might have had if no assignment had been made, shall, in virtue of the adjudication of bankruptcy and the appointment of his assignee, * * * be at once vested in such assignee."

It will be perceived that powers of revocation and powers of appointment, though they be such as may be exercised by the bankrupt for his own benefit, are not enumerated among the things which pass to the assignee either by virtue of the assignment or of the adjudication in bankruptcy. The "power" which is enumerated and does pass, is only the power to sell, manage, dispose of, sue for and recover, or defend the property and rights which do pass.

A power is not property or an estate. A power to convey or appoint property may be lodged in one having no interest whatever in the property over which the power is to be

exercised, or in one having an estate or interest in it. But in either case the power is distinct from the estate. It may be that a grant of property to A., to dispose of it as he should please, would invest him with a complete title; but a grant to A. for life, with remainder to such persons as he should by deed or will appoint, will not give him the absolute interest, although he might acquire it by the exercise of the power. 1 Sugd. Powers, 120; Maundrell v. Maundrell, 10 Ves. 246; Reid v. Shergold, Id. 371; Burleigh v. Clough, 52 N. H. 272; Collins v. Carlisle's Heirs, 7 B. Mon. 13; McGaughey's Adm'r v. Henry, 15 B. Mon. 383. So a conveyance by A. to B. and his heirs in trust for A. for life, remainder to such persons or uses as A. should appoint, and in default of appointment in trust for C. and his heirs, would leave or vest in A. a life estate only. Or, if A. should convey to B. in trust for himself for life, reserving to himself an absolute power of revocation, still A. would have only a life estate in the property limited. The power of revocation reserved would neither render the conveyance void nor have the effect of enlarging his estate. The learned judges who decided the case of Willard v. Ware, 10 Allen, 263, certainly so understood the rule, else they need not have troubled themselves with the perplexing question presented in that case, whether the power of appointment reserved in the deed, which was there the subject of consideration, had been actually exercised.

The bankruptcy statute of 13 Eliz. "enables the commissioners to dispose of any estate for such use, right or title as such offender (bankrupt) then shall have in the same which he may lawfully depart withal." And the statute of 21 James I. directs bankrupt laws to be expounded most favorably for the relief of creditors. I quite agree with Sir Edward Sugden when he says that "as a power is a mere right" to declare the trust of an estate upon which declaration the statute of uses immediately operates, and, as it is therefore clearly a use, interest or right which the bankrupt "may lawfully depart withal," there is considerable ground to contend that the bargain and sale of the commissioner should have the same operation as the execution of the power by the bankrupt whilst solvent would have had; but such was never in fact the construction of these statutes. In Lord Townshend v. Windham, 2 Ves. Sr. 3, and in Thorpe v. Goodall, 17 Ves. 388. Lord King is said to have held that in the case of a tenant for life, with power to charge £100, the power was not such an interest as would pass to the assignees.

Holmes v. Coghill, 7 Ves. 498, was thus: Sir John Coghill, under a settlement made by himself in 1757, reserved the power to himself to charge the estate, situate in certain counties, with any sum not exceeding £2,000. Sir John was also entitled to other estates, remainder in tail to his oldest son. The son arrived of age in 1787, and thereafter he and the father suffered a recovery, and then made a settlement. This settlement embraced all or some of the property mentioned in the settlement of 1757. It not only expressly extinguished the power reserved in the settlement of 1757, but directed the trustees to raise such sum, not exceeding £2,000, as Sir John should direct, and pay the same to him or his assigns; or, if the same should not be raised and paid over in his lifetime, then upon trust to raise the same at such time and pay the same to such person as Sir John should appoint. By his will, dated in 1775, and therefore before this settlement, Sir John gave the sum of £2,000, to be raised under the power, to be applied to the payment of his debts. There was a codicil to this will which bore date subsequent to the settlement of 1787, but it took no notice of this power. The bill was filed by creditors. Held, by the master of the rolls, Sir Wm. Grant—First: That the power reserved in the original deed of 1757 was discharged by the deed of 1787. Second: The will refers only to the power reserved in the deed of 1757, and consequently it is no execution of the power reserved in the deed of 1787. Third: There is an evident difference between a power and an absolute right of property. Fourth: Equity will aid the defective execution of a power, but it cannot itself execute a power. The case was affirmed on appeal. 12 Ves. 206. On the appeal it was urged that there is a difference between an estate to be created under a power which must be limited to a third person and one which may be limited to the donor himself. It was conceded that in the first case the power must be asserted, but in the latter it was strongly insisted that, as the donor had the same power over the estate which he had over his own estate, it should, in equity at least, be equally subject to his debts. But the court rejected the distinction, remarking: "If the argument in support of this appeal prevails, there must be an end of the distinction between the non-execution and the defective execution of a power."

In Thorpe v. Goodall, 17 Ves. 388, 460, one who had been adjudged a bankrupt was seized for life of a certain estate, with a general power of appointment, with remainder in default of appointment to the heirs of his body. The suit was by his assignee to compel him to execute the power. Held, by Lord Eldon that equity cannot compel the execution of the power. The learned chancellor, it is true, says that the question whether the power passed, by operation of law, to the assignee was not before him, but he refers to the opinion imputed to Lord King in such terms as to show that he approves it. Sir Edward Sugden says, in his work on Powers (volume 1, p. 225), that upon a bill filed by the assignees against the purchaser in this same case, the vice chancellor was of opinion,

that the power did not pass to the assignee. He cites Thorp v. Frere, N. C., M. T. 1819, but I have not been able to find the case reported.

These decisions doubtless led to the enactment of 6 Geo. IV. cc. 16, 5, 77. This statute provides that "all powers vested in any bankrupt, which may be legally executed for his own benefit (except the right of nomination to any vacant ecclesiastical benefice,) may be executed by the assignees for the benefit of creditors in such manner as the bankrupt might have executed the same." A provision substantially the same has, I believe, been incorporated into every bankrupt act which has been passed in England since the date of the above statute, but no similar provision is to be found in our statute, and I must conclude that it was omitted ex industria. It certainly cannot be inferred that the draftsman of our statute was unfamiliar with this provision. It may be found in both of the English bankrupt acts of 1861 and 1869. And we know that many of the provisions in our original and amended acts were copied from these statutes.

But whether it was omitted intentionally or not may not be material. Our statute certainly contains no such provision, and it is impossible to construe it as passing to the assignee anything which the English statutes enacted prior to 6 Geo. IV. were held not to pass.

As the power reserved by the son in his settlements might be exercised for his own benefit, it is clear that if he was a bankrupt in England his assignee, in virtue of the recent statutes there, might exercise the power for the benefit of his creditors; but as we have no such statute here; as a power is neither real nor personal property, nor an estate of any kind, it is equally clear that this power did not pass to his assignee.

I have no doubt that, in respect to the property which does pass under our statute to the assignee, all the power and dominion which the bankrupt had over it before his bankruptcy likewise passes. Nor have I any doubt that the bankrupt, in virtue of the general provisions of the statute, as well as in virtue of the express terms of section 5050, may be required to execute any instruments, deeds and writings which may be proper to enable the assignee to possess himself fully of the assets; but it is only in respect to the assets of the bankrupt which have passed to the assignee that he can be required to execute any instruments, deeds or writings. He cannot be required to execute a mere power, since a power is not assets or property, or embraced among the things and rights which the statute declares shall pass to the assignee.

But, complainant's counsel insist that the justices of the supreme court have given construction to our statute to the effect that it does embrace powers to dispose of or charge property. In proof of this they refer to schedule B, which forms part of every bankrupt's petition, and which schedule was prescribed by the justices under authority of law (section 4490).

It is true that the caption of schedule B implies that the petitioner shall include therein "property in reversion, remainder or expectancy, including property held in trust for the petitioner, or subject to any power or right to dispose of or charge." It is also true that the directions in the body of that schedule seem to contemplate that the petitioner shall mention all "rights and powers wherein I (he,) or any other person or persons in trust for me (him,) or for my (his) benefit have any power to dispose of, charge or exercise."

No one more readily than I would submit to a decision of the supreme court; but I cannot regard this schedule, though nominally prescribed by its justices, as a decision of the court. The judges cannot in this way give an authoritative construction to the statutes. Besides, the schedule does not purport to be a construction of the statute, nor does it necessarily imply that all the rights enumerated in it will pass to the assignee in bankruptcy. It is true it would seem idle to insert in the schedule anything in which the assignee could have no interest, but the petitioner cannot be allowed to judge whether or not a given right or interest will pass to his assignee, and to include or exclude it from his schedule at pleasure. His assignee should be fully informed respecting his estate. He is entitled to have, and should have, all the information which the bankrupt himself has.

This may suggest some explanation of the requisitions contemplated by the form prescribed in the schedule. Certainly the form, in terms, contemplates that the schedule shall include a mere naked power to dispose of or charge property in which the bankrupt never had any interest, and which he could not dispose of or charge for his own benefit. Surely no one would be so bold as to contend that such a power passes in bankruptcy; yet, in my opinion, in view of the decisions in England before referred to, construing bankruptcy acts containing more comprehensive terms than ours; in view of the legislation there declaring that powers which a bankrupt may exercise for his own benefit shall pass to his assignee in bankruptcy, in view of the terms of our statute and its omissions, there is scarcely more ground for the contention that a power which may be exercised by the donee for his own benefit passes to the assignee, either in virtue of the assignment to him or of the adjudication in bankruptcy, than a power which must be exercised by the donee for the benefit of a stranger.

Let an order be entered dismissing the bill with costs.

[NOTE. An appeal was then taken by the plaintiff to the supreme court, where the decree was affirmed, in an opinion by Mr. Justice Field,

who said that a conveyance by a husband to his wife, even without the intervention of a trustee, when such husband is not in debt, and when such disposition of the property does not deprive others of any existing claim to it, will be upheld. The presence of the power of revocation does not tend to create an imputation upon the good faith and honesty of the husband. Such power is usually inserted, and its absence has often been held to be a badge of fraud. Should he make use of the power, the creditors would be benefited. Such power was not a chose in action, and did not constitute assets of the bankrupt which passed to his assignee. 101 U. S. 225.]

## Case No. 7,458.

JONES v. COAL BARGES.

[3 Wall. Jr. 53;[1] 3 Am. Law Reg. 391; 3 Pittsb. Leg. J. 44.]

Circuit Court, W. D. Pennsylvania. April Term, 1855.

ADMIRALTY JURISDICTION.

1. The coal barges, arcs, or flat boats used on many rivers, to transport merchandise down stream, and usually broken up and sold for lumber at the end of their voyage, are not "ships or vessels," subject to admiralty jurisdiction on such waters.

[Distinguished in The General Cass, Case No. 5,307. Cited in Gastrel v. A Cypress Raft, Id. 5,266; The F. & P. M. No. 2, 33 Fed. 513; Ruddiman v. A Scow Platform, 38 Fed. 159; Seabrook v. A Raft of Railroad Cross-Ties, 40 Fed. 596.]

[Cited in American Transp. Co. v. Moore, 5 Mich. 394.]

2. Although the extension of admiralty jurisdiction over our fresh water public rivers seems to have been assumed rather from the decision of the supreme court in The Genesee Chief v. Fitzhugh [12 How. (53 U. S.) 458], decided in 1851, than from the act of congress of February 26th, 1845 [5 Stat. 726], which speaks only "of the lakes and navigable waters connecting said lakes," yet it does not follow that the admiralty may assume jurisdiction over everything floating on such waters. On the contrary, the restraints of that act should be applied to all the jurisdiction now assumed over such waters, to wit, "to vessels over twenty tons burden, licensed and enrolled for the coasting trade," and the pleadings in such cases should contain such averment in order to give jurisdiction.

[Cited in Muntz v. A Raft of Timber, 15 Fed. 557.]

[See The Ann Arbor, Case No. 408.]

[Appeal from the district court of the United States for the Western district of Pennsylvania.]

The constitution of the United States, according to the views taken of it by the supreme court for the first fifty years of our federal government, confined the admiralty jurisdiction of the court to tide waters; and considered that, however large were the streams or lakes, yet if the water in them was not tidal, no admiralty jurisdiction could be exercised over them. The Thomas Jefferson, 10 Wheat. [23 U. S.] 428; Orleans v. Phoebus, 11 Pet. [36 U. S.] 175. Although, therefore, an act of 1789 [1 Stat. 55], which gave the court jurisdiction over enrolled and licensed vessels, spoke, in one place, indiscriminately of "waters navigable from the sea," our lakes, which had been the scene of naval victories between ships of war, and our western rivers, of late years navigated by large steamers freighted with immense cargoes, were for more than sixty years regarded as beyond any constitutional control of the admiralty. In 1845, however (Act Feb. 26, 1845), congress taking a more extensive view of its constitutional rights, passed a law giving to the federal courts jurisdiction "in matters of contract and tort arising in, upon, or concerning steamboats and other vessels of twenty tons burden and upwards, enrolled and licensed for the coasting trade, and at the time employed in business of commerce and navigation between ports and places in different states and territories upon the lakes and navigable waters connecting said lakes." This law was decided in 1851, in The Genesee Chief v. Fitzhugh, 12 How. [53 U. S.] 443, to be constitutional; and the supreme court, reversing its earlier decisions, as not made upon a sufficiently comprehensive view of the constitution, and of the extent, progress and necessities of the country, seemed, in that leading case, to declare that the admiralty jurisdiction granted by the constitution to the federal government, and the exercise of which congress might allow to the courts when it pleased, extends to all public navigable lakes and rivers where commerce is carried on.

In this condition of the law, a coal barge, loaded with coals, and on its way from Pennsylvania into another state, was coming down the Monongahela, a considerable and important stream at Pittsburg, Pennsylvania, but one having numerous dams and locks in it, and one which, though navigable in the rainy season for small steamers, is perhaps hardly to be reckoned one of the great navigable rivers of the west. Coming out of a lock in the river, this barge ran foul of another barge loaded with coal, and fastened to the shore, but standing out further in the stream than she had any right to be. The descending barge was broken, and sank with her cargo, and a libel by its owner having been allowed and sustained by the district court, the case came here by appeal, the correctness of that court's action in sustaining the libel, being the point in issue here. These western coal barges, it must be added, are rough trunks, being flat boats with sides, made merely for transporting coals, and, owing to the trouble of returning up stream with them, usually sold as lumber at the end of the voyage. They have no coasting license.

GRIER, Circuit Justice. The subject of dispute proposed by the libel, is a collision between two coal barges loaded with coal. They are not ships or vessels in the maritime sense of the terms. They do not take out a coasting license. They are generally

[1] [Reported by John William Wallace, Esq., and here reprinted by permission.]

mere open chests or boxes of small comparative value, which are floated by the stream and sold for lumber at the end of their voyage. A remedy in rem against such a vessel, either for its contracts or its torts, would not only be worthless but ridiculous; and the application of the maritime law to the cargo, and hands employed to navigate her, would be equally so.

The case of The Genesee Chief v. Fitzhugh, 12 How. [53 U. S.] 458, reversing the former decisions of the supreme court (which had adopted the English definition of navigable rivers, and bounded the jurisdiction of admiralty courts by tide water), does not necessarily extend the sceptre of the admiral over every stream whose occasional floods or factitious basins may suffice to float a steamboat. If it was unreasonable to refuse to ships and steamboats on our great lakes and rivers the benefit of the remedies afforded by courts of admiralty, it may be equally so to apply the principle and practice of the maritime law to everything that floats on a fresh water stream. Every mode of remedy and doctrine of the maritime law affecting ships and mariners, may be justly applied to ships and steamboats, but could have no application whatever to rafts and flat boats. A court of admiralty is not needed to try common law actions of trespass, nor to administer common law remedies in any form.

The act of 1845 extends the jurisdiction of courts of admiralty to "the lakes and navigable waters connecting said lakes." On other navigable rivers it seems to have been assumed by virtue of the decision of the supreme court, and without regard to the limitations of the act of congress, either as to place or subject. But the court having decided this act of congress to be constitutional and binding, it must govern the question as to the subjects which it defines, even if it be not considered as denying such jurisdiction on the navigable waters omitted.

This act confines the jurisdiction of admiralty courts on the lakes and rivers, to "matters of contract and tort in, upon, or concerning steamboats and other vessels of twenty tons burden and upward, enrolled and licensed for the coasting trade, and at the time employed in business of commerce and navigation between ports and places in different states and territories upon the lakes and navigable waters connecting said lakes."

The supreme court, in speaking of this provision in the act of 1845, and of the act of 1789, says: "These laws are both constitutional, and ought therefore to be carried into execution. The jurisdiction, under both laws, is confined to vessels enrolled and licensed for the coasting trade; and the act of 1845 extends only to such vessels when they are engaged in commerce between different states and territories. It does not apply to vessels engaged in the domestic commerce of a state, nor to a vessel, or boats, not enrolled and licensed for the coasting trade under the authority of congress." The Genesee Chief v. Fitzhugh, supra.

It follows, that in order to show the jurisdiction of the district courts of the United States in "matters of contract and tort" arising on the lakes and other navigable rivers, the libellant should aver and prove the facts and conditions stated in the act of congress of 26th of February, 1845. And as in this case no amendment to this effect can be made conformably with the facts of the case, the decree is reversed, and the cause dismissed for want of jurisdiction. The question of costs is reserved for further hearing.

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JONES (CORCORAN v.). See Case No. 3,229.

JONES (COX v.). See Case No. 3,303.

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## Case No. 7,459.

JONES v. CROWELL et al.

[N. Y. Times, June 15, 1854.]

District Court, S. D. New York. June 12, 1854.

WAGES — LIBEL FOR — TENDER — ADMISSION OF OWNERSHIP OF VESSEL — COSTS — SUIT IN STATE COURT — SUMMONS BEFORE COMMISSIONER PREVIOUS TO FILING LIBEL.

[1. A tender by respondents on libel for services as stewardess of a ship is an admission of ownership of the vessel.]

[2. Costs will not be refused for not bringing such a suit in the state court or taking out a summons before a commissioner before filing the libel, in the absence of an apparent intention to annoy the respondents.]

The libellant Mary Jane Jones, by her husband, James Jones, sues [William Crowell and others, owners of the ship Jane D. Cooper] for wages due her as stewardess of the ship during a voyage from New York to Liverpool and back between November, 1852, and March, 1853, at the rate of $10 a month, claiming a balance due her of $23. The respondents tendered $15, and claimed that by reason of her misconduct during the voyage she was not entitled to receive any more. They also claimed that they were not proved to be the owners of the ship, and that the libellant should at any rate be refused costs, because she had not brought her suit in a state court, and had not taken out a summons before a commissioner before filing the libel.

Benedict & Allen, for libellant.

Cochrane & Donohue, for respondents.

HELD BY INGERSOLL, District Judge. That the respondents, having made a tender in the case, admitted themselves to be the owners of the ship. That no misconduct was shown on the part of the libellant which would deprive her of her right to full wages. That, if the libellant had brought suit without good reason, or in such a way as to show an intention to annoy the respondents, costs would be refused; but that no such intention is shown. Decree for libellant, with costs.

## Case No. 7,460.

JONES v. DAVIS et al.

[Abb. Adm. 446.] [1]

District Court, S. D. New York. Jan., 1849.

MASTER FOR A FOREIGN VOYAGE—MASTER TO SUPERINTEND LOADING—EVIDENCE NECESSARY TO SHOW FORMER EMPLOYMENT.

The employment of a master to take command of a vessel for a foreign voyage, is usually a circumstance so notorious that there can seldom be wanting definite and decisive evidence by which the fact of such employment may be established. There is, moreover, no incompatibility between the employment of one person as master to superintend the loading and preparing a vessel for sea, and the engagement of another person to take the command of her upon the voyage. When, therefore, one claiming under an alleged employment as master for a foreign voyage seeks to establish such employment, merely by inference from services rendered and acts performed by him, under authority of the owners, in making the vessel ready for sea, the court will require that the evidence shall be so strong as to exclude all reasonable doubt that an employment for the voyage was intended.

[See Ames v. Le Rue, Case No. 327.]

This was a libel in personam by Frederick W. Jones against Samuel G. Davis and Cornelius Savage, owners of the brig Fawn, to recover damages for the wrongful discharge of libellant from an alleged employment as master.

BETTS, District Judge. The libel avers that the respondents hired and engaged the libellant to take charge of the brig Fawn, owned by them, as master thereof, at the wages of a dollar a day for the time she should remain out of employment, and at the wages of sixty-six dollars per month from and after the time of her obtaining employment. That, in pursuance of the agreement, the libellant entered on board the brig July 17, 1848, and continued on board, in command of her, until August 2d, following, when a charter was obtained for her to St. Petersburg, and other places. That thereupon, on August 3d, he commenced loading the Fawn for the voyage, which was to be circuitous and of uncertain duration, and continued that service until the brig was loaded and fully ready for sea; when on August 14th, the respondents wrongfully and without previous notice, discharged him, and would not permit him to make the voyage, upon the allegation that they had disposed of part of their interest in the vessel. The libellant avers, that by such wrongful discharge, he has sustained damages to the amount of $800, being wages, expenses and board for the probable duration of the voyage. He prays the court to pronounce for the damages aforesaid.

The answer explicitly denies any agreement with the libellant, hiring him as master of the brig, for any time or upon any terms; and also denies that the respondents were partners, or that the brig was chartered for the voyage described, or that they gave libellant any encouragement to incur expenses of preparation to act on board of her as master for the alleged voyage. It sets forth, in detail, what the respondents assert to have been the agreement made between them and libellant; but it is not necessary to advert to that portion of the defence, as the libellant seeks no decree for services on board as ship-keeper, but sues wholly in the character of master, hired to serve as such over the vessel, both in port, while seeking freight, and afterwards at sea, and for damages for loss of wages, &c. during the probable duration of the voyage for which the vessel was engaged. The answer, moreover, admits that on August 14th, during the lading of the brig, they agreed with one Shaw that he should go in her as master, and states that libellant was then informed in substance that a master was engaged for the voyage, and that his further services would not be required.

No express hiring of the libellant, as charged in the libel, is proved, nor is it shown that he was put in possession of the vessel in the character of master. The argument in his behalf is, that the agreement set up is to be implied from the facts in evidence. The facts relied upon to raise this implication are, that the libellant was on board the vessel for some time in July and August,—that one of the respondents said to the notary who was employed to ship a crew for the voyage, that Captain Jones would superintend the selection of the men, —that the shipping articles were drawn up, and the crew hired by the notary, in the expectation that the libellant was to command the vessel,—that the libellant gave orders and made arrangements on board for the voyage, in taking in cargo, supplies, &c., —that upon one occasion the libellant, at the express direction of one of the respondents, signed bills of lading for part of the cargo,— and that he was also conversed with by one of the respondents, in relation to the course he would pursue in case the vessel should be detained by ice in the Baltic.

The respondents proved a conversation had since the cause was at issue, between a witness and the libellant, in which the latter stated to the witness, that the ship-keeper of the brig having left her, he, the libellant, agreed with the owners to go on board her and sleep at night, and to look for business during the day; and that respondents were to give him a dollar a day for the service. They further proved that the libellant did not sign the shipping articles, or ship the first or the second mate for the voyage,— that a provisional agreement was made by him, with the assent of the owners, with one Coffin, to go on board and assist in loading the vessel at a dollar and a half a day, with the understanding that if he was approved he should be employed for the voyage as first mate; another person was, however,

[1] [Reported by Abbott Brothers.]

shipped in that capacity,—that when the brig was ready for sea, and hauled out into the river, the libellant left her, and Captain Shaw having then become a part-owner, cleared her as master, and came on board, and made the voyage in command of her.

Evidence was given on the part of the libellant of his general repute for skill and fidelity, and of his ample experience as shipmaster. The respondents on their part proved, that they made inquiries of persons who had employed him, and that they obtained unfavorable accounts of his qualifications.

The facts and circumstances in evidence, are clearly consistent with the claims set up by the libellant, that after August 3d, he was employed by the respondents as master of the brig for the voyage, but they are by no means of force sufficient to exclude the presumption that he was continuing with the vessel on his original undertaking, with a hope and expectation of receiving the command of the brig when she should be sent upon a voyage. Indeed, it must be conceded that the facts tend about equally to the support of either hypothesis.

The circumstance which most directly sustains the claim of the libellant is his act of signing bills of lading in presence of one of the owners, during the time the brig was loading. This being one of the functions of a master, very strongly imports that libellant was at that time clothed with a master's authority. It must be remarked, however, that the appointment and employment of masters is wholly at the discretion of owners (Abb. Shipp. 156; 3 Kent, Comm. 161), and, that there is no incompatibility in assigning a person to that agency in a home port, for the purpose of loading and fitting out a vessel, although he is not to act as master for the voyage. Advantages may result to owners and to commerce from placing this home service in the hands of men of experience and dispatch in the business of inspecting, taking in and storing cargo, or selecting the men, who no longer go abroad as navigators, or may not possess proper qualifications for that duty. Such employment of a master in port might also be desirable for the purpose of satisfying owners of his competency to take charge of the ship or manage her business upon her voyage. The owner and ship would stand charged by his acts as master pro hac vice, without respect to the fact of actual command at sea. A transaction which occurred in loading this vessel illustrates this principle. It appears that Coffin applied for the office of first mate, which was vacant, and he was recommended by the libellant as a proper person to fill it. He was taken into service to assist in loading the vessel, with a view to his engagement as first mate, if he should be approved of. The fact of his being on the vessel, and acting in port as her first mate, does not accordingly determine that he was shipped for the voyage in that capacity. The auxiliary fact of his having signed the shipping articles would certainly be required, in absence of oral proof of express hiring.

It seems to me that this principle should be applied to the engagement of a master, and that it governs the present case. There would appear to be rarely any occasion to resort to implications and presumptions for the purpose of showing employment in that important capacity. The fact must almost invariably be too notorious and marked; to leave any room for question. The owners treat with masters publicly as such. The vessel is advertised for her voyage in his name. Bills are furnished to him, and certified by him in that capacity, and scarcely any particular can be referred to in the employment of a vessel, less likely to be wanting in means of clear and decisive proof, than the appointment of master for a foreign voyage.

When, therefore, a resort is had to circumstantial evidence to establish the employment of a master, the evidence required should be of a character which leaves no fair reason to doubt the fact; and must certainly go further than to present a case equally consistent with the supposition of a temporary engagement in port in preparation for the voyage, as with an appointment to go out in command of the vessel. I forbear expressing any opinion upon other topics of importance involved in the case, the right of a master to consequential damages, because of a breach of a contract of hiring of this kind with him, or the legal measure of such damages, or the limitation, if any, of the power of an owner to displace a master from his command, or to refuse entrusting a vessel to him.

There being no satisfactory evidence of any contract entered into between the respondents and libellant, engaging him as master, or corresponding in substance with the agreements alleged by him in his libel, I must pronounce against his demand for damages. Libel dismissed, with costs.

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JONES (DIXWELL v.). See Case No. 3,937.

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## Case No. 7,461.

JONES v. FIELD et al.

[12 Blatchf. 494; 2 Ban. & A. 39.] [1]

Circuit Court, E. D. New York. April 8, 1875.

PATENTS—INJUNCTION TO RESTRAIN INFRINGEMENT—WHEN DENIED.

An injunction was applied for to restrain the infringement of a patent reissued within five months previously. On the motion, the validity of the patent was disputed, the novelty of the invention was denied, exclusive possession in the plaintiff was not shown, the defendants were shown to be able to respond in damages, and, on

[1] [Reported by Hon. Samuel Blatchford, District Judge; reprinted in 2 Ban. & A. 39; and here republished by permission.]

a broad construction of the claim of the patent, for which the plaintiff contended, the affidavits in opposition raised a doubt as to the novelty of the invention: *Held*, that the motion must be denied.

[Cited in Foster v. Crossin, 23 Fed. 400.]

[This was a bill in equity by Willis Jones against Charles H. Field and Maurice Flynn for the alleged infringement of plaintiff's patent.]

John J. Allen, for plaintiff.

Andrew J. Todd, for defendants.

BENEDICT, District Judge. This is a motion for an injunction to restrain the defendants from making a certain form of self-lubricating vehicle axles, which, it is claimed, infringes upon a patent owned by the plaintiff. The patent relied on was first issued to the plaintiff on March 10th, 1874 [No. 148,368]. It was re-issued November 10th, 1874, No. 6,129. The claim in the re-issue is for "a wheel axle, with recesses in the upper part of such axle, substantially in the manner and for the purposes set forth."

Neither the construction nor the validity of the re-issue has ever been adjudicated. Upon this motion, the validity of the patent is disputed and the novelty of the invention is denied. If, as the plaintiff contends, his invention covers every form of recess made in the upper part of an axle, for the purpose of containing oil and permitting it to be drawn therefrom as the wheel revolves, the affidavits produced in opposition to this motion raise sufficient doubt as to the novelty of the invention, to defeat a motion for injunction, where, as in this case, the patent was issued within five months, where exclusive possession is not shown, and where the defendants are responsible and able to respond to any claim for damages that may be made out against them. The motion must, therefore, be denied.

JONES (FLINT v.). See Case No. 4,872.

## Case No. 7,462.

JONES v. The FLOATING ZEPHYR.

MYTINGER et al. v. SAME.

[7 Am. Law Reg. 494.]

Circuit Court, E. D. Pennsylvania. 1859.

BILL OF LADING—BREACH — DETENTION BY ICE—SUIT BEFORE TERM FOR PERFORMANCE OF CONTRACT HAS EXPIRED.

Where a ship is detained in port by ice, and her cargo is damaged before the season allows her to proceed, though she subsequently delivers it to the consignees, a shipper cannot, without rescinding the contract, sustain a libel in rem for a breach of the bill of lading, until the term for the performance of the contract has expired.

[Appeal from the district court of the United States for the Eastern district of Pennsylvania.]

These cases came into the circuit court on appeal from a decree in the admiralty in favor of the respondent. Both appeals involved the same questions, and were argued and decided together. The libel, in the first case, was presented on February 28th, 1856; that in the second case was presented March 10th, 1856. The libellants [Paul T. Jones and L. G. Mytinger and others] respectively alleged that in the month of December, 1855, they shipped on board the ship the Floating Zephyr, a foreign vessel, belonging to the port of Boston, but then lying in the port of Philadelphia and bound for Liverpool, a certain number of barrels of flour, to be carried to Liverpool and to be delivered there in good order and condition, to the order of the shipper, or to assigns (in the first case,) and (in the second case,) to Richardson, Spence & Co., or their assigns. Bills of lading, in the usual form, were signed by Shepherd Blanchard, the master of the ship, and part owner thereof. That the officers of the ship, in disregard of their duty, and contrary to the usage of merchants and of this port, received on board a large quantity of Indian corn, a portion of which was unsound, and all of which was improperly and defectively stowed, being placed in the hold, in layers under and over the barrels of flour. That the ship, by unreasonable delay in her sailing, became frozen up in her berth, and did not begin the voyage for a period of five weeks and upwards, during which time the corn gradually deteriorated by and under the influence of the heat of the ship. That the damaged corn was not discharged from the ship as it should have been, but was allowed to injure and destroy the flour. That on or about the 20th of February, 1856, the corn and flour were removed—spoiled and offensive—from the ship, by the order of the master; the flour being stored on shore, and so damaged by the heat as to be unfit for reshipment. That the performance of the contracts, in the bills of lading, was thus rendered impossible by the negligence of the officers of the ship. That the damage to the libellants arose from the unreasonable delay in sailing, the unfit condition of part of the cargo, and the defective stowage of the whole of it. The answer of Shepherd Blanchard denied that the cargo was improperly stowed, or that the Indian corn was in an unsound condition when received. The respondent alleged that the cargo was stowed in a customary and proper manner. That the ship was detained entirely by the ice; and that, while frozen in, precautionary measures were taken to prevent injury to the cargo. That on the 15th of February a survey was had. That on the 18th of February the respondent apprised the shippers by letters, of the condition of the cargo, but that they refused to co-operate with him in any measures for its safety. That the cargo was discharged in compliance with the recommendations of the surveyors.

That on the 23d of February, at the instance of the consignees, a second survey was made. That in accordance with the opinion of the surveyors, the damaged flour was reshipped for transportation. That the voyage to Liverpool was not broken up, and the performance of the contract had not been rendered impossible by the negligence of the owners of the ship. The Floating Zephyr sailed for Liverpool subsequently to the filing of the libels, and delivered her cargo to its consignees. The district court, after argument dismissed the libels.

KANE, District Judge. It is unnecessary to decide most of the questions that were argued so fully by the counsel in these cases. There is a difficulty in the way of the libellants' recovery, which is at the threshold, and is, as it seems to me, insuperable. They were shippers on board the Zephyr. She was arrested at the wharf, after lading, by the ice of winter; and the libellants' goods were damaged before the season allowed her to proceed. She sailed, however, at the earliest practicable time, and delivered her cargo at its place of destination to the several consignees. These suits were instituted by the shippers on their bills of lading, while the vessel was still at her port of departure. It is obvious that they were instituted too soon. The ship is liable integrally for the damage sustained by the cargo during the voyage by reason of causes not excepted against in the contract of affreightment. But she cannot be libelled nor her owners sued de die in diem, as the voyage advances, and one item or circumstance of default and damage follows another. The contract is an entire one, and unless it be rescinded, the recourse for a breach of it must be sought when the term for its performance has expired. The liabilities under it cannot be split up. Valin, Comm. lib. 3, tit. 3, art. 9; 2 Boul. P. Dr. Com. 390. To meet this objection, the libellants allege in argument that the voyage was broken up by the detention of the vessel, and the contract for carriage abandoned; and they liken the case of detention by ice, to that of detention by blockade, which according to the adjudication in 3 Serg. & R. 559 (Stoughton v. Rappalo) is said to justify a rescission of the contract by the shippers. But without entering upon the question, whether the declaration of a blockade has this effect, which has been decided by many jurists, (see the opinion of Chancellor Kent in Palmer v. Lorillard, 16 Johns. 348, and Valin's Commentary on the 8th article of title 1, book 3, of the Ordonance,) it is enough to observe: First.—That the ground on which a blockade is supposed to have this effect, is simply the uncertainty of its duration, it resting in the discretion of an enemy, while the period of a detention by ice is ascertainable within reasonable limits, which must be understood to have been in the view of the parties a detention "par force majeure a cause d'um obstacle passages." Valin. Second.—The case referred to was a case of replevin; and it decides, not that even a blockade rescinds the contract of affreightment, but that it justifies a party in rescinding it. Now, in the cases before me, the parties have not claimed to rescind the contract; but on the contrary, they establish it by claiming damages for a breach of the bill of lading, which defines its terms; as their consignees also have done, by accepting the goods when they arrived out. The libels must, therefore, be dismissed.

I do not pass upon the question, whether there was defective stowage of the libelants' goods; nor upon the question of law which was pressed in the argument, whether the libellants could rightfully have reclaimed them, or can now claim damages for the injury they may have sustained, without exhibing as evidences of their title all the parts of the bill of lading. The references to Abbott, Shipp. 596; Valin, Comm. lib. 3, tit. 3, art. 17; Emerigon, Ass. c. 11, §§ 3, 7; and Boul. P. 2 Do. Com. Mar. T. 7, § 1, would, however, suggest to this last question, a negative answer.

Mr. Paul and Mr. Geo. M. Wharton, for appellants (libellants below), made the following points:

I. The voyage was broken up, because, (1) The character of the article was changed by the fault of the carrier, before the departure of the vessel. It was no longer flour, but something else. (2) Of the lapse of time—a period of two months, and more—after the shipment of the cargo. (3) Of the entire discharge of the cargo. (4) Of the new voyage having been undertaken, merely by agreement, between the captain and certain shippers. The libellants refused to consent to the arrangements of those parties, with regard to the disposition of the cargo.

II. It was within the power of the libellants to consider the voyage as at an end. Stoughton v. Rappalo, 3 Serg. & R. 559; Valin, Comm. art. 9, Pothier, Traite de la Charte Partie, pt. 1, § 4, Nos. 97, 98, 102; The Isabella Jacobina, 4 C. Rob. Adm. 77; 2 Boul. P. 385, 386, tit. 8, § 6.

III. Duty of the captain in regard to stowage; and the specific liability of the ship for the negligence or bad stowage of the master. Fland. Shipp. p. 214, § 200, etc., and cases cited; Abb. Shipp. 425; Curtis on Merchant Seamen, 213, 214; Clark v. Barnwell, 12 How. [53 U. S.] 273; Rich v. Lambert, Id. 347; Fland. Shipp. 217, § 202; The Freeman v. Buckingham, 18 How. [59 U. S.] 183; Brass v. Maitland, 88 E. C. L. 470; Id. p. 476, note.

IV. The real owner must sue in the admiralty. The bare legal title will be disregarded as in equity.

V. Consignor must sue when he is the real owner of the goods. Flanders, pp. 461–464, and cases therein cited; Ludlow v. Bowne, 1 Johns. 1; Freeman v. Birch, 1 Nev. & M.

420; Davis v. James, 5 Burrows, 2680; Grove v. Brien, 8 How. [49 U. S.] 439; Lawrence v. Minturn, 17 How. [58 U. S.] 100.

Mr. Kane and Mr. Geo. W. Biddle, for appellee (respondent below), contended:

I. That the action was one purely in rem, and as such, was dependent upon the general maritime law. The Rebecca [Case No. 11,619]; The Yankee Blade, 19 How. [60 U. S.] 89, 90.

II. That the contract in each case, in the bills of lading, was an indivisible one. It was still in force when the suits were instituted. The recourse for the breach of a contract must be sought when the term for its performance has expired. The vessel subsequently sailed; her cargo was delivered to the consignees. The suits were premature. 2 Boul. P. Dr. Com. 390; Logan v. Caffrey, 6 Casey [30 Pa. St.] 196. The parties here did not claim to have rescinded the contract. They treated it as still subsisting. They therefore cannot recover. Goodman v. Pocock, 69 E. C. L. 576.

III. That these contracts are terrean rather than maritime in their character, and are therefore not within the jurisdiction of the admiralty.

IV. That the libellants were bound to exhibit, as evidence of their title, all parts of the bills of lading. Even if the voyage had been broken up, the title to sue, in respect to Mytinger & Co.'s shipment, was in the endorsees of their bill of lading. As to the right of the endorsee or consignee to bring his action, they cited 6 Serg. & R. 429; Ld. Raym. 271; 12 Mod. 146; [Grove v. Brien] 8 How. [49 U. S.] 438; [Lawrence v. Minturn] 17 How. [58 U. S.] 107.

V. That there was no evidence, in the cases, of bad stowage, or of negligence in the conduct of the master. This point, however, was not much discussed by the counsel for the respondent, who relied mainly upon the questions of law comprehended in the four preceding points.

After the argument upon both sides had been concluded, GRIER, Circuit Justice, affirmed the decree of the district court, dismissing the libels.

It may be proper to remark that the decree of the circuit court must, for the present, be regarded as a contingent decision of these cases. The learned judge will write an opinion only in case the libellants determine not to appeal to the supreme court of the United States. Should they conclude, by next October, not to bring the cases before that tribunal, Judge Grier will formally decide the important and interesting questions involved in them.

[There is no record of any such case in the supreme court, nor anything in the office of the clerk to show that such appeal was ever taken.]

JONES (GANTT v.). See Case No. 5,213.

JONES (GASSAWAY v.). See Case No. 5,263.

JONES (GOLDSBOROUGH v.). See Case No. 5,517.

## Case No. 7,463.

JONES v. GRAY.

[3 Woods, 494.] [1]

Circuit Court, N. D. Georgia. Sept., 1876.

EXEMPTION—HEAD OF A FAMILY.

An unmarried man who lives (but does not keep house) in one town, and supports, by his contributions, his mother and his unmarried sister, who board with his married sister in another town, is not entitled to the exemptions allowed by the law of Georgia to the head of a family.

[In review of the action of the district court for the Northern district of Georgia.

[This was a suit in bankruptcy by Edgar E. Jones against Sylvester Gray.]

John T. Glenn, for petitioner.

E. N. Broyles, for objecting creditor.

WOODS, Circuit Judge. The question presented by this petition is, whether the bankrupt is entitled to the exemptions allowed by the Code of Georgia, as the head of a family. The bankrupt, at the date of his bankruptcy, was, and now is, an unmarried man, residing in Athens, Georgia, but not keeping house there. He has a mother and an unmarried sister, twenty years of age, who are boarding with a married sister of the bankrupt, in Augusta, Georgia. The mother and unmarried sister have no means of support, and the bankrupt, since the year 1872, has supported them by his contributions, but it does not appear that they are unable to maintain themeselves by labor. Under this state of facts, can the bankrupt be called the "head of a family"? We think not. The supreme court of Georgia has given a very liberal construction to the phrase, "head of a family." In Marsh v. Lazenby, 41 Ga. 153, it was held that "an unmarried man, whose indigent mother and sisters live with him, and are supported by him, is the 'head of a family,' in the sense in which the term is used by the constitution of the state, and is entitled to a homestead." But this definition, liberal as it is, does not include the case of the bankrupt, for the mother and sister of the bankrupt do not live with him. He, a single man, without family of his own, lives in one town, and supports, by his contributions, his mother and unmarried sister, who live in another town, and are inmates of the family of a married sister of the bankrupt. To call a man, so situated, the "head of a family," is, in my opinion, unwarfantably extending the meaning of the phrase. The bankrupt and his mother and unmarried sister do not constitute a family; the bankrupt cannot, therefore, be the head of a family, for "a family

[1] [Reported by Hon. William B. Woods, Circuit Judge, and here reprinted by permission.]

is a collective body of persons, who live in one house, and under one head or manager." Webst. Dict. I agree in opinion with the district court, that the bankrupt is not the head of a family, and is not, therefore, entitled to the exemptions allowed the head of a family.

## Case No. 7,464.

JONES v. GREENOLDS.

[1 Cranch, C. C. 339.] [3]

Circuit Court, District of Columbia. July Term, 1806.

WITNESS—ATTENDANCE—DEPOSITION DE BENE ESSE.

The return of non est upon a subpoena issued only a few days before the sitting of the court, is not a sufficient evidence that the witness is "unable" to attend, so as to enable the party to read his deposition taken de bene esse, under the act of Virginia.

Assault and battery.

Mr. Youngs, for plaintiff, contended, that he had a right to read the deposition of Beckwith Green, taken de bene esse, upon showing that a subpoena had been issued to the marshal of the District of Columbia, and returned non est. It was issued only a few days before the sitting of the court. He cited the case of Broadwell v. McClish [Case No. 1,911], at April term, 1801.

But THE COURT said, that under the act of assembly (Parl. Papers, 279, § 12), the party who would use such a deposition, must show that the witness is unable to attend, and that the return of the subpoena is not satisfactory evidence to the court of that fact. The fact was then proved by affidavit, and the deposition was read.

## Case No. 7,465.

JONES et al. v. HABERSHAM et al.

[3 Woods, 443.] [1]

Circuit Court, S. D. Georgia. April Term, 1879.[2]

CHARITY—PERPETUITY—UNCERTAINTY—PROVIDING OF TRUSTEE BY COURT OF CHANCERY—HOLDING PROPERTY BEYOND A CERTAIN AMOUNT—VIOLATION OF CHARTER—CORPORATION AS A TRUSTEE.

1. Where there is an immediate gift to trustees for a general charity, but the particular application of the fund will not of necessity take effect within any assignable limit of time, and can never take effect at all except on the occurrence of events in their nature contingent and uncertain, the gift is valid, and the court will hold up the fund a reasonable time to await the happening of the contingencies.

2. Certain devises and bequests in a will were made substantially in the following form: I hereby give, devise and bequeath to N. W. Jones all that lot (describing it), to him and his heirs forever. I hereby give, devise and bequeath to the trustees of the Independent Presbyterian Church, in Savannah, all that full lot of land (describing it and declaring the purposes for which the devise was made). The devises were followed by an item which declared: "It is my wish and I hereby direct that none of the legacies, bequests or devises in any of the clauses of this, my will, shall be executed or take effect until the building and other improvements on the lot on the corner of Gaston and Whitaker streets, and known as the 'Hodgson Memorial Hall,' which I have conveyed in trust to the Georgia Historical Society, shall be completed and entirely paid for out of my estate." *Held*, that the gifts themselves were not suspended, but only the payment thereof.

[See note at end of case.]

3. The law of charities is fully adopted in Georgia, as far as is compatible with a free government, where no royal prerogative is exercised.

[See note at end of case.]

4. There was devised by the will of the testator to the trustees of the Independent Presbyterian Church, in Savannah, a certain lot of land in that city, with the buildings thereon, upon terms and conditions stated as follows: "First. That the trustees of the said Independent Church shall appropriate annually out of the rents and profits of said lot and improvements the sum of one thousand dollars to one or more Presbyterian or Congregational churches in the state of Georgia, in such destitute and needy localities as the proper officers of said Independent Presbyterian Church may select, so as to promote the cause of religion among the poor and feeble churches of the state. Second. This gift and devise is made on the further condition that neither the trustees nor any other officers of said Independent Presbyterian Church will have or authorize any material alteration or change made in the pulpit or galleries of the present church edifice on the corner of Bull and South Broad streets, but will permit the same to remain substantially as they are, subject only to proper repairs and improvements; nor shall they sell or alien the lot on which the Sabbath school-room of said church now stands, but shall hold the same to be improved in such manner as the trustees or pew-holders may direct. Third. Upon the further condition that the trustees of said Independent Presbyterian Church will keep in good order and have thoroughly cleaned up every spring and autumn my lot in the cemetery of Bonaventure, and that no interment or burial of any person shall ever take place either in the vault or within the inclosure of said lot; and for the purpose of having the same protected and cared for, I hereby give, devise and bequeath my said lot in the Bonaventure cemetery to the trustees of the Independent Presbyterian Church and their successors." *Held*, (a) that the devise was not void for uncertainty; (b) that the condition not to allow any alteration in the pulpit and galleries of the church, but to hold the same to be improved, and not to alien the sabbath school lot, did not render the bequest void; the condition for the improvement of the pulpit, etc., was a proper charity, and the others were conditions subsequent, which could not affect a charitable gift; (c) that the church named as trustee was capable of taking and executing the trust.

[Cited in Kelly v. Nichols (R. I.) 21 Atl. 908.]

[See note at end of case.]

5. A will contained the following devise: "I give and devise to the Union Society of Savannah all that lot or parcel of land in the city of Savannah on the north side of Bay street, and at or near its intersection with Jefferson street, extended or prolonged, known in the plan of said city as lot letter 'B,' with the buildings and improvements thereon, but on the express condition that said society shall not sell or alienate said lot, but shall use and appro-

[3] [Reported by Hon. William Cranch, Chief Judge.]

[1] [Reported by Hon. William B. Woods, Circuit Judge, and here reprinted by permission.]

[2] [Affirmed in 107 U. S. 174, 2 Sup. Ct. 338.]

priate the rents and profits of the same for the support of the school and charities of said institution, without said lot being at any time liable for the debts or contracts of said society." *Held*, (a) that the condition expressed is a condition subsequent, which, if void, does not vitiate the gift; (b) that a condition against alienation annexed to property devoted to charity does not render it void; (c) that the fact that the Union Society had already a surplus of funds does not vitiate the gift.

[See note at end of case.]

6. A will contained the following devise: "Twelfth. I give, devise and bequeath to the Widows' Society of Savannah, all that lot or parcel of land in Savannah on the corner of President and West Broad streets, on which the improvements now consist of four brick tenement buildings, the rents and profits of the same to be appropriated to the benevolent purposes of said society." *Held*, that the Widows' Society being incorporated for the relief of indigent widows and orphans, the gift was not too general, and was for charitable purposes, and not for indefinite benevolence.

[See note at end of case.]

7. Where a will devised, on certain conditions, a gift over, of devises and bequests already made: *Held*, that said provision did not vitiate said devises and bequests.

[See note at end of case.]

8. A gift for a library and academy of arts and sciences is for an "educational purpose," and is authorized by section 3157 of the Code of Georgia.

[See note at end of case.]

9. Where a charity is definite, the court of chancery will provide a trustee if none is named, or if the one named is incompetent to act.

[See note at end of case.]

10. A general power was given to the Georgia Historical Society to take and hold goods and lands, with a proviso that the clear annual income should not exceed a stated sum: *Held*, that a devise which increased the income of the society beyond the sum limited, was not void; if the society accepted the trust, that might be cause for forfeiting its charter.

[See note at end of case.]

11. Where a corporation has power to hold property, and is forbidden to hold beyond a certain amount, the matter being one of degree merely, it is not a question of ultra vires, but of violation of its charter.

12. That provision of the constitution of Georgia of 1868 (Code 1873, § 5068) which declares that the general assembly shall have no power to grant corporate powers and privileges to private companies, except to banking and other business companies named, but shall prescribe by law the manner in which such powers shall be exercised by the courts, does not take away from the general assembly the power to make amendments to existing charters, or give that power to the courts.

[See note at end of case.]

13. A corporation may be a trustee, if not prohibited; with the qualification, perhaps, that the object of the trust shall be germane to, or in harmony with, the objects of the corporation.

[See note at end of case.]

14. The requirement, in the devise, of a building to be used for the purposes of a library, that the name of the testator should be engraved on a marble slab to be placed and kept over the main entrance, does not render the devise void.

15. A devise for the "building and erection and endowment of a hospital for females within the city of Savannah, on a permanent basis, into which sick and indigent females are to be admitted and cared for," is not void for uncertainty as to the beneficiaries of the charity.

[See note at end of case.]

16. The devise mentioned in the preceding head-note directed that the income and profits of the residuum of the testator's estate should be applied to the erection and endowment of a hospital, and the testator expressed a desire that an act of incorporation should be obtained for the hospital, but no time was fixed for the erection of the building or the obtaining of the charter. *Held*, that the devise was not void for uncertainty in these respects.

[See note at end of case.]

17. If a devise for a charity cannot be carried out in the particular manner contemplated by the testatrix, a court of equity can and will provide proper trustees to carry it out.

[See note at end of case.]

18. The state of Georgia has not inadvertently or otherwise deprived itself of the power of creating a charitable corporation.

19. A devise to trustees for a charitable purpose, which is to be carried on by them until a building, to be erected for the charity, shall be completed, which is then to be handed over by the trustees, with the funds to support it, to a corporation to be created, creates no perpetuity.

[This was a bill in equity by Wallace S. Jones and Noble W. Jones, executors of the will of George N. Jones, and others, against William N. Habersham and William Hunter, executors of the will of Mary Telfair.]

Heard on demurrer to the bill. Mary Telfair was a maiden lady, a resident of Savannah, Georgia. She died June 1, 1875, leaving a will by which she disposed of her entire estate. Her nearest relatives were the great-grand-children of a brother, the grand-children of a paternal uncle, and the grand-children of a maternal aunt. The probate of the will was resisted by representatives of each of these classes of relatives. The result of the litigation was that the will was established as the last will and testament of Miss Telfair, and was duly admitted to probate as such. See Wetter v. Habersham, 60 Ga. 193, and Jones v. Habersham, Id. 203. The bill in this case was filed by the representatives of certain persons claiming to be of kin to the testatrix, to attack and annul certain devises and bequests in the will contained, on various grounds fully set out in the bill. The clauses of the will assailed, and the grounds on which they were claimed to be void, will appear in the opinion of the court. The defendants, executors of the last will of Miss Telfair, demurred to the bill, and upon the demurrer the cause was argued and decided.

W. W. Montgomery and J. R. Saussy, for complainants:

1. The tenth item of the will is void for uncertainty. Code Ga. §§ 2468, 3155, et seq. The trust is ultra vires, and the devise being indivisible, the whole fails. Cherry v. Mott, 1 Mylne & C. 123. A bequest which is void in part fails altogether. Attorney General v. Davies, 9 Ves. 535; Chapman v. Brown, 6 Ves. 404; Fontain v. Ravenel, 17

How. [58 U. S.] 369; Wheeler v. Smith, 9 How. [50 U. S.] 55. An illegal condition annexed to a gift is void. Code Ga. § 2661. Prohibition of alienation voluntary or involuntary, in a devise, is void, as repugnant to the estate devised. Blackstone Bank v. Davis, 21 Pick. 42; Hall v. Tufts, 18 Pick. 455; Taylor v. Sutton, 15 Ga. 109. The church which is made a trustee under this item of the will is not capable of taking or holding the real estate thereby devised. Charter Act 1806, § 4; Code Ga. §§ 2267, 2466. Conditions in terrorem (see second condition of tenth item) are void, and render the devises void. Code Ga. § 2466; 1 Jarm. Wills, 836; Levy v. Levy, 33 N. Y. 97; Van Nostrand v. Moore, 52 N. Y. 12; Van Kleeck v. Dutch Church of New York, 20 Wend. 457.

2. The eleventh item is void, because it must appear that property left to corporations by will is necessary to the purposes of their organization, and the contrary affirmatively appears as to the Union Society.

3. The twelfth item is void, because the legatee is uncertain, and benevolent are not necessarily charitable purposes. The charter of the Widows' Society of Savannah does not show the purposes of the incorporation, except as the name may indicate. Charter Acts 1837, p. 220. The name does not indicate the purpose. In re Deveaux, 54 Ga. 673. The trust is, therefore, ineffectually declared, and results to the heirs. Code Ga. § 2316, par. 4.

4. The legatee under the thirteenth item cannot take until the happening of the condition provided for. 1 Jarm. Wills, 836; 1 Story, Eq. Jur. § 287. It may never happen, hence a perpetuity.

5. Fourteenth item: The Georgia Historical Society is incapable of taking any property whose income is over five thousand dollars, and only that much for the purposes specified in the preamble of the charter. The trust is foreign to the purposes of the society; hence the society cannot accept it. Ang. & A. Corp. 104; Andrew v. New York Bible & Prayer-Book Soc., 4 Sandf. 156; Morice v. Bishop of Durham, 10 Ves. 521; Attorney-General v. Davies, 9 Ves. 535; Cherry v. Mott, 1 Mylne & C. 123. A corporation whose charter forbids it doing more than is granted, cannot take as trustee. American Colonization Soc. v. Gartrell, 23 Ga. 448. The amendment to the charter, made since the beginning of this litigation, does not help the charter. The law at the death of testatrix must govern. Bennett v. Williams, 46 Ga. 399; Hargroves v. Redd, 43 Ga. 146. An executory devise is never created per verba de presenti, but always per verba de futuro. Goodright v. Cornish, 1 Salk. 226; Inglis v. Trustees of Sailors' Snug Harbor, 3 Pet. [28 U. S.] 99. The devise to the Georgia Historical Society is not when they shall have their charter amended so as to render them capable of taking, but per verba de presenti. Again, under Code, § 5146 (Const. 1877, art. 12, par. 4), it is impossible to amend the charter of 1839. It is, constitutionally, petrified. Even if the amendment by the court were valid, it would not avail the society for another reason—the whole intention of the testatrix was to intrust the property to a corporation with a perpetual charter. The court could only grant one for twenty years. What is to become of the property at the end of that time? Code, § 1688. Nor is the amendment by the legislature valid. Id. § 5068 (Const. 1877, art. 3, § 7, par. 18). It was never accepted. Ang. & A. Corp. 51–55. If good, it does not confer power to act as trustee. Nor can the legislature now grant power to one corporation to buy shares in another. Const. 1877, art. 4, par. 4. Again, the devise is uncertain. Who are "the proper officers," and who "the public?" The devise is also specific, and cannot, therefore, be executed cy pres. Or, if general, there is no trustee capable of taking, and no beneficiaries sufficiently certain to enable them to maintain a suit for the enforcement of the charity. Hence the bequest is too indefinite, and must lapse. Grimes' Ex'rs v. Harmon, 9 Am. Rep. [35 Ind. 198] 690 et seq. If the devise lapse, it does not fall into the residuum. Because: 1st. The property is, for the purposes of descent, to be regarded as realty. $30,000 worth is realty. Heirs may sue for and recover railroad shares in their own name without intervention of administrator. Southwestern R. Co. v. Thomason, 40 Ga. 408. As to personalty generally they cannot. Land, when held by a partnership, is treated in equity as personalty. Nevertheless, a sale of his interest by a member of the firm is within the statute of frauds. Black v. Black, 15 Ga. 445. On the death of one partner, his legal representative must join in a deed of the realty by the surviving partners. Is not land treated as personalty when owned by a corporation or firm only for business or commercial purposes, but for purposes of descent, or where the statute of frauds is involved, is it not subject to the ordinary rules governing realty in such cases? Rent is due for some purposes at sundown; for others at midnight. If the landlord die between sunset and midnight, the rent goes to the heir, not to the executor. 2 Bouv. Law Dict. "Rent." Again, the lease of the A. & S. R. R. to the C. R. R., disposes of the entire franchise, and is, therefore, an assignment. 2 Bl. Comm. 317. And "rent" only is reserved. Rent issues out of realty alone. 2 Bouv. Law Dict. "Rent;" Code, §§ 2218, 2237. 2d. Even if personalty, the terms of the residuary clause are so narrowed as to exclude it. Tucker v. Tucker, 5 N. Y. 408; Hughes v. Allen, 31 Ga. 483; Williams v. Whittle, 50 Ga. 523. 3d. The property is not necessary for the purposes of the organization of the corporation contemplated in the residuary clause. Code, § 1676, par. 5, § 1679. If the value has shrunk since the death of testa-

trix, that will not open the residuary clause to take in enough to supply shrinkage. Again, the supreme court has decided that lapsed devises do not fall into the residuum, but go to the heirs. Williams v. Whittle, 50 Ga. 523. The rules of construction as to both realty and personalty shall be the same. Code, § 2245. The Georgia Historical Society was evidently selected as trustee for the Telfair Academy, because it has a perpetual charter. No such charter can now be granted. Hence, if the bequest in the fourteenth item is to be considered a general charity, it would, if in England, be executed by sign manual, because it is out of the power of the courts to give effect to the intention of testatrix. It follows that it must fail in this country. Again, the devise is not to charity, the charity is incidental only. It is "a monument of vanity" to perpetuate donee's name. It is no charity at all. Mellick v. President & Guardians of the Asylum, 4 Eng. Ch. (1 Jac.) 180. Nor will trustees be appointed to give effect to a perpetuity. Bequest to buy books to promote virtue and religion, void for uncertainty. Browne v. Yeall, cited in 7 Ves. 56.

6. The twenty-first item is void for uncertainty. What females are meant? White or black? Whence must they come? Grimes' Ex'rs v. Harmon, 9 Am. Rep. [35 Ind. 198] 690 et seq. And here is another reason why neither this item nor the fourteenth can be enforced at the instance of the attorney-general, in Georgia. If it be conceded that he has such power in behalf of the citizens of Georgia, he certainly has no such power in behalf of the "public" at large, or of the "females" of the world. Grimes' Ex'rs v. Harmon, supra, is exactly in point here. Again, who is to determine what sort of hospital is "suited to the wants of Savannah?" This item is also void as against the law of perpetuity. When are the executors or "their successors" to build the Telfair hospital? When is the "act of incorporation" to be obtained, and from what "tribunal?" The legislature cannot pass such an act. Code, § 5068; Const. 1877, art. 3, § 7, p. 18. No power existed under the constitution of incorporating churches, etc., until in 1872 the legislature, perceiving the defect, provided for incorporating academies and churches (Code, § 1677), and in 1876 extended the section so as to allow incorporations of church organizations whose operations extended over more than one county (Acts 1876, p. 34). At the same session (1876) the legislature passed the act under which the Georgia Historical Society has sought to amend its charter by application to the court. Id. p. 33. As that act only provides for amendments by the courts of such legislative charters as belong to the class "contemplated" by section 1676, and as that section contemplates business corporations alone, it follows that the attempt to amend the charter of the society under that act is futile. But if good, the law at the death of testatrix must govern. Hargroves v. Redd, 43 Ga. 142. This, then, is the extent to which the legislature has yet gone under the present constitution in conferring power upon the courts to grant charters. So here again the law against perpetuities applies. First, the legislature must pass an act authorizing some court to grant the desired charter, and then the court may or may not (as in Re Deveaux, 54 Ga. 673), in its discretion, grant it. Provision in a will impossible to fulfill under existing laws void. Adams v. Bass, 18 Ga. 130. A gift to a corporation to be created, which cannot be incorporated under existing laws, must fail. Perry, Trusts, § 730; Zeisweiss v. James, 63 Pa. St. 465. Note in case last cited, distinction between an unincorporated society already in existence, and for definite purposes, and a corporation hereafter to be formed and incorporated out of persons not yet associated for any purpose. Some of the decisions say that a devise or bequest to a society to be incorporated, is good by way of executory devise, if the incorporation must necessarily take place within the legal limit; i. e., a life or lives in being, and twenty-one years. Holmes v. Mead, 52 N. Y. 332; Fontain v. Ravenel, 17 How. [58 U. S.] 360. Otherwise, the devise is void. Leonard v. Bell, 58 N. Y. 676. The corporation to be created is the residuary legatee. "The trustees, managers, or directresses," as the will calls them, must first be incorporated before they can act. The executors are only the trustees, to build and turn over. This does not make them trustees of the charity. Zeisweiss v. James, supra; Beekman v. Bonsor, 23 N. Y. 298. The gift of the entire income being to the future corporation, carries corpus. Code, § 2455; Smith v. Dunwoody, 19 Ga. 237. When is the bequest to take effect? (1) Not until a law is passed authorizing the court to grant the charter. (2) Not until the charter is granted by the court. (3) Not until the hospital is built by the executors, "or their successors." (4) Not until the ladies named "consent" to become corporators. (5) Not until some one (who?) determines what the wants of Savannah are in this respect. (6) Not until the Hodgson Memorial Hall is completed and paid for out of the estate of testatrix. Is it not possible that one or more of the conditions may be unfulfilled at the end of a life or lives in being and twenty-one years, and a portion after? Suppose the present executors decline to build the hospital. Will a court of chancery compel them to do so? May they not, by the terms of the will, leave it to their successors, and they to their successors? A bequest to build hospital and get charter in two years, "provided two lives named in will should continue so long," not void for remoteness. Burrill v. Boardman, 43 N. Y. 254. It follows, that the building of the hospital is illegal: 1st. Because no reasonable time (a life

or lives in being, etc.) is limited within which it must necessarily be built. 2d. No definite persons are pointed out who are to build the hospital. 3d. No persons are indicated who are to determine what the wants of Savannah are in this respect, and how much is to be expended on the building. This being so, the balance of the residuary bequest fails, for another reason, to wit: It is impossible to say what may be "the portion of the residuum of my estate, as may not be expended in the building, erection and furnishing said hospital." And the whole bequest fails. Chapman v. Brown, 6 Ves. 404. Again, the intention of the testatrix is evidently to create a corporation, with perpetual succession. It is to be established on a "permanent basis." No court can create such a corporation, and the charity, if general, would, in England, fall to the crown, to be effectuated by sign manual; and hence fails here. Moggridge v. Thackwell, 7 Ves. 36. But, we submit, that under the decisions, this, as well as all the other charitable bequests in the will, is specific, and not general. If this be so, and the intention of testatrix cannot be carried out, the bequests fall altogether. Cy pres does not apply. Even in general charities, unless the English courts can give substantial effect to the donor's intention cy pres, they will not enforce the charity. Routledge v. Dorril, 2 Ves. Jr. 357. Is it likely that the testatrix intended that, at the expiration of the charter, twenty years after granted, the property should be divided among the members? Code, § 1688.

7. The twenty-third item is void for uncertainty, and as against the law of perpetuities. In no event can the bequest in this item fall into the residuum. It comes after the residuary clause, and is thus excepted out of it.

A. R. Lawton, W. S. Chisholm, and W. Grayson Mann, for defendants.

The complainants have not stated a case which entitles them to any relief. As heirs at law, they claim there is a resulting trust in their favor.

Code Ga. § 2312, provides as follows: "Resulting Trust: An implied trust is sometimes for the benefit of the grantor or his heirs, or heirs or next of kin of a testator, and is then a resulting trust."

Section 2316. "Implied Trusts: Trusts are implied." Paragraph 4. "When a trust is expressly created, but no trusts are declared, or are ineffectually declared, or extend only to a part of the estate, or fail from any cause, a resulting trust is implied for the benefit of the grantor, or testator, or his heirs." See, also, Code, §§ 2445, 3194.

Code, § 2456. "Intention of Testator: In the construction of all legacies, the court will seek diligently for the intention of the testator, and give effect to the same as far as it may be consistent with the rules of law." And if this test is applied to the will, there cannot be extracted from it an intention that there should be a resulting trust in favor of the heirs. In fact, if there is one controlling intention pervading the whole will, it is that no one as heir at law shall inherit. An effect may be given to this intention which "will be consistent with the rules of law" in the state of Georgia. The particular devises which the bill attacks are charitable bequests.

Code Ga. § 3157, provides: "Subjects of Charity: The following are proper matters of charity for the jurisdiction of equity: (1) The relief of aged, impotent, diseased or poor people. (2) Every educational purpose. (3) Provisions for religious instruction or worship. (4) For the construction or repair of public works or highways, or other public conveniences. (5) The promotion of any craft, or persons engaging therein. (6) For the redemption or relief of prisoners or captives. (7) For the improvement or repair of burying grounds or tombstones. (8) Other similar subjects, having for their object the relief of human suffering, or the promotion of human civilization."

"Section 3155: Equity has jurisdiction to carry into effect the charitable bequests of a testator or founder or donor, when the same are definite and specific in their objects, and capable of being executed."

Code, § 3156: "Cy Pres: If the specific mode of execution be for any cause impossible, and the charitable intent be still manifest and definite, the court may, by approximation, give effect in a manner next most consonant with the specific mode prescribed."

Code, § 2468: "Bequest to Charity: A devise or bequest to a charitable use, will be sustained and carried out in this state, and in all cases where there is a general intention manifested by the testator to effect a certain purpose, and the particular mode in which he directs it fails, from any cause, a court of chancery may, by approximation, effect the purpose in a manner most similar to that indicated by the testator."

Code, § 3195: "Want of Trustee: A trust shall never fail for want of a trustee."

Code, § 3160: "Extraneous Evidence: If the terms of a bequest or deed are obscured, doubtful or equivocal, other evidence may be looked up to ascertain the sense in which particular expressions are used, but not to make definite that which in itself is too indefinite for execution."

The foregoing sections of the Code have been construed together by the supreme court of Georgia. Newson v. Starke, 46 Ga. 88. In the above case the law of Georgia, upon charitable bequests, is fully discussed, and being the unanimous decision of the supreme court, the law there fixed was the guide to the testatrix. From that decision the following rules may be established: The words "definite and specific," in the Code, mean such as by the usual practice in chancery

courts, are held to be "definite and specific." Id. 95. "If the bequest be to charity generally, or to religion and education generally, the jurisdiction was not in the courts, as such, to carry it into effect; but if the objects of the gifts were stated, though only generally, or if there were a trustee appointed, the court would supply the want of definiteness in the object, or would compel the trustee to carry out the general intent of the testator." Id. The following are cited as instances which have been held not to be too indefinite: A gift "to the poor;" to a "particular parish or place;" to the "widows or orphans of a parish;" to a "church, to be laid out in bread for the poor." Id. "If the general objects were pointed out, or if the testator had fixed any means for doing so, as by the appointment of trustees for such purpose, courts of chancery treated the bequest as one sufficiently 'definite and specific' for judicial cognizance, and carried it into effect, notwithstanding there might remain some indefiniteness and uncertainty." Id. "If there should be no trustee, or if the trustee should fail, the court has power to appoint a master to devise a scheme for carrying the bequest into effect." Id. 95, 96. This case overruled Beall v. Drane, 25 Ga. 430, and affirmed Beall v. Fox, 4 Ga. 404. And, in the last named case, the statute of 43 Eliz. c. 4, was declared of force in Georgia, and the statute of 9 Geo. II., not of force. The only restriction upon the right of a testator to devise his property to charity, is contained in Code, § 2419; Rev. Code, § 2384.

Code, § 2419: "Charitable Devises: No person leaving a wife or child, or descendants of child, shall, by will, devise more than one-third of his estate to any charitable, religious, educational or civil institution, to the exclusion of such wife or child; and in all cases the will containing such devise shall be executed at least ninety days before the death of the testator, or such devise shall be void." This section construed by the supreme court of Georgia. Reynolds v. Bristow, 37 Ga. 283.

Miss Telfair left no lineal heirs, and had never been married. It was, therefore, competent for her to have given her entire property to charity; and, in giving expression to her wishes, it was necessary that she should comply with the laws of Georgia alone, and those laws may be reduced to the following general principles: (1) The objects of the charity should be "definite and specific," according to the meaning of those words in the usual practice of chancery courts. For instance, "to the poor," to "a particular parish or place," "to the widows and orphans of a parish," "to a church to be laid out in bread for the poor." (2) If the objects should not be "definite and specific," the devise must be to a trustee, upon whose judgment the testator will be supposed to have relied to supply any want of definiteness. (3) If no trustee be appointed where the objects are definite and specific as aforesaid, or if a trustee be appointed, and the want of definiteness in that way be supplied, and the trustee should fail, or need judicial aid, the court will appoint a trustee, or a master, to devise a proper scheme for carrying the bequest into effect. And more particularly is this true, where a bequest is to a trustee and his successors. If these principles are applied to the devises in this will, they will be found valid.

Item Tenth. This devise is to the trustees of the Independent Presbyterian Church of the city of Savannah. The gift is to the corporation in its corporate name. The object is definite and specific.

Item Eleventh. The devise is to the Union Society of Savannah. The object is definite and specific.

Item Twelfth. This devise is also to the corporation. The object is definite and specific. The uses in each of these items are all charitable, and the objects of the corporations are also charitable. Perry, Trusts, §§ 706, 699, 712, p. 657. But even if these devises were not charitable they are good as bequests to the several corporations, which, under their charters and the general laws of Georgia, are empowered to receive donations by gift, grant, devise, etc. Code, §§ 1679, 2346, 2347; see "Charters."

Conditions. The condition against alienation in each of the tenth, eleventh and twelfth items does not render the devises void. Perin v. Carey, 24 How. [65 U. S.] 465; Stanley v. Colt, 5 Wall. [72 U. S.] 119; McDonogh's Ex'rs v. Murdoch, 15 How. [56 U. S.] 367; Ould v. Washington Hospital, 95 U. S. 303; Wilcoxon v. Harrison, 32 Ga. 480; Proprietors of Church in Brattle Square v. Grant, 3 Gray, 142. The conditions are not illegal, immoral or impossible, and, therefore, do not invalidate the devises; but if they are of that character the conditions are void, and the devises stand.

Code, § 2661: "Void Conditions: Impossible, illegal or immoral conditions are void, and do not invalidate a perfect gift."

Code, § 2296: "Repugnant Conditions: A condition repugnant to the estate granted is void; so are conditions to do impossible or illegal acts, or which in themselves are contrary to the policy of the law." This very point, in principle, was made in the case of McDonogh's Ex'rs v. Murdoch, 15 How. [56 U. S.] 358, supra, by the heirs at law, and was decided against them. The statute law of Louisiana being almost in the above language of the Code of Georgia. Conditions which are repugnant to the legal rights which the law attaches to ownership, the common law pronounces void, and the civil law treats as recommendation and counsel not designed to control the will of the donee. McDonogh's Ex'rs v. Murdoch, supra. Subsequent conditions are not favored because they serve to defeat estates. These conditions are good whenever they are not impos-

sible to be performed at the time, or made so afterwards by the act of God or the grantor, when they are not contrary to law or repugnant to the deed itself. In all such cases the conditions themselves are void, and the party takes an absolute estate at once. Taylor v. Sutton, 15 Ga. 109. But even if these conditions contained in said tenth, eleventh and twelfth items should be held to defeat the devise, still there would be no resulting trust in favor of the heirs at law, for the reason that the thirteenth item provides that for breach of conditions, the executors are directed to enter and dispossess the original legatee, and the estate is given to the Savannah Female Orphan Asylum. Where property was given to one charity to go over to another in a certain event, it was allowed to go over to the second charity after the lapse of two hundred years, on the ground that it was no more a perpetuity in one charity than in the other. Perry, Trusts, § 736, p. 687; Christ's Hospital v. Grainger, 1 Macn. & G. 460.

Item Fourteenth. This is a devise to the Georgia Historical Society, and its successors, of the lot on St. James's Square, with the pictures, books, etc., in special trust, to keep and preserve the same as a public edifice for a library and academy of arts and sciences etc., "to be open for the use of the public," etc. The object here is clearly a charity. Perry, Trusts, § 700; Jarm. Wills, 236. The testatrix intended the gift for "educational purposes," and for "the promotion of human civilization." Code Ga. § 3157. The devise is to a corporation, the Georgia Historical Society, and its successors. A corporation may be a trustee to carry out a charitable bequest (Vidal v. Girard's Ex'rs, 2 How. [43 U. S.] 127; Perin v. Carey, 24 How. [65 U. S.] supra), unless prohibited by charter (American Colonization Soc. v. Gartrell, 23 Ga. 448). If the trust be not germane to the powers and purposes of the corporation, the corporation cannot be compelled to act, but the devise does not fail. McDonogh's Ex'rs v. Murdoch, 15 How. [56 U. S.] supra; Vidal v. Girard's Ex'rs, 2 How. [43 U. S.] supra; Code Ga. §§ 3195, 3197. If the corporation be willing, but not competent under the charter, this is a question for the state and not for the heirs. Wade v. American Colonization Soc., 15 Miss. [7 Smedes & M.] 663; Vidal v. Girard's Ex'rs, 2 How. [43 U. S.] supra. In this case the devise is to the Georgia Historical Society, and its successors. It is, therefore, to be presumed that the testatrix anticipated that there might be a substitute for her first choice. Perry, Trusts, § 721. As to the conditions attached to this devise, they are mere details which are to be treated as recommendations, but which do not invalidate the gift. See cases already cited on conditions. The conditions are so much in detail, and the charitable intention of the testatrix is so plain, that a court of chancery could, with the aid of a master, carry the bequest into effect. Newson v. Starke, 46 Ga. 88.

Item Seventeenth. This contains a gift of $30,000 to the Presbyterian Church in Augusta, or to the trustees thereof, and its or their successors. The statement of the devise is the best argument which could be made to sustain it.

Item Twenty-First. This contains the devise of the residuum to the executors, and their successors, in trust, etc., to build a hospital for sick and indigent females, etc., and to obtain a charter, etc. In addition to the authorities already cited, in this connection particular attention is asked to the consideration of the cases of Ould v. Washington Hospital, 95 U. S. 303; Inglis v. Trustees of Sailors' Snug Harbor, 3 Pet. [28 U. S.] 99.

Item Twenty-Third. This contains two gifts: $1,000 to the Hodgson Institute in Telfairville, Burke county, Ga. This is clearly valid. And $1,000 to the first Christian church erected or to be erected in said village of Telfairville. The executors are made trustees, and if the church is not now erected, the court would hold up the fund a reasonable time. If the contingency fails to happen, the court will apply the fund cy pres. Attorney-General v. Bishop of Chester, 1 Brown, Ch. 444; Attorney-General v. Oglander, 3 Brown, Ch. 166; Ould v. Washington Hospital, supra. But if this device were void, being a gift of money, there would be no resulting trust for the heirs at law; the fund would fall into the residuum. Word v. Mitchell, 32 Ga. 623; Williams v. Whittle, 50 Ga. 523. Railroad stock is personalty in this state. Code, § 2237; Southwestern R. Co. v. Thomason, supra.

Item Twenty-Second. This item contains the expression upon which is based the claim that the entire will is void, under the law against perpetuities. "It is my wish, and I hereby so direct, that none of the legacies, bequests and devises in any of the clauses of this, my will, shall be executed or take effect until the building and other improvements on the lot on the corner of Whitaker and Gaston streets, and known as the 'Hodgson Memorial Hall,' which I have conveyed in trust to the Georgia Historical Society, shall be completed and entirely paid for out of my estate." The bill states "that the building and other improvements referred to were in the course of construction at the time of the death of testatrix, but were not completed until many months thereafter, and whether yet entirely paid for, your orators are not certainly informed. If not paid for, it is the only debt known to your orators now existing against said estate."

Code, § 2451: "Assets to Pay Debts: All property, both real and personal, in this state being assets to pay debts, no devise or legacy passes the title until the assent of the executor is given to such devise or legacy."

Code, § 2547: "Duty as to Contracts: The administrator must, as far as possible, fulfill the executory and comply with the executed contracts."

The said twenty-second item is but a statement of the general law, and if stricken out, Code, §§ 2451, 2547, would take its place. And should the construction contended for by complainants be placed upon this section of the Code no one could make a will in Georgia, valid under the law of perpetuities, who should die leaving unfinished, and not entirely paid for, any house, building or other improvement. Each legatee, upon the death of the testatrix, acquired such an interest in the respective legacies that, if the executors capriciously delayed the payment of debts and withheld their assent, he could in equity have compelled the assent. Code, § 2452. All the devises, bequests and legacies in the will are immediate and not mediate. These words were originally used and a technical meaning given to them by Lord Hale. Collingwood v. Pace, 1 Vent. 413. If the gift, devise or bequest is direct to the legatee or devisee, without passing through another, it is immediate. In this case all the gifts are directly to the legatees or devisees mentioned in the respective items of the will or they are to William N. Habersham and William Hunter, who are nominated "as executors of this my last will and testament, and trustees under the provisions of the same." "When a will directs acts to be done which necessarily require the intervention of a trustee to hold the property, the executor is a trustee by necessary implication." Nash v. Cutler, 19 Pick. 67; Bennet v. Batchelor, 1 Ves. Jr. 63; Gordon v. Green, 10 Ga. 534. In this case the testatrix not only directs acts to be done which require the intervention of a trustee (if the payment of her debts and the completion of the building and other improvements on the lot on the corner of Gaston and Whitaker streets known as "Hodgson Memorial Hall," be such acts), but expressly declares that Habersham and Hunter are nominated executors and trustees under the provisions of the will. The various legatees are the beneficiaries. Construe, then, the entire will, and the scheme of the testatrix is, that her whole estate should pass to Habersham and Hunter, as executors and trustees, to carry out her intentions. They are instructed to complete and pay for, out of her entire estate, the building and other improvements on the lot on the corner of Gaston and Whitaker streets, and known as "Hodgson Memorial Hall," which has been conveyed in trust to the Georgia Historical Society; and when this charity, begun in her life time, shall have been completed and entirely paid for out of her estate, then these trustees are directed to assent to and turn over the legacies according to the other provisions of the will. The trust, if any, is to perfect a charity commenced in the life time of the testatrix, and to execute the provisions of the will. In such case, as already cited, when property was given directly to one charity to go over to another in a certain event, it was allowed to go over to the second charity after a lapse of two hundred years, on the ground that it was no more a perpetuity in one charity than in the other. Perry, Trusts, § 737, p. 687, and cases cited in the text. "The disposition which he makes of any surplus, after the complete organization of the colleges, is a good charitable use for poor white male and female orphans." Perin v. Carey, 24 How. [65 U. S.] 465. Charitable uses are never void for perpetuity, and but rarely for uncertainty in America. Wag. Wills, pp. 401–406; Tud. Char. Trusts, p. 207. There being a gift to charity, remoteness is out of the case—that doctrine has no application to a charity. Chamberlayne v. Brockett, 8 Ch. App. 206; Christ's Hospital v. Grainger, 1 Macn. & G. 460. There may be a use or trust upon a use or trust. Code, § 2315.

Code, § 2311: "An express trust may depend for its operation upon a future event, and is then a contingent trust. It may operate in favor of additional or other beneficiaries upon specified contingencies, and is then a shifting trust." But the complainants rely upon the following extract from the opinion of Judge Swayne, in the case of Ould v. Washington Hospital, supra; "There may be such an interval of time possible between the gift and the consummation of the use as will be fatal to the former. The rule of perpetuity applies to trust as well as to legal estates. The objection is as effectual in one case as in the other. If the fatal period may elapse before what is to be done can be done, the consequence is the same as if such must inevitably be the result. Possibility and certainty have the same effect; such is the law." The bill alleges, on this point, as follows: "And your orators show that the building, and other improvements referred to, were in course of construction at the time of the death of testatrix, but were not completed till many months thereafter, and whether yet entirely paid for your orators are not certainly informed. If not yet paid for, it is the only debt known to your orators existing against said estate." The appraised value of the estate is placed at $650,000. If "can be done" is to be ascertained by what has been done, then there has never been the least possibility of the lapse of the fatal period in this case. The building and improvements, says the bill, were in course of construction; there was but one debt, and it has, in fact, says the bill, required but a few months to complete this work. The law regards that as certain which can be made certain. If the executors had been dilatory, a court of equity could have compelled the completion of and payment for the work.

The nineteenth chapter of "Lewis on Perpetuities" concludes the subject on indefinite contingencies as follows: "In fine, let the event contemplated be what it may, and the probability of its early occurrence as great as it may, it will, in every case be of too remote expectancy, and a limitation depending upon it will, therefore, always be void, unless either from the nature or internal quality of the contingency, or from express provisions and restrictions it be certain, that the event which is to give effect to the limitation will happen, if at all, within the period of lives in being, and twenty-one years." Lewis, Perp. 481. The contingency relied on in this case is the completion of a building, and other improvements which were in the process of construction at the death of testatrix, and finished several months after her decease. Is there anything in the nature or internal quality of such a pretended contingency to make a perpetuity? The estate was wealthy; the fulfillment of that executory contract of the testatrix was a legal certainty, and not a contingency. In Henshaw v. Atkinson, Sir John Leach uses the following language: "It is argued that it was the testator's intention that the charities were not to take effect until lands or buildings were supplied by others, and that the money may be locked up for an indefinite period of time, and, therefore, that the bequest cannot be sustained. The cases of In re Downing College [Attorney-General v. Lady Downing], Amb. 550, and Attorney-General v. Bishop of Chester, 1 Brown, Ch. 444, seem to be authority against that objection." 3 Madd. 306. But if, as already contended, the gift is immediate, either to the legatees or to Habersham and Hunter, as trustees under the provisions of the will the devise is good, although the enjoyment or consummation of the use may depend upon uncertain events. In such cases, the court will hold up the gift a reasonable time to await the happening of the contingency. Attorney-General v. Bishop of Chester, 1 Brown, Ch. 444; Attorney-General v. Oglander, 3 Brown, Ch. 166; Chamberlayne v. Brockett, 8 Ch. App. 206. In this case, the contingency, if any ever existed, has already happened, and the intention of the testatrix expressed in clear and unambiguous terms, can be carried into full effect. Mr. Justice Swayne, in Ould v. Washington Hospital, supra, said: "It is a cardinal rule in the law, that courts will do this whenever it can be done. Here we find no impediment in the way. The gift was immediate and absolute, and it is clear, beyond doubt, that the testator meant that no part of the property so given should ever go to his heirs at law, or be applied to any object other than that to which he had devoted it." "Charitable uses are favorites with courts of equity. The construction of all instruments, where they are concerned, is liberal in their behalf. Even the stern rule against perpetuities is relaxed for their benefit." Ould v. Washington Hospital, 95 U. S. 313. See, also, Beall v. Fox, 4 Ga. 404.

Before BRADLEY, Circuit Justice, and ERSKINE, District Judge.

BRADLEY, Circuit Justice. This is a bill filed by the heirs at law of Mary Telfair, seeking to have the devises and bequests of her last will adjudged inoperative and void, and a resulting trust in all of her estate declared in favor of said heirs, and that they may have a decree for their distributive shares thereof. The defendants demurred, and the question now arises on the demurrer. The will was made on the second day of June, 1875, when the testatrix was far advanced in years, and the probate thereof was strenuously contested, on various grounds, but was finally established on appeal by the supreme court of Georgia. The testatrix was never married, and had no relations except collaterals in the third and fourth degree. A great portion of her estate, which is alleged to have been of the value of $650,000, was given to charities.

A fundamental objection raised by the complainants to all the devises and bequests, arises on the twenty-second item of the will, which is as follows: "Twenty-Second. It is my wish, and I hereby so direct, that none of the legacies, bequests and devises in any of the clauses of this, my will, shall be executed or take effect until the building and other improvements on the lot on the corner of Gaston and Whitaker streets, and known as the 'Hodgson Memorial Hall,' which I have conveyed in trust to the Georgia Historical Society, shall be completed and entirely paid for out of my estate." It is contended that this postponement of the execution and effect of the devises and bequests violates the rule against perpetuities, and renders them inoperative and void. The bill alleges that the building and other improvements referred to were in course of construction at the time of the death of testatrix, but were not completed till many months thereafter, and whether yet entirely paid for, the complainants were not certainly informed. If not paid for, it was the only debt known to the complainants existing against said estate. The complainants concede the English rule to be, that where there is an immediate gift to trustees for a general charity, but the particular application of the fund will not of necessity take effect within any assignable limit of time, and can never take effect at all, except on the occurrence of events in their nature contingent and uncertain, the gift is valid, and the court will hold up the fund a reasonable time, and await the happening of the contingency. Reference for this is made to the cases of Attorney-General v. Bishop of Chester, 1 Brown, Ch. 444; and to Attorney-General v. Oglander, 3 Brown, Ch. 166. But the complainants question whether this rule can be applied in

Georgia; and they contend that, whether it can or cannot, there is no immediate gift of the property in the mean time, before the contingency happens. The last clause of the will, it is true, after appointing executors of the will, makes them also "trustees under the provisions of the same;" but it is contended that this does not operate as a devise to them of the real estate.

In considering this objection to the validity of the dispositions of the will, it is to be observed, in the first place, that all the gifts therein contained are immediate in form. Thus, the first item declares: "I hereby give, devise and bequeath to George Noble Jones, son of the late Noble Wymberly Jones, all that full lot of land in the city of Savannah," etc. (going on to describe it), "to him and his heirs forever." The tenth item declares thus: "I hereby give, devise and bequeath to the trustees of the Independent Presbyterian Church, of the city of Savannah, all that full lot of land," etc., going on to describe the same, and to declare the purposes for which the gift was made. It seems to us, therefore, that the gift itself is not suspended upon the completion of the Hodgson Memorial Hall, and the payment thereof; but only the execution and carrying into effect thereof. Some of the gifts are pecuniary legacies. If this view is correct, the gift of these legacies is not suspended, but only the payment thereof. This seems to us to be the intent of the testatrix. No one can read the whole will and believe that the testatrix, for one moment, had in her mind the revocation or non-operation of the gifts themselves. The memorial hall was begun at the time the will was executed, and was so far constructed as to be completed within a few months afterwards. Its plan and extent must have been designed, and its cost must, within probable limits, have been anticipated. It was her desire that the executors and trustees should finish that building, and pay for it, before the other legacies should be paid or the other donations carried into effect. If any unreasonable delay should occur in this behalf, of course it would be competent for any of the beneficiaries under the will to compel the trustees to proceed. But it being an obligation of her estate, incurred under her own directions, she wished it discharged before the other donations of her will should be carried out, and she is, therefore, emphatic on the subject. There is reason in what the counsel for the defendants say, that this provision is in effect what the law of Georgia requires or allows in all cases. Section 2451 of the Code declares that "all property, real and personal, in this state, being assets to pay debts, no devise or legacy passes the title until the assent of the executor is given to such devise or legacy." In other words, the payment of debts and the fulfillment of obligations are the first things to be executed before the devises and bequests can be carried out without the assent of the executors. The completion of this memorial hall was an obligation already incurred, and the will merely requires what the law virtually requires, or allows the executors to require, in all cases.

Before proceeding further, it may be proper to cite the provisions of the Code of Georgia on the subject of charities. The most important for the purposes of this case are the following:

Section 2468: A devise or bequest to a charitable use will be sustained and carried out in this state; and in all cases where there is a general intention manifested by the testator to effect a certain purpose, and the particular mode in which he directs it to be done fails from any cause, a court of chancery may, by approximation, effectuate the purpose in a manner most similar to that indicated by the testator.

Section 3155: Equity has jurisdiction to carry into effect the charitable bequest of a testator, or founder, or donor, when the same are definite and specific in their objects, and capable of being executed.

Section 3156: If the specific mode of execution be for any cause impossible, and the charitable intent be still manifest and definite, the court may, by approximation, give effect in a manner next most consonant with the specific mode prescribed.

Section 3157: This section specifies the subjects which are proper matters of charity for the jurisdiction of equity, corresponding nearly to the 43 Eliz.

By these provisions, it will be seen that the law of charities is fully adopted in Georgia, as far as is compatible with a free government where no royal prerogative is exercised.

We will now proceed to consider the objections which have been urged against the several charitable dispositions of the will. The first of these is contained in the tenth item, and is a gift to the trustees of the Independent Presbyterian Church of the city of Savannah, of a certain lot of land in Savannah, with the buildings and improvements thereon, upon the following terms and conditions, to wit:

"First. That the trustees of the said Independent Church shall appropriate annually out of the rents and profits of said lot and improvements the sum of one thousand dollars to one or more Presbyterian or Congregational churches in the state of Georgia in such destitute and needy localities as the proper officers of said Independent Presbyterian Church may select, so as to promote the cause of religion among the poor and feeble churches of the state. Second. This gift and devise is made on the further condition that neither the trustees nor any other officers of said Independent Presbyterian Church will have or authorize any material alteration or change made in the pulpit or galleries of the present church edifice on the corner of Bull and South Broad streets, but will permit the same to remain substantially as they are, subject only to proper repairs

and improvements; nor shall they sell or alien the lot on which the Sabbath school-room of said church now stands, but shall hold the same to be improved in such manner as the trustees or pew-holders may direct. Third. Upon the further condition that the trustees of said Independent Presbyterian Church will keep in good order and have thoroughly cleaned up every spring and autumn my lot in the cemetery of Bonaventure, and that no interment or burial of any person shall ever take place either in the vault or within the inclosure of said lot; and for the purpose of having the same protected and cared for, I hereby give, devise and bequeath my said lot in the Bonaventure cemetery to the trustees of the Independent Presbyterian Church, and their successors."

Various objections are raised to this gift, which will be considered in due order.

First. It is objected that it is void for uncertainty. This objection cannot prevail.

The appropriation of a certain sum of money annually to one or more Presbyterian or Congregational churches in the state of Georgia in such destitute and needy localities as the trustees may select, so as to promote the cause of religion among the poor and feeble churches of the state, is a definite charitable object, much more so than hundreds of cases to be found in the books which have been sustained. The circumstances under which this opinion is prepared will not allow us to cite authorities for all the conclusions to which we have arrived, and, therefore, we shall content ourselves, in most instances, by simply stating them. We can only say that on the point under consideration we have no doubt whatever. It requires but a slight knowledge of the law of charities to determine a question of this kind. Almost all charities describe their objects in general terms, indicative of the particular kind of good to be effected thereby. When this is done the charity is definite, although the particular objects are indefinite. Another object declared in this item is to keep in good order the testatrix's burying lot in the cemetery of Bonaventure. This is sufficiently definite, and is clearly authorized by the Code of Georgia (section 3157); although it was once held not to be a proper object of a charitable disposition. Perry, Trusts, § 706. It is somewhat singular that it should ever have been doubted, since the sanctity of tombs and other places of rest for the dead has always been an object of cherished regard since the establishment of Christianity, and received the peculiar care of the Roman law.

Second. Another objection made to this devise is that it is accompanied with a condition which renders it void, namely, not to allow any alteration to be made in the pulpit or galleries of the church edifice of the trustees, nor to alien the lot on which the Sabbath school-room of said church stands, but to hold the same to be improved in such manner as the trustees or pew-holders may direct. So far as this condition is expressive of a direction to keep the pulpit or school house in repair, it is a proper charity. So far as it may be construed as a condition, as for example, a condition against changing the form of the pulpit, or alienating the land, if unlawful (which we do not affirm), it is nevertheless a condition subsequent, and cannot affect the charitable gift. It is a condition subsequent, because it relates to the future after the gift is designed to take effect.

Third. The next objection is, that the trustee named being a corporation of definite powers, not including that of holding property in trust for any other object than that connected with the church as a religious society, is incapable of receiving or administering the trust. Supposing, for the sake of argument, this to be true, still the charity will not be permitted to fail, but the court of chancery has full power to supply the want of a legal trustee. A definite charity is not allowed to fail for want of a trustee. The Code expressly says: "A trust shall never fail for the want of a trustee." Section 3195. But we are inclined to think that the corporation may administer this trust. Every religious society or church has, from the very nature of the Christian religion and Christian institutions, a missionary vocation as old as the apostolic times; and it is not foreign to its purposes to extend aid to sister churches, or to promote the cause of Christianity, and especially of the particular form of Christianity which it professes, in places of destitution or ignorance.

Another objection founded on the terms of the thirteenth item of the will, will be considered hereafter.

The next gift is contained in the eleventh item of the will, and is in these words: "Eleventh. I give and devise to the Union Society of Savannah all that lot or parcel of land in the city of Savannah on the north side of Bay street, and at or near its intersection with Jefferson street, extended or prolonged, known in the plan of said city as lot letter 'B,' with the buildings and improvements thereon, but on the express condition that said society shall not sell or alienate said lot, but shall use and appropriate the rents and profits of the same for the support of the school and charities of said institution, without said lot being at any time liable for the debts or contracts of said society." This gift is objected to on account of the condition against alienation, and because the Union Society has already a surplus of funds. The condition is nothing but a condition subsequent, and if void, does not vitiate the gift. But we are not aware that a condition against alienation annexed to property devoted to a charity has ever been held to be void. Charity property, as a general thing, cannot be alienated without the aid of the court of chancery. Its normal character is to be inalienable, and the condition only expresses that character. The court, notwithstanding the

condition, would probably, if a proper case arose, make a decree allowing it to be alienated for the good of the charity. See Perin v. Carey, 24 How. [65 U. S.] 465. The objection that the Union Society has more funds already than are needed or can be used for the purposes of its institution is not supported by the allegations of the bill. The fact that a charitable society is well managed, and does not spend its entire income, but increases, as it may occasionally, its capital, is no evidence that its sphere of usefulness may not be greatly enlarged by an accession of new capital.

The twelfth item of the will is as follows: "Twelfth. I give, devise and bequeath to the Widows' Society of Savannah, all that lot or parcel of land in Savannah on the corner of President and West Broad streets, on which the improvements now consist of four brick tenement buildings, the rents and profits of the same to be appropriated to the benevolent purposes of said society; but this devise is made on condition the said Savannah Widows' Society shall not sell or alienate said lot or improvements, nor hold the same subject to the debts, contracts or liabilities of said society." It is objected to this item that the gift is too general, being for benevolent purposes indefinitely, which are not necessarily charitable. But it is for the benevolent purposes of the donee, the Widows' Society of Savannah. By turning to the charter of this society we find that it is incorporated and made a body politic, by the name and style of the Savannah Widows' Society, for the relief of indigent widows and orphans. This is sufficiently expressive of its charitable objects. But it is insisted that this declaration of the purpose and object of the society is only a part of its name. This is doubtful; but if it were so, it would still be sufficient to show for what purpose the society was organized, and would lay the foundation of a bill, or information, in equity, to prevent a diversion of its funds to any other purpose. We think the objection is untenable.

The thirteenth item of the will contains a provision which is applicable to the tenth, eleventh and twelfth, which have been considered. It is as follows: "Thirteenth. Should either one or more of the corporate bodies or institutions named in the preceding items of my will attempt to sell, alienate or otherwise dispose of the property and estate therein devised, contrary to the terms and conditions therein set forth, or should there be any levy on the same to satisfy the debts of said corporation, then I hereby direct my executors, or legal representatives, to re-possess and enter upon said property or estate as to which the conditions may be so broken or violated, and in that event I do hereby give and devise the said property so entered upon and re-possessed unto the Savannah Female Orphan Asylum." Here is a gift over of the property devised in the three previous items upon certain conditions subsequent. It is either valid or invalid. If valid, there is an end to the matter. If invalid, the conditions are inoperative, and the property remains as first given. This seems to us so clear that no further observation is required on the subject.

The next item is as follows: "Fourteenth. I hereby give, devise and bequeath to the Georgia Historical Society, and its successors, all that lot or parcel of land, with the buildings and improvements thereon, fronting on St. James's Square, in the city of Savannah, and running back to Jefferson street, known in the plan of said city as lot letter 'N,' Heathcote ward, the same having been for many years past the residence of my family, together with all my books, papers, documents, pictures, statuary and works of art, or having relation to art or science, and all the furniture of every description in the dwelling-house and on the premises (except bedding and table service, such as china, crockery, glass, cutlery, silver, plate and linen), and all fixtures and attachments to the same; to have and to hold the said lot and improvements, books, pictures, statuary, furniture, and fixtures, to the said Georgia Historical Society, and its successors, in special trust, to keep and preserve the same as a public edifice for a library and academy of arts and sciences, in which the books, pictures and works of art herein bequeathed and such others as may be purchased out of the income, rents and profits of the bequest hereinafter made for that purpose, shall be permanently kept and cared for, to be open for the use of the public on such terms and under such reasonable regulations as the said Georgia Historical Society may from time to time prescribe; but this devise and bequest is made upon condition that the Georgia Historical Society shall cause to be placed and kept over and against the front porch or entrance of the main building on said lot a marble slab or tablet, on which shall be cut or engraved the following words, to wit: 'Telfair Academy of Arts and Sciences,' the word 'Telfair' being in larger letters and occupying a separate line above the other words; and, on the further condition, that no part of the building shall ever be occupied as a private residence, or rented out for money, and none but a janitor, and such other persons as may be employed to manage and take care of the premises, shall occupy or reside in or upon the same, and that no part of the same shall be used for public meetings or exhibitions, or for eating, drinking or smoking; and that no part of the lot or improvements shall ever be sold, alienated or incumbered, but the same shall be preserved for the purposes herein set forth. And it is my wish, that whenever the walls of the building shall require renovating by paint or otherwise, the present color and design shall be adhered to, as far as practicable. For the purpose of providing more

effectually for the accomplishment of the objects contemplated in this item or clause of my will, I hereby give, devise and bequeath to the Georgia Historical Society, and its successors, one thousand shares of the capital stock of the Augusta & Savannah Railroad, of the state of Georgia, in special trust, to apply the dividends, income, rents and profits arising from the same, to the repairs and maintenance of said buildings and premises, and the payment of all expenses attendant upon the management and care of the institution herein provided for, and then to apply the remaining income, rents and profits in adding to the library, and such works of art and science as the proper officers of the Georgia Historical Society may select, and in the preservation and proper use of the same, so as to carry into effect in good faith the object of this devise and bequest." The charity indicated in this gift is a very meritorious one, and is authorized by the Code (section 3157), under the general class of "every educational purpose," which undoubtedly embraces public libraries. The principal objection to the gift is, that the donee, the Georgia Historical Society, is incapable of taking it. But if this were true, as before stated, where the charity is definite, the court of chancery will provide a trustee, if none is named, or if the one named is incompetent to act. It seems to us, however, that the gift to the Georgia Historical Society is not void. One ground of objection is, that whilst a general power is given to the society to take and hold goods and lands, it is coupled with a proviso that the clear annual income of such real and personal estate shall not exceed the sum of five thousand dollars; whereas the bill states that the income of the society was already between three and four thousand dollars at the time of the gift, which will increase it seven thousand dollars more. This, if the society accepted the trust, may have been cause of forfeiting its charter; but the gift would none the less be vested in it. To hold otherwise would be to render the society exempt from any inquiry on the subject at the suit of the state, for the answer would be: "We cannot hold more property than our charter allows, and, therefore, we do not." Certain things are ultra vires of a corporation; but when it has the power to hold property, and is forbidden to hold beyond a certain amount, the matter being one of degree merely, or of more and less, this is not a question of ultra vires, but of violation of its charter. A contrary rule would involve many absurdities. Suppose a corporation has no more property than its charter allows, but by an enhancement of values it grows into an excess of that allowance, to what particular portion of its property does its title become void? Is the whole affected by the vice? The answer plainly is, the title to none of it becomes void; but the corporation may be amenable to the penalty of violating its charter. Individuals cannot call it in question; its tenants must continue to pay its rents, and its debtors their debts; the state alone has the right to proceed against it. The state may or may not see fit to do so. It would depend on the circumstances of the case, the greatness of the excess, the causes which led to it, etc. The state may condone the offense. The legislature may relieve by enlarging its power. In the present case the defendants contend that the Georgia Historical Society has been relieved by an amendment to its charter, passed in 1870, by which the proviso in question was repealed. The complainants insist that this amendment was unconstitutional, because the constitution of 1868 declares that the general assembly shall have no power to grant corporate powers and privileges to private companies, except to banking and other business companies named; but shall prescribe by law the manner in which such powers shall be exercised by the courts. But "corporate powers and privileges" are powers and privileges which appertain to a corporation as such; its corporate franchise is not every power that a corporation has which is a corporate power. The intent of this prohibition undoubtedly was to relieve the legislature from applications to create private corporations of a certain class, such as benevolent, religious, literary, etc. It did not take away the power to make amendments to existing charters, nor intend to give that power to the courts. Suppose there had been a general law of mortmain, forbidding all religious corporations to hold land, would the constitution prevent the legislature from repealing it? Yet, by repealing it, existing corporations would have a new accession of power—not of corporate power, but of power to hold property. We think the amendment of 1870 was valid. That a corporation may be a trustee, if not prohibited, has been frequently held. Vidal v. Girard's Ex'rs, 2 How. [43 U. S.] 127; Perin v. Carey, 24 How. [65 U. S.] 465; McDonogh's Ex'rs v. Murdoch, 15 How. [56 U. S.] 367; American Colonization Soc. v. Gartrell, 23 Ga. 448. It may be a qualification that the object of the trust should be germane to, or in harmony with, the objects of the corporation. If this is true, what more appropriate existing corporation in Georgia could have been selected as trustee for the proposed library than the Georgia Historical Society? The presence of the library would greatly promote the objects of its incorporation. The charter declares that it shall be construed benignly and favorably for every beneficial purpose therein intended. In our judgment, the gift in this case took effect in the society as trustee.

The other objections to this item, relating to the inscription to be placed on the building, etc., are not tenable. It is a laudable ambition to wish to transmit one's name to posterity by deeds of beneficence. The millionaire who leaves the world without doing any-

thing for the benefit of society, or for the advance of science, morality or civilization, turns to dust, and is forgotten; but he who employs a princely fortune in founding institutions for the alleviation of suffering, or the elevation of his race, erects a monument more noble, and generally more effectual to preserve his name, than the pyramids. Thousands of the wealthy and the noble, in the early days of English civilization are deservedly forgotten; but the founders of colleges in Oxford and Cambridge will be borne on the grateful memories of Englishmen as long as their empire lasts. Harvard and Yale, in our own country, are pertinent examples of this truth.

The seventeenth item of the will gives thirty thousand dollars to the Presbyterian Church of the city of Augusta, to be appropriated in building a commodious Sunday school house and library on a portion of its lot. We do not remember that any peculiar objections were raised to this bequest.

The twenty-first item is as follows: "Twenty-first. All the rest and residue of my estate, of whatever the same may consist, real, personal and mixed, and wherever situated, I hereby give, devise and bequeath to my executors hereinafter named, and to the survivor of them, and to the successors in this trust of said survivor, in trust, to use and appropriate the proceeds arising from the same to the building and erection and endowment of a hospital for females within the city of Savannah, on a permanent basis, into which sick and indigent females are to be admitted and cared for, in such manner and on such terms as may be defined and prescribed by the trustees or directresses provided for in this item or clause in my will. The income, rents and profits of such portion of the residuum of my estate, as may not be expended in the building, erection and furnishing said hospital, shall be annually appropriated to the support and maintenance of the same. My desire and request is that a thoroughly convenient hospital, of moderate dimensions, suited to the wants of the city of Savannah, and capable of enlargement, if necessity should require, may be built and erected, with no unnecessary display connected with it. And I do hereby nominate as first trustees, managers or directresses of said hospital, Mrs. Louisa F. Gilmer, Sarah Owens, Mary Elliott (formerly Habersham), Susan Mann, Florence Bourquin, Eva West, and Eliza Chisholm, all of Savannah, Georgia, and do request and instruct my executors to advise and consult with the ladies named as to the construction, arrangement and furnishing of said hospital. It is further my wish and desire, and I do hereby request, that a suitable and proper act of incorporation for said hospital shall be obtained from such tribunal in the state of Georgia as may have jurisdiction in the premises, to be called and known as the 'Telfair Hospital for Females,' with the ladies above named, or such of them as may consent to serve, and such others as they may apply for to be associated with them as the first trustees, managers or directresses, under said act of incorporation, with power to fill any vacancies that occur in their number. And for the purpose of accomplishing the objects contemplated in this item or clause of my will, I do hereby authorize and empower my executors, or the survivor of them, to sell and convey all, or any portion, of the real estate, or any interest in the same, which I may have, or be entitled to, and not given or devised in any of the previous items or clauses of this my will, using their discretion as to private or public sales, and to whether, and at what time, such sales shall be made." This is an important item in consequence of the amount supposed to be given for the object indicated therein. It is devoted to the building and endowment of a hospital for sick and indigent females within the city of Savannah. It is objected to for uncertainty as to the objects; for uncertainty as to the time when the hospital is to be built, and when the act of incorporation is to be obtained; for the impossibility of creating such an act under the constitution and laws of Georgia, and as being in violation of the rule against perpetuities, in that it gives the property ultimately to a corporation not yet in existence. We do not think that any of these objections can prevail. First. As to want of certainty in its objects. Surely, when the testatrix says that the hospital is intended for females within the city of Savannah, into which sick and indigent females are to be admitted and cared for, she has said all that is necessary to make it a well-defined charity. It is to be a hospital; it is to be for females in Savannah; it is to be for sick and indigent females. What more could well be said to define it? Very few charities are more definite. As to the uncertainty of the time when the hospital is to be built, and when the act of incorporation is to be obtained, no one who has read the case of Inglis v. Trustees of Sailors' Snug Harbor, 3 Pet. [28 U. S.] 99, or the more recent case of Ould v. Washington Hospital, 95 U. S. 303, can have any doubt that the gift is good. Even if it cannot be carried out in the particular manner contemplated by the testatrix, the court can and will provide proper trustees to carry it out. This is fairly within the powers given by the Code. But we cannot agree with the counsel for the complainants that the state of Georgia has, inadvertently or otherwise, deprived itself of the power of creating a charitable corporation. If the law authorizing the courts to grant charters is imperfect in this respect, it will, no doubt, be promptly amended when the defect is discovered. This is no greater or more remote contingency than that which intervenes in any case where a gift of charity contemplates a future act of incorporation by the legislature. The fact

that the property is directed to be ultimately conveyed to a corporation to be created, creates no perpetuity. The estate is given immediately to the executors and trustees, and the prosecution of the charity is to be carried on by them until the building shall be ready for delivery, and then handed over with the fund to support it to the corporation to be created; or, if none shall be created, to such trustees as the court may appoint. This creates no perpetuity as has been decided in the cases referred to, and many others that might be cited.

The twenty-third item which gives a thousand dollars to the first Christian church erected, or to be erected, in the village of Telfairville, in Burke county, or to such persons as may become trustees of the same, and a like sum to the Hodgson Institute, in the same village, are of the same character precisely, so far as objected to, with the bequest in the case of Attorney-General v. Bishop of Chester, 1 Brown, Ch. 444, which was approved by Lord Eldon in Attorney-General v. Parsons, 8 Ves. 186.

In our judgment, the gifts of this will must be sustained. We should not have thought it necessary to go so much into detail in examining the objections that have been raised, but for the ability and earnestness with which the several points were presented. The bill must be dismissed with costs.

[NOTE. This case was reviewed upon appeal in the supreme court, Mr. Justice Gray delivering the opinion of the court. The contention is made that by the twenty-second clause of the will all the devises and bequests in the will are made to violate the rule against perpetuities. This contention is founded upon the use of the words "take effect," in the twenty-second clause. Says the learned justice: "Reading the twenty-second clause in connection with the other parts of the will, and in the light of the attending facts, it is quite clear that the words 'take effect' are used by the testatrix as synonymous with or equivalent to the word 'executed,' with which they are coupled, and not as signifying that the devises and bequests shall not vest immediately, but only that they shall not be paid or carried out until the debt contracted by the testatrix for the construction of the Hodgson Memorial Hall shall have been paid out of her estate. Each devise and bequest is present and immediate in form, introduced by the words, 'I give, devise, and bequeath.' The bill shows that the building and improvements referred to were, at the time of the death of the testatrix, in the course of construction, and so far advanced that they were actually completed within some months afterwards, so that the probable cost must have been capable of estimation at the time of making the will. The twenty-second clause is but a declaration of what the law would require,—that the debt of the testatrix for the construction of the memorial hall must be first paid out of her estate before her devisees and legatees receive any benefit therefrom." The objection that section 2914 of the Code of Georgia, providing that wills containing devises to charitable, educational, etc., uses, shall be executed at least 90 days before the death of the testator, applies to this case, is met by the learned justice by a number of citations showing that the true construction given to the clause by the supreme court of Georgia limits its application to cases of testators who have wife, child, or descendants. The opinion considers at length the subject of charitable bequests. The particular bequests are to be considered under the operation of the Georgia state statutes. Says the learned justice in speaking of sections 2468, 3155–3158, Code Ga.: "These provisions were evidently enacted to clear up the doubts created by previous conflicting decisions and opinions of the supreme court of Georgia. They show, as was well observed by Mr. Justice Bradley in the circuit court, quoting the opinion above, 'That the law of charities is fully adopted in Georgia as far as is compatible with a free government where no royal prerogative is exercised.'" The learned justice then takes up the devises in their order. First, that of tenth clause, to the trustees of the Presbyterian Church (a corporation). He overrules the objection that the corporation cannot, under its charter, hold and administer the charity. "It is a novel proposition, as inconsistent with the rules of law as it is with the dictates of religion, that a Christian church or religious society cannot receive and distribute money to poor churches of its own denomination, so as to promote the cause of religion in the state in which it is established." The eleventh clause of the will, to the Union Society, which was incorporated "for the relief of distressed widows, and the schooling and maintaining of poor children." The twelfth clause, to the Widows' Society, having similar purposes; and the fourteenth clause, to the Georgia Historical Society, are all considered and sustained. In the last it was contended that, because the Historical Society, by its charter, was limited as to the amount of property it might hold, and this bequest, if valid, together with the other property of the society, exceeded the amount, rendered the bequest void. There is, says the learned justice, a conclusive answer to this argument. "Restrictions imposed by the charter of a corporation upon the amount of property that it may hold cannot be taken advantage of collaterally by private persons, but only in a direct proceeding by the state which created it." Of the residuary clause of the will, giving to trustees the residue of the estate for the purpose of establishing a hospital, continuing, says the learned justice: "That this devise and bequest to establish a hospital for sick and indigent females in the city of Savannah is sufficiently definite, and that its validity is not impaired by the proviso of the will requiring an act of incorporation to be obtained, is clearly settled." Summing up: "The result is that all the devises and bequests contained in Miss Telfair's will are valid as against her heirs at law and next of kin." Decree affirmed. 107 U. S. 174, 2 Sup. Ct. 338.]

JONES (HALL v.). See Case No. 5,937.

JONES (HAMILTON v.). See Case No. 5,983.

## Case No. 7,466.

JONES et al. v. The HANOVER.

THOMPSON et al. v. JONES et al.

[9 N. Y. Leg. Obs. 232.]

District Court, S. D. New York. 1851.

CROSS LIBELS FOR COLLISION AT SEA—INEVITABLE ACCIDENT—SIGNAL LIGHTS—FOG—LOOKOUT—OWNERS OF CARGO AS PARTIES.

1. By the settled law of navigation, applicable to vessels, the one close hauled and the other free, sailing during daylight or a clear night, the free is bound to get out of the way of the close hauled, by taking proper measures of precaution in time.

[Cited in The Northern Indiana, Case No. 10,320.]

2. During thick and foggy weather, the law exacts from each vessel the greatest care and vigilance to avoid collision, which, if observed, and a collision, notwithstanding, takes place, it is regarded as an inevitable accident.

3. During thick darkness, mist or fog, the admiralty courts have noticed various precautions as proper to be observed by those navigating under these circumstances—such as carrying lights, keeping a good look-out, regulating the speed, notices by fog-horns, bells, and other means, to indicate their respective positions.

4. No positive law has yet settled that vessels generally are bound to carry lights in the night when sailing; nor have the American courts of admiralty recognized any explicit rule as obligatory in such cases.

5. No custom was proved of carrying a permanent light at night, while under sail at sea, or in the coasting trade.

6. The general bearing of testimony indicates that vessels are more misled than aided by a single stationary light on another vessel under sail.

7. Under the circumstances of vessels sailing during a thick fog, a light should have been within reach of the look-out, to have been exposed, or waved, to give notice to the other vessel of their position, and the omission was blameable.

8. In the present case, a suit "in rem" being pending there was no necessity for a cross suit "in personam" until a decision of the previous suit. Libel in personam dismissed with costs.

9. Vessels sailing during a dense fog are bound to have on deck all the disposable part of their crew, to aid in keeping a look-out.

10. To have been a want of vigilance on board of both vessels to trust the look-out to one man.

11. Under the circumstances, the master and crew of the vessel lost were justified in abandoning her, and staying on board the other vessel; and, therefore, their so doing did not culpably contribute towards her loss.

12. Owners of cargo must be made parties to the suit before they can avail themselves of the operation of the decree.

[Cited in The Atlas, Case No. 633.]

[These were cross libels by John H. Jones and others, against the schooner Hanover, William C. Thompson and others, claimants, and by William C. Thompson and others against John H. Jones and others.]

F. B. Cutting, C. B. Moore, and W. Q. Morton, for the Amelia.

D. Lord, Jr., B. F. & W. S. Butler, for the Hanover.

BETTS, District Judge. These two actions are founded upon a collision at sea, between the schooners Amelia and Hanover. Each party charges the other with being the blameable cause of the disaster, and claims compensation for the damages resulting from it. The two vessels came together in a thick fog, early in the evening of January 18, 1850, a few miles south-easterly from Hog Island, off the eastern coast of Virginia, and about 20 miles from Cape Henry. The Amelia left Hampton Roads for New York at noon the same day, laden with flour, grain, &c. The Hanover was light, on her return voyage from New York to Richmond, with passengers, &c. The pleadings in neither action state the course of the wind, nor the direction either vessel was taking at the time of the collision; but it appears upon the proofs that the wind was about N. N. W., and that the Amelia was steering nearly N. E. by N., close hauled, and the Hanover heading nearly S. S. W., four or five points off the wind, which would bring them approximating to the same line, running in opposing directions, although it is contended by each party that their vessel was some points to the windward of the other. Had the vessels met in that manner in daylight, or a clear night, they were approaching each other so directly that the familiar law of navigation would apply, and the Hanover, as sailing with the wind, would have been bound to give way, the obligation being imposed on the vessel having the wind free of taking proper measures to get out of the way of a vessel which is close hauled. Story, Bailm. § 611; Ang. Carr. § 651; Abb. Shipp. 234, margin, and notes. If two vessels come together in thick and foggy weather, when all reasonable precautions have been taken on board of both, the collision is regarded an inevitable accident, and neither is liable to the other for the consequences. The Itinerant, 2 Wm. Rob. Adm. 236. But the law is strict in exacting from each the observance of the greatest care and vigilance under such circumstances, to avoid the danger of collisions.

Various particulars have been adverted to by the courts, as marking the exercise or omission of proper prudence in navigating in thick darkness, mist or fog. These relate to carrying lights, to keeping a sufficient lookout, to the speed of movement, and to notices attempted to be given by fog-horns, bells, or other means tending to indicate the presence and position of the vessel, and afford a warning to others approaching. No positive law has yet settled that sailing vessels are bound to carry lights in the night time, when under way. The point has been frequently before the English court of admiralty. The Rose, 2 W. Rob. Adm. 1; The Iron Duke, Id. 382. The Trinity masters declared their opinion, that under ordinary circumstances, sailing vessels do not show a light, and are not required to do so. Id. 385. But one at anchor, in a track frequented by other vessels, is bound at night to show an efficient light. The Victoria, 3 W. Rob. Adm. 49; Abb. Shipp. 232; Hay v. Le Neve [2 Shaw, App. 395]. The American courts have repeatedly adverted to the subject, without laying down any explicit rule to be regarded as obligatory on vessels under way. The Falcon [Case No. 4,619]. But when at anchor in a harbor (Ang. Carr. §§ 647, 649; The Scioto [Case No. 12,508]; The Indiana [Id. 7,020]; Thain v. The North America [Id. 13,853]), or lights are required by statute to be exhibited (Bulloch v. Lamar, [Id. 2,129]; Waring v. Clark, 5 How. [46 U.

S.] 441) the courts are rigid in exacting an observance of the requirements. So, also, when a vessel is discovered approaching, and apparently not observing the one she advances upon, the latter, on descrying her, if in the night, should exhibit or wave a light, as a warning to her. The Neptune [Case No. 10,120]; The Bay State [Id. 1,148]; The Birkenhead, 3 W. Rob. Adm. 75. These comprise the points considered in the reported American cases. I do not, therefore, think the law imposed on the Amelia the obligation of carrying a light on the occasion, nor is it proved that a custom is established in the coasting trade, in which she was engaged, for vessels in her situation to carry lights. The practice obtains with many masters to do so, yet, the methods they adopt, according to the evidence, vary with the notions of each individual, and a habit of hanging or placing a light somewhere on or above deck, however useful it may prove in particular instances, cannot be regarded as amounting to a custom which sailing vessels must observe, or an usage of such notoriety that vessels at sea will regulate themselves in expectation of its being done by others.

The utility of lights on steamers, usually high out of water, and which hold a steady course, and are not so much encumbered with sails, so that they can give the lights a conspicuous position, is far different from what it may be supposed to be with ships, and particularly small vessels, lying low in the water, which, from the necessity of veering about with the changes of wind, can afford no certain indication by the light, whether their course will interfere with that of the other or not.[1] Accordingly, the vessel approached can have no sure indication of the course of another exhibiting a single light until she is near enough to discover her hull or sails, nor indeed can it be known but that she is at anchor. As the custom is notorious to show a light when a vessel is at anchor, the general bearing of the testimony in this court upon the subject for several years has been, that sailing vessels are more misled than aided by a single stationary light on another sailing vessel under way. A lamp, or brand of fire waved to and fro, is a significant signal that the vessels are closely approximating, and it is a fault to omit giving such signal, when one vessel has time to do it, or for the other not to heed it when given.

In the present case, I do not think the testimony fixes any blame on the Amelia for not carrying a light, or shows the one on the Hanover was any advantage to her. Was anything omitted on the Amelia after the Hanover's light was descried, proper to be done, or anything wrong done, which tended to produce the collision? These enquiries can only be solved by the testimony furnished from the Amelia, and the consideration of the relative positions of the two vessels, because nothing was known of her on the Hanover until the instant of collision. Kearney, the man on the weather bow of the Amelia, testifies that he was on the look-out. He saw a light right forward, and a little to the windward of the Amelia. He called to the mate at the helm to know if he saw it, and was answered he did not. Then called a second time, and ordered him to port the helm as hard up as he could—gave the order quick, "Up and hard up." As the vessels were striking, he heard an order from the Hanover to put up the helm, but could not tell whether it was given to that vessel or the Amelia. Captain Mott was below, and heard the call of Kearney and a reply by the mate, and went immediately on deck and jumped on the trunk. Then saw a light two or three points on the weather beam of the Amelia. He ordered the wheel hard up—the mate answered, it was hard up. He supposed the light was set on the jib boom of the Hanover; if he had thought it aft, he should have ordered his helm down. The light was then pretty much on his beam. He did not make out the sails of the Hanover, until after he saw the light, and then she was about her length off, as near as he could judge. He heard no hail from the Hanover to his vessel; but some one on the Hanover sung out, "Which way is she going?" He did not understand it addressed to his vessel. Captain Lampkin, of the Hanover, testified he was keeping the look-out on his vessel, and was the first to see the Amelia, then right under his lee bow, the jib boom of the Hanover in the act of passing in between the fore mast and mizzen mast of the Amelia. He could not see more than fifty or sixty feet off on account of the dense fog; and he called out to her to put her helm a-port—that is, up. It is to be remarked, that the Hanover was a large schooner, was light, and high out of water; the Amelia, a small vessel, deeply laden, and lying low in the water. At the time the two masters discovered the proximity of the vessels, it was palpably out of the power of either to do anything which would have prevented the collision. It must have followed instantaneously. Nor does it appear to me any movement of the Amelia could have avoided it, after the light of the Hanover was descried. No reliance can be placed on an estimate of time by witnesses under such circumstances; but the acts which followed

[1] "Marine Affairs—Notice to Mariners. The subjoined instructions are forwarded from the U. S. Navy Department: That all U. S. steamers will carry the following lights when at sea during the night. A white light at the masthead; a green light on the starboard paddle-box, and a red light on the port paddle-box. It is believed that the general use of these signals would prevent many disasters. Notice is given that the following steamers are fitted according to the above instructions: [The names of forty steamers on the Atlantic and Pacific Oceans are enumerated in the original instructions.] Wm. Skiddy, Navy Constructor, New York, January, 1851."

demonstrate that the vessels were at the moment directly upon each other. Kearney cried out to the mate, giving notice of the light, and then, as quick as he could, called again to put his helm hard up. Captain Mott heard the cry, and sprang on deck. He was lying on the floor of his cabin, and the outlet was close by the helm, and when he got there the Hanover was only her length from him; and Captain Lampkin says he also cried out to the Amelia to port her helm. It is possible a notice from the Amelia, such as to apprize the Hanover of her situation when the light was first seen by Kearney, might have enabled the latter vessel to luff out of the way of the Amelia; although no great confidence can be placed upon a mere conjecture of the kind, for Kearney says, as does also Captain Lampkin, of the Hanover, that they could not perceive the Amelia obeyed her helm so as to fall off any, and Captain Mott only infers she might have fallen off two or three points; yet a proper precaution ought to have placed at hand some means on the Amelia, by which an effort to warn the Hanover of her position might have been made. A lantern might have been kept within the ready reach of the look-out, which he could have waved on the forward part of his vessel, affording some chance for the other vessel to see it, and be benefited by it. But what would have been far more serviceable, he should have been prepared to give signal by some noise calculated to reach the approaching vessel when she was first descried. These particulars are the only omissions chargeable upon the Amelia, and in my opinion, upon the evidence, from the thickness of the fog and the nature of that darkness, a warning by some appropriate noise would have been the only one which could have benefited the Amelia. If there was a blameable omission in this respect on her part, it attaches equally to the Hanover, and the owner of the latter vessel cannot charge upon the owner of the former the entire loss occasioned by a fault in which both participated alike.

There accordingly seems to me no legal grounds established upon which the action in personam by the owners of the Hanover against the owners of the Amelia can be sustained. At most, the case would only justify a division of the damages between the parties; but as, upon the evidence, the loss fell almost exclusively upon the respondents, a judgment in this form of action could not be rendered in their favor against the libellants, for the excess of damages payable to them after those sustained by the libellants were satisfied, and they would be driven to a cross-action for their remedy. There was no necessity for the suit until a decision was obtained upon the action previously instituted against the Hanover. On the 16th of February, 1850, a libel was filed, and a warrant taken out against the Hanover, and she was arrested thereon the same day. On the 27th of February the libel was filed in personam against the owners of the Amelia, so that the suit in rem was already in prosecution, in which would appropriately be adjusted a division of damages, if one should be decreed by the court because of mutual delinquency, or a fault somewhere, inscrutable in its character. As the owners of the Hanover fail to establish a right to recover against the owners of the Amelia, independent of a counter responsibility to the latter, and that liability, if regarded only as a right of set-off, will greatly overbalance the demand of the libellants, the libel in personam must be dismissed with costs. It may be proper to notice, that an act of congress, passed the present session, limits the liability of owners of vessels for damages by collision to the value of their interest in the vessel and freight at the time the wrong was committed. 9 Stat. 635, § 3. Under similar provisions of a British statute, the court of admiralty in England holds that, in case of the total loss of the colliding vessel in consequence of the collision, no action can be maintained against the owners for damages. The Seringapatam, 3 W. Rob. Adm. 41. This is founded upon an alleged exposition of the statute by the court of exchequer, but the case is not quoted.

Without professing myself satisfied with the principle adopted by the English courts, I think here the clear equity is with the respondents, and the decree must be in their favor for costs. The two cases have been submitted to the decision of the court upon the same proofs and arguments. The decision in one case in effect must determine the controlling points in the other; yet the suit in rem against the Hanover brings more directly under consideration all the particulars of the occurence, and properly requires a more minute examination of the movements of the two vessels than has been given in the personal action. It is assumed in that decision that the two vessels were moving in opposite directions on the same line. That seems to be the reasonable bearing of the evidence taken together, although no positive exactness can be attained on this particular. The course of the wind, and the courses the two vessels were steering, are given upon estimates, neither being ascertained by the compass. The wind was about N. N. W. The Hanover was bearing about S. S. W., and the Amelia about N. E. by N., the sails of each vessel being kept full, the Amelia close hauled about five points on the wind, and the Hanover four or five points free. The testimony does not enable the court to fix these positions with certainty, yet the variations of a point or two either way from these precise courses, would still leave the vessels so directly approaching that, in the day time, the Amelia would have the privilege of holding her course, and the Hanover would be bound to give way. Westminister Review, Sept. 1844, p. 63, 3 Kent, Comm. (6th Ed.) 230; Abb. Shipp. 234. It is otherwise

when the wind is equally favorable to each, for then both must go off to the right (Ang. Carr. § 652; Story, Bailm. § 611), and if it be doubtful as to that, or of the precise course of the approaching vessel, the one on the larboard tack, particularly in the night, must give way in due time (Ang. Carr. § 654), without regard to the fact that she may be a point or two most to the windward (The Traveller, 2 W. Rob. Adm. 197; The Ann and Mary, Id. 195). The Amelia, in the darkness of the night, and the glimmering of light apparently directly ahead, was justified in acting upon the supposition that the vessels were so situated in relation to each other that it was the duty of both to give way, so as to pass to larboard. But she was very likely mistaken in the supposition, as from the manner the blow was given it is most probable the Hanover was, in fact, rather to leeward instead of in a right line with, or to the windward of, the Amelia. Several circumstances tend to prove this. First. The light which was seen dead ahead was on the starboard side of the Hanover, and aft of midships. Had the Amelia been to the leeward, the sails of the Hanover would have interfered with, if not intercepted, a direct view of the light, or brought it to bear off her larboard bow. In the second place, it is reasonable to infer that the action of the Amelia's helm, when put hard down, had some effect upon her, she being under good headway, with a strong breeze, and that she had, as conjectured by her master, fallen off some points by her head, and perhaps sufficiently to move her out of the track of the Hanover, had the latter been, when descried, dead ahead. And, in the third place, the blow was given so far aft on the Amelia as to indicate that she was then standing more at right angles with the direction of the Hanover than she would naturally be had the latter been directly ahead, and is not readily reconcilable with the notion the Amelia was to windward. These presumptions, however, if well founded, in no degree vary the relative rights and duties of the two vessels. The movement of the Amelia was in thick darkness and at random, to rescue herself from a danger impending instantly over her; and whether, in the extremity, she went to the right or left, could not be imputed as a fault to her. To render her chargeable for a wrong movement thus made, there must have been some delinquency on her part in the circumstances bringing her into that situation. Nor, indeed, do these hypotheses supply any conclusion very satisfactory to the judgment, for any inadvertent bearing up of the Hanover when there was no special effort to hold her to a fixed line, or any accidental irregularity in her steerage, might fully account for her being in a situation to give such a blow as received by the Amelia, whether when first described she had been running on the same line with her, or a point or two to leeward or windward; and it is to be remarked, there is no proof that there was any particular effort to keep her steady to a fixed course by the compass. Both vessels were guilty of two marked faults, but neither more so than the other. It was the duty of both to have had on deck all the disposable part of their crews to aid in keeping a watch during the continuance of the dense fog. This fog had come on suddenly, and it was well understood by those familiar with the navigation; and climate in that region, that, under the existing state of the wind, the obscurity would be but temporary. In fact, it was removed within a few minutes after the collision and before the vessels could be separated. Admitting that a careful look-out was kept by one man on each vessel, it was inadequate, and not what the exigencies of the case demanded.

This point is frequently brought up in the decisions of the English admiralty, and it seems to be insisted on as want of vigilance, if not a mark of positive fault, to trust the watch, under such circumstances, to a single look-out. In one of the latest cases, it was observed by the court, when the master went below to examine his chart, leaving a single man on the look-out, that it is no excuse to urge that from the intensity of the darkness, no vigilance, however great, could have enabled one vessel to descry the other in time to avoid the collision. In proportion to the greatness of the necessity, the greater ought to have been the care and vigilance employed, and if the master found it necessary to go below, he was bound to have called up another of the crew to supply his place on deck. The Mellona, 3 W. Rob. Adm. 7. Similar doctrine is declared in other cases. 2 W. Rob. Adm. 201, 206, 234. The precaution, incumbent on both vessels to use in such extremity of weather, was alike omitted by each, that of giving notice of their situation by sounding fog horns, ringing bells, or employing other signals of like efficacy. Dr. Lushington has in repeated instances marked this as a duty of the most urgent character, with vessels embedded in deep fogs, or mist, or thick darkness. The Itinerant, 2 W. Rob. Adm. 237; The Virgil, Id. 201; The Ebenezer, Id. 206; The Europa (1850) 14 Jur. 627. The practice has been likewise recognized in this court, as one demanding the observance of vessels so situated. The Bay State [Case No. 1,148]. Both vessels were guilty of a common fault in these two particulars, which, if the libellants have not shown misconduct and negligence on the part of the Hanover in other respects conducing to the disaster, will call for the decree apportioning the loss between them, because one vessel, by her own improvident or improper conduct, placing herself in a situation to receive damages from another acting with like improvidence and impropriety, but without any culpable purpose, cannot impose on the latter the entire loss incurred. Story, Bailm. §§ 608, 610. It is different at

law, as a party cannot then, when himself in whole or in part the blameable cause of the injury he has sustained, claim compensation for the injury his own fault has tended to produce. Kent v. Elstob, 3 East, 18; 3 Kent, Comm. 231, note 6.

It is charged against the Hanover, that she was running under too heavy a press of sail, and at a dangerous speed, and that at the time the two vessels came within sight of each other she had no look-out stationed forward. The Hanover was in ballast, and had her main-sail, foresail, main-top-sail, jib and flying-jib all set. She had a beam or leading wind, steady at about N. W. This is so stated by Capt. Lampkin. Capt. Mott, of the Amelia, makes the wind N. N. W. She was making 7½ to 8 knots the hour. The Amelia had no square sale, but was running close hauled with all her sails set, and making about 6 knots the hour. The sea was pretty rough. The speed of the vessels is of course given upon conjecture, but supposing the estimates approximate the actual speed, the difference is too small between them to render the act of maintaining it essentially more culpable in one than the other. The doctrine of reason as well as of the law, in regard to vessels running in intense darkness is, that those of all descriptions should so check or restrain their velocity that their movements may be reasonably under command of their crews, and so that the effect of a collision, if one occurs, may be prevented becoming fatal to either. The Iron Duke, 2 W. Rob. Adm. 377; The Rose, Id. 1; The Europa, 14 Jur. 627; The Bay State [supra]; The Neptune [Case No. 10,120]. The Virgil was condemned in damages and costs for running down another vessel because going before the wind in a hazy, dark night at the rate of eight or nine knots the hour. The Trinity masters reported she was faulty in not being put under easier sail. 2 W. Rob. Adm. 201. In the succeeding case of The Ebenezer, the same court, however, held it not to be ground for condemnation, that she was running in thick weather and a dark night with full sail, when no other circumstance of fault was found against her, and it might be reasonable precaution against vessels following her to keep on all sail. Id. 206.

I am not disposed to pronounce the Hanover guilty of any negligence or want of precaution in this respect, on the occasion, seeing she was as liable to be followed by vessels on the same course as to meet those going in an opposite direction, and that, probably, both vessels, with a view to these considerations, were going at nearly an equal rate of speed. Nor do I think either vessel was bound to come to anchor, although on soundings, because both were, in effect, on the high seas, and it is proved by Capt. Dearborn that anchoring at that place, in the state of the weather, would be highly hazardous. Nor does it appear to me that the cause turns upon the question of proper or improper speed of the vessels at the time, or that the extreme darkness imposed more responsibility on one than the other. The Birkenhead, 3 W. Rob. Adm. 75. It is attempted to be shown against the Hanover, by a critical analysis of the proofs and the attendant circumstances, that there was not, at the time when she was descried by the Amelia, (and the collision became inevitable,) any look-out stationed forward upon her. Captain Lampkin swears positively to the fact that he had himself the station of look-out forward, and so placed himself that, as far as his vision could extend, he had a view off each bow of his vessel, and that he was at that post, keeping a careful look-out, twenty or thirty minutes previous to the collision. He did not see the Amelia until the bowsprit of the Hanover passed over her side. It is argued with great earnestness that he had neglected his duty of look-out in going aft to examine the soundings of the lead, and that the depositions of Waldin, the man at the helm, and of Wilson, the one heaving the lead, import that the master was about the deck elsewhere than forward keeping a look-out at the moment the Amelia was descried.

On a most careful consideration of all that evidence, I do not find anything in it in contradiction to, or necessarily inconsistent with, the statement of Captain Lampkin. Nor is he any other way contradicted in this respect than by the seeming improbability, that keeping a careful watch he could run upon the Amelia, without seeing her until within the length of his bowsprit from her hull. Whether he was capable of seeing her or not must depend upon the denseness of the mist and fog. It may present a reason for greater caution in examining and receiving the representations of Captain Lampkin as strictly true, that the body of the Hanover was seen from the Amelia at a greater distance than that. Still, it must be borne in mind, that the Hanover was much the larger vessel, stood higher out of the water, and presented a broader view of her sails to the Amelia, if they approached in a direct line; and, also, that the attention of those on board the Amelia was fixed upon the point where she appeared by the light previously discerned in that direction. I cannot, therefore, regard those circumstances as discrediting the testimony of Captain Lampkin, and whilst I pronounce both vessels grossly culpable in running in such thick darkness in a route known to be a great thoroughfare for coasters, with only a single look-out stationed forward, I must hold the blame incurred by them alike, and can see no reason for charging upon the Hanover the whole responsibility for the neglect. It is impossible to assert, that if both crews had been employed in keeping the most vigilant watch, the approach of the two vessels could have been discovered sooner than they were in fact.

Nevertheless the law imposes on them the necessity of using the utmost precaution adapted to the nature of the hazard and within their ability to employ. That of maintaining a full and attentive look-out is always signalized as one most urgent, and generally found to be most beneficial. 2 W. Rob. Adm. 201, 206, 234; 3 W. Rob. Adm. 7, 17; The Falcon [Case No. 4,619].

I do not, on a careful view of all the evidence, regard the collision as an unavoidable accident, in which neither vessel should be answerable to the other for the consequences. 2 Hagg. Adm. 154. On the contrary, I think the case is resolved into one of mutual neglect and inattention in these vessels, and that the losses they have incurred in consequence, must be apportioned between them. This rule of dividing a common loss between the parties occasioning it, or "judicum rusticum," as sometimes termed, is peculiar to this class of cases, and obtains only in maritime courts. Chancellor Kent regards it one of equity and expediency, when both parties are to blame, and where the controlling fault cannot be detected. 3 Kent, Comm. 231. After the collision had occurred, it was the duty of all on board both vessels to do everything within their power to rescue each other from the calamity, and lessen to the greatest extent possible the injurious consequences, and neither is responsible to the other for losses which might, by reasonable exertions, have been avoided or diminished by those sustaining them. It is imputed to the master of the Amelia that he abandoned his vessel without justifiable cause, and without any of the efforts a prudent and resolute man would have made to save her. The testimony of the captain of the Hanover is very pointed and strong to that effect. His representations are to be received with great caution in this respect, for, whatever may be his integrity of character, there must be an influence creating the strongest bias on his mind, to exhibit his own conduct in a proper light, and cast on the suffering vessel and her crew the burthen of blame, if any, leading to the catastrophe. He accordingly charges on Captain Mott gross inattention to and neglect of his vessel, when proper efforts, within his means to employ, might have saved her. Immediately after the concussion, Captain Mott and his two men jumped on board the Hanover. They stepped back twice to the Amelia whilst the vessels continued fastened together, remaining but a minute or two, and making no effort to save their own effects. All they did was to attempt to lower their own boat, to have it in readiness, and to extricate the vessels from each other, first by lowering and then immediately hoisting some of the forward sails of the Amelia. One of the davits upon which her boat hung was carried away by the Hanover, thus letting down one end of the boat into the water, causing it to fill immediately, and rendering it useless for the service of the crew. Captain Lampkin says he directed Captain Mott to anchor his vessel, and offered his boat for his use, and also two of his own crew to go on board the Amelia, and two of the men testify they offered and were willing to go in her. These statements must be received with some allowance, if not distrust. Captain Mott denies he had any directions or advice from Capt. Lampkin to anchor the Amelia, and the inquiry will naturally arise, why, if Captain Lampkin did not think her seriously injured, he should require her to be anchored more than the Hanover? It would not be a very obvious or promising measure to take in the predicament of the vessels. The wind and sea were high, the night very dark, and as yet it was unascertained what might be the character and extent of the injury either vessel had received. Captain Dearborn proves that the place was an open roadstead and unsafe for the anchorage of small vessels. It is scarcely credible, therefore, that while the vessels were thumping violently together, and the danger to both becoming instantly more imminent, that any advice should have been given to bring the Amelia to anchor, with a view to her safety. The probability is also strongly against any offer then being made to lend the boat of the Hanover to the Amelia, or to place part of her crew on board the latter. Captain Lampkin, in answer to enquiries why he did not see to having the anchor of the Amelia thrown over, if he deemed it so important, excuses any personal attention to the matter, because his anxiety and exertions were all required by his own vessel, as he felt it of extreme necessity to clear her immediately of her then situation. What use, besides, for her boat, whilst the two vessels remained entangled and beating violently together, and why would it be offered the Amelia in that situation? The acts on board the Hanover show that all the efforts of the crew were called forth for her rescue and preservation. The main stays or shrouds of the Amelia were cut away by the crew of the Hanover, and it was manifestly considered everything respecting her must be disregarded or sacrificed to aid in saving the Hanover. After the vessels separated, there would seem to be no object in offering the boat of the Hanover, or men from her, because the Amelia filled off instantly with her sails on the wind, and was out of sight in a few minutes. No fact is in evidence to show she could have been successfully pursued and overtaken, had the boat of the Hanover been despatched for the purpose, nor is it proved that any body on board the latter believed it could have been done. If, then, an offer, such as is stated, was made, all the facts conduce to show it was after the vessels had separated, and when no serviceable end could be expected to be answered by it.

In my opinion, the circumstances well justified the master and crew of the Amelia abandoning her, and seeking the preservation of their lives in the Hanover. The shock of the two vessels in striking had knocked the mate of the Amelia overboard, and he was drowned. The wound received by her was near mid-ship. The slight examination made indicated it to be a fatal one, both from its place and extent. She was a small craft, deeply laden, lying low in the water. The Hanover was driving stem on her, by force of the wind and sea, and each moment perilling her instant destruction. When cast loose, her main shrouds were severed. The night was dark, the sea rough, and no port she could hope to make with security short of twenty miles distance. For the master and two men, or even four, to have attempted her navigation under these circumstances, would have been flagrant rashness, particularly without a boat in which they might have a chance for their lives. It is not to be inferred or credited that the Hanover, until her own condition was fully known, would have allowed the Amelia to take away her boat, leaving no means of escape, if one became necessary, for her own crew and the twelve passengers she had on board. The propriety of the course adopted by the captain of the Amelia is not to be determined by the aspect of things as now presented to us, nor by the impressions of Captain Lampkin at the time, but according to the natural language of the circumstances then in view of Captain Mott. He was bound to devote himself with energy and courage to the preservation of his ship, but there was no obligation on him to peril his own, and the lives of his crew, in an undertaking desperate, or imminently perilous in its character, when other means of safety were at hand, and he ought not to be controlled in his decision, nor its justness be measured, by the opinion of those whose interests were all on the side of his encountering the hazard.

By the testimony of Captain Mott and Kearney, who examined the break made in the side of the Amelia, as far as the condition of things at the moment permitted, there was probable reason to believe she would sink instantly on being disengaged from the Hanover. It is to be accepted on the evidence, that she perished from that cause, although she was seen under way fifteen minutes after she was cut clear from the Hanover. She was shortly afterwards fallen in with, capsized and mostly under water, and soon afterwards was seen stranded on the coast, near Norfolk; it would, therefore, be easy for the claimants, who reside there or at Richmond, to prove the state of her bottom, and show that no such injury had been inflicted there as must necessarily have caused her destruction. In my judgment, the master and crew were justified in abandoning her, and her total loss must be attributed to the injury received from the collision with the Hanover.

Many particulars in the extended detail of proofs have been urged by counsel with much earnestness as tending to discredit Captain Mott and Kearney on one side and Captain Lampkin on the other. I do not discuss those topics, or pronounce any opinion on the bearing or effect of those particulars, because, to my mind, the essential facts upon which the decision is rendered stand unquestioned before the court. I shall, accordingly, order a reference to ascertain the total loss sustained by each vessel, and that there be decreed an equal apportionment of the whole losses between them. The libellants sue as owners of the schooner, her equipments and freight, and claim recompense for a total loss of those, and also claim the right, as bailees of the cargo, to recover the value of the cargo in behalf of all persons interested in it who shall contribute to the expenses of this suit. There are no papers presented on the hearing to show that the owners of the cargo have made themselves parties to this action so as to be concluded by its decision. If they do not connect themselves properly with the cause, so as to have their rights determined with it, their interests will not be taken into account on the reference before the commissioner. Order accordingly.

JONES (HATHAWAY v.). See Case No. 6,212.

## Case No. 7,467.

JONES et al. v. HAYS.

[4 McLean, 521.] [1]

Circuit Court, D. Indiana. May Term, 1849.

PLEADING — STATE LAWS — JUDICIAL NOTICE BY FEDERAL COURTS—STATUTE OF LIMITATIONS—REPLICATION.

1. It is unnecessary in a declaration or plea to set out the law of any state, as the courts of the United States take notice of such laws without pleading or proof.

2. The statute of limitation is the law of the forum.

3. The replication is not good which does not answer the plea. To a plea of the statute of limitations the plaintiff replies that he lived in another state. This is not an exception within the statute.

At law.

Mr. Sullivan, for plaintiffs.

Mr. Marshall, for defendant.

OPINION OF THE COURT. This action is brought against defendant as the indorser of a promissory note to the plaintiffs [Jones and Hardy], given by William Stewart to the defendant, promising to pay Hays, or order,

[1] [Reported by Hon. John McLean, Circuit Justice.]

twelve hundred and nineteen dollars, eight months after date, which note, before it became due, the payee indorsed to the plaintiffs and one Moses Stewart, since dead. At the maturity of the note, demand of payment was made and due notice of the non-payment given to the defendant. The plaintiffs in their declaration set out the substance of the act of Pennsylvania, where the note was given and assigned, showing that it was negotiable.

In the defense, several pleas were filed, and among others, the fifth plea alleged that by the sixth section of the act of the general assembly of Pennsylvania, suit should be brought on the promissory note specified, within such time as is appointed for commencing or suing actions upon the case by the act of 11th & 12th of Anne, which required suit to be brought in six years, and that he did not promise within that time. The sixth plea set up the same act. To these pleas the defendant demurred. It was not necessary to set out in the declaration or plea the statute of limitations of Pennsylvania. This may be necessary in the state courts, but the judges of the courts of the United States take notice, without pleading or proof of the laws of the respective states. The rule is well settled that the statute of limitations is the law of the forum; and of course, must be the statute of the state where the suit is brought.

The fourth plea stated that the plaintiff and one Moses Atwood, in his life time, impleaded the maker of the note, William Stewart, by foreign attachment, under which the sheriff attached twenty-five tons of iron, the property of Stewart, when it was agreed by the plaintiffs and defendant Stewart, that twenty tons of iron, of the value of fourteen hundred dollars, should be received in full satisfaction of the said debt, interest and costs, and the same was delivered by said Stewart, and accepted by said plaintiffs, and their deceased partner, in full satisfaction and discharge of said debt, interest and costs, and was so indorsed by said sheriff and made a part of his return and a part of the record of said cause in the circuit court at Madison, in Indiana, and said cause was dismissed; which judgment of dismissal and return of said sheriff and proceedings remain of record, etc. To this plea the plaintiff replies that the foreign attachment mentioned in said plea and commenced by plaintiffs and said Atwood, against the goods and chattels, etc., of the said Stewart, was commenced and carried on to its termination in Jefferson county circuit court by said defendant, in the name of said plaintiffs, at the request of said defendant and for his indemnification as indorser of said note and for his benefit, and was commenced and carried on by the permission of said plaintiffs at defendant's request, for the purposes aforesaid, and for no other purposes whatever; and this they are ready to verify. To this replication the defendant demurs. The replication does not answer the plea, and is therefore bad. The plea alleges an accord and satisfaction to the plaintiffs; which the plaintiffs answer by saying the suit was carried on, etc., for the benefit of the defendant Hays, the indorser to the plaintiffs, and for his indemnity and for no other purpose. The truth of the plea afforded the best possible indemnity of the defendant as indorser—the payment of the debt. The demurrer is, therefore, sustained.

The seventh plea is to the third count in the declaration, that the defendant did not within six years next before the commencement of this suit, undertake and promise, etc. To this plea the plaintiffs reply that the said undertakings and promises of said defendant were made by the indorsement and delivery to said plaintiffs of the said promissory note and in the state of Pennsylvania, and that by the laws of that state the note was negotiable. That demand of payment on the note when due was made, protest and notice. To this replication the defendant demurred. If the note be negotiable in Indiana, the statute of limitations does not run against it, such paper being excepted by the statute. But the statute could only begin to run against the plaintiffs from the time of demand, and notice. Prior to that the defendant was not liable to be called on or prosecuted for the amount of the note. As before remarked, the statute of Indiana must govern and not the statute of Pennsylvania. The replication is no answer to the plea of the statute. A residence out of the United States is an exception in the statute, but not a residence in any other state of the Union. The plaintiffs must take issue on the plea or set up a new promise. The demurrer is sustained. Leave being given to amend the pleadings, etc., the parties put the cause before the jury on the merits. And it appearing from the statement of Mr. Stevens and the memorandum in writing, that the iron, on the discontinuance of the attachment, Mr. Stevens being of counsel in that case, was not received in payment, but that it was agreed to be sent to St. Louis, to a house named by the plaintiffs, and sold, and the proceeds applied to the payment of the note the iron was so forwarded, but the article fell in the market, and the proceeds of the sale were less than was anticipated.

THE COURT instructed the jury that the house in St. Louis, being selected by the plaintiffs, was thereby constituted their agent for the sale of the iron, and that a sale being made would entitle the defendant to a credit on the note. The jury found for the plaintiffs, on which verdict judgment was entered.

## Case No. 7,468.

JONES v. HEATON.

[1 McLean, 317.] [1]

Circuit Court, D. Indiana. May Term, 1838.

AVERMENT OF CITIZENSHIP—PLEADING — PROTEST OF BILL OF EXCHANGE—CERTIFICATE OF NOTARY AS EVIDENCE.

1. An averment of citizenship in the first count is sufficient to give jurisdiction to the court, although in the other counts, there be no such averment.

2. A plea that the bill of exchange, on which the action is founded, was not drawn and accepted at the place alleged, constitutes no bar to the action, and is bad on demurrer.

3. The certificate under the seal of the notary of demand and protest for nonpayment, when the bill becomes due, is evidence.

At law.

Fletcher & Butler, for plaintiff.

Mr. Pettit, for defendant.

OPINION OF THE COURT. This action was brought on a bill of exchange drawn and accepted in Cincinnati. The defendant pleaded first, non assumpsit, secondly, payment, and thirdly, that the bill was not drawn and accepted in Cincinnati. The defendant also demurred to the second count in the declaration, on the ground that it does not allege the non-residence of the plaintiff. The plaintiff demurred to the third plea, and joined in the demurrer of the defendant to the second count. And the court held that the non-residence or citizenship being averred in the first count, and referred to in the second, is sufficient to give jurisdiction to the court, and the demurrer to the second count was overruled. And the court sustained the demurrer to the third plea, because the matter of that plea, if true, constituted no bar to the plaintiff's action. Whether the bill was drawn and accepted or not in Cincinnati, cannot defeat the plaintiff's right, though under some circumstances it may have some influence in the remedy, and the amount of damages to be recovered. The jury being sworn, the plaintiff's counsel offered the certificate under the seal of the notary to show that a demand was made when the note became due, and a regular protest entered for non payment. This was objected to by defendant's counsel, but it was admitted by the court as evidence. In the case of Nicholls v. Webb, 8 Wheat. [21 U. S.] 326, the supreme court say, that protests of foreign bills of exchange are admissible evidence of a demand upon the drawer, and this rests upon the usage of merchants and the universal convenience of mankind. And this usage being as general in case of inland bills of exchange or promissory notes, the reason for receiving the certificate under the notarial seal, as evidence of demand and protest for non payment, is as strong in one case as the other. But this was a bill drawn in Cincinnati and payable in this state, which brings it within the definition of a foreign bill of exchange, as given by the supreme court. Buckner v. Finley, 2 Pet. [27 U. S.] 586; Chit. Bills (Ed. 1839) 642; 12 Mod. 345; 2 Ral. 346; 10 Mod. 66; Phil. Ev. (Ed. 1839) 382, 1052, note 704. Verdict for the plaintiff, and judgment.

[1] [Reported by Hon. John McLean, Circuit Justice.]

## Case No. 7,469.

JONES et al. v. HODGES et al.

[1 Holmes, 37.] [1]

Circuit Court, D. Massachusetts. Feb. Term, 1871.

PATENTS — INJUNCTION TO RESTRAIN INFRINGEMENT—WHEN DENIED—NOVELTY—PATENTABLE INVENTION.

1. A preliminary injunction will not be granted to restrain infringement of letters patent where upon the evidence, the court entertains strong doubts as to the novelty of the patented invention.

[Cited in Foster v. Crossin, 23 Fed. 400.]

2. The application of a peculiar process previously patented and used for preserving animal and vegetable food and other perishable articles, the vegetable substances to be preserved being taken in a raw or crude state, to the preserving of green corn, is not a patentable invention, although the corn is cut from the cob before it is preserved.

[This was a bill by John W. Jones and others against William Hodges and others.]

On motion for preliminary injunction to restrain infringement of letters-patent [Nos. 34,928, 35,274,[2] 35,346, and 36,326] granted Isaac Winslow, for improvements in preserving green corn, dated April 8, May 13, May 20, Aug. 26, 1862.

W. H. Clifford, for complainant.

Chauncey Smith, Avery & Hobbs, and R. K. Sewall, for defendants.

LOWELL, District Judge. Two of the counsel in this case being out of the district, I will put in writing, very briefly, the views which govern my action on this motion for preliminary injunction. As much evidence has been put in as is brought forward at many final hearings; and, excepting that the witnesses have not been cross-examined, I suppose there has been but little left unsaid. Still, it must be understood that the opinion of the court is never finally made up until the final hearing.

The plaintiffs are the owners of four patents, all founded on an invention of Isaac Winslow, for an improved method of preserving green corn for the table; an invention of undoubted utility in this country, and one which has come into very general use. This method appears to have become known and used before the patent was issued; but I think the affidavits tend to show that Wins-

[1] [Reported by Jabez S. Holmes, Esq., and here reprinted by permission.]

[2] [Patent No. 35,274 was reissued April 18, 1876, No. 7,067.]

low was the real and original inventor; although the somewhat unusual state of things is presented of an invention made more than twenty years before it was patented. Under these circumstances, it would seem fit that the case should be fully investigated; but still the preponderance of the evidence seems to be strong in favor of the patent. And that there has been infringement by the defendants is not denied.

The ground on which I feel bound to refuse the injunction at this time is, that I entertain strong doubts whether, in view of what had been done before, there was any scope for a patent to Winslow. The English patent of Durand, enrolled in 1810, No. 3370, cited from a printed copy in the public library of Boston, is for a method of preserving animal food, vegetable food, and other perishable articles, and describes the Winslow process exactly, excepting the "venting," as it is called. Durand is very full in his directions for putting the articles into bottles, or other vessels, sealing the vessels, putting them into a boiler, filling the boiler with water, and boiling it for a longer or shorter time, according to the nature of the article and other circumstances. He shows that the cooking may be done by a steam bath, or by hot air, &c. He says that vegetable substances should be put into the vessels in a raw or crude state. He adds, that the aperture of the vessels, or a small portion thereof, may be left open until the effect of the heat shall have taken place. This is the Winslow process for preserving green corn; and Winslow, in one of his patents, says that he is aware that vegetables and fruits have been cooked in this way. He makes two points of distinction, neither of which has been relied on in argument: namely, that the object of the old process was to exclude all the air, while he has discovered that the presence of a little air is not injurious; and, secondly, that he cooks his corn much longer than usual.

It is proved and admitted that the Durand process was known and practised in this country long before Winslow's time, as applied to vegetables, such as beans, peas, &c., and to fruits. This being so, and Durand having shown that the time of boiling must vary according to the nature of the substance to be preserved, experiments to find out how long to boil green corn could not result in a distinct invention. If it could, Durand has no patent; because he does not mention a single substance by name, and leaves every vegetable and every kind of animal food open to a separate patent. Nor is the alleged fact that a little air may be left in the cans important, because it leads to no change of process: all the manipulation remains precisely the same, and it is merely a discovery that the Durand process is more perfect than it was known to be.

At the argument, the principal distinction taken, and which was very strongly and ably urged, was, that Winslow cuts his corn from the cob, and that this is not putting it into the cans "in a raw or crude state," but in a state one step removed from crude. I do not understand the English patent to mean by "crude" that the vegetables must be in the precise state in which they grew, but as equivalent to raw, that is, uncooked; and in this sense the corn is crude, as much so as the peas and beans that are shelled, or the vegetables that may be sliced. Winslow took no such distinction, for he says that his method applies to ears of corn; though he adds, that he does not recommend their use. And, at the time of his discovery, it could hardly be invention to cut the corn from the cob before applying to it the Durand process. A patent may sometimes be obtained, perhaps, for putting an old process to a new use; but I recall no case in which one has been upheld where the new use has been so closely analogous to the old as is shown here.

It is argued that corn is a cereal rather than a vegetable, and chemically different, and acted on differently by heat. But I doubt whether green corn for table use has any such marked differences. It is cooked and eaten like other "vegetable substances," and not ground or manufactured like cereals; and the very purpose of Durand's invention, it seems, is fulfilled in respect to it, by the application of his process.

While, therefore, I think that Winslow was an original inventor, upon the evidence as it now stands, and was the first, too, to apply the process to this article, yet I am unable at present to see that he has made a discovery in the sense of the patent law. By original inventor, I mean that he probably may have discovered the process anew, and have been informed afterwards of the Durand process, and required to notice it in his patents.

It may be that he was the first inventor of the "venting," for which one of the four patents was granted; but as this is a very subordinate part of the invention, and as there are some considerable doubts about it, I do not think I ought to issue this preliminary injunction for that only. Motion denied.

[For other cases involving these patents, see Jones v. McMurray, Case No. 7,479; Jones v. Merrill, Id. 7,481; Jones v. Sewall, Id. 7,495, reversed in 91 U. S. 171; and Jones v. Barker, 11 Fed. 597.]

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JONES (HURST v.). See Cases Nos. 6,933 and 6,934.

JONES (HYSLOP v.). See Case No. 6,990.

## Case No. 7,470.

JONES v. INSURANCE CO.

[2 Wall. Jr. 278.] [1]

Circuit Court, E. D. Pennsylvania. Nov. 5, 1852.

INSURANCE — IMPLIED WARRANTY OF SEAWORTHINESS IN TIME POLICIES.

1. Seaworthiness is not a condition implied in regard to time policies, except under particular circumstances, if it is at all.

[Cited in Rouse v. Insurance Co., Case No. 12,089; Pope v. Swiss Lloyd Ins. Co., 4 Fed. 155.]

[Cited in Merchants' Ins. Co. v. Morrison, 62 Ill. 247; Hoxie v. Pacific Ins. Co., 7 Allen, 215.]

2. The court, supposing on a case not before it says: It may indeed be true, that in a time policy there is a warranty of seaworthiness at the commencement of the risk, so far as it lay in the power of the assured to effect it. But in such case the plea must state such facts as show either that at the time the insurance commenced the ship was in her original port of departure, and commenced her voyage in an unseaworthy condition, and so continued till the time of her loss; or, that having come into a distant port in a damaged condition before or after the commencement of the risk, where she might or ought to have been repaired, the owner or his agents neglected to repair her, and that she was lost in consequence.

The plaintiff in this case declared on policies of insurance on the ship Sarah and Eliza, dated the 12th day of May, 1851, "lost or not lost from the first day of May, 1851, at noon, to May the first, 1852, at noon;" averring that during the continuance of the risk, to wit, about the first day of August, 1851, and proceeding on her voyage the said ship was, by the perils and dangers of the sea, &c., destroyed and totally lost. A second count averred that during the continuance "of the risk in said policy mentioned, to wit, on or about the first day of July, 1851, the said ship Sarah and Eliza set sail and departed from a certain port, to wit, the port of Callao in South America, bound to the port of New York, and that the said ship so sailing and proceeding on her voyage afterwards, to wit, on or about the 23d day of the same month, and, while on the high seas, was, by the perils and dangers of the seas, &c., destroyed and wholly lost." To this declaration the defendants pleaded inter alia: (1) That at the commencement of said voyage, the said vessel was unseaworthy, defective and insufficient, &c., and so continued to be and still was, at the time of the occurrence of the supposed perils and loss, &c. (2) That the said vessel was not sound and seaworthy at the time the risk in said policy mentioned attached, to wit, on the first day of May, 1851. (3) The said vessel was not sound and seaworthy at the time she was warranted so to be by the said plaintiff, according to the true tenor and effect of the said policy and contract of insurance. To these pleas the plaintiff demurred, assigning as causes of demurrer, that the said pleas tender an immaterial issue, to wit, upon the seaworthiness and sufficiency of the vessel for the said voyage at the commencement of said voyage, and subsequently thereto, &c. The question, therefore, raised by these demurrers and argued, was, whether there is an implied warranty of seaworthiness in time policies, as well as in policies on a voyage?

T. I. Wharton and Henry Wharton, in support of demurrer.

W. Rawle and J. Fallon, contra.

GRIER, Circuit Justice. Although some of the treatises on marine insurance do not, in treating this subject, make any distinction between voyage and time policies, and many dicta of judges may be found, to the same effect, while others (see Paddock v. Franklin Ins. Co., 11 Pick. 231, and cases there cited) express doubt, the precise point does not appear to have been decided on full argument in a court of error till very lately. The case of Small v. Gibson, 3 Eng. Law & Eq. 290–299, 14 Jur. 368, and 15 Jur. 325, was first argued and decided in the queen's bench, in November, 1850, and it was there decided, "that there is an implied warranty of seaworthiness in time policies, if nothing appear in them to the contrary, as well as in policies on a voyage." This case was removed by writ of error to the exchequer chamber, where the judgment of the queen's bench was reversed. The opinion of Baron Parke, which had the concurrence of the whole court, contains a full review of all the cases and arguments bearing on the subject. This decision of a doubtful point is of the highest authority, and as I fully assent to the reasons on which it is founded, I consider it conclusive on the general question, and shall therefore content myself by referring to that case, where the arguments on both sides of the question have been exhausted by the counsel and court. It is true this case does not decide, that there is no warranty of seaworthiness at all in a time policy, or that there is not a warranty that the ship is or shall be seaworthy for that voyage, if the ship be then about to sail on a voyage; or if she be at sea that she was not seaworthy when the voyage commenced. It may be true, also, that there is in a time policy a warranty of seaworthiness at the commencement of the risk, so far as lay in the power of the assured to effect it, so that if the ship had met with damage before, and could have been repaired by the exercise of reasonable care and pains, and was not, the policy would not attach. But in all such cases the plea must state such facts and circumstances as shall show either that at the time the insurance commenced, the ship was in her original port of departure, and commenced her voyage in an unseaworthy condition, and so continued till the time of her loss—

[1] [Reported by John William Wallace, Esq.]

or that having come into a distant port in a damaged condition before or after the commencement of the risk, where she might and ought to have been repaired, and the owner or his agents neglected to make such repairs, and the vessel was lost by a cause, which may be attributed to the insufficiency of the ship. As neither of these pleas comes within the conditions stated, we overrule them, and give judgment for plaintiff on the demurrers.

NOTE. Since this opinion was given, we have (18 Jur. 1131, December, 1853) the report of Small v. Gibson (the case cited as a precedent by the court), in the house of lords, to which it was taken after the judgment mentioned by Mr. Justice Grier in the exchequer chamber. Nine judges gave able opinions to the house: seven being against implying a condition of seaworthiness, and two in favour of it. After the opinions were given, Lord St. Leonards and Lord Campbell delivered the judgment of the house, which affirmed the judgment of the exchequer chamber. Both these judges agreed very clearly, on the point decided, with the seven judges. On the point raised by Mr. Justice Grier in the conclusion of his opinion, which was one of the questions put by the house of lords to the judges, though not a point necessary to be decided in the actual case, there appears to have been a difference of opinion between Lord St. Leonards and Lord Campbell. The former says: "If a ship were to sail on a particular voyage, and a time policy were to be effected instead of a policy on the intended voyage, as at present advised, I think that a condition would be implied that the ship was seaworthy at the commencement of the voyage." Lord Campbell, on the contrary, acting on a principle of simplicity and broad distinction, says as follows: "I have hesitated more upon the questions, whether, when a time policy is effected upon an outward bound ship lying in a British port where the owner resides, a condition of seaworthiness is to be implied. This might be an exception to the general rule, that in time policies there is no implied warranty of seaworthiness; and it is free from some strong objection to the condition of seaworthiness, being implied where the risk is to commence abroad. But in addition to the objection that as yet there has been no implied condition of seaworthiness in any time policy, and that the general rule being against the condition, as it seems to me—having the most sincere and perfect deference for the opinion of my noble and learned friend on this point, in which I do not agree—this would be a gratuitous and judge-made exception to the rule, and I think it more expedient that the rule should remain without any exception; and, as at present advised, I should decide against the implied condition in all cases of time policies. There is a broad distinction which may always be observed between time policies and voyage policies; but when you come to subdivide time policies into cases where the ship is in a British port, and where she is abroad, and still more, if the residence of the ship owner is to be inquired into and regarded, there would be a great danger of confusion being occasioned by the attempted classification. It is most desirable, therefore, that, in commercial transactions, there should be plain rules to go by, without qualification or exceptions. Marine insurance has been found most beneficial as hitherto regulated, and I am afraid of injuring it by new refinements. I should be glad, therefore, if it were understood, according to my present impression of the law, that in all voyage policies there is, and in no time policies framed in the usual terms is there, a condition of seaworthiness implied. This rule, I believe, is adapted to the great bulk of the transactions of navigation and commerce; and where any case occurs to which it is not adapted, this may be easily provided for by express stipulation. My observations upon this last point I must offer with the greatest deference, after what has fallen from my noble and learned friend, for whose opinion on all subjects within the whole range of the laws of England, I entertain the most sincere respect."

JONES v. INSURANCE CO. OF NORTH AMERICA. See Case No. 7,453.

## Case No. 7,471.

JONES v. JOHNS.

[2 Cranch, C. C. 426.] [1]

Circuit Court, District of Columbia. Oct. Term, 1823.

WITNESS—REFRESHING MEMORY.

A witness will be permitted to refresh his memory as to the items of an account for work and labor by the original entries only, made by himself, or by another in his presence; and although he has no distinct recollection of each particular item charged, yet if he has a distinct recollection of such work as is charged in the account generally, being done, and after having refreshed his memory, if he can swear that the work was done as charged in such account, his testimony will be competent evidence.

Assumpsit [by Richard Jones] upon a blacksmith's bill of work done for the defendant's plantation, from September, 1816, to August, 1822, amounting to $1,349.56.

Mr. Marbury, for defendant [L. H. Johns], contended that as the witness had no distinct recollection of the particular items independent of the entries in his handwriting in the day-book, his testimony was not competent evidence to the jury.

THE COURT, (nem. con.) after hearing argument and authorities, gave the following opinion: The witness shall be permitted to refresh his memory only from the original entries made by himself or another in his presence. In addition to this, if he has no distinct recollection, independent of such entries, of each particular item charged, he must, at least, have a distinct recollection of such work as is charged in the account generally, being done by the plaintiff for the defendant; and if, after having so refreshed his memory, he can swear that the work was done as charged in such entry, his testimony will be competent evidence.

JONES (JUSTICE v.). See Case No. 7,588.

## Case No. 7,472.

JONES v. KEMPER.

[2 Cranch, C. C. 535.] [1]

Circuit Court, District of Columbia. May 5, 1825.

ATTACHMENT AGAINST GARNISHEE — JUDGMENT — IRREGULARITY—SETTING ASIDE AT SUBSEQUENT TERM.

1. In an attachment under the Maryland Act of 1795, c. 56, if the garnishee be taken and

[1] [Reported by Hon. William Cranch, Chief Judge.]

held to special bail under the sixth section of that act, no judgment can be rendered against him until he has appeared.

2. The capias against the garnishee must not be to answer to, the plaintiff "in a plea of trespass on the case," &c., but to appear at the return of the writ, to make answers to such interrogatories, in writing, as he should, by rule of court, be required to answer touching the property of the defendant in his possession or charge at the time of serving such writ of attachment, or at any other time; and render his body to prison, to pay the condemnation-money if judgment should pass against him.

3. A judgment or condemnation may, for irregularity, be set aside at a subsequent term.

Scire facias against the bail of the garnishee, upon a recognizance of bail taken before two justices of the peace.

CRANCH, Chief Judge (nem. con.). Mr. Wallach, for the bail, moved to set aside the original judgment against Kemper, the garnishee, upon the ground that it was irregularly obtained; and to quash the execution issued thereon. The facts and proceedings appear to be as follows: On the 29th of May, 1819, Richard Jones, the plaintiff, obtained an attachment under Act Md. 1795, c. 56, against Burnett Moore, returnable on the first Monday of June, 1819, which was returned, "Laid in the hands of Reuben Kemper." To this attachment Kemper, the garnishee, appeared, and in answer to interrogatories, denied that he had received for Burnett Moore any money that was his at the time the garnishee received it; and that he had no money of Burnett Moore's in his hands. He admits that he received money under a power from Moore, but received it to his own use as his own money. These interrogatories were answered on the 15th and 22d of June, 1819. On the 10th of July following the plaintiff became nonsuit in that attachment, and immediately caused another to be issued, under the same act, and upon the same cause of action, against the same defendant, Burnett Moore, containing a clause commanding the marshal to take the body of Reuben Kemper, the garnishee, "to answer to the said Richard Jones, in a plea of trespass on the case, &c., according to the act of assembly aforesaid," no act of assembly having been before mentioned in the writ of attachment. The warrant, however, of the justice to the clerk commands him to issue the attachment "according to the form of the statute in such case made and provided." This attachment was returnable on the fourth Monday of December, 1819, and returned "attached credits in the hands of Reuben Kemper, and cepi, 10th July, 1819." On the 20th of May, 1820, the following recognizance of bail was filed.

"No. 44 appearances to December, 1819. Richard Jones, plaintiff. Reuben Kemper, garnishee of Burnett Moore, defendant. You, Joseph Gales and Philip R. Fendall, do jointly and severally acknowledge yourselves special bail for the said Reuben Kemper, in an action of trespass on the case brought by the said Richard Jones against the said Reuben Kemper, garnishee, in the circuit court of the district of Columbia, held for the county of Washington in the said district; they acknowledge themselves to be content, this 15th day of May, 1820, before R. C. Wightman, Joseph Forrest."

"To the Honorable the Judges of the Circuit Court of the District of Columbia: I, Reuben Kemper, hereby authorize and request Walter Jones, Esq. attorney-at-law, to appear for me in the above suit. Reuben Kemper."

It does not appear from the papers that any appearance was ever entered for Reuben Kemper, the garnishee; but it is stated in the scire facias that judgment was rendered against him at October term, 1821, whether by default or otherwise, does not appear, nor whether a ca. sa. was issued against Kemper and returned non est. The writ of scire facias against the bail does not state that any judgment was rendered in the action in which they became bail. It says that they became bail, "in a plea of trespass on the case, &c., by the said Richard Jones against the said Reuben Kemper, garnishee of B. Moore"; "and that the said Richard Jones, by the judgment of the said court, recovered against the said Reuben Kemper, garnishee of the said B. Moore, as well the sum of five hundred and sixty-two dollars and eighty-two cents current money, a certain debt, as the sum of eleven dollars and ninety-three cents, which was adjudged by the said court to the said Richard Jones, on his assent, for his costs and charges by him about his suit in that behalf laid out and expended, whereof the said Reuben Kemper, garnishee of B. Moore, is convict as it appeareth of record." There is no averment that this judgment was in the action in which they became bail. That was an action of trespass on the case; this seems to have been an action of debt. All the forms of scire facias against bail, which I have seen, show that the judgment against the principal was in the suit in which the bail was taken. 2 Lil. Ent. 379, 380, 386, 387, 395, 403, 406–408, 410.

All the facts stated in this scire facias may be true, and yet it will not appear that the plaintiff ought to have execution against the bail. Therefore, if the first attachment has been discontinued, and if that discontinuance after the appearance and answer of the garnishee be not a bar to any further proceeding against him by the same plaintiff on the same cause of action, if the clause of capias ad respondendum in the attachment be such as is authorized by the statute of Maryland; if the recognizance of bail be such as the statute authorizes; if there be such a judgment against Kemper as is set forth in the scire facias; if there could be judgment by default upon a cepi corpus before an appearance; if such an action of trespass on

the case by Jones against Kemper as is mentioned in the recognizance, was instituted and pending at the time of the recognizance; if a ca. sa. against Kemper was duly issued and returned non est before the issuing of the scire facias; yet I should be of opinion that this scire facias ought to be quashed, for we cannot award execution upon it. But I am strongly inclined to think that the judgment against Kemper was irregularly obtained by default before appearance upon the cepi corpus. It certainly would have been irregular, if the action had been, as the recognizance supposes, an action of trespass on the case by Jones against Kemper; and, by analogy, I should suppose it would be equally irregular in any case where a cepi corpus was the return. On this ground, therefore, as the bail cannot have a writ of error, the judgment, I should think, ought to be set aside, and the scire facias quashed. I am also inclined to think that the recognizance of bail is not such as the act of Maryland requires.

The condition of the recognizance ought to have been, as I conceive, that Kemper should appear at the court, at the return of the writ, to make answers to such interrogatories in writing, as he should, by rule of court, be required to answer, touching the property of the defendant in his possession or charge, or by him owing at the time of serving such writ of attachment, or at any other time; and should render his body to prison, or pay the condemnation-money, if judgment should pass against him. See Act Md. 1795, c. 56, §§ 5, 6.

The recognizance is not taken in the right suit. It purports to be taken in an action of trespass on the case, brought by Richard Jones against Reuben Kemper. No such action had been commenced; nor did the clause of capias in the writ of attachment warrant the justices in thus naming the case. That clause commands the marshal "to take the body of Reuben Kemper, to answer to the said Richard Jones, in a plea of trespass on the case, &c." If this "&c." had been extended, it would probably have been in these words, "brought by the said Richard Jones against the said Burnett Moore," and not, as the justices seem to have understood it, "brought by the said Richard Jones against the said Reuben Kemper." If it should be said that this clause of capias was the commencement of such an action of trespass on the case by Jones against Kemper, then it ought to have been followed by a declaration, before judgment could have been taken against Kemper by default; and upon that ground the judgment ought to be set aside. Inasmuch, then, as the recognizance is not taken in the right suit, and has not the condition required by the act of Maryland, I think the scire facias should be quashed.

If the clause of capias in the writ of attachment is to be understood as commanding the marshal to take Kemper to answer to Jones in a plea of trespass on the case brought by Jones against Kemper, it is a clause not warranted by the act of Maryland, which does not authorize the plaintiff to maintain an action of trespass on the case against the garnishee; and no such action would lie either at common law or upon the custom of London. The act of Maryland only authorizes a capias to bring in the garnishee to answer interrogatories, and to abide the judgment of the court; not to answer the plaintiff's original cause of action. If the clause of capias was not warranted by the act of Maryland, the recognizance of bail taken upon it, cannot support an execution. It is void. If the scire facias had stated that judgment had been rendered for the said R. Jones, against the said R. Kemper, in the said plea of trespass on the case, then these defendants might have pleaded "no such record," generally. And now, I suppose, they might plead (according to the precedent in 2 Lil. Ent. 410), "that no judgment for the said R. Jones, against the said R. Kemper (after the time of the recognizance aforesaid, acknowledged, and before the issuing of the said writ of scire facias), in the said action in the recognizance aforesaid, mentioned in the said court here, ever existed;" and certainly no such judgment could be produced, for no such action has ever existed. Upon the whole, I think the judgment against Kemper must be set aside for irregularity,—upon the authority of Ault v. Elliot [Case No. 655], in this court,—and the writ of scire facias quashed. Judgment set aside and scire facias quashed.

## Case No. 7,473.

JONES v. KINNEY et al.

[5 Ben. 259; [1] 4 N. B. R. 649.]

District Court, E. D. New York. June, 1871.

BANKRUPTCY—ASSIGNEE — PREFERRED CREDITOR.

1. R., being insolvent, made a general assignment to K., who was not a creditor, with preferences. He had previously transferred to W. & Co., a creditor, a warehouse receipt for certain goods, to secure them. They received the goods, but afterwards turned them over to K., the assignee, who disposed of them as assignee. He paid to W. & Co. certain moneys, as preferred creditors, and paid certain other moneys under the assignment, without objection from any creditor, although all knew of the assignment. R. being adjudged a bankrupt, and an assignee in bankruptcy being appointed, the latter brought an action against K. and W. & Co., claiming to recover of the former all the property which came into his hands under the assignment, and of the latter the property embraced in the warehouse receipt, or its value. *Held*, that W. & Co. were not liable for the property embraced in the warehouse receipt, but were liable for the amount paid by K. to them as preferred creditors.

2. K. was not chargeable with the value of any property, turned over by him in good faith to lawful creditors of the bankrupt, and was entitled to be credited with all payments to law-

[1] [Reported by Robert D. Benedict, Esq., and here reprinted by permission.]

ful creditors, made by him in accordance with the assignment, but was liable for all other property or its proceeds.

[Cited in Wehl v. Wald, 3 Fed. 94.]

In bankruptcy.

BENEDICT, District Judge. This action is brought by [Charles Jones] the assignee in bankruptcy of one William M. Rice, to recover of the firm of C. C. Wilson & Co., Frank Kinney and others, the value of certain personal property of Rice, the bankrupt, which has been disposed of by the defendants. As against the defendants C. C. Wilson & Co., the claim is that, with a knowledge of the insolvency of Rice, for the purpose of obtaining a preference, they received some $2,800 worth of goods, which were transferred to them by a warehouse receipt, for the value of which they thereby became liable to the plaintiff. As against Frank Kinney, the only other defendant who has here interposed a defence, the claim is, that, knowing the insolvency of Rice, he received, under general assignment to himself, all the remaining property of the bankrupt, in which assignment the defendants C. C. Wilson & Co. and others were made preferred creditors, whereby he became liable to the plaintiff for the value of all the property so transferred to him.

In regard to the claim against C. C. Wilson & Co., I do not think it can be sustained upon the ground taken by the plaintiff, that they became possessed of the property described in the warehouse receipt. As I understand the evidence, although the property referred to was at one time in their possession under the warehouse receipt, it was shortly afterwards surrendered by them to the general assignee, Kinney, and by him disposed of as assignee. C. C. Wilson & Co. are not, therefore, liable as transferrees of the warehouse receipt, but they are liable for the money which they received from Kinney as preferred creditors. This amount the evidence shows to have been $550, and for that sum the plaintiff is entitled to judgment against them.

In regard to the claim to hold Kinney, the general assignee, liable for the value of all the property which he originally received under the assignment, inasmuch as the evidence shows that he was not a creditor of the bankrupt, and that before objection made on the part of any creditor, although all the creditors but two were notified of the assignment, and before any proceedings in bankruptcy, he had distributed some of the property in specie or in proceeds to the preferred creditors, I am of the opinion that he is not chargeable with the value of any property which shall be shown to have been, in good faith, turned over to lawful creditors of the bankrupt, and is entitled to be credited with the payments to lawful creditors made by him in accordance with the terms of the assignment; but he is liable for the balance which shall appear to be in his hands upon a proper accounting with the assignee in bankruptcy, after deducting such payments. As against him, therefore, the decision will be for an accounting, and that the judgment be entered for the balance found due, after giving the credits allowed by this opinion, and saving all questions as to his disbursements and other expenses until the coming in of the master's report, before whom evidence in respect to the same may be given on either side.

## Case No. 7,474.

JONES et al. v. KNOWLES.

[1 Cranch, C. C. 523.]

Circuit Court, District of Columbia. Dec. Term, 1808.

FRAUD—COLLUSION—PROOF — DEPOSITION TAKEN UNDER ACT OF CONGRESS—CERTIFICATE OF PERSON TAKING—REQUISITES.

1. The court will not permit a party to prove other fraudulent transactions of the other party with strangers, and not connected with the present case, in order to fortify a charge of fraud and collusion in this case.

2. The magistrate who takes a deposition under act of congress must certify all the facts necessary to make it evidence under the statute.

Assumpsit on a promissory note for 1,500 dollars made by the defendant [Henry Knowles] to Eber Hale, dated March 19th, 1805, payable to Eber Hale on the 7th of September, 1805, who indorsed the note in this form, viz.: "Baltimore, September 7, 1805. The within note I assign to Jones & Passmore for such part of it as will be security for them for five hundred and fifty-six dollars and eighty-six cents, which Mr. Henry Knowles will pay if not paid by me in sixty days. Eb. Hale." There were counts for goods sold and delivered, and for goods sold and delivered to Hale at the request of the defendant, and defendant's promise to pay.

F. S. Key, for plaintiffs, offered to examine a witness to prove that Hale had, after the date of the receipt, viz. in September, 1805, offered to pass other notes of the defendant in Alexandria; that the defendant did not, before these notes became due, deny the notes, when shown to him; but when payable, produced receipts in bar, and to prove that Hale was in the habit of purchasing goods with Knowles' notes. This testimony was offered as evidence of a fraudulent collusion between Knowles and Hale in the present case.

But THE COURT (FITZHUGH, Circuit Judge, absent) refused to admit it, saying that no man could come prepared to meet evidence and charges respecting every transaction of his life, without notice.

Mr. Jones then offered the deposition of Eber Hale, taken under the act of congress before the mayor of Hartford.

Mr. Morsell objected that the witness was

interested. He only assigned five hundred dollars, part of the notes to the plaintiffs. If they can recover the whole they are trustees for Hale for the balance. Parol evidence cannot be received of P., being mayor of Hartford. The mayor does not state that he was not of counsel for one of the parties; has not certified the reasons of taking the deposition and does not state the residence of the witness, nor of the parties. The mayor was not competent to certify a release from the plaintiffs to the witness, nor a copy of the release. The original ought to be produced.

Mr. Jones, contra. Parol evidence is competent to prove A. B. to be mayor. If the mayor was of counsel for the plaintiffs, the defendant must show it. It appears by his certificate that the witness was in Hartford, and that appears to be the reason of the taking the deposition.

Hale in the deposition itself states that he has no interest in the note. He stands indifferent between the parties. If the plaintiffs recover against Knowles, Knowles may recover against Hale upon his receipt. The copy of the release certified by the mayor, is sufficient. It is competent for the plaintiffs to prove that Hartford is more than one hundred miles from Washington, and that the witness lives in Hartford, and that the defendant lives in Georgetown.

The original release belongs to the witness. It is not in the power of the plaintiffs to produce it. The witness is not obliged to produce it.

The mayor acted judicially, and was competent to judge whether it was a release, and to certify the same.

THE COURT (FITZHUGH, Circuit Judge, absent) were of opinion that the deposition was not admissible in evidence, no cause being certified by the mayor for taking the deposition, nor whether notice was given and on the ground of the interest of the witness.

THE COURT was of opinion that the mayor ought to have certified all the facts necessary to make the deposition good evidence under the act of congress.

The plaintiffs had leave to amend their declaration by adding two new counts, on payment of all antecedent costs. Juror withdrawn.

JONES (KURTZ v.). See Case No. 7,954.

## Case No. 7,475.

JONES v. LEACH et al.

[1 N. B. R. 595 (Quarto, 165).] [1]

District Court, S. D. Mississippi. 1868.

BANKRUPTCY—RIGHT OF SHERIFF TO MAKE LEVY AFTER COMMENCEMENT OF PROCEEDINGS.

The commencement of proceedings in bankruptcy transfers to the United States district court, the jurisdiction over the bankrupt, his estate, and all parties and questions connected therewith, and operates as a supersedeas of the process in the hands of the sheriff, and an injunction against all other proceedings than such as might thereupon be had under the authority of that court, until the question of bankruptcy shall have been disposed of.

[Cited in Re Dey, Case No. 3,870; Re Mallory, Id. 8,991; Re Carow, Id. 2,426; Re Brinkman, Id. 1,884; Thames v. Miller, Id. 13,860; Re Steadman, Id. 13,330; Phelps v. Sellick, Id. 11,079; Re Hufnagel, Id. 6,837; Johnson v. Price, Id. 7,407; Hudson v. Schwab, Id. 6,835.]

[This was a bill by Josiah Jones against L. L. Leach, E. V. Early & Co., and Joe Eakens, sheriff.]

Shannon & Gallagher, for complainant.

S. A. D. Steele, for defendants.

HILL, District Judge. The questions in this case arise upon the demurrer of defendants to the bill of complainant. The bill alleges that complainant, on the 30th of March, 1868, filed his petition in this court to be adjudged a bankrupt, and that in a short time afterwards the defendant, Eakens, sheriff of Lauderdale county, was about to seize the property surrendered, for the payment of taxes, and the satisfaction of sundry executions then in his hands as sheriff, and would proceed to sell the same, unless restrained by the injunction of the court; that in his opinion the amount of taxes claimed were more than he was liable to pay, and prays that the sheriff be restrained from interfering with said property, and that the estate of complainant be disposed of as directed by the bankrupt act [of 1867 (14 Stat. 517)]. The defendants, by their demurrer, admit these statements to be true, but insist that the taxes due, and the judgments heretofore rendered, and the executions in the hands of the sheriff, constitute a lien upon the estate of complainant, and that this court has no power to interfere with the same.

Two questions are presented: First. Has the complainant (there not having been time for the appointment of an assignee) the right to file this bill, or interfere on behalf of the general creditors? By the act, the bankrupt is required to render all needful aid to preserve and collect the estate for the benefit of the creditors. By a general rule adopted by this court, the petitioner is made the custodian of the property surrendered, until an assignee shall have been appointed, and he is held amenable to the court for any negligence in relation thereto. It is impossible, under the rules and orders of this court, that an assignee, other than a provisional one, can be appointed in less than about fifteen days after the filing of the petition, and frequently a much longer time elapses before an appointment is made. Creditors may be absent, and know nothing of the condition of the property; therefore the petitioner is not only authorized, but it is his duty to apply for such remedy as may be necessary to protect the estate. Be-

[1] [Reprinted by permission.]

sides, he has an interest in it; he may not obtain a discharge; in that event the property becomes his, subject to such liability as may have attached to it.

The next question is, did the sheriff, after the commencement of proceedings in bankruptcy, have a right to seize the property of the complainant surrendered, sell it, and apply the proceeds to the payment of the taxes and executions in his hands? We are not informed by the bill whether the judgments were enrolled, or not, or whether the executions were in the hands of the sheriff before the commencement of the proceedings in bankruptcy; upon the existence of one or other of these facts, a lien on any property for satisfaction would depend; but admitting that one or both did exist, the question remains, whether or not the sheriff had a right to make the seizure after the proceedings in bankruptcy had commenced. In the case of Pennington v. Lowenstein [Case No. 10,938], decided at Oxford a short time since, the court held that, when the levy was made before the commencement of bankruptcy proceedings, the possession and legal title being in the sheriff for the purpose of satisfying the process in his hands, he, as trustee, might go on and sell the property, unless enjoined from so doing. In such cases an injunction would not be granted, without a statement showing that a sale under such circumstances would be injurious to the general creditors, or to some one having a prior lien. When a levy has not been made before bankruptcy, no title to any specific property passes out of the bankrupt; only a general lien remained, which was liable to be defeated, and could only be rendered available by the aid of the court. The title to the property is held in abeyance by the proceedings in bankruptcy, and so soon as the assignee is appointed, it vests in him from the filing of the petition. The title, however, passes to him, subject to any lien, or incumbrance, which may then be upon it, which lien in such case can only be enforced through the agency of the bankrupt court.

Section 20 of the bankrupt act provides that "when a creditor has a mortgage or pledge of real or personal property of the bankrupt, or a lien thereon for securing the payment of a debt owing to him from the bankrupt, he shall be admitted as a creditor only for the balance of the debt, after deducting the value of such property, to be ascertained by agreement between him and the assignee, or by a sale thereof, to be made in such manner as the court shall direct." This clearly gives the court jurisdiction of the subject matter, especially when taken in connection with the first and twenty-fifth sections. The first section confers full and ample powers on this court over the bankrupt, his estate, and all persons and questions connected therewith, providing for the presentation and enforcement of the rights of all parties as they existed at the date of the bankruptcy; the object being to adjust and enforce all their conflicting interests in as summary and as short a time as may be. This power is absolutely necessary to attain the object of the law, as, between the creditors, none can complain so long as his interests are protected. The power of congress to establish "a uniform system of bankruptcy" throughout the United States, and, as a necessary consequence, all the jurisdiction and power to accomplish its object and purpose, is expressly granted by the constitution. It is difficult to conceive any motive in this court to assume jurisdiction under this law which does not belong to it, and is not necessary to the proper administration of the law, but it would be unfaithful to refuse the exercise of constitutional and necessary powers merely because it draws with it a heavy amount of labor. The bill not showing on its face that a lien had attached in favor of these judgment creditors when the petition was filed, the demurrer would, for this reason, be overruled; but on the supposition that such lien did exist, either by the enrolment of the judgment or the executions being in the hands of the sheriff, it does not appear from the bill that they had been levied at the time complainant filed his petition in bankruptcy. The commencement of proceedings in bankruptcy transferred to this court the jurisdiction over the bankrupt, his estate, and all parties and questions connected therewith, and operated as a supersedeas of the process in the hands of the sheriff, and an injunction against all other proceedings than such as might thereupon be had under the authority of this court, until the question of bankruptcy shall have been disposed of. Such being the case, the demurrer will be overruled, and the defendants allowed fifteen days in which to answer.

## Case No. 7,476.

JONES v. LEAR.

[Cited in Channing v. Reilly, Case No. 2,596. Nowhere reported; opinion not now accessible.]

JONES (LINTHECUM v.). See Case No. 8,376.

JONES (LIVINGSTON v.). See Cases Nos. 8,413 and 8,414.

## Case No. 7,477.

JONES v. LLEWELLYN.

[Cited in Reiling v. Bolier, Case No. 11,671. Nowhere reported; opinion not now accessible.]

## Case No. 7,478.

JONES v. LOVELL.

[1 Cranch, C. C. 183.] [1]

Circuit Court, District of Columbia. July Term, 1804.

EVIDENCE—SUBSCRIBING WITNESS.

The testimony of the subscribing witness may be dispensed with if he is absent from the country.

Assumpsit on promissory note. The note was not suffered by the court to go in evidence to the jury; not being proved by the subscribing witness, and the absence of the witness not accounted for. The plaintiff then offered evidence to prove that the subscribing witness was a resident of this district some few years ago, and that he went off in a clandestine manner, to avoid the payment of his debts, and proved by many witnesses that they did not know, nor believe that he was now residing in the district of Columbia, or within the reach of the process of this court, and having proved the handwriting of the subscribing witness, and of the defendant, THE COURT permitted the note to go to the jury. Prince v. Blackburn, 2 East, 250, and Cunliff v. Sefton, Id. 183.

The following were the grounds upon which THE COURT decided the case: The only reason why those cases should not apply to this country, is, that here we may issue a commission to examine witnesses resident abroad. But the answer to that objection is, 1st. That in this case it was not known where the subscribing witness resided; and therefore it was impossible to know where to send a commission. 2d. That upon such a commission the plaintiff could not compel the subscribing witness to testify. 3d. That the plaintiff ought not to be compelled to send his original security abroad, and run the risk of its loss. 4th. That if the defendant wished to avail himself of the evidence of the subscribing witness he might summon him or take his deposition. 5th. That the rule was a hard one, particularly with regard to negotiable paper, and the court would not extend it beyond the cases already decided. The reason why the testimony of a subscribing witness is required, is because the best evidence which the circumstances of the case admit ought to be produced. And the reason of that rule is because the not producing such evidence, raises a presumption that if produced it would make against the party who ought to produce it. But the circumstances of this case do not admit of the production of the testimony of the subscribing witness; and they do sufficiently account for its non-production. This destroys the presumption arising from the want of that testimony, and thereby removes the ground upon which the rule was founded.

[1] [Reported by Hon. William Cranch, Chief Judge.]

## Case No. 7,479.

JONES v. McMURRAY.

[3 Ban. & A. 130; 2 Hughes, 527; 13 O. G. 6; Merw. Pat. Inv. 156.] [1]

Circuit Court, D. Maryland. Oct. 31, 1877.

PATENTS—ORIGINAL AND REISSUE—WANT OF NOVELTY.

1. Where the supreme court declared certain patents void, for want of novelty, and they were afterwards reissued, and suit was brought for an infringement of the reissues, *held*, that the reissues being for the same invention as were the original patents, they would be void for want of novelty upon the same grounds as the original patents.

[Cited in Mathews v. Flower, 25 Fed. 832.]

2. If it be admitted that there is something new and patentable in the reissues, which was not in the original, the reissued patents would be void because not for the same invention as the original patents.

[In equity, on a motion for an injunction to restrain the infringement of a patent-right. John Winslow Jones, of Portland, Maine, applied to the court for an injunction to restrain Louis McMurray, fruit packer, of Baltimore, from making use of certain patents for packing and preserving green corn, which, it was contended, had been granted to Isaac Winslow and by him assigned to the complainant, his nephew. The hearing in the case occupied four days in the United States circuit court, beginning on the 4th and ending on the 7th September, 1877. There were about eighteen hundred pages of printed testimony, which was read or referred to by counsel. Judges Bond and Giles dismissed the bill of complaint, with costs to the defendant, thus refusing to grant the injunction asked for. Had the injunction been granted, and the circuit court been afterwards sustained by the United States supreme court, Jones could have compelled every packer of green corn in the United States to pay him a royalty on every can of corn packed, or prevented them from packing corn at all. McMurray packed 1,600,000 cans of corn in 1877; and the proposed royalty would have cost him $32,000. Besides his factory in Baltimore, he has one at Frederick, Maryland, where he employs 900 hands, and has 1250 acres devoted exclusively to the growing of sugar corn. An appeal [2] will be taken by the complainant to the United States supreme court from the opinion of the circuit court, of which the following is the text:] [3]

Benjamin F. Butler, Archibald Stirling, Jr., David Fowler, and T. C. Mattocks, for complainant.

E. R. Dickerson, Charles C. Beaman, I. Nevitt Steele, Sr., and J. H. Howard, for respondent.

[1] [Reported by Hubert A. Banning, Esq., and Henry Arden, Esq., and by Hon. Robert W. Hughes, District Judge, and here compiled and reprinted by permission. The syllabus and opinion are from 3 Ban. & A. 130, and the statement is from 2 Hughes, 527.]

[2] [See note at end of case.]

[3] [From 2 Hughes, 527.]

Before BOND, Circuit Judge, and GILES, District Judge.

BOND, Circuit Judge. As this cause involves large pecuniary interests, and is also of much importance to the public at large, the court has very carefully read and considered the whole testimony, which was so voluminous that counsel could only refer to it in their arguments, or but partially read it.

This bill is preferred by complainant to establish the validity of four letters patent relating to inventions for the canning and preservation of green corn. The first patent, No. 34,928, dated April 8th, 1862, and its reissue, No. 7067, dated April 18th, 1876, cover the invented product, while the second patent, No. 35,274, dated May 13th, 1862, and its reissue, No. 7061, dated April 18th, 1876, relate to the process of making the product.

The supreme court of the United States, in the case of Sewall v. Jones, 91 U. S. 171, determined that the original patents above named were void for want of novelty, and this court is saved the labor of investigating their validity. But the complainant here claims that though the original patents were declared invalid by the supreme court, he is entitled to the relief he asks, because he has surrendered patents Nos. 34,928 and 35,274, and the commissioner of patents has reissued the same to him because the originals were invalid merely "by reason of a defective or insufficient specification" under section 4916, Rev. St. U. S. He, therefore, so far as this part of his case is concerned, relies upon the reissued patents, Nos. 7061 and 7067, which relate to both the process of canning and to the product of the canning process.

While we are of the opinion that the decision of the supreme court in Sewall v. Jones is much broader that the complainant admits, and that it goes to the whole invention there and now claimed by Jones in the patents we are here considering, and that it determined that both the process and product now claimed by Jones was the invention of Appert, in France, and Durand, in England, more than sixty years ago, and held that Jones' patents were void for want of novelty, and not merely invalid for want of a proper specification and description of Jones' claim, nevertheless, since the commissioner of patents has reissued the patents to Jones, we would give him the benefit of them could we discover in what respect they differed essentially or substantially from the originals, which the supreme court has decided were not novel. There is no essential difference, however, between the process described in patent 35,274 and its reissue, No. 7061. The first recites that after some difficulty found in preserving the green corn without drying, the inventor removed the corn from the cob and boiled it, but that this process, the corn being broken by removal from the cob, dissolved the juices and made the corn insipid, and that, finally, he removed the corn from the cob, packed the kernels in cans, hermetically sealing them, and boiled them until the corn was cooked. The supreme court, in Jones and Sewall, say this is not new.

In his reissued patent the complainant states that he takes tender green corn and scrapes it from the cob so as not to detach the inner ends of the kernel, which, with the juices and softer parts of the corn, he cooks together and then proceeds with the old process of Appert for cooking and sealing. He claims as his invention the process described of separating and obtaining the nutritious and edible parts of the corn and boiling them in a liquid composed wholly or mainly of their own juices.

No one ever cut green corn from a cob who did not accomplish exactly what this claim describes, and no one under the process described in patent 35,274, which required the corn to be removed from the cob, could so remove it without breaking the kernels, and when he proceeded to cook it in a can, as the patent required, he would find necessarily more or less of the juices with it. The reissue does not claim that the juices only should be used in the cooking.

The process described in the reissue is substantially that of the original patent. But if we admit there is something new and patentable in the reissued patent which was not in the original, the patent is void, because it is not for the same invention as the original. It may be the subject of a new patent, but cannot be a reissue of an old one, and that, too, of an old one which has been adjudged invalid by the supreme court for the want of novelty. But the fact is that Jones, as far back as May, 1862, had applied for and obtained a patent, No. 35,346, which described the cutting off the corn from the cob in very much the same words as he does in the reissued patent, 7061. This patent, No. 35,346, Judge Clifford held, and rightly, to be substantially the same with No. 35,274, now under consideration. It cannot, therefore, be claimed that the reissued patent contains anything which the original one did not, and the original, says the supreme court, is void for the want of novelty.

The two remaining patents which the bill alleges the defendants have infringed are Nos. 51,379 and 54,170, which describe a curved knife for the removal of the corn from the cob. We are of the opinion that these two patents are also void for the want of novelty. The knife described in the first patent is simply a curved knife provided with a gauge for the purpose of removing corn from a cob. The second patent makes the gauge adjustable. This, we think, the defendant has shown to be old. The knife differs nothing in principle and little in construction from the knife known as the "spokeshave," or from the repairing knife of Adam Oot. (Defendant's Record, 606.)

But even if we admit the validity of these patents we have looked in vain for any

proof that the defendant has infringed them by using complainant's knife. On the contrary, the complainant's proof (Record, 25, 42) shows that the defendant used a different knife entirely.

For these reasons, and without considering other, and, as we think, equally fatal objections to the complainant's case, we think the complainant's bill should be dismissed with costs, and will sign a decree to that effect.

[The following is the decree: "This cause having been submitted for final hearing, and the counsel for the respective parties having been heard, and the bill, answer, exhibits, and evidence having been read and considered, it is this 31st day of October, 1877, adjudged, ordered, and decreed that the bill of complaint filed in this cause be and the same is hereby dismissed, with costs to the defendant."] [4]

[NOTE. The appeal in this case to the supreme court was dismissed October 9, 1883, for failure, under the 16th rule, on the part of the appellant to prosecute. There was no opinion filed.

[For other cases involving these patents, see note to Jones v. Hodges, Case No. 7,469.]

JONES (McMURTRIE v.). See Case No. 8,905.

JONES (MASON v.). See Cases Nos. 9,239 and 9,240.

## Case No. 7,480.

JONES v. The MASSACHUSETTS.

[Cited in Bulgin v. The Rainbow, Case No. 2,116, where it is distinguished from the case at bar, and stated to have been dismissed, as, the contract sued on having been made on land and the damage done in port, the cause was one for common-law jurisdiction exclusively. The suit was on a bill of lading of goods at Havana to be delivered at Charleston. The goods were delivered, but it was alleged that part of them were injured in Charleston Harbor.]

[Nowhere reported. The original records of this, the district court for the district of South Carolina, prior to 1860, have been lost or destroyed. The only record preserved of this case is a journal entry as follows: "The court decreed that the plea in bar exhibited in the case to the jurisdiction of the court be sustained, and that the libel be dismissed."]

JONES v. The MASSASSOIT. See Case No. 9,260.

## Case No. 7,481.

JONES et al. v. MERRILL et al. SAME v. NOYES et al. SAME v. OSTRANDER et al.

[8 O. G. 401.]

Circuit Court, N. D. New York. 1875.

PATENTS—INJUNCTION — ADJUDICATION ON FINAL HEARING—PRESERVATION OF GREEN CORN —LACHES—FUTURE DAMAGES.

1. An adjudication in favor of a patent at final hearing, and after full consideration of elaborate proofs touching the validity of the patent, must be held controlling upon an application for a preliminary injunction, unless cogent evidence is presented in addition to that which was found insufficient upon the final hearing.

[Cited in Edison Electric Light Co. v. Electric Manuf'g Co., 57 Fed. 619.]

2. While the fact that the defendant has obtained a patent for his process is not controlling in proceedings for an injunction, it is entitled to some weight.

3. The process covered by the patent of John W. Jones, assignee of Isaac Winslow, May 13, 1862, for preserving corn in its green state, involves three distinct features, each of which is essential to the result: First, separating the kernels from the cob; second, placing them in their natural juices in cans; third, sealing the cans hermetically, and subjecting them to heat by water or steam until the kernels are thoroughly cooked.

4. This patent would not be infringed by a process in which the corn, whether on the ear or removed therefrom, is thoroughly cooked by the direct application of steam before it is canned.

5. Where it appeared that the defendants subjected their corn to the direct action of steam, or otherwise "cooked" it, before canning it, but heated it again in a steam-bath after canning, a preliminary injunction under the Winslow patent was denied, although grave doubts were entertained as to whether that part of the defendants' process which was adopted prior to the canning was anything more than a colorable departure from the patented process.

6. Where defendants claimed to cook their corn in the ear thoroughly before subjecting it to heat in the sealed cans, but the printed label on their cans, prepared when they had no interest to warp the facts, stated that the corn was "cut from the cob while fresh, and sealed at once, and then prepared by an entirely new process," &c.: *Held*, that in proceedings for an injunction the defendants must be concluded by the statement they thus published to the world.

7. Where complainants were chargeable with knowledge of defendants' acts, but permitted them to continue their manufacture, and, in response to an inquiry as to whether they regarded defendants' process to be an infringement, returned an answer that led defendants to believe that they did not, an injunction was refused.

8. It is a general principle of equity jurisprudence that the court will not lend its extraordinary aid, by way of preliminary injunction, to any claimant who has encouraged or acquiesced in an infringement of his right, or unreasonably delayed in prosecuting for its violation.

9. Compensation for damages accrued and protection from future damages is all such a complainant is entitled to. This provided for by a bond.

[These were bills in equity by John Winslow Jones and others against G. Lewis Merrill and Oscar F. Soule, John H. Noyes and others, and W. B. Ostrander and others.]

Motions for preliminary injunctions to restrain alleged infringements of letters patent granted to John W. Jones April 8, 1862 [No. 34,928], and May 13, 1862 [No. 35,274], for certain inventions of Isaac Winslow, relating to a new and useful improvement whereby corn in its green state is preserved in hermetically-sealed cans. The first of the patents was for the product; the second, for the process.

[4] [From 2 Hughes, 527.]

W. H. Bright, W. H. Clifford, and E. W. Fox, for complainants.

Smith, Markham & Smith, for Merrill & Soule.

Tower & Joslyn, for Noyes et al.

Sedgwick, Kennedy & Tracy, for Ostrander et al.

WALLACE, District Judge. The defenses interposed in these actions to the validity of the complainants' patents must be regarded as unavailing to the defendants for the purposes of this motion, because of the decision of the court in the First circuit in the case of Jones v. Sewall [Case No. 7,495]. It was there adjudicated upon final hearing, after full consideration, that the defenses that Isaac Winslow was not the original discoverer of the improvement; that it had been patented abroad, and described in public works prior to his alleged discovery; that it had been in public use or on sale for more than two years before his application for a patent, and had been abandoned to the public use, were not sustained by the proofs. That adjudication must be held controlling upon an application for a preliminary injunction, unless cogent evidence is presented in addition to that which was found insufficient upon the final hearing. The new evidence which has been adduced here as to prior use, is far less satisfactory than that which was held insufficient there, and the additional proof on the subject of prior publication is open to the same objections which were regarded as fatal there to this branch of the defense.

Upon the final hearing of these cases they must be determined each upon its own merits, and the validity of the patents will be an open question; but for present purposes the only question for consideration must be whether or not the defendants have infringed. In determining this question it is first necessary to ascertain the scope and extent of the patents, because the result of the controversy may hinge entirely upon the conclusion whether the right covers a broad claim or a narrow one. It was not necessary in the case in the First circuit to give accurate consideration to this question, because the defense stood solely on the validity of the patents and conceded infringement if they were valid.

The construction which seems to be the reasonable one, according to the liberal interpretation now accorded to patents, and in view of the history of the art of preserving fruits and vegetables, is, that the process secured to complainants involves three distinct features, each of which is essential to the result he has produced. These consist in the preservation of the corn by first separating the kernels from the cob; second, placing them in their natural juices in cans; and, third, sealing the cans hermetically and subjecting them to heat by water or steam until the kernels are thoroughly cooked. Adherence to these three features in the process is deemed vital to the result which the specifications signify as the great advantage and the sine qua non of the discovery—viz., the preservation of the article in its natural juices so that the milk of the corn will not be evaporated, its flavor rendered insipid, or its aroma lost. If any one of these three features of the process is discarded in the process of the defendants, there is no infringement. Hill v. Thompson, Webst. Pat. Cas. 229. They cannot escape liability, however, by the substitution of a feature which is but a colorable departure from either of those claimed by the patentees.

It seems not to be necessary to discuss the argument for the complainants by which a broader right is claimed under the patent for the product. The only product which is secured to the patentees is the one derived from the process which alone gives vitality to the claim. The product patent is not one for corn preserved green, but for corn preserved green by the process particularly described. Applying the rules adverted to as the test of infringement, it is quite apparent, so far as the facts now appear, that the defendants, Merrill & Soule, do not infringe by the process they adopt; because they discard one of the steps of complainants' process and substitute one in its place which complainants very clearly repudiate as fatal to success. While complainants place their corn in hermetically-sealed cans, and cook it by the application of water or steam to the cans, in order, as they state, that the juices of the corn shall be coagulated without evaporation or dilution, these defendants apply steam directly to the corn. The complainants disclaim this method, on the theory that when thus cooked the corn is insipid and unpalatable. In order to obviate the escape of the aroma and the evaporation of the milk and juices of the corn, these defendants have invented an apparatus which seems to accomplish the desired result, for which a patent has been granted them. One test of infringement is whether or not the process adopted by the alleged infringer is a sufficient departure from that of the patentee to amount to a substantive invention sufficient to support a patent as for a new thing. Curt. Pat. § 321. While the fact that they have obtained a patent is not controlling, it is entitled to some weight. It would seem that their substitute is one differing in principle from complainants. Clearly this is so, if their corn is thoroughly cooked by the direct application of steam before it is canned. The fact that after canning their corn they heat it again in a steam bath, militates somewhat against this conclusion. If that part of their process which is adopted prior to canning is but a colorable device, without practical result, or the process is really accomplished by the steam bath subsequently applied, they can-

not escape liability. But upon the evidence now presented they must prevail on this question, and as to them an injunction is therefore denied.

As to the defendants, John H. Noyes and others, (who constitute the "Oneida Community,") they claim to have used a different process from complainants, in that they cook their corn in an open vessel before canning it in a sirup, which they describe. The serious difficulty in the way of this defense lies in the doubt which the affidavits leave, as to whether or not this is anything more than a colorable departure from complainants' process. They cook their corn but a short time in the open vessel, and it is far from clear whether this part of the process has any material effect in the final result. It would be unjust, however, to determine this question adversely to them upon the affidavits used on this motion, and for this reason an injunction should be denied. Aside from this consideration, complainants, as to these defendants, are justly open to the imputation of laches. One of the assignors of the complainants visited defendants' manufactory in 1868, and saw their process, which, as then practiced, in the most adverse view to defendants, was not less an infringement than that now used by them. The complainants are chargeable with the knowledge of their co-owners of these facts, and from the time he became owner until the present, they have permitted these defendants to continue manufacturing. In addition to this, it appears that, in 1873, defendants sent a messenger to complainants for the express purpose of ascertaining if their process was considered by complainants a violation of the patents, and from information then received were evidently led to believe that it was not. They were not intentionally misled, doubtless, but complainants should have given them more explicit information, if they intended to treat them as infringers. These facts should shelter them upon this application.

As to these defendants the injunction is denied.

As to the defendants, Loomis, Allen & Co., they claim to use a different process from complainants, because they cook their corn in the ear thoroughly before subjecting it to heat in the sealed cans. But an exhibit of one of their cans of corn, as offered for sale by them, is produced, upon which is a printed label, which states: "This corn is picked when at proper size for table use, and cut from the cob while fresh and sealed at once, and then prepared by an entirely new process," &c. They also claim that their corn is cooked subsequently in the sealed cans, in a "liquid compound," but fail to describe this compound. They concede that they have contributed to a fund to contest the validity of complainants' patents. Affidavits on part of complainants present admissions of one of the defendants that the cooking of the corn before canning it is so slight as to produce no effect upon it; whereby a strong inference arises that this feature is merely an evasive departure from complainants' process. If their label truthfully advertises their process, the conclusion that they have infringed is no longer a matter of inference, but is clearly proved. It may be explained upon the final hearing, but as the case now stands they must be concluded by it. It is in direct conflict with the process which they now claim to have pursued. It was made when they had no interest to warp the facts. If untrue, it was a misrepresentation to their patrons, and until it is explained in some manner consistent with good faith, they must be held to the statement which they published to the world.

Notwithstanding the strong case made against these defendants, they are entitled to the benefit of other considerations, which render it inequitable to grant an injunction against them unconditionally. The complainants have to a certain extent slept upon their rights for many years, during which time a large amount of capital has been embarked in all parts of the country in the business of preserving corn by processes substantially similar to theirs, in ignorance of the right they now assert to the exclusive monopoly of such business. If these rights had been promptly asserted, many individuals would have been saved from the jeopardy which now menaces their investments, and among them are these defendants. It is a general principle of equity jurisprudence that the court will not lend its extraordinary aid to any claimant who has encouraged or acquiesced in an infringement of his right, or unreasonably delayed in prosecuting for its violation. Compensation for damages accrued, and protection from future damages, is all such a complainant is entitled to. An order to secure such remedy will be made in this case.

As to these defendants an injunction is granted, unless within thirty days they file with the clerk of this court a bond in the penalty of $20,000, with sufficient sureties conditioned for the payment of such sum, if any, as may be decreed in favor of complainants on the final hearing of the cause, to be approved in form and as to sufficiency of sureties by the clerk of this court. And defendants must file monthly statements, under oath, with the clerk, of the amount of their manufacture and sale of preserved corn during the pendency of this action.

[For other cases involving these patents, see note to Jones v. Hodges, Case No. 7,469.]

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JONES (MERRYFIELD v.). See Case No. 9,486.

## Case No. 7,482.

JONES v. MILLER.

[17 N. B. R. 316; [1] 1 N. J. Law J. 113.]

Circuit Court, D. New Jersey. 1877.

BANKRUPTCY—TROVER BY ASSIGNEE—CHATTEL MORTGAGE.

Where, before the commencement of the proceedings in bankruptcy, the holder of a chattel mortgage executed by the bankrupt took possession of the mortgaged property and appropriated it to his own use, *held*, that the assignee could not maintain an action of trover to recover the value of such property.

[Error to the district court of the United States for the district of New Jersey.

[This was an action at law by Elias N. Miller, assignee of Kauffman & Houck, against David Jones.]

J. Whitehead and T. N. McCarter, for plaintiff in error.

C. Borcherling and A. Q. Keasbey, for defendant in error.

McKENNAN, Circuit Judge. The plaintiff in error was sued in the court below, in trover, by the defendant in error, as assignee of Kauffman & Houck, bankrupts, to recover the value of certain goods of the bankrupts, alleged to have been wrongfully converted to his use. He was the holder of a chattel mortgage executed in December, 1871, by the bankrupts, upon their personal property, consisting chiefly of lager-beer, malt, hops and coal. In August, 1874, he took possession of this mortgaged property and appropriated it to his own use. Several months after this, proceedings in bankruptcy were commenced against the mortgagors, which resulted in an adjudication against them, and an assignment of all their property, etc., to the defendant in error. This action of trover was then brought by the assignee, and, at the trial, the only evidence of conversion was proof of the possession of the mortgaged chattels taken and appropriated to his own use by the defendant in August, 1874. The plaintiff in error thereupon asked the court to instruct the jury, "that the assignee could not recover in this form of action, for any property which was not in actual existence at the time his title accrued." This request the court refused, and instructed the jury that, "if they believed the mortgage was given to hinder, delay and defraud the creditors of the mortgagors, it conveyed no title to the mortgagee, and that by the express provisions of section 5046 of the Revised Statutes of the United States, the title and right of possession of the mortgaged chattels vested at once in the assignee by virtue of the deed of the register or district judge, and that an action in trover is the usual and proper remedy to recover the value of the goods thus wrongfully converted by the defendant to his own use."

[1] [Reprinted from 17 N. B. R. 316, by permission.]

To entitle a plaintiff to maintain an action of trover it is essential that he should be invested, at the time of the conversion, with a complete property, either general or special, in the chattels sued for, and with the actual possession or a right to the immediate possession of them. So well settled is this principle, that Mr. Justice Strong, in Overton v. Williston, 7 Casey (31 Pa. St.) 155, says of it: "Now, if there be any principle beyond dispute, it is that, in an action of trover, the plaintiff must have had a right to the possession of the goods at the time of the conversion." And it is equally true that goods wrongfully transferred and delivered must be regarded as converted as of the date of their delivery, and that the mere adverse and continued enjoyment of them will not give a right of action in trover against the tort feasor to third persons afterwards acquiring a lawful title to them. Overton v. Williston, supra; Garland v. Carlisle, 4 Clark & F. 693. At common law, then, it is clear that the plaintiff below could not maintain trover, for the obvious reason that, at the time of the conversion proved he had no title whatever to the property converted, so that there could be no such invasion of his right of possession to it as an action in this form would be appropriate to redress.

It is argued, however, that the bankrupt law [of 1867 (14 Stat. 517)] so defines the interest of the assignee in the property upon which the assignment operates, as to render an action of trover a proper remedy in a case like this, and upon this hypothesis the instruction complained of seemed to be founded. This is claimed to be the effect of the 14th section of that act (Rev. St. § 5046). That section enacts that: "All property conveyed by the bankrupt in fraud of his creditors; all rights in equity, choses in action, patent rights and copyrights, all debts due him or any person for his use, and all liens and securities therefor, and all his rights of action for property or estate, real or personal, and for any cause of action which he had against any person arising from contract or from the unlawful taking or detention, or injury to the property of the bankrupts, and all his rights of redeeming such property or estate; together with the like right, title, power, and authority to sell, manage, dispose of, sue for, recover or defend the same, as the bankrupt might have had if no assignment had been made, shall, in virtue of the adjudication of bankruptcy and the appointment of his assignee, but subject to the exceptions stated in the preceding section, be at once vested in such assignee."

This section invests the assignee with a double character. All the property of the bankrupt, in possession or in action, and all property fraudulently conveyed by him, are vested in the assignee; and for either of these classes of property he may maintain a suit in his own name. As the successor of the bankrupt, he has all the bankrupt's rights per-

taining to the property which belonged to him at the date of the bankruptcy proceedings; as the representative of the creditors he has all their rights, which the bankrupt could not assert, touching any property of which the bankrupt has fraudulently dispossessed himself. Whatever title the bankrupt had, or his creditors might acquire, to any species of property which ought to be applied to the payment of the bankrupt's debts, the assignee is invested with. This is the whole scope and purport of the section. But it does not provide any special remedy or indicate any method by which the rights of property vested in him may be enforced. By necessary implication, he may employ any remedy, within the whole range of legal or equitable procedure, which may be appropriately invoked to give effect to such rights; but he is not authorized to adopt an incongruous one. Unless, therefore, the form of action resorted to is, in its general nature, adapted to the plaintiff's complaint, its exceptional employment is not warranted by the statute. Now it is plain that, at common law, the assignee could not maintain this action in virtue of any right derived from the bankrupts, because they had voluntarily transferred their property in the mortgaged chattels, and had conclusively assented to the conversion of them. Nor could he, as the representative of creditors, because his own right of possession accrued only at the date of the bankruptcy proceedings, and a creditor could not acquire any title to the mortgaged chattels, by means of which their value could be recovered in an action of trover, resting upon a conversion before he had acquired legal ownership of them. In neither of the rights, then, with which the assignee was invested, and in no aspect of the case, as it was presented in the evidence, could he recover, in this form of action, and the defendant below was entitled to an instruction to the jury to that effect. The judgment is reversed, and a new trial awarded.

JONES (MILLER v.). See Cases Nos. 9,575 and 9,576.

JONES (MOORE v.). See Cases Nos. 9,768 and 9,769.

JONES (MOREHEAD v.). See Case No. 9,791.

JONES (MOUNTZ v.). See Case No. 9,889.

## Case No. 7,483.

JONES v. NEALE et al.

[1 Hughes, 268;[1] 2 Mart. (N. C.) 81.]

Circuit Court, D. North Carolina. 1796.

EVIDENCE—DEPOSITION DE BENE ESSE—WHEN ADMITTED.

Where a deposition was taken de bene esse under the 30th section of the judiciary act of 1789 [1 Stat. 88], of a witness who resided at a distance greater than a hundred miles from the place of trial, but within the process of the court, and the witness was in good health at the time of trial, and had been duly subpoenaed to appear at the trial, and had failed to appear, but the deposition had not been delivered into court by the magistrate who took it, nor sealed and directed to the court as required by the statute, *held*, that it could not be read.

Debt on bond [against Neale & Blount].

To prove the execution of the bond, the plaintiff's counsel offered a deposition of the subscribing witness, who resided at Newbern, about one hundred and thirty miles from Raleigh. It appears that the witness had been subpoenaed by the plaintiff, but did not attend, and that he was at home in good health. The deposition was offered as one taken in pursuance of the thirtieth section of the acts of congress, entitled "An act to establish the judicial courts of the United States," approved 24th December, 1789, which provides for the taking depositions de bene esse in certain cases, one of which is, where the witness shall live at a greater distance from the place of trial than one hundred miles. Two objections were made by defendants' counsel to the reading this deposition: 1. That it was taken de bene esse only, and therefore could not be read unless the party offering it first proved that the personal attendance of the witness could not be obtained. But here it appeared that he was within reach of the process of the court, and in sufficient health to attend. 2. That the certificate of the magistrate who took the deposition did not set forth the reasons of taking it, which is made necessary by the act of congress. To the first objection it was answered by the plaintiff's counsel that the manifest intention of the act is, that those circumstances which authorize the taking of a deposition de bene esse should, if they exist at the time of trial, entitle it to be heard. That the residence of the witness at a greater distance from the place of trial than one hundred miles is by the act placed on the same footing with his age, infirmity, going to sea, etc., and is equally a good cause for taking his deposition de bene esse. But the age or infirmity of a witness would without doubt excuse his non-attendance, and entitle his deposition to be read, and there is good ground to infer the same of his residence at a greater distance from the place of trial than one hundred miles. This construction is greatly corroborated by that clause of the act which defines the evidence admissible on appeals, but if a contrary construction should prevail, it appeared that the plaintiff had caused the witness to be subpoenaed, which was all that could be required to enforce his attendance, and if that proved ineffectual, the deposition ought to be read. To the second objection, that the act of congress requires the magistrate taking the deposition to certify the reasons of taking it, in order to save the party at whose in-

[1] [Reprinted in 1 Hughes, 268, from Francis Xavier Martin's Notes of North Carolina Decisions, 81, and here republished by permission.]

stance it is taken the trouble and expense of bringing witnesses from a great distance to prove the age, infirmity, etc., of the witness examined, but it left the party at liberty to incur this trouble and expense if he thought proper, as in taking depositions under commissions issued from the state courts of this state, the party at whose instance the deposition is taken may procure the commissioner to certify that notice of the time and place of caption was given to the adverse party, and such certificate is received by the court as conclusive evidence as to that point, but if the commissioner fail to certify, the party must establish the fact.

Badger & Taylor, for plaintiff.
Mr. Woods, for defendants.

Before PATERSON, Circuit Justice, and SITGREAVES, District Judge.

It appears to be the true construction of the act of congress that those circumstances which will warrant the taking of a deposition de bene esse should, if they exist at the time of trial, authorize the reading of it. But as this act is made in derogation of the common law, it must be strictly construed and literally observed. To fail in one iota of the ceremonies prescribed by it is to fail in the whole. The act requires that the deposition shall be retained by the magistrate taking it until he delivers the same with his own hands into the court for which it is taken, or [shall, together with the reasons of its being taken, and of notice, etc.] [2] be by him sealed up and directed to such court. This part of the act has not been observed, therefore the deposition cannot be read.

## Case No. 7,484.

JONES et al. v. NEWSOM et al.

[7 Biss. 321.] [1]

Circuit Court, D. Indiana. Dec., 1876.

PARTNERSHIP ASSETS.

The assets of a firm in the possession of one of the partners are held in trust for the creditors of such firm, and if the partner in possession of them is afterwards adjudged bankrupt they are not assets in the hands of his assignee, and if he obtain possession of them he must account to the creditors of the firm for the proceeds.

Jones and William McEwen were partners in a banking business at Columbus, from January, 1865, to March 1, 1870. On the latter day Jones withdrew, leaving McEwen in possession, but without any formal dissolution. Shortly afterwards McEwen joined with him his sons, Gideon and Archibald, in the same business and continued it, using the same books that had been used by McEwen & Jones, until September, 1871, when the three McEwens were adjudged bankrupts. [Case No. 8,783.] The assignees in taking possession of the property and effects of the McEwens found among them certain choses in action and other personal property known to have been the property of McEwen & Jones at the time Jones withdrew. The firm of McEwen & Jones was insolvent. Jones demanded of the assignees that they should apply this property to the payment of the debts of McEwen & Jones, which they declined to do, but agreed with him to keep a separate account of all the effects of McEwen & Jones and hold them subject to the order of this court. This they have done, and in this cause they appear merely as stakeholders. The bill is filed by Jones and the creditors of McEwen & Jones, to compel the application of the funds of McEwen & Jones, in the hands of McEwen & Sons, to the payment of the debts of McEwen & Jones. Certain individual creditors of William McEwen, who were permitted to intervene, answer, and deny the title of McEwen & Jones and of their creditors, and insist that the title, after the dissolution of that firm and the bankruptcy of William McEwen, and the possession of the assignees under their deed of assignment, was in the assignees, as their trustees, and that no distribution of the fund can be made to the creditors of McEwen & Jones; or, if any, that it can at most only be rateably with them as creditors of William McEwen. Upon this state of facts the master reported a finding for the complainants. The individual creditors of William McEwen file exceptions to the report.

Baker, Hord & Hendricks and Herod & Winter, for complainants.
H. W. Harrington and McDonald & Butler, for intervening creditors.

GRESHAM, District Judge. William McEwen took the assets in question, clothed with a trust. In equity they belonged to the creditors of McEwen & Jones. William McEwen was the trustee of these creditors, and upon a proper application a court of equity would have compelled him to account to them for the trust property. The individual creditors of a surviving partner who has possession of the firm assets have no claim on those assets as against the firm creditors.

The fact that the creditors of McEwen & Jones failed to assert their right to these assets from the time of the virtual dissolution of that firm in March, 1870, until the bankruptcy of McEwen & Sons in September, 1871, cannot be said to amount to laches on their part. There is nothing in the evidence showing that McEwen & Sons ever paid a cent for these assets or claimed any title to them.

The adjudication of bankruptcy against William McEwen & Sons operated upon the

[2] [From 2 Mart. (N. C.) 81.]

[1] [Reported by Josiah H. Bissell, Esq., and here reprinted by permission.]

firm and the individual members of it, and transferred into the hands of the law their individual and partnership assets to be distributed to their individual and partnership creditors. Jones was not a party to that adjudication. As already stated, the assets of McEwen & Jones passed into the hands of McEwen, charged with the payment of the debts of that firm. A portion of those assets reached the hands of McEwen's assignees in bankruptcy. That portion is perfectly identified, and the assignees have kept a distinct account of it.

The assignees of William McEwen or of McEwen & Sons acquired no title under the deed of assignment to the assets which thus found their way into their possession. Amsinck v. Bean, 22 Wall. [89 U. S.] 395; Holland v. Fuller, 13 Ind. 195. Part of the debts of McEwen & Jones are still unpaid, and those unpaid creditors, or Jones as surviving partner, in their behalf, have a right to the assets in controversy. Exceptions overruled.

JONES v. NOYES. See Case No. 7,481.

## Case No. 7,485.

JONES v. OCEANIC STEAM NAV. CO.

[11 Blatchf. 406.] [1]

Circuit Court, S. D. New York. Dec. 12, 1873.

REMOVAL OF CAUSES — FOREIGN CORPORATION — PRACTICE—TERMS OF COURT—DEFENCE.

1. Under the provisions of the 2d section of the act of July 27, 1868 (15 Stat. 227), a suit commenced in a state court against a corporation created under the laws of Great Britain cannot be removed by it into this court.

2. The terms of this court, appointed to be held by section 1 of the act of February 7, 1873 (17 Stat. 422), being terms exclusively for the trial and disposal of criminal cases and matters, are not sessions of this court, within the meaning of an act requiring copies of proceedings in a suit to be entered in this court on the first day of its session, in order to perfect the removal of such suit into this court.

[Cited in Bright v. Milwaukee & St. P. R. Co., Case No. 1,877.]

3. A petition under the said act of 1868, stating that the defendant has a defence to an action brought, arising under an act of congress, giving the title of such act, is sufficient, although it does not state what the defence is, or what are the facts which constitute it.

4. The question of the actual existence and validity of the alleged defence cannot be determined on an interlocutory motion, if the proceedings for removal have conformed to the statute, but can be determined only on formal pleadings and proofs, in this court.

In equity.

Edmund Coffin, Jr., for plaintiff.

Everett P. Wheeler, for defendant.

BLATCHFORD, District Judge. This suit was commenced in the supreme court of the state of New York, against the Oceanic Steam Navigation Company, Limited, (a corporation created under the laws of Great Britain,) and other persons, as defendants, to recover damages for the breach of a contract alleged to have been entered into by the defendants with the plaintiff [John Spencer Jones], whereby they agreed to transport him, and certain property of his, from Liverpool to New York. The corporation petitioned the state court for the removal of the suit into this court. The application was denied by the state court, whereupon the corporation entered in this court copies of the proceedings in the suit, and now moves for an order granting leave to it to put in, in this court, an answer to the complaint filed in the state court in the suit, claiming that the suit is removed into this court. The plaintiff opposes the motion by objecting to the jurisdiction of this court over the suit.

It is contended, for the corporation, that the suit is removed by virtue of the provisions of the 2d section of the act of congress of July 27, 1868 (15 Stat. 227). That section enacts as follows: "Any corporation, or any member thereof, other than a banking corporation, organized under a law of the United States, and against which a suit at law or in equity has been or may be commenced in any court other than a circuit or district court of the United States, for any liability or alleged liability of such corporation, or any member thereof as such member, may have such suit removed from the court in which it may be pending, to the proper circuit or district court of the United States, upon filing a petition therefor, verified by oath, either before or after issue joined, stating that they have a defence arising under or by virtue of the constitution of the United States, or any treaty or law of the United States, and offering good and sufficient surety for entering in such court, on the first day of its session, copies of all process, pleadings, depositions, testimony, and other proceedings in said suit, and doing such other appropriate acts as are required to be done by the act entitled 'An act for the removal of causes in certain cases from state courts,' approved July twenty-seventh, eighteen hundred and sixty-six" (14 Stat. 306); "and it shall be thereupon the duty of the court to accept the surety, and proceed no further in the suit, and, the said copies being entered as aforesaid in such court of the United States, the suit shall then proceed in the same manner as if it had been brought there by original process." The petition filed in the state court, for the removal of this suit, sets forth that the petitioner is a corporation, and has a defence to the action, arising under and by virtue of the act of congress, passed March 3d, 1851, entitled, "An act to limit the liability of shipowners and for other purposes" (9 Stat. 635).

It is insisted by the defendant, that, as it is not a banking corporation, and is not organized under a law of the United States,

[1] [Reported by Hon. Samuel Blatchford, District Judge, and here reprinted by permission.]

its case is covered by the act; that, as the words, "organized under a law of the United States" follow the words "banking corporation," they limit the latter words, and do not limit the word "corporation" in the earlier part of the sentence; that, if the intention, in the sentence, had been, to limit or qualify the word "corporation" in the earlier part of the sentence, the sentence would have read, "any corporation organized under a law of the United States, other than a banking corporation," and would not have been made to read, as it does, "any corporation, other than a banking corporation, organized under a law of the United States;" that the language must be interpreted in its ordinary meaning; that it cannot be supposed that the act was passed solely for the benefit of the few corporations which have been chartered by congress and are not banking corporations; that the object of the act was to give to all corporations, by whatever authority organized (except national banks), the right to have a defence arising under a law of the United States tried in the federal courts; that the expression "organized under a law of the United States" is an accurate expression only in its application to national banks, because they are organized under a general law (Act June 3, 1864; 13 Stat. 99), and are spoken of throughout the statute as being "organized" thereunder (sections 6, 7, 32); that other corporations existing under acts of congress are created by special acts, and are spoken of therein as being "created" thereby, as the Union Pacific Railroad Company (Act July 1, 1862, § 1; 12 Stat. 489, 490), and the Northern Pacific Railroad Company (Act July 2, 1864, § 1; 13 Stat. 365, 366); that, if, as an historical fact, it be conceded that the act of July 27, 1868, was passed with an especial view to allow a suit which had then recently been brought in the supreme court of New York against the Union Pacific Railroad Company, and certain members of it, to be removed into this court (Fisk v. Union Pac. R. Co. [Case No. 4,827]), the language of the act is broad enough to include the present case; that no reason can be assigned for allowing such railroad corporation, or any other railroad corporation created by congress, to remove into a federal court a suit in which such a defence exists as is specified in the act, which does not equally apply to a like suit against a foreign corporation, or against a corporation created by a law of a state; that the purpose of the act, as manifested on its face, is to secure to all corporations, except national banks, the right to have determined by a federal court a defence arising under the constitution, laws, or treaties of the United States; that the act looks to the subject-matter of the defence, when the defendant is a corporation and not a national bank; and that jurisdiction over any suit in which such a defence arises, can be conferred by congress on the federal courts, under the 1st subdivision of the 2d section of the 3d article of the constitution, which provides, that the judicial power of the United States shall extend to all cases, in law and equity, arising under the constitution, the laws of the United States, and treaties made, or which shall be made, under their authority. Cohens v. Virginia, 6 Wheat. [19 U. S.] 264, 379.

For the plaintiff, it is insisted, that the words, in the act of 1868, "against which a suit," &c., manifestly qualify the word "corporation," where it first occurs in the sentence, and do not qualify the words "banking corporation;" that those words "against which a suit," &c., are connected by the word "and," as a copulative, with the words "organized under a law of the United States," in such manner that it must necessarily follow, that, as the words "against which a suit," &c., qualify the word "corporation," where it first occurs in the sentence, the words "organized under a law of the United States" must qualify the same word "corporation," and cannot qualify the words "banking corporation;" that, in any other view, such word "and" is useless, and has no meaning; that the construction contended for by the defendant requires the sentence to be read thus—"any corporation, (other than a banking corporation organized under a law of the United States,) and against which a suit," &c.; that such reading makes the word "and" superfluous; that the construction contended for by the plaintiff makes the sentence read thus—"any corporation, (other than a banking corporation,) organized under a law of the United States, and against which a suit," &c.; that such reading gives a meaning to the word "and;" that it is not reasonable that foreign corporations, or corporations created by a state, should have a right to remove a suit to a federal court, which is not conferred on natural persons; that it is entirely reasonable that corporations created by the United States, or organized under the laws of the United States, (except such thereof as congress may except,) should enjoy the right to have federal laws interpreted by the federal courts; that good reasons can be assigned for discriminating between national banks and other corporations organized under a law of the United States; and that no good reason can be suggested for extending the right of removal, under the act of 1868, to a banking corporation organized under a law of a state, and expressly withholding such right from a national bank.

In response to the criticism by the plaintiff on the verbiage of the sentence, the defendant urges, that the words "any corporation" are qualified, first, by the words "other than a banking corporation, organized under a law of the United States," and, second, by the words "and against which," &c.; that there are thus two limitations on the expression "any corporation," such two limitations being connected by the word "and,"

and properly so connected, giving a meaning and effect to the word "and," the first limitation being, that the corporation must not be a national bank, and the second and additional limitation being, that a suit of a specified character must have been brought against it; and that the sentence, paraphrased, and supplying omitted words, reads thus—"any corporation, being other than a banking corporation organized under a law of the United States, and being a corporation against which a suit," &c.

I have stated at length the positions of the respective parties on the question of jurisdiction, in order that it may be seen that their respective views have been appreciated and considered. The point involved is a new one, and I am referred to no decision upon it. It is, also, an important one, as, if the construction given by the defendant to the statute is correct, it is not perceived why the provisions of the statute do not apply to corporations created by the states as well as to corporations created by foreign governments. After careful reflection I am constrained to the conclusion that the view taken by the plaintiff is the more correct one, and that this suit is not one of which this court has, or can have, jurisdiction, under the act of 1868, for the reason that the defendant corporation is not a corporation organized under a law of the United States. I have the less reluctance in adopting this view, because, if this court is in error in refusing jurisdiction in this case, the defendant has a ready and prompt remedy by an application to the supreme court for a mandamus, to direct it to take jurisdiction of the case, and proceed to adjudge it upon its merits. Ex parte Bradstreet, 7 Pet. [32 U. S.] 634; Ex parte Newman, 14 Wall. [81 U. S.] 165; Insurance Co. v. Comstock, 16 Wall. [83 U. S.] 258, and cases there cited. If, on the other hand, this court should now take jurisdiction of this case, and compel the plaintiff, in case of an adverse decision on the merits, to seek the judgment of the supreme court on the question of jurisdiction, (the amount claimed by the plaintiff being over $7,000,) the plaintiff might thus obtain a favorable decision on that point, only at the end of a long and expensive litigation. Doubtful questions of jurisdiction should, if possible, be authoritatively disposed of at the threshold of a controversy.

Assuming that the act of 1868 does apply to the present case, I am of opinion that the proceedings for the removal of the cause were regular. The objection is taken that the defendant did not enter in this court copies of the proceedings in the state court, until the 17th of October, 1873, and that it should have entered them on the 8th of October, 1873. The petition for removal was filed in the state court on the 11th of August, 1873. The next term of this court, after that time, for the transaction of civil business, began on the third Monday of October, 1873 (the 20th), as appointed by the act of August 8, 1846 (9 Stat. 72, § 1). By the act of February 7, 1873 (17 Stat. 422, § 1), an additional term of this court is appointed to be held on the second Wednesday of October, which day fell, in 1873, on the 8th. But that act provides that such term shall be devoted exclusively to the trial and disposal of criminal cases and matters. The first day of the term commencing on the 20th of October was, therefore, the first day of the session of this court, within the meaning of the statute, and on that day the papers in question were on file in this court.

The petition for removal states merely that the defendant has a defence to the action, arising under the act of March 3, 1851, giving its entitling, and prays for a removal of the suit into this court under the act of July 27, 1868, giving its entitling. It is objected that the petition does not set forth affirmatively facts from which the court can see that the defence is one arising under the act of 1851; and, also, that the act of 1851 cannot, under any circumstances, apply to a defence set up by this defendant in this suit, for the reason that that act has no application to a foreign ship-owner, and, especially, none to the liability of a foreign ship-owner to an alien (the plaintiff being an alien), on a contract made abroad, as the contract in this case was. The petition is sufficient, without stating what the defence is. The contest as to the actual existence and validity of the alleged defence, involving, also, the scope of the operation of the act of 1851, cannot be determined on an interlocutory motion, if the proceedings for removal have conformed to the statute. Such contest can be determined only on formal pleadings and proofs, in this court. Dennistoun v. Draper [Case No. 3,804]; Mayor v. Cooper, 6 Wall. [73 U. S.] 247. An order must be entered denying the defendant's motion, and stating that such denial proceeds solely on the ground that this court has no jurisdiction of the suit, and also dismissing the suit for want of jurisdiction.

## Case No. 7,486.

JONES v. OREGON CENT. RY. CO.

[3 Sawy. 523; [1] 8 Chi. Leg. News, 115.]

Circuit Court, D. Oregon. Nov. 30, 1875.

DEDIMUS, WHEN GRANTED—HOW ISSUED AND EXECUTED—COMMISSIONER TO EXECUTE DEDIMUS—CERTIFICATE TO DEPOSITION—OATH OF WITNESS—RETURN TO DEDIMUS.

1. Section 866 of the Revised Statutes gives the courts of the United States power to grant a dedimus to take the examination of a witness whenever in their judgment it may be necessary to prevent a failure or delay of justice; and sections 863–865 of said Revised Statutes, relating to taking depositions de bene esse have

[1] [Reported by L. S. B. Sawyer, Esq., and here reprinted by permission.]

no application to the granting or execution of said dedimus.

2. The mode of issuing and executing a dedimus granted in pursuance of said section 866 is regulated by "common usage" or practice, which usage or practice, as to this court, is prescribed by sections 807–809 of the Oregon Civil Code, relating to taking depositions on commission; and title 7 of chapter 9 of said Code, relating to taking depositions de bene esse does not apply.

3. A person appointed to execute a dedimus represents the court and not the parties; and his commission should contain full directions as to the manner of its execution, as set forth in section 809 of the Oregon Civil Code.

4. In certifying the deposition to the court it is not necessary for the commissioner to state when or where the examination of the witness was taken, nor by whom it was reduced to writing, or that the witness was "cautioned" before being sworn.

5. A witness examined under a dedimus should be sworn according to the law of the forum whence it issued.

6. Section 860 of the Oregon Civil Code having provided that an affirmation may be made by any person in place of an oath, a dedimus which authorizes the commissioner to administer an oath to a witness, is well executed in this respect when it appears from the return thereto that the witness was duly affirmed.

7. A return to a dedimus need not show how a witness was sworn or affirmed, if it states substantially that the witness was duly sworn or affirmed; nor is it material whether the facts required to be stated in such return are stated in the introduction or conclusion of the examination, if they are plainly referred to, and included by the commissioner in certifying the deposition as a part of the proceeding and return.

[This was a suit by Robert W. Jones against the Oregon Central Railway Company.] Motion to suppress deposition.

Joseph N. Dolph, for the motion.

Walter Thayer and Benton Killin, contra.

DEADY, District Judge. The defendant moves to suppress the deposition of Charles S. Hinchman, taken at the instance of the plaintiff herein, for the reason that the witness does not appear, 1. "To have been cautioned, sworn or affirmed according to law; nor, 2. "To have been examined upon the interrogatories attached to the commission;" and that said deposition does not appear, 1. To have been "taken, returned and certified according to law;" nor, 2. "Taken, certified and returned in accordance with chapter 9 of the Code of Oregon and the practice of this court."

On May 7, 1875, a dedimus potestatem, or commission, was issued by the clerk of this court to Samuel L. Taylor, of Philadelphia, giving him power to cause Charles S. Hinchman "to come before" him "at certain days and places to be appointed" by such commissioner, "and then and there" to take the examination of said "Hinchman on his corporal oath as a witness" in the above-entitled cause upon the direct and cross interrogatories thereto annexed; and also "to reduce such examination to writing, and certify and return the same annexed" to such commission "in a sealed envelope directed to the clerk" of this court "with all convenient speed." This commission was issued under section 806 of the Revised Statutes—the same being the final proviso of section 30 of the judiciary act of 1789 [1 Stat. 88], and sections 807–809, inclusive, of the Oregon Civil Code.

The examination of the witness was returned to this court in a sealed envelope on October 12, and published by order of the court on November 11. From the return, which is annexed to the commission, it appears that the deposition of the witness was taken in pursuance of the commission at the office of the commissioner in Philadelphia, on the fifteenth and twentieth days of July, 1875, the witness being first "duly affirmed according to law to testify the truth, the whole truth and nothing but the truth." It also appears that the witness, being so affirmed, did depose, in answer to the several interrogatories annexed to the commission, as stated in the deposition. So much appears from the statement of the commissioner preceding and introductory to the answers of the witness to the direct and cross interrogatories. The examination is signed by the witness and then follows a certificate of the commissioner, from which it appears that the witness, pursuant to said commission, came before him "on the days above specified," at 3 p. m. of each day, and "being duly affirmed according to law did testify in the above case as is found above"; and that the deposition was by him reduced to writing and subscribed in his presence. This motion appears to have been made under the apprehension that the provisions of section 30 of the judiciary act of 1789, now sections 863–865 of the Revised Statutes, regulating the taking of depositions de bene esse, apply to the examination of a witness upon a dedimus potestatem as authorized by the proviso to said section 30, now section 866 of the Revised Statutes, and that title 7 of chapter 9 of the Oregon Civil Code applies to depositions taken upon a commission as well as to those taken de bene esse. But this is a mistake. Neither sections 863–865 of the Revised Statutes, nor title 7 aforesaid, is in any way applicable to a deposition taken upon a dedimus or commission. The argument for so applying title 7 is founded upon the following clause in section 818 of the Oregon Civil Code: "A deposition taken, whether in the state or without, upon insufficient notice or otherwise, not substantially in conformity with the provisions of this chapter (chapter 9), may be excluded from the case, unless," etc.

Title 6 of the same chapter provides for taking the deposition of a witness, out of the state, upon a commission. In such case it is only necessary for the return of the commissioner to show that he administered

an oath to the witness and took his examination upon the interrogatories, or if there are none, in respect to the question in dispute. Section 109, Civ. Code Or. But title 7 provides for taking depositions de bene esse upon notice, and in such case section 815 requires the officer to certify many details as to the taking of the deposition, which are not required by section 809 in the case of depositions taken under a commission. Chapter 9 provides for two modes of taking depositions, the one upon commission and the other upon notice. A deposition taken in either of these modes is taken "in conformity with the provisions of the chapter," when it is taken in conformity with the provisions or title of the chapter relating to the taking of such a deposition.

To hold that all the provisions of the chapter are applicable to a deposition taken under either mode, would not only violate the plain significance of the clause in question, but make the statute an impracticable absurdity. Why go to the trouble of providing for two different modes of taking depositions, and then practically require them to be taken in the same manner in all cases—in effect in only one mode? It is not to be supposed that the legislature would provide different modes for taking depositions, in the case of witnesses without or within the state, and then declare that all the provisions applicable to either case should be complied with in the other, and there is nothing in the language of chapter 9 which gives the slightest countenance to such a conclusion. Therefore it is not necessary that the return should show on what days or times the examination of the witness was taken, nor who reduced it to writing. The commissioner is the agent or officer of the court. Gilpens v. Consequa [Case No. 5,452]. Power is given him to take the examination, and confidence is reposed in him that he will exercise this power according to the directions of the commission, which is his chart and guide. Neither do the provisions of the Revised Statutes, relating to depositions taken de bene esse, apply to this deposition. In Seargent's Lessee v. Biddle, 4 Wheat. [17 U. S.] 508, the supreme court held that depositions taken under a dedimus are not to be considered as taken de bene esse. To this same effect is the ruling in Nicholls v. White [Case No. 10,235].

Therefore it is immaterial whether the witness was "cautioned," or not, before being sworn as required by section 864 of the Revised Statutes, in the case of depositions taken de bene esse. Neither is it material that the return should show anything more than that the witness was duly sworn or examined upon his oath duly administered. Where an oath is required by the commission, if the law declares that an affirmation is equivalent, an affirmation is sufficient. Section 860 of the Oregon Civil Code provides that an affirmation may be made in place of an oath by any person who has conscientious scruples against taking the latter. The commission being an act of this court and the examination of the witness an exercise of judicial power through the intervention of its agent or officer, the commissioner, I think that the law regulating the proceeding in this court—the law of this state—controls the matter of how the witness should be qualified. On the other hand, if it should be held that the law of the place where the commission was executed would control in this respect, it can hardly be doubted that an affirmation is equivalent to an oath in the Quaker city of Philadelphia.

The objection that the witness was not examined upon the interrogatories, does not appear to be well founded in fact. As has been stated, the return shows that the witness deposed in answer to the first interrogatory as follows, giving the answer, and so on through all the series. This is found in the preamble or introduction to the deposition, and therefore it is contended that it is no part of the certificate to the deposition. Now the Code (section 809, supra) does not require a certificate to be appended to the examination of the witness, but only that the commissioner shall "certify the deposition to the court." This is sufficiently done when he certifies that the following or the foregoing or accompanying is the examination of the witness given upon his oath or affirmation by me duly administered, in answer to the interrogatories annexed to the commission, or as therein stated. Keene v. Meade, 3 Pet. [28 U. S.] 1. In this case the certificate appended to the examination states that the witness "testified in the above case, as is found above," that is, in answer to the interrogatories annexed to the commission. Indeed, the matter is too plain to waste words upon. The power to grant a dedimus to take the examination of a witness is given to this court, "in any case where it is necessary, in order to prevent a failure or delay of justice," by section 866 of the Revised Statutes. It is to issue "according to common usage," which is construed to be the rule or law governing the practice of the court in this respect at the time. Rhoades v. Selin [Case No. 11,740]. In this case that law is found in sections 807–809, inclusive, of the Oregon Civil Code. The mode of issuing the commission and the authority and directions to be contained in it are prescribed by these sections, and it is to be executed accordingly. But the cases in which it may issue are not prescribed by the local law but by the United States statute above cited. When it is necessary to grant a dedimus to prevent a failure or delay of justice, the court must determine either by a general rule or a special order in each particular case. It may become necessary to take the examination of a witness upon a dedimus as well within the state as without,

and in such a case it would be done although the local law does not authorize it. None of the objections made to this deposition are valid. It appears to have been taken in substantial conformity with the directions in the commission, and the motion to suppress it is disallowed.

JONES v. The ORPHEUS. See Case No. 8,330.

## Case No. 7,487.

JONES v. OSGOOD et al.

[6 Blatchf. 435; 3 Fish. Pat. Cas. 591.] [1]

Circuit Court, S. D. New York. June 4, 1869.

PATENTS — SPECIFICATIONS — DISTINCTION — INFRINGEMENT BY OFFICERS OF CORPORATION —INDIVIDUAL LIABILITY.

1. The specification of the letters patent granted to Samuel T. Jones, February 24th, 1852, for an "improvement in the manufacture of zinc white," includes in its claim what is found in the English letters patent, No. 11,964, granted November 16th, 1847, specification sealed and enrolled May 16th, 1848, to William Edward Newton, for "improvements in the mode or modes of manufacturing or preparing certain matters to be employed as pigments."

2. Although the Jones patent was extended by the commissioner of patents, on the 23d of February, 1866, and the question of its extension was vigorously contested before the patent office, yet, as the existence of the Newton patent was not then adverted to, and there never had been any trial, at law or in equity, on the Jones patent, in which the full bearing of the Newton patent on the invention of Jones had been thoroughly examined, this court refused to grant a provisional injunction restraining the infringement of the Jones patent.

3. The specification of the Jones patent does not properly distinguish, within the meaning of the sixth section of the act of July 4, 1836 (5 Stat. 119), what was invented by Jones from what is found in the Newton patent.

4. The defendants being three individuals, and the infringement committed by them having arisen solely out of their connection with a New Jersey corporation, and only one, O., of the three defendants being interested in the management of the corporation, at the time the motion for a provisional injunction was made, and no infringement having been committed out of New Jersey, where the manufactory of the corporation was situated, and O.'s only concern with the infringement being as a director of the corporation, and he being only one of several directors, and it not appearing that he could control the use, or direct the disuse, by the corporation, of the infringing apparatus, the motion was denied.

5. Whether, even if a majority of the directors of the corporation were parties defendant to the suit, the suit ought not to have been brought in New Jersey, where the corporation was located, and carried on its business, quere.

[This was a motion [by Martha M. Jones, administratrix of Samuel T. Jones, deceased] for a provisional injunction, to restrain defendants [Franklin Osgood and others] from infringing letters patent [No. 8,756] for "improvement in the manufacture of zinc white," granted to Samuel T. Jones, February 24, 1852, extended by the commissioner of patents, February 23, 1866, for seven years from February 24, 1866, but declared by act of congress, approved July 3, 1868 [15 Stat. 15], to be duly extended for seven years from July 23, 1864, the date of the expiration of an English patent granted to the inventor for the same invention. The alleged infringement consisted in the manufacture of zinc by the Bartlett Zinc Company, a corporation doing business in the state of New Jersey, where, if anywhere, the alleged infringement took place. Defendant Osgood was president and one of several directors of said company, and was the only one of the defendants, at the time of the hearing, connected with or interested in the management of the corporation.

[The claim of the complainant's patent was as follows: "What I claim as my invention, and desire to secure by letters patent, is the use of a porous or fibrous bag or receiving chamber, with porous sides or bottom, or an air-tight chamber with a straining or porous bag adapted to the inside thereof, and used in connection with either a blowing or exhausting apparatus, so that the products of the distillation and oxygenation of zinc or other volatile metals may be separated from the accompanying air and gases, which latter will be forced or otherwise drawn through the pores of the cloth bag or chamber, and escape into the atmosphere."

[The claims of Newton's English patent were as follows: "First. The distillation of metallic zinc, or of oxide of zinc, or of zinc ore, by any of the means above-mentioned. Second. The application of furnaces similar to glass furnaces, reverberatory furnaces, and coke ovens, as above described, and the modifications of them respectively, in order to fit them for the purpose of manufacturing zinc white. Third. The novel construction of furnace for this purpose, above described, and shown in sheet III of the accompanying drawings. Fourth. I claim isolating the retorts from each other, and also cutting off the communication between the retorts and the oxidizing chamber, when required, whatever means may be employed to effect that object. I do not confine myself to the apparatus shown for the purpose, as I have done so merely for the purpose of illustration. Fifth. The employment of suitable apparatus for cleansing the mouths of the retorts, without being obliged to enter the oxidizing chamber. Sixth. The arrangement of apparatus shown and described, or any modification thereof, by which the retorts may be charged, cleaned, and replaced, or submitted to any operation required, without interfering with the oxidizing chamber. Seventh. The application or employment of blast furnaces for the production or manufacture of

[1] [Reported by Hon. Samuel Blatchford, District Judge, and by Samuel S. Fisher, Esq., and here compiled and reprinted by permission. The syllabus and opinion are from 6 Blatchf. 435, and the statement is from 3 Fish. Pat. Cas. 591.]

zinc white or oxide of zinc, whether such furnaces are circular or of any other suitable form, and whether they are constructed and arranged in a vertical, inclined, or horizontal position. Eighth. The employment or introduction of currents of air into an oxidizing or other chamber, for the purpose of converting the metallic vapors of zinc into zinc white or oxide of zinc; also, the employment of an exhausting tube or blowing apparatus for conducting the metallic vapors to the oxidizing chamber, as above shown and described. I claim, also, the employment of wire gauze or sieves for sifting the products; also, the arrangement of vessels for receiving the heaviest portion of the products. Ninth. The arrangement of the oxidizing chambers so as to allow of the products being collected from them without the necessity of entering the said chambers. Having now described all that relates to the manufacture and manner of collecting zinc white, I will proceed to an explanation of that part of the invention which relates to the other colors, viz: yellow of zinc and green of zinc. Zinc yellow—As the manufacture of this substance forms the subject of a previous patent, I will merely remark that hydrochloric acid may be used instead of sulphuric acid. Zinc green—Yellow having been produced by the patented process, is diluted with a suitable quantity of water, and mixed with a certain quantity of Prussian blue (previously mixed with a suitable quantity of water, oil, or other appropriate liquid) either in a hot or cold state. Green of zinc will thus be formed, the color of which will be as durable as the blue itself. The above substances may be employed for painting of any kind, or for any other purposes for which white lead or other pigments are usually employed."][2]

C. A. Seward, C. M. Keller, E. W. Stoughton, and Geo. Gifford, for complainants.

A. J. Todd, T. C. T. Buckley, E. Pierrepont, and B. R. Curtis, for defendants.

BLATCHFORD, District Judge. Various interesting questions were discussed on this motion, but, in the view I take of the case, it is unnecessary to refer to many of them, as there is one ground that is fatal to the motion. The specification of the patent is, I think, so broad as to include what is found in the prior patent, granted in England, November 16th, 1847, No. 11,964, and the specification of which was sealed and enrolled May 16th, 1848, to William Edward Newton, for "improvements in the mode or modes of manufacturing or preparing certain matters to be employed as pigments." The question of the extension of the Jones patent was vigorously contested before the patent office, but the existence of the Newton patent does not seem to have been adverted to. There never has been any trial, at law or in equity, on the Jones patent, in which the full bearing of what is found in the Newton patent on the invention of Jones has been thoroughly examined. The question, as between those patents, is now presented to me in the unsatisfactory form of ex parte affidavits, on both sides, without the benefit of a sifting of the testimony by cross-examination. From the most careful examination which I have been able to give to those affidavits, in connection with the specification of the Jones patent, I cannot resist the conclusion, that that specification, as now drawn, covers, in its claim, things which are found in the Newton patent. The specification is, also, open to the kindred objection, that it does not properly distinguish, within the meaning of the 6th section of the act of July 4, 1836 (5 Stat. 119), what was invented by Jones from what is found in the Newton patent. I by no means intend to say that there is not, in what Jones really invented, something which may lawfully be patented, by a properly drawn specification,' even in view of what is found in the Newton patent.

Independently of the foregoing views, I should hesitate long before granting a provisional injunction in this case. It is shown that whatever infringement has been or is being committed by any of the three defendants on the plaintiff's patent, has arisen solely out of their connection with a New Jersey corporation, called the Bartlett Zinc Company, of which the defendant Osgood is president and a director, and of which the defendants Bartlett and Reid are not directors, although Bartlett has heretofore, and, perhaps, since the commencement of this suit, been a director of it, and Reid was a director of it prior to the commencement of this suit, and is now secretary of it. The defendant Osgood is shown to be the only one of the defendants who is now connected with, or interested in, the management of the corporation. No infringement has been committed out of the state of New Jersey, where the manufactory of the corporation is situated. The patent is for the use of a certain apparatus in the collection of the products of the distillation or oxygenation of zinc and other volatile metals. It does not cover the use or sale of such products, when collected. Osgood's only concern with the infringement is as a director of the corporation, and he is only one of several directors. It does not appear that he can control the use, or direct the disuse, of the apparatus by the corporation. The intendment would be to the contrary, as he is but one of several directors. It cannot fairly be said that the apparatus used by the corporation, in New Jersey, is used under the direction, management, and superintendence of Osgood, within the meaning of the case of Goodyear v. Phelps [Case No. 5,581]. It ought to appear that Osgood has power alone to direct the use or the disuse of the apparatus, or, at least, a majority of the directors ought to be parties to the suit. And even then, it would

[2] [From 3 Fish. Pat. Cas. 591.]

be questionable whether the suit ought not to be brought in New Jersey, where the corporation is located, and carries on its business. Goodyear v. Chaffee [Id. 5,564]. The motion for an injunction is denied.

JONES v. OSTRANDER. See Case No. 7,481.

JONES (OTTS v.). See Case No. 10,619.

## Case No. 7,488.

JONES v. PENSACOLA.

[6 Chi. Leg. News, 264.]

Circuit Court, N. D. Florida. 1873.

MUNICIPAL CORPORATION — REORGANIZATION UNDER STATUTE—POWER TO DISSOLVE MUNICIPAL CORPORATION.

1. The corporation, the city of Pensacola, which issued the bonds in question has been dissolved, and the defendant corporation, the city of Pensacola, is a new corporation, and not responsible for the debts of the old.

2. The city of Pensacola, having surrendered its charter and organized under the general law, the surrender worked a dissolution of such corporation.

3. The legislature may and has power to dissolve a municipal corporation.

[This was a bill in equity, brought by Samuel G. Jones against the city of Pensacola, to enforce the payment of certain bonds. Defendant demurred.]

FRASER, District Judge. The bill in this case is filed to enforce the payment of the contents of four hundred and eighty-two coupons of $17.50 each, for interest upon bonds issued by the city of Pensacola, in conformity to its charter, approved March 2, 1839, and the amendments thereof. The legality of the issue of said bonds is not denied. A demurrer for want of equity is filed to the bill. In support of the demurrer it is contended: 1. That the complainant has a plain, adequate, and complete remedy at law. 2. That said corporation has no legal authority to levy a tax. 3. That the corporation, the city of Pensacola, which issued the bonds, has been dissolved, and the defendant corporation, the city of Pensacola, is a new corporation, and is not responsible for the debts of the old. The bill does not allege that any assets of the old corporation remain, out of which any part of the debt can be made.

It will be well, first, to consider the last ground of demurrer, for if the debtor corporation no longer exists, then this court has no jurisdiction, there being no defendant against whom it can proceed to make or enforce a decree. The 30th section of the act, approved August 6, 1868 (Laws Fla. 1868, p. 118), provides that "it shall be lawful for any previously incorporated city to re-organize its municipal government under the provisions of this act, by a voluntary surrender of its charter and privileges, and by an organization under this act." The city of Pensacola, as organized under this charter of March 2, 1839, did voluntarily surrender such charter, and organized a city government by the same name, under the act of 1868, in compliance with the 30th section thereof. The 32d section of the act of 1868 repeals all laws conflicting with said act. The city of Pensacola having surrendered its charter under the act of 1839, did that surrender work a dissolution of such corporation? Did the act of 1868 create a new corporation; or was an organization under that act a prolongation and continuation of the old? One of the modes by which a corporation may be dissolved, is by the surrender of its "franchise of being a body corporate." Such franchise is created by charter, and the surrender of the "charter and privileges" as required by the act of 1868, is tantamount to a surrender of such franchise. Upon such surrender accepted by the king in England, or authorized by the legislature in this country, a corporation is dissolved. Willcock, Mun. Corp. pt. 1, § 852. When once dissolved, it can not be revived. Any subsequent grant must operate as a new creation. Id. §§ 858, 875. Though the surrender of the old charter, and the organization under the new, may have been made so nearly together that the acts appear to be simultaneous, yet the right to organize under the new grant is made dependent upon the surrender of the old; and there must have been a moment when the thread of perpetuity was broken, and being once broken, the spinning of a new thread can not make both one. The organization under the new charter must be considered a new creation, and not a revival of the old grant, which was surrendered and repealed. Such was clearly the intention of the legislature, as drawn from the words of the act. Though such legislation may be reckless and inconsiderate, the language of the act is too plain to admit of any other judicial interpretation.

On the 4th of February, 1869, the legislature enacted another law [Laws Fla. 1869, p. 28], the 30th section of which is nearly identical with the 30th section of the act of August 6, 1868, and provides that "it shall be lawful for any previously incorporated city or town to re-organize their municipal government under the provisions thereof, by a voluntary surrender of their charters and privileges, and by an organization under this act; and upon a failure of any incorporated town or city to accept the provisions of this act within nine months after its approval, all the acts vesting such city or town with power, are hereby repealed." The city of Pensacola, as organized under the act of 1868, did not surrender its charter and privileges, and re-organize under the act of 1869, therefore, at the expiration of nine months after the approval of the said act of 1869, the act of 1868, which vested said city with power, was repealed. The act vesting the city with

power being repealed, the corporation was dissolved—for we can no more conceive of a corporation without a charter and without power, than we can of a human existence without life. The right to exercise corporate powers is the very life of a body politic, and no corporation can exist without it. The 32d section of the act of 1869 further provides "that the act entitled an act to provide for the incorporation of cities and towns, and to establish a uniform system of municipal government in the state, approved August 8, 1868, and all laws and parts of laws conflicting with the provisions of this act, be, and the same are hereby repealed." The 30th section of the act of 1869, is in the nature of an exception to the 32d section, and suspends the operation of the same for nine months in the case of previously incorporated towns and cities, and prolongs the existence of the corporation of such towns and cities for nine months after the approval of said act; but upon the failure on the part of such towns and cities to accept said act within nine months, all acts conferring corporate powers upon such towns and cities, are repealed; and such repeal ipso facto dissolves the corporation. A corporation may exist, but from neglect to elect officers, or from some other cause, may be incapable of exercising the power which the law has conferred upon it, then it is said to be suspended. But when all the power with which it is clothed by the legislature is taken away, it can no longer exist. Such a repeal of all laws vesting it with power, destroys its being and works its absolute dissolution. That the legislature may and has, power to dissolve a municipal corporation, there can be no doubt. "Towns being mere organizations for public purposes, are liable to have their public powers, rights and duties modified or abolished at any time, by the legislature." East Hartford v. Hartford Bridge Co., 10 How. [51 U. S.] 534; Dartmouth College Case, 4 Wheat. [17 U. S.] 629, 630; [Piqua Branch, etc., v. Knoop] 16 How. [57 U. S.] 380; [Bissell v. City of Jeffersonville] 24 How. [65 U. S.] 295; 2 Kent, Comm. 275. On the 3rd of February, three months after the said corporation ceased to exist, the legislature passed an act as follows: "Whereas the legislature of this state, by the passage of an act entitled, 'An act to provide for the incorporation of cities and towns, and to establish a uniform system of municipal government in this state,' approved February 4, 1869, did not intend said act to affect the organization of any city or town made under or by virtue of an act entitled 'An act to provide for the incorporation of cities and towns, and to establish a uniform system of municipal government in this state,' approved August 4, 1868, therefore, the people of the state of Florida, represented in senate and assembly, do enact as follows: Section 1. That all acts, doings and proceedings, made and had, or hereafter to be made and had, by any mayor, board of councilmen, or any other city officer, in any city of this state organized in pursuance of 'An act entitled an act to provide for the incorporation of cities and towns, and to establish a uniform system of municipal government in this state,' approved August 4, 1868, and while in performance of their duties under said organization, are hereby declared to be legal and valid." There is no act of the title mentioned which was approved August 4, 1868. The act intended is the act of that title, approved August 6, 1868.

The act of February 3, 1870, is a statute of explanation, and such statutes "shall be construed only according to the words, and not by any manner of intendment, for it is incongruous, it is said, for an explanation to be explained." "When one act is made explanatory of another, the court cannot carry the explanation farther than is expressed in that act; it must be construed precisely, and no new interpretation can be made of it." Dwar. St. 730. The 13th section of the 4th article of the constitution of this state, provides that "the enacting clause of every law shall be as follows: 'The people of the state of Florida, represented in senate and assembly, do enact as follows.'" The preamble of an act can in no sense have the force of a law. If, therefore, we construe the enacting clause of this act strictly by its words, it simply declares legal and valid all acts, doings and proceedings of the mayor, councilmen or other officer of the city of Pensacola, as organized under the act of August 6, 1868, made and had, or thereafter to be made and had, by said officers, and while in the performance of their duties under said organization. Now we have seen that the said organization ceased to exist on the 4th day of November, 1869. Said officers can not be held to be in performance of their duties after that time, under said organization, and we have also seen that this act can not revive the said organization, and can not be so construed. The defendant corporation, the city of Pensacola, was organized on the 26th day of December, 1870, "under those provisions of the act of 1869, relating to communities in which there was no pre-existing corporations."

It is the inevitable conclusion, then, that the defendant corporation, the city of Pensacola, is not the same corporation which issued the bonds in question, and is not responsible for them. "If the old corporation be revived, all the rights and responsibilities are revived with it; but if the grant operate as a new creation, it can not be subject to the responsibilities of the old corporation." Ang. & A. Corp. § 780; Colchester v. Seaber, 3 Burrows, 1866; Rex v. Pasmore, 3 Term R. 240 et seq. In Mumme v. Potomac Co., in delivering the opinion of the court, Mr. Justice Story says: "A corporation, by the very terms of its political existence, is subject to dissolution by a surrender of its corporate franchises, and by a forfeiture of them for a willful misuser and non-user. Every creditor must be presumed to understand the nature

and incidents of such a body politic, and to contract with reference to them." "For there is no pretense to say that a scire facias can be maintained and a judgment had thereon against a dead corporation, any more than against a dead man." 8 Pet. [33 U. S.] 286, 287. The city of Pensacola, the corporation which issued the bonds and created the debt which is the subject matter of this suit, has been twice superseded and may be said to be doubly dead. There is, therefore, no party in being against whom any proceedings can be had to recover the debt. This court can make no decree for its payments upon the case made by the bill. The demurrer must be sustained and the bill dismissed for want of equity.

## Case No. 7,489.

JONES v. The PHOENIX.

[1 Pet. Adm. 201.] [1]

District Court, D. Pennsylvania. 1800.

SEAMEN'S WAGES—EVIDENCE—ENTRY IN LOG-BOOK—DESERTION.

1. The entry in the log-book is not conclusive evidence, and is to be admitted in support of no circumstances but those stated in the act of congress [April 23, 1800; 2 Stat. 48].

[Cited in The Martha, Case No. 9,144; Knagg v. Goldsmith, Id. 7,872.]

2. The captain is responsible to the seamen for wages, and therefore not a competent witness in suits for wages by mariners.

[Criticised in The Trial, Case No. 14,170. Cited in The William Harris, Id. 17,695; The Fortitude, Id. 4,953.]

The log-book was offered as incontrovertible proof of desertion by a sailor. The captain, in the absence of the mate, was produced to prove the entry, and other facts.

BY THE COURT. The log-book is, by act of congress, made legal evidence in proof of desertion, but is not incontrovertible and conclusive. It ought not to be admitted to any fact, but that in which the act of congress permits it to be evidence. Independent of the plain construction of the act, there are other objections. I have seen attempts to deceive by such entries. In one case it was proved before me, that the captain had made an entry in the log-book, in a blank accidentally left by the mate, of a seaman's desertion. On a careful and clear investigation it was proved that the entry was false in point of fact, and calculated to gratify a malicious, personal antipathy. I have generally been averse, as I am in this case, to admitting masters of ships as witnesses, in disputes with mariners. I do not believe, or suspect, that masters of ships are liable to any more or peculiar objections, than any other class of citizens. But it so happens, from their situation, that differences and disputes, and consequently strong prejudices, most commonly originate between the master and mariners; and the merchant is governed by the master's representation. The master is personally liable for wages, though the seaman may proceed in rem, against the ship, or in personam, against the owner. It is his interest to throw the responsibility off himself. If the vessel is not valuable enough to discharge the lien, or the owner is in bad circumstances, and the master solvent, he must pay the debt. Instances have not been wanting in this court where unjustifiable endeavours have been made, by masters, to charge the ship with seaman's wages. In some cases, where funds had been furnished and misapplied; in others, to secure themselves. But suppose the master's testimony given in a proceeding in rem, and a decree on the merits against the demand, the success of the seamen in a prosecution in personam thereafter, if their circumstances permitted further proceeding, would be hopeless. I would not be understood, so to apply particular instances, as to affect general character or principles, but a practice liable to great abuses, ought to be avoided, and other testimony may be procured. The law removes from testimony, persons even remotely interested; especially where their testimony is not the only proof which can be obtained. Having, on the admiralty side of this court, to judge of both competency and credit, I wish to avoid exposing myself to the painful task, of rejecting testimony for want of credit. Although I might not be often placed in this predicament, yet such a situation might occur. The line between competency and credit is often imperceptible, and difficult to draw.

[1] [Reported by Richard Peters, Jr., Esq.]

## Case No. 7,490.

JONES et al. v. The RATLER et al.

[Taney, 456.] [1]

Circuit Court, D. Maryland. Nov., 1841.

LIEN FOR REPAIRS TO VESSEL—OWNERSHIP—BURDEN OF PROOF.

1. On a libel against a vessel owned by residents of New York, and against her owners, for materials furnished such vessel at the city of Baltimore, partly before, and partly after she came into their possession: *Held*, that as the vessel was previously owned by a resident of Baltimore, the materials furnished her, whilst so owned, were no lien.

2. But materials furnished after the change of ownership, at the request of the master and former owner, under whose charge the vessel was fitted out, were a lien upon her, unless it be shown that they were furnished on credit of the master. And the burden of proof as to this fact was on the libellants.

[Appeal from the district court of the United States for the district of Maryland.]

The libel in this case was filed in admiralty, on the 29th of August, 1834, stating that between the months of January and August, 1834, at the special instance and request of the agent of the owners of the brig Ratler,

[1] [Reported by James Mason Campbell, Esq., and here reprinted by permission.]

the libellants [Francis Jones, surviving partner of John Craig, and others] furnished and provided various materials necessary and proper for said brig, and for her safety and navigation on the high seas, the times when and amounts whereof were more particularly specified in a schedule annexed to said libel, and prayed to be taken as a part thereof. That at the times when such materials were furnished, said vessel was a foreign vessel belonging to Oakley & Roome, of the state of New York, and that the libellants had a lien on said vessel for such materials, enforceable by this court. That they had often applied to said owners for the payment of the balance due on said schedule or account, but said owners had always refused to pay the same. The libel prayed for the usual process, and that the vessel might be sold, and the proceeds applied to the payment of the libellants' said debt.

The defendants [Charles Oakley and Edward Roome] in their answer denied that the libellants, between the periods mentioned in the libel, provided said materials at the request of the defendants; they admitted that they had been the owners of said brig since the 19th of April, 1834; that they believed that not more than thirty dollars of value of the said bill was furnished by the libellants for the use of said brig, and they insisted that the small amount, if any, which was furnished for the use of the said brig, was furnished upon the personal credit, which the master, under whose charge she was fitted out, had with the libellants, and especially with Francis Jones, one of them, with whom the said master, Wm. H. Trott, was upon the most intimate and friendly terms; that the defendants did not know the libellants, and they denied that they, or either of them, or any one for them, requested the libellants to perform any work on the brig, or to furnish any materials for her use, and they denied that, to their knowledge, the libellants performed any work or labor on the said brig, or furnished any materials or other things necessary for her or for her use, unless they furnished some small amount of not more than thirty dollars in value, which the respondents did not admit, but left the libellants to prove the same.

The account filed with the libel was for $242 70, to which was annexed an affidavit of Francis Jones, one of the libellants, "that the within account is just and true, as stated, and that he hath not, nor hath his co-partner, or any other person for said firm, received any part or parcel of, or security or satisfaction for the same, to his knowledge." A deposition of the master, William H. Trott, was filed, in which he stated, that he had a running account with said libellants for such materials and supplies as, from time to time, he required in the course of his business; such materials and supplies being furnished exclusively by them, upon his personal credit. That none of the stores on said bill were for the brig Ratler, except the last item for $13 36; that he did not do anything with her, until six weeks before she was libelled by the libellants; that his whole account with the libellants for supplies and materials, for several vessels that the deponent had had under his charge, was between two and three thousand dollars; and that the brig Ratler was the property of Oakley & Roome, of New York, from some date in April, 1834; that the outfit she required was entirely furnished by them; he further said, that the anchor mentioned in said account was paid for by him in exchange, by giving another; what he did on the Ratler, he did as agent of Oakley & Roome, by virtue of a power of attorney. This deposition was taken by consent, to be used as evidence on the part of the claimants of the brig, so far as the same contained legal evidence; the other facts proved will appear from the opinion of the court. The decree in the district court was in favor of the libellants, and on appeal taken, the case was argued in the circuit court.

D. Stewart, for appellants.
R. Johnson, for appellees.

TANEY, Circuit Justice. The libel in this case was filed in the district court for the district of Maryland, against the brig Ratler, to recover the value of necessary materials, furnished by the libellants, for the purpose of fitting her out, at the port of Baltimore; the libel charging that she was a foreign vessel, the owners residing in the city of New York.

The claimants admit, in their answer, that they became the owners of the brig on the 19th day of April, 1834, and that they reside in New York, and insist, that the materials furnished after they became owners, was a very small amount, if any; and they insist, that they were furnished on the personal credit of the master, under whose charge the brig was fitted out. Various items, necessary for the equipment of the vessel, are charged in the libellants' account, which begins on the 21st of February, 1834, and ends on the 15th of July in the same year.

The evidence offered, proves that the vessel was owned by William H. Trott, of the city of Baltimore, until the time mentioned in the answer of the claimants, and the materials furnished during that period are, consequently, no lien upon the brig.

But the claimants, having admitted in their answer, that they became the owners of the brig on the 19th of April, 1834, and were residents of the city of New York, and that the materials were furnished at the request of the master, under whose charge the vessel was fitted out, the materials furnished during that period are, undoubtedly, a lien upon her, unless the claimants can substantiate their allegation, that they were furnished on the credit of the master; the burden of proof, as to this fact, is on them. The

only witness who testified to this fact, is the master himself; but every witness examined, proves him to be unworthy of credit on oath; this testimony, therefore, must be disregarded. The conversations with one of the libellants, as given in evidence by another witness for the claimants, show no intention to waive any lien the libellants had on the brig.

The books of the libellants have been called for, and used and made evidence by the claimants, and they show that necessary materials of the value of eighty-one dollars and thirty-six cents, were furnished after the claimants became owners; and allowing them a credit of ten dollars for an old anchor, as proved by the testimony, a balance of seventy-one dollars and thirty-six cents was due for these materials on the 15th of July, 1834, which is a lien upon the vessel; and the court proceed to decree accordingly. The brig, it appears, was delivered, upon stipulation, to the claimants by the district court.

Decree for $71 36, each party paying their own costs.

## Case No. 7,491.

JONES et al. v. The RICHMOND.

[28 Hunt, Mer. Mag. (1853) 709.]

District Court, S. D. New York.[1]

SALVAGE—WHEN NECESSARY—SALE OF CARGO—WRECK—POWER OF MASTER.

[1. The sale of the cargo of a vessel by the master, to be valid and binding on the owners, must be bona fide, and under circumstances of extreme necessity, and for the benefit of all concerned. The Sarah Ann, Case No. 12,342, followed.]

[2. The master of a whaling vessel wrecked in Behring's Strait, having no means of storing or saving his cargo, after posting notices on two other whalers which had come to the scene, sold by a disinterested person, at auction, sufficient of the cargo to fill them up. *Held* a case of extreme necessity, and that the sale was valid and binding on the owners.]

[See note at end of case.]

[3. In the absence of fraud or collusion, the fact that the masters of the wrecked vessel and one of the other vessels were brothers would not invalidate the sale.]

[4. It having been agreed at the sale that payment should be made at the Sandwich Islands, it was immaterial that no money passed at the time of sale.]

[5. The portion of the cargo sold having been actually delivered, the fact that there was no memorandum or formal bill of sale was immaterial.]

[6. Nor was it material that no entry of the sale was made upon the log book.]

[7. The transaction was not a salvage service on the part of the purchasers.]

[See note at end of case.]

[This was a libel by Walter R. Jones and others, owners of the ship Richmond and cargo, against the cargo, to recover the same. Similar libels were instituted in Cases Nos. 7,492 and 11,797.]

[1] [Reversed by circuit court (case unreported). Decree of circuit court reversed in 19 How. (60 U. S.) 150.]

The libelants were the owners of the ship Richmond and her cargo, Philander Winters, master. She sailed in July, 1846, from a place called Cold Spring, L. I., on a whaling voyage, and having been out over three years, was about to take up her homeward voyage, with nearly a full cargo of oil and bone; and having fallen in with a dense fog, on the 2d day of August, 1849, she struck on the rocks, and was there wrecked to such an extent that she could not be got off, and eventually she became a total wreck. The place of this misfortune was in or near Behring's Strait, at about latitude 66° north. It was not until the year preceding this disaster that the Arctic Ocean was known as good fishing ground. While cruising in that vicinity, the ship Richmond found the object of her pursuit abundant and quite easily captured. The ship Superior, of Sag Harbor, Capt. Royce, Master, has the honor of this discovery, and was the first ship to take whale in the waters of the Arctic Sea. Only two months in the year are these waters open to the bold navigators, while during the residue of the year these waters are sealed up by ice as impenetrable as the Rocky Mountains, upon their borders. On the 2d day of August, 1849, a short time before these seas were to be closed for that season, Captain Winters found his ship Richmond on the rocks, with water rushing into her until she was filled within eighteen inches of her plank deck. Still he did not abandon her, but kept lawful and actual possession, going with his boat to and from shore, a distance of about half a mile each way. His first impression must have been to have effected a landing of as much of his cargo of oil and bone as might have been practicable, but then he had no means of protection. The spot was a thousand miles from the face of civilized man, and the natives in that region were savages according to the worst import of the term, and to land the cargo within their reach, would prove as destructive as if left to the winds and the waves. Such was the condition of the ship Richmond, when, on the 4th day of August, 1849, two other ships hove in sight, and coming within hail, proved to be the Elizabeth Frith, Jonas Winters, master, and the Panama, F. M. Hallock, master. The masters of these two ships were called to view the condition of the Richmond, and, not being full, the master of the Richmond proposed a sale of oil and bone from his ship, in quantities sufficient to fill up each of those ships. And the master of the Richmond put up a written notice upon the masts of those two ships, the Elizabeth Frith and the Panama, that the oil and bone of the Richmond's cargo would be sold at auction, on board the Richmond, on the 8th of August, 1849. The notice having been so posted up four days, a disinterested person was designated as auctioneer by the master of the Richmond, and he then and there sold at public auction oil and bone as follows:—To

the master of the Panama 18,000 gallons of oil, at 75 cents per barrel, and 3,000 lbs. of bone. And to the master of the Elizabeth Frith 600 barrels (18,860 gallons) of oil, at $1 per barrel, and 6,000 lbs. of bone. These several quantities of bone and oil filled up the two last ships so that no more could be taken, and in order to receive this much, the Elizabeth Frith was obliged to throw overboard shooks and bread to the value of $800, and in like manner the Panama was obliged to throw overboard shooks and bread to the value of $500, to make room for the oil and bone. The oil and bone were delivered and taken out of the Richmond, and stowed in the respective ships, Elizabeth Frith and the Panama, with which these two ships returned home, bringing from the Richmond her master and crew. Five days from thence the master of the Richmond died, while on the passage to the Sandwich Islands, where, according to the terms of the sale, the oil and bone were to be paid for, to the master of the Richmond. There was no bill of sale executed by the master of the Richmond, and no security given by either of the purchasers. The auctioneer kept the only memorandum of the quantity sold to each purchaser. When taken out of the Richmond, the oil and bone were stowed indiscriminately with other oil and bone in the Frith and Panama, and on their arrival home the entire cargo of each ship was sold, together, amounting in all to a little short of $50,000.

The present libel is instituted by the owners of the ship Richmond against the owners of the Elizabeth Frith and the Panama, and they seek to recover the value of the oil and bone in the home market, to wit, in New York, yielding the right of the claimants to deduct therefrom such sum or sums as may be deemed just and reasonable for salvage service. It is not material to state the allegations contained in the libel, nor is it essential particularly to point out the admissions or allegations contained in the several answers of the claimants, as spread upon the record. It is sufficient that it should now appear that the claimants set up the sale made by the master of the Richmond, on the 8th of August, 1849, as the foundation of their title to the oil and bone taken from the Richmond and transferred to their ships respectively. And the claimants rest their defense on the grounds that the sale was made under circumstances of extreme necessity, for the good of all concerned; and that the sale was bona fide and valid, as against the owners. On the other hand, the libelants deny that the master had authority to sell the cargo, and insist that the property, in the cargo still remains in them; admitting, at the same time, that the court now, on the pleadings and evidence of the case, may award salvage to the claimants, but insist on a decree for the balance in the names of the claimants.

The statement of the controversy, thus far, puts the claimants in the affirmative, and it is incumbent on them to sustain their title to the property by the rules of law. To do that, they say:

I. The ship and cargo were wrecked and irrecoverably lost, within twenty or thirty days of the period when polar ice would inclose that whole region for ten months of the coming year. She was 27,000 miles from her home port, and no vessel could be found to take her cargo on freight or salvage on so long a voyage.

II. The sale was bona fide, and there cannot be shown any want of integrity of motive on the part of the master of the Richmond in making the sale. Howland v. Two Hundred and Ten Barrels of Oil [Case No. 6,801]; 6 Owen, 271.

III. There being no other method of saving any thing from the ship, the master had authority, as agent for all concerned, constituted by the necessity of the case, to save what he could from inevitable annihilation by means of the sale. Abb. Shipp. (5th Am. Ed.) pp. 14, 19, and note to page 19; The Sarah Ann [Case No. 12,342]; New England Ins. Co. v. The Sarah Ann, 13 Pet. [38 U. S.] 387.

The points taken by the libellants were as follows:

I. The pleadings admit the ownership and title of the claimants to the cargo of the Richmond, subject only to the question, whether the alleged sale was valid. The burden of proof to show a valid sale is upon the claimant.

II. The service rendered was essentially a salvage service, and the sale was invalid. The vessel was an acknowledged wreck; and under this head, the counsel of the libelants assign the following reasons for the purpose of invalidating the sale: 1. The master and crew abandoned the ship, and sought a passage home on any terms. 2. This was no proper place for a sale. 3. There was no waiting for purchases. 4. This was no market. 5. No money required or paid. 6. There was no written entry, bill of sale, or memorandum of the sale. 7. No counting or measurement except by the pretended purchasers for their own purposes. 8. There was a considerable portion in possession of the salvors on board the Elizabeth Frith at the time of the sale. 9. The whole was in their absolute power. 10. No actual change of possession. 11. No single circumstance to change the case from the ordinary one of wrecked property in danger of being lost. The rules of law applicable to the principles are familiar. See The Emulous [Case No. 4,480]; Bearse v. Three Hundred and Forty Pigs of Copper [Id. 1,193].

III. The master in this case did not rightfully exercise any such powers of sale as he is, under some circumstances, entitled to exercise; the voyage being broken up. 1. The auction was without competition. 2. No notice given to any other vessels. 3.

The whole transaction was a combination, and if not so in fact, yet too much exposed to abuse to be permitted or sanctioned. 3 E. C. L. 215; 8 E. C. L. 309; Pope v. Nickerson [Case No. 11,274]; 2 Nev. & M. 303, 317, 328; The Tilton [Case No. 14,054]; The Sarah Ann [Id. 12,342].

IV. The sale of the bone with the oil was of itself sufficient to impair the whole sale.

V. The ship, including boats, sails, anchors, &c., were sold for $5 only.

VI. This is a question of salvage and of its proper adjustment. Brevoor v. The Fair American [Case No. 1,847]; The Emblem [Id. 4,434]; 1 W. Rob. Adm. 331; 3 Hogg. Adm. 422; Park, Ins. 304; The Centurion [Case No. 2,554]; Butterworth's Case [Id. 2,251]; Joy v. Allen [Id. 7,552].

VII. There was no serious danger.

VIII. There was no saving of life connected with the service.

IX. It must be either a sale or a salvage. The Emulous [Case No. 4,480]; The Tilton [Id. 14,054].

X. The sale was not bona fide. 1. Not two parties. 2. The buyer was brother to the seller. 3. The public auction was a farce. 4. There was no time of payment. 5. The entry of the party buying in his private books was not enough. And 6. No entry in the log-book.

Mr. Moore and D. Lord, for libelants.
Hoxey & O'Connor, for claimants.

BY THE COURT. The preceding statement of this cause, and the singular ability with which it has been conducted by the learned counsel, mark it as one of great importance. The amount in question is of no small consideration. The principle involved, and the facts in evidence, tend to magnify the deep interest of the parties concerned, as well as the bearing it may have on the commerce and navigation of the country. The great question to be decided in this case is the effect of the sale made by Captain Winters on the 8th of August, 1849. If that sale was a valid one then these libelants are not entitled to a decree and as a necessary consequence the libel must be dismissed. But, on the contrary, if the sale was invalid, the libel must be sustained, and in that event other questions will be open for discussion. The learned counsel have given to the subject so thorough an investigation, that the duties of the court, are rendered much less arduous than they otherwise might have been.

Having alluded to the principle involved, I proceed now to state that principle more at large, and apply it to the facts of the case. Does the law afford the master of a vessel power, under any circumstances, to sell the cargo; and if so, under what circumstances may that power be exerted by the master? Recurring to the early cases in admiralty, the English courts may have held the question in doubt, and, perhaps, we are authorized in saying that the power was denied altogether; but in later years it has been decided otherwise, and in disposing of this case, it may not be important to extend our inquiry beyond the period when, in this country, all doubts have been swept away, and the law on this subject has been settled, too well settled to admit of doubt or difficulty. I will state in the most concise manner possible, what may be considered thus settled. The sale must be bona fide, without fraud or collusion, and under circumstances of extreme necessity. Although in some of the leading cases, language less strong and emphatic, sanctioning a sale, has been used, still in disposing of the present case, it may be proper to adopt the characteristic language used in other cases, "extreme necessity," as more appropriate, without saying that evidence less strong may not be used in other cases. In The Sarah Ann [Case No. 12,342], Obadiah Woodbury and others, claimants, this question is considered at large, and Judge Story, in his opinion, says: "I agree at once to the doctrine, that it is not sufficient to show that the master acted with good faith and in the exercise of his best discretion. The claimants (upon whom the onus probandi of the validity of the sale is thrown) must go farther, and prove that there was a moral necessity for the sale, so as to make it an urgent duty upon the masters to sell for the preservation of the interests of all concerned. And I do not know how to put the case more clearly, than by stating, that if the circumstances were such that an owner of reasonable prudence and discretion acting upon the occasion would have directed the sale from a firm opinion that the brig could not be delivered from the peril at all, or not without the hazard of an expense utterly disproportionate to her real value, as she lay on the beach, then the sale by the master was justifiable, and must be deemed to have been made under a moral necessity." The judge adds: "As to the position of the brig, there is abundant evidence that it was truly perilous." This opinion was pronounced at the May term of the First circuit, 1835, and was taken to the supreme court, and finally disposed of there, at the January term, 1839. See [New England Ins. Co. v. The Sarah Ann] 13 Pet. [38 U. S.] 387. After a very able discussion of the case, the unanimous opinion of the court is there pronounced, most fully confirming Judge Story's doctrine as laid down at the circuit, on the original trial of the cause. The marginal note is an epitome of the case, and is conclusive authority, thus briefly stated: "The right of the master to sell a vessel stranded depends on the circumstances under which it is done to justify it. The master must act in good faith, and exercise his best discretion, for the benefit of all concerned; and a sale can only be

made on the compulsion of a necessity, to be determined in each case by the actual peril to which the vessel is exposed, and from which it is probable, in the opinion of persons competent to judge, the vessel cannot be saved. This is an extreme necessity."

On a particular examination of this case, it would seem that whenever there "is a moral necessity, extreme peril or extreme necessity," the master has the power to sell the vessel, and of course he may, under the like necessity, sell the cargo when it belongs to the same owners. This principle must ever be qualified by the fact, that the master has acted bona fide, and for the benefit of all concerned. A reference to this case, of course, embraces the authorities cited in support of the doctrine maintained, rendering it unnecessary to enumerate those cases here. The doctrines of this case are recognized in Ben. Adm. p. 169, § 299, a work of great merit, recently published. The principles of law having been considered as settled, the remaining inquiry is, do the facts proved present a case falling within those principles?

The facts adduced to establish the sale belong to three distinct classes: (1) To show that the sale was bona fide; (2) to show that the sale was for the benefit of all concerned; and (3) to show that a case of extreme necessity existed. To the first, it is objected that the master of the Elizabeth Frith was a brother of Capt. Winters of the Richmond, under whose authority the sale was made. In the entire absence of all proof showing a collusion between the seller and the purchaser, the relationship alone should not impair the sale. The facts on this point very satisfactorily rebut all presumptions of fraud and collusion. As to the second, after a careful examination of the testimony, I have no doubt, but for this sale, the whole cargo must have proved a total loss. Although but little was saved, yet that little was designed by the seller, and was in fact for the benefit of all concerned. There was no alternative between a total loss and this sale. The testimony has established this beyond a reasonable doubt. As to the third and last class of evidence to sustain the sale, that the condition of the ship was that of extreme necessity, the evidence is overwhelming. Indeed, this point has been so thoroughly maintained, that the libelants do not make it a point in their case, but rely very much on other objections to the sale. There is no necessity of recapitulating the testimony as to the extreme peril the ship was in at the time of the sale, because it is all one way, and stands uncontradicted. The master finds his ship and cargo in the condition of extreme peril, and proceeds to sell so much of the oil and bone as could be taken out of his ship to the masters of the Frith and the Panama, and the same was delivered, on an agreement to pay therefor, at the Sandwich Islands, when the ships arrived there; but before their arrival at the place of payment, the master of the ship Richmond died at sea, and there was no person at the Sandwich Islands qualified to receive the same, and the money remains due to the owners of the Richmond, and the liability is admitted.

Numerous other objections have been suggested against the validity of the sale, most of which have been removed by evidence, and still a few of those objections require some notice.

It has been said that this was no proper place for the sale; there was no market there. But it should be considered that in waiting for a more convenient place, or a better market, the ship would have gone to pieces, and the whole cargo would have been lost.

It is said, likewise, that there was no money required, and no money paid. In reply to this, it will be remembered, that it was agreed that the payment should be made at the Sandwich Islands, but before the ships, whose masters had purchased the oil, arrived at that place, Capt. Winters, of the Richmond, had deceased at sea, and there was no one authorized to receive payment. It is urged, also, that there was no memorandum or bill of sale of the oil, and that it never was delivered. Neither of those can avail—for in point of fact the oil and bone were delivered, and although there was no bill of sale, yet there was a memorandum in writing kept, and produced in court, of all the oil and bone purchased. In a case like the present a formal bill of sale cannot add to the title of the purchasers. An actual sale and delivery of personal goods, orally, will carry the title as well as a bill of sale. The law does not demand any particular form for the sale of personal goods.

It is insisted that the omission to enter the sale on the log-book is a good reason to set aside the sale as invalid, but the impression cannot well be avoided, that the disaster itself was calculated to prevent the entry. Great confusion, anxiety, and terror must have prevailed, and every moment after the ship struck was employed in devising means to secure something to the owners from the wreck. Besides, if the log-book had been here, with all the circumstances written down upon its pages, by the mate, it would only be cumulative evidence of what is amply proved by a mass of uncontradicted testimony.

And last of all, the principal stress of the libelants rests on their legal proposition, that this was salvage service, and not a sale. Salvage is the compensation that is to be made to persons by whose assistance a ship or its lading has been saved from impending peril, or reward after actual loss. By reference to the testimony, it will be seen at a glance, that this was never undertaken as a salvage service. Situated as these two vessels were at the time, on the best whaling ground, where both ships might have been filled in three or four days, it cannot be be-

lieved that their masters would have undertaken the risk of bringing to the home port the property of another, relying, as they must have done, on uncertain litigation for their compensation. But, again, the oil was taken on an express agreement,—a sale for a stipulated price, excluding altogether the idea of salvage. The law did not compel these masters to receive the oil on such terms, and as they virtually declined, their owners cannot now be compelled to accept salvage compensation.

As to the chronometer, the instruments, and their medicine chest, they are not claimed under any sale or for salvage. It was a mere gratuity. And the owners of the Richmond should be satisfied then without suit or decree, especially when they have been safely kept for their use alone, without any pretence to detain them from the rightful owners.

So far, then, as I have been able to weigh the testimony, and bring the case to the test of well-settled principles of law, I am bound to say, that the sale of the cargo of the ship Richmond, on the 8th of August, 1849, was made under circumstances of necessity; that it was bona fide and for the benefit of all concerned. For these reasons, the sale is upheld, and the libel dismissed, without cost to either party.

[NOTE. Upon an appeal to the circuit court by the libelants, this decree was reversed, the sale declared void, and the respondents declared to be entitled to a moiety of the net proceeds, in the New York market, of the articles brought in their respective ships. The claimants appealed to the supreme court. The opinion was delivered by Mr. Justice Grier, in which the decree of the circuit court was reversed, in that the salvors were allowed compensation only by a moiety of the saived property at the first port of safety,—the Sandwich Islands,—and an additional allowance for freight for the carriage of the owners' moiety to a better market at the home port. 19 How. (60 U. S.) 150. The case was held to be one of derelict, the transfer requiring no great exertions or any long delay. "The contrivance of an auction sale under such circumstances, * * * where there was no market, no money, no competition, * * * is a transaction which has no characteristic of a valid contract."]

## Case No. 7,492.

JONES v. The RICHMOND.

[39 Hunt, Mer. Mag. 71.]

District Court, S. D. New York. April 26, 1858.

DAMAGES TO CARGO—DEPOSITION—STOWAGE.

[1. The sale by auction of the cargo of a whaler consisting of oil and bone, wrecked in Behring's Strait, made by the master, to masters of three other whalers homeward bound, the master having no other means of disposing of or of saving the cargo, will be regarded as a salvage service by the ship and crew of the purchasing vessel, and not a purchase by the masters. Post v. Jones, 19 How. (60 U. S.) 150, followed.]

[2. The owners of the wrecked cargo have the right to an accounting from such a purchasing vessel for the value of the salved property, less the value of the salvage service. Post v. Jones, 19 How. (60 U. S.) 150, followed.]

[3. The jurisdiction of admiralty in such a case is independent of the fact that the salved property was arrested or brought within the territorial authority of the court.]

[4. An action in rem may be brought in admiralty, without arrest of the property proceeded against, or its presence within the territorial jurisdiction.]

[5. In such a case, unless the want of jurisdiction is patent on the libel, the personal appearance of the defendant by stipulation and answer, without protest, demurrer, or plea to the jurisdiction, is equivalent to attachment of the property.]

[6. Limitation of time or staleness of libelants' claim will not avail the respondent, unless pleaded in bar.]

[7. Delay pending another case, arising out of the same transaction and substantially involving the merits of the case at bar, and of which both parties are cognizant, will not render a claim stale, so as to preclude the claimant.]

[8. Cumulative testimony of salvors is admissible in evidence ex necessitate as to facts concerning the alleged service, notwithstanding their apparent interest in the result of the proceeding.]

The ship Richmond, being wrecked in Behring's Straits, while on a whaling voyage, her cargo of oil and bone was purchased by the masters of the ships Elizabeth Frith, Panama, and Junior, and brought to a port of safety. The owners of the Richmond [Charles H. Jones and others] libeled that portion of the cargo brought by the first two vessels, claiming that the sale was not a valid one. The suit was decided by the supreme court at Washington — [Post v. Jones] 19 How. [60 U. S.] 150—in favor of the libelants, decreeing that they recover the proceeds after deducting salvage. The present action is against that portion of the cargo brought by the ship Junior.

Mr. Lord and Mr. Moore, for libelants.

Mr. Benedict and Mr. Hoxie, for claimants.

BY THE COURT (BETTS, District Judge). 1. The case made by the multifarious facts and witnesses produced on the hearing of this cause differs in no essential particulars from the one tried in the supreme court of the United States upon the same subject-matter. [Post v. Jones] 19 How. [60 U. S.] 150.

2. The additional proofs given in this case are mostly cumulative (Palmer v. Fiske, [Case No. 10,691]; 15 Johns. 413), and also speculative and hypothetical in their character, not capable of determining positively the fact they were used to establish; i. e. that the ship Junior would be able to catch and secure whales sufficient to produce the quantity of oil and bone produced from the ship Richmond in less time than was occupied by the Junior in removing the same quantity of each from the wreck of the Richmond. Besides, the supreme court had considered and determined, in its judgment, the value of that species of evidence.

3. The court will hold the decisions of the supreme court upon the effect of the proofs in that cause to be conclusive upon the weight and value of the like testimony in this.

4. Accordingly, the transaction between the two ships in Behring's Straits on board the wreck of the Richmond must, for the purposes of this trial, be regarded as salvage service by the ship and crew of the Junior, and not a purchase of the oil and bone by the master of the latter from the master of the Richmond, which vested the right of property in the owners of the Junior.

5. The owners of the wrecked ship are entitled to call the owners of the Junior to account in this court for the value of such salved property, over and above satisfying out of the salvage services performed.

6. The court of admiralty has jurisdiction of the cause to that end, and the jurisdiction is not dependent upon the fact that the salved property was arrested or brought within the territorial authority of this court.

7. An action in rem may be instituted and prosecuted to judgment in this court, without the arrest of the property proceeded against, or its presence within the territorial jurisdiction of this court. This necessarily is so when the process issues against rights and credits, and may be the case, also, in respect to proceeds of ships and other property. Mauro v. The Almeida, 10 Wheat. [23 U. S.] 473. A citation or monition to the party holding the property is adequate service to authorize the court, by decree against the party personally, to compel him to fulfil the decree. Waterbury v. Myrick [Case No. 17,253]; Reed v. Hussey [Id. 11,646]; The Robert Fulton [Id. 11,890]; [Jennings v. Carson] 4 Cranch [8 U. S.] 22, 24; 1 Gel. 75; Mauro v. The Almeida [supra]; [Greenleaf v. Birth] 9 Pet. [34 U. S.] 300. The practice of the English admiralty is to the same effect,—1 Hogg. Adm. 335; The Merchant [Case No. 9,434],—and the personal appearance of the defendants, by stipulation and answer, is equivalent to an attachment of the property itself.

8. The process prayed for in the libel was one in due form of law, according to the course of courts of admiralty and of this court, against the proceeds of the cargo, materials, and furniture of the ship Richmond, and that the defendants (by name) and each of them, and all persons having any right thereto, etc., "may be cited to appear and answer the matters alleged and proposed," etc.

9. The usual process in rem, against the effects named, was issued in connection with a citation or monition to the defendants personally to appear and answer the libel.

10. This process was returned to the marshal, personally served on one of the defendants, and all of them appear in open court by their proctors, and made their appearance, "apud acta to the cause," and subsequently filed their answer, contesting the merits of the case, without taking exception by pleading to the form or sufficiency of the process, or its mode of service.

11. This is a recognition of the jurisdiction of the court over the case, and of the regularity of the proceedings in instituting the suit. A protest, demurrer, or plea to the jurisdiction, or exception to the process, must be taken previous to a full answer to the merits (2 Brown, Civ. Adm. Law, 414; Dunl. Adm. Prac. 180, 185; Conk. Prac. c. 8; Betts, Adm. Prac. 48; cases as cited), unless the want of jurisdiction is patent on the libel.

12. Nor can the defendants legitimately avail themselves of limitation of time or staleness of the demand, without interposing a defensive allegation to the libel, either being applied as causes of bar to the action. 2 Brown, Civ. Adm. Law, 406, 414.

13. The delay of this prosecution is reasonably accounted for by the pending of the case of Post v. Jones, 19 How. [60 U. S.] 161, in the supreme court, which related to this wreck and salvage, and involved substantially the merits of this case, and of which the defendants were cognizant; and also by the correspondence between the parties, and is sufficient to protect the libelants from the exception of staleness to their demand.

14. The testimony of the witnesses, Cheny and Carr, is admissible, ex necessitate, notwithstanding their apparent interest in the suit; they being salvors in the transaction, —2 Hogg. Adm. 151; Id. 145; The Henry Ewbank [Case No. 6,376]; The Boston [Id. 1,673],—their interest is mostly, if not entirely, cumulative.

15. The decision in the previous case—[Post v. Jones] 19 How. [60 U. S.] 161—having settled the character of this transaction to be one of salvage, I regard the award of compensation made in that case to the salvors a proper one to be adopted in this, to be reserved by the defendants out of proceeds which have gone into the hands of the defendants, and the same rule also measures one moiety of these proceeds as the amount they are bound to account for to the libelants.

16. The decree will be so framed as to secure the libelants a moiety of these proceeds, cargo, and materials obtained by the respondents from the Junior at New Bedford, after the deduction of freight and charges thereon from the Sandwich Islands to New Bedford. The salved goods lost by perils of the sea on the voyage from the Sandwich Islands to New Bedford are to be brought into the account.

Decree accordingly, with cost, with an order of reference to ascertain and report the amount payable, if the same is not agreed between the parties.

[See note to Case No. 7,491.]

## Case No. 7,493.

JONES et al. v. SCHELL.

[8 Blatchf. 79.] [1]

Circuit Court, S. D. New York. Dec. 3, 1870.

TRIAL BY COURT—DOCKET FEE.

1. Where, in a suit at law, a jury is waived, under the 4th section of the act of March 3, 1865 (13 Stat. 501), and the case is tried by the court without a jury, and judgment is ordered for the plaintiff, a docket fee of $20, under the fee bill of February 26, 1853 (10 Stat. 161), is not taxable in his favor.

[Cited in Jerman v. Stewart, 12 Fed. 275.]

2. But a docket fee of $10 is taxable in his favor under said act of 1853, being the docket fee in a case "at law, where judgment is rendered without a jury."

[Action by Frederick M. Jones and others against Augustus Schell, collector of the port of New York, for the recovery of duties illegally exacted.]

Almon W. Griswold, for plaintiffs.

Noah Davis, Dist. Atty., for defendant.

WOODRUFF, Circuit Judge. This is an action at law, brought against the defendant, as collector of the port of New York, to recover back moneys erroneously exacted for duties. The parties, in pursuance of the 4th section of the act of March 3, 1865 (13 Stat. 501) waived a jury, and the cause was tried by the court, and judgment was ordered for the plaintiffs. In their bill of costs the plaintiffs claimed, and the clerk allowed on taxation, twenty dollars, as a docket fee; and from such taxation the defendant appeals.

By the act of February 26, 1853, "to regulate the fees and costs," &c., in the courts of the United States (10 Stat. 161), it is enacted, that the following and no other fees shall be taxed and allowed: "In a trial before a jury, in civil and criminal cases, or before referees, or on a final hearing in equity or admiralty, a docket fee of twenty dollars;" to which a proviso is added, that, if the recovery be less than $50, in admiralty, then the docket fee shall be $10.

It is clear that the language of this clause of the statute does not include the present case. It is not a case in equity or in admiralty. The trial was not had before a jury or before referees. There is no other clause in the statute which gives twenty dollars as a docket fee. It is, however, argued, that, when this statute was passed, a trial by the court, on a waiver of a jury, had not been provided for, and that, for that reason, it was not mentioned. It is quite probable that this is so. If there be a trial of an issue of fact, there would seem to be no good reason for denying to the attorney the docket fee, when the trial is before the court without a jury. The same preparation is necessary, and the same time is consumed in attendance, and the same labor is employed in the trial, as when the issues of fact are tried by a jury or before referees. Nevertheless, the statute does not allow it, and it does forbid any allowance which is not specified. If it was a mode of trial not known to this court when the fees were prescribed, that is a reason why it was not provided for; but this very circumstance shows that in truth it was not provided for rather than it was. When the statute was passed, in 1865, permitting such waiver and a trial by the court, no change was made in relation to fees; and, while it may be true that it created a case omitted in the former statute, the court are not warranted in supplying the supposed omission, in the face of the prohibitory language of the prior act.

Still, the attorney is not left without a docket fee. The statute, in its further specification, adds: "in cases at law, where judgment is rendered without a jury, ten dollars." At the time of this enactment, this clause was applicable to judgments rendered on demurrer, on default, &c., where no trial was had; but, as a general statute, it must be held to embrace all cases in which, under any existing or future legislation, such a judgment might be rendered. The present is a case "at law," and not in equity nor in admiralty. Judgment herein "is rendered without a jury." It comes within the very terms of the statute. The plaintiffs are, therefore, in this condition—by waiving a trial by jury in an action at law, they have placed themselves in a situation in which no existing statute will allow to them a docket fee of twenty dollars. If it is a hardship, that should have been considered before the waiver was made. They can claim the ten dollars, because congress, by the act of 1865, made a new case, which comes within the statute giving that allowance. The taxation by the clerk must be modified, by striking out ten dollars, as erroneously taxed.

[1] [Reported by Hon. Samuel Blatchford, District Judge, and here reprinted by permission.]

JONES (SCOTT v.). See Case No. 12,536.

## Case No. 7,494.

JONES v. SEARS. WELSH v. SAME. MALONEY v. SAME.

[2 Spr. 43.] [1]

District Court, D. Massachusetts. Dec., 1861.

SEAMEN—DISCHARGE IN FOREIGN PORT—INSUBORDINATION—PAYMENT OF WAGES.

1. Discharge and imprisonment of seamen in a foreign port. The degree of disobedience and insubordination which will justify a discharge.

[Cited in Worth v. The Lioness No. 2, 3 Fed. 925.]

[See The America, Case No. 286.]

2. Responsibility of master for permitting unlawful act toward crew.

[1] [Reported by John Lathrop, Esq., and here reprinted by permission.]

3. The intoxication of seamen.

4. Payment of wages already due discharged seamen to consul, not a payment to seamen.

These were three libels in personam, and heard together. The respondent was the master of the ship Sylvanus Allen, and the libellants formed part of the crew of that vessel, which lay in the harbor of St. Thomas on the 22d February last. About forty American shipmasters were in port, and they resolved to celebrate that day on board the Sylvanus Allen. Accordingly, a dinner was prepared, to which the captain, with some invited guests, sat down about five o'clock. After this was over, there was dancing by the party, and other festivities, until ten or eleven o'clock at night, when the difficulties occurred out of which these suits arise. The crew consisted of four men,—the libellants and one other. Three of these went ashore early in the afternoon, and came back at eight or nine in the evening. Welsh, one of the libellants, did not go ashore. At the time of the difficulty, nearly the whole party of captains and guests, forty or fifty persons, was on board, aft upon the quarter deck, and the crew, with several sailors from other vessels, who however took no part in the affair, were forward. A dispute arose amidships between Ryan, the one of the crew who does not sue and who did not return to this country, and the second mate. A scuffle followed; the captains and others of their party rushed forward, the remainder of the crew rushed aft, and a general mêlée ensued. The evidence as to the degree of violence used and the threats uttered, on either side, was very conflicting. Jones received a blow which broke his skull, and Maloney one which rendered him senseless until the next morning. The police were sent for from shore, and all the crew except Maloney were ironed and sent to jail. Maloney was carried to the hospital. While thus confined, the Sylvanus Allen sailed. The libellants were afterwards discharged by the authorities of the island.

R. R. Bishop, for libellants.

H. A. Scudder, for respondent.

SPRAGUE, District Judge. These are three libels heard together. I shall first consider the case of Jones. Four distinct causes are included in his libel: 1. Wages earned before the 22d February; 2. Damages for unlawful discharge and imprisonment in a foreign port; 3. Clothing converted by the captain or lost by his fault; 4. Damages for personal injuries inflicted, as he charges, by the captain.

1st. As to the wages earned before the 22d February, the claims of all the libellants stand upon the same ground. It appears by the master's account-book and supplementary oath, that, when they were discharged, a small sum was due to each of the libellants for wages previously earned, which sum the master paid to the American consul at St. Thomas; and the defendant contends that this is such a payment to or for the benefit of the seamen as will exonerate the master from further liability. The question is, these men having been sent ashore and discharged, is a payment to the American consul at that port, of wages then earned and due, a payment to the seamen? It not appearing that this was by the request of the seamen, or that the proceeds ever came to their use, I know of no law by which the master can shield himself by such payment.

2d. The unlawful discharge and imprisonment. One ground taken by the respondent is that the sending ashore was not by his order. I think the evidence establishes that the master did send the men ashore. The mate's testimony clearly proves that it was done by his express order; but it would make no difference in my mind if it were not. Nobody had power to send the men ashore but the master, except the master of the port, who might do it for the violation of the local law. It is not pretended that he did it or ordered it to be done, nor was it done for the violation of the local law. The master alone had command of the vessel and crew, and with this exception was responsible for them; and whatever he suffered any one without right to interfere and do, he became directly responsible for as his own act. The sending ashore, and the imprisonment of the men, were the acts of the master.

This being so, was there any justification for it? Nothing justifies such an act but necessity. The general rule is that a master in a foreign port may discharge seamen if he cannot retain them on board with safety; but not otherwise. If they are dangerous men, this would justify the master in discharging them or confining them on shore.

Take the case of Jones. Was he a dangerous man? In the first place, there is no evidence that he had ever misconducted himself before. All the evidence is the other way, and goes to show that up to this time he had properly conducted himself on board the ship. Again, this was an extraordinary occasion,—a festive one; the master was entertaining his friends, and Jones and Maloney went ashore and came back with his permission. It is alleged that while on shore they became intoxicated; if it be so, that does not show that they were dangerous men, which is the question. Now at the time the men were put in irons and sent ashore, what was the condition of affairs on board the ship? Jones had been entirely disabled and prostrated by a blow upon the head; Maloney was disabled by a blow and gash in his eye,—both these were insensible or nearly so from near the beginning of the affray to the time they were taken off the ship,—and Welsh is not shown to have been

a dangerous man. A prudent and discreet captain, before sending these men ashore and to a foreign jail, should at least have kept them on board till the next morning, and seen how they were after the effect of their intoxication had passed away.

Courts certainly cannot sanction or countenance intoxication. And yet it is perfectly evident that masters of ships cannot deal with it as it can be dealt with on shore. It is perfectly well known that sailors do get intoxicated; masters hire them with this knowledge; suffer them to go ashore with this knowledge; and with this knowledge furnish them money to spend ashore. I was once much struck by the reply of a seaman of more than ordinary intelligence, to a question put him upon the witness stand in regard to the crew of his vessel being upon an occasion under the influence of liquor. "Yes," he said, "we were drunk; the captain knew we were going to get drunk, and furnished us money to get drunk with." He meant that the captain furnished the crew money to go ashore, knowing their almost invariable tendencies in the use of it. Masters know the habits of sailors; owners get their services at a less price for these very habits; year after year they serve at a mere pittance because of them; and to say that, as between master and sailor or owners and sailor, you are to hold the crew to the same degree of responsibility, and deal with them with the same severity, as men on shore, would be very unjust. And yet we cannot say that seamen may get intoxicated at their pleasure. There is great difficulty in dealing with the question and in drawing the line. This may be said,—that, upon a festive occasion like the one at St. Thomas, an intoxicated sailor is not to be treated with the same severity for wrongful acts which might properly be applied to a sober man. Jones is therefore entitled to recover for his wrongful discharge and imprisonment.

3d. As to the clothing. It is shown by the testimony of the mate that the clothing was sent ashore by order of the master, and it does not appear that it ever reached Jones. Being wrongfully sent from the ship by the master's direction, and never reaching its owner, the master is responsible for its conversion.

4th. That Jones received a severe blow upon the head there can be no doubt. Was it inflicted by the respondent? Is this proved? The libel alleges that it was; the answer, that it was not. Both are under oath, and no inference can be drawn on behalf of either. Two witnesses, Welsh and Maloney, testify directly that the blow was given by the defendant, and this would generally be sufficient to establish the fact. But there is evidence directly contradicting this. The last witness upon the stand, who was sitting upon the galley, testifies that he saw another man,—a captain,—whose appearance he describes, strike the blow with a pitch-pine stick; and there is the evidence of another captain, that this blow was struck by a captain, but not by the respondent, together with the tendency of the other evidence, introduced on behalf of the respondent, to show that he never left the quarter-deck. Therefore the testimony of the two witnesses for the respondent neutralizes that of the two for the libellant, and —while we cannot say it is proved that the captain did not strike this blow—the burden of proof being upon the libellant, it is not made out by a preponderance of the evidence that he did.

The amount which Jones should recover is, wages earned prior to the 22d February, the time of the unlawful discharge; what he would have earned as wages from the 22d February to the time of his arrival in the United States; the value of his clothing; and a further sum as damages for being sent to jail when he did not merit it. It does not appear that he suffered greatly from the confinement. But considering his physical condition, which rendered him a fitter subject for the hospital than a jail, something certainly should also be decreed for this. I shall therefore decree, in all, to Jones the round sum of one hundred dollars.

Next the case of Welsh, who claims for wages due on the 22d February, and for damages for the unlawful discharge, only. In regard to the allegation of drunkenness, which is made of him also, the remarks already made respecting Jones are applicable. It is to be further observed that the liquor which Welsh drank was furnished him on board.

The evidence is that, after Jones was struck down, Welsh was on the quarter-deck, and uttered threats, though there is no evidence that he threatened the master until he was put in irons. He was willing to submit to being ironed if the mate directed it. Welsh had always been a good man on board, and never committed any offence before. In this matter he hurt nobody. He took no lead in the matter. Ryan had taken the lead, and it would perhaps seem proper that he should have been sent ashore. Jones and Maloney made the mistake of sympathizing with and helping Ryan. Welsh was the last to come up and help. His conduct was not such as to render him a dangerous man on board; and his discharge and confinement were therefore unjustifiable. In addition to the wages due Welsh on the 22d February, I shall allow him, as damages, what he would have earned on board ship during his confinement in jail and until his arrival in this country, or $55.50. I shall not allow anything additional for suffering in jail or hardship in being sent there, as he appears to have been well treated, and was not, like Jones, in a condition to need medical attendance and nursing when sent.

The case of Maloney, who makes the same two claims as Welsh, is peculiar. He was sent to the hospital,—not to the jail,—and properly so sent. He was insensible, and suffering greatly from a blow, struck not by the master and from no fault of his. The hospital was therefore the proper place for Maloney, and to be sent there was for his benefit. He therefore can only recover the wages due on the 22d February.

Decree for wages and damages in accordance with the foregoing opinion, with full costs in the cases of Jones and Welsh, and part costs in Maloney's case.

See Brunent v. Taber [Case No. 2,054]; Shorey v. Rennell [Id. 12,806].

## Case No. 7,495.

JONES et al. v. SEWALL.

[6 Fish. Pat. Cas. 343; 3 Cliff. 563; 3 O. G. 630; Merw. Pat. Inv. 153.] [1]

Circuit Court, D. Maine. May 17, 1873.[2]

PATENTS FOR INVENTIONS — PRESERVATION OF GREEN CORN—PROPERTY RIGHTS OF INVENTOR —ABANDONMENT—EVIDENCE—LICENSE.

1. Inventions are the property of the inventor, even before they are secured to him by letters patent, and continue to be such, without the protection of a patent, until he abandons the same to the public, unless he suffers the patented product to be in public use or on sale, with his consent and allowance, for more than two years before he files his application for a patent.

[Cited in Butler v. Ball, 28 Fed. 755; Rein v. Clayton, 37 Fed. 355.]

2. Novelty and utility are both required to constitute a patentable invention, but where both of these qualities are combined, it is settled law that the right to a patent does not depend upon the quantity of thought, ingenuity, skill, labor, or experiment, or the amount of money which the inventor may have bestowed upon his production.

3. The patent for improvement in preserving Indian corn in the green state, granted Isaac Winslow, April 8, 1862, is for the product of the invention.

4. The patent issued to Isaac Winslow, May 13, 1862, is for the process of manufacturing the product patented in the previous patent.

5. The claim of the first patent does not extend to the process, and the patent office committed no error in granting the second.

6. Improvements consisting of separate and distinct parts may, in certain cases, be secured by separate and distinct patents, but no more than one patent can legally be granted for the same invention.

7. The commissioner does not possess the power to grant a second patent for the same invention, in any case nor under any circumstances, without the surrender of the first one granted to the patentee.

8. The patents granted to Isaac Winslow, May 20, 1862, and August 26, 1862, are void, as being for the same invention described and claimed in his patent dated May 13, 1862.

9. The irregular issuing of a second patent for the same invention can not impair the rights of the patentee under the first patent, if valid at the time it was granted.

10. The description in the specifications of Winslow's first two patents constitutes a full compliance with the acts of congress in that behalf.

11. The purpose of Winslow's invention, as evidenced by the language of the description, is to preserve, not only the farinaceous elements of the kernels, but also the milk and juices of the same, which give the peculiar aroma or flavor to green corn, when cooked for the table in the usual way, during the season, when the kernel is full grown, or nearly so, but before the milk and juice becomes concrete, as in ripe corn.

12. The patented process, if the directions are properly followed, will accomplish the purpose for which it was invented.

13. When the patentee proposes to show that his invention is of a date prior to the time of filing his original application, he takes upon himself the burden of proof, and to maintain that theory, as against another patented improvement of the same construction and mode of operation, he must prove not only that he made his invention at the period claimed, but that he reduced the same to practice as an operative machine.

14. The mere previous knowledge or use of the thing patented, in a foreign country, will not defeat a patent issued here to an original inventor, unless it appears that the same invention had been patented in such foreign country, or had been described in some public work anterior to the supposed discovery thereof by the patentee.

15. It is well-settled law that patented inventions can not be superseded by the mere introduction in evidence of a foreign publication, though of prior date, unless the description or drawings contain or exhibit a substantial representation of the patented improvement, in such full, clear, and exact terms as to enable any person skilled in the art or science to which the improvement appertains to make, construct, and practice the invention to the same practical extent as he would be enabled to do if the information was acquired from a prior patent.

16. The process shown in the English patent of Peter Durand is substantially different from that of complainant's patent, and produces a much inferior product. It can not be held to supersede complainant's patents.

[See note at end of case.]

17. There is abundant evidence that Winslow was the original and first inventor of the improvements claimed in his patents.

18. Nothing short of proof that the invention was on sale or in public use, with the consent and allowance of the inventor, for a period exceeding two years before his application, will support a defense under the clause of the statute relating to use and sale before application.

[Cited in Andrews v. Hovey, 124 U. S. 710, 8 Sup. Ct. 681.]

19. Uses or sales, without the consent and allowance of the inventor, are plain violations of his rights, and afford no justification to a subsequent wrong-doer.

20. If the sale or use is without the consent or allowance of the inventor, or if the use is merely experimental, to ascertain the value, utility, or success of the invention, by putting it in practice, that is not such a sale or use as will deprive the inventor of his title.

21. Such acts of the inventor are to be liberally construed as acts of an experimental character, nor is the inventor to be estopped by allow-

[1] [Reported by Samuel S. Fisher, Esq., and by William Henry Clifford, Esq., and here compiled and reprinted by permission. The syllabus and opinion are from 6 Fish. Pat. Cas. 343, and the statement is from 3 Cliff. 563.]

[2] [Reversed in 91 U. S. 171.]

ing a few persons to use his invention, to ascertain its utility, or by any such acts of use or indulgence to others to use the same, as are not inconsistent with the clear intention to hold the exclusive privilege, and to secure the same by letters patent.

22. Where the party has subsequently taken out a patent, the court is not authorized to give effect to the defense of abandonment, except in a case where the proof is clear and cogent.

23. There is no evidence in the record to show that either of Winslow's inventions were in public use or on sale more than two years before he applied for a patent, or for any shorter time, with his consent and allowance.

24. Public use of the invention, unless by the patentee himself, for profit, or by his consent and allowance, will not work a forfeiture of his title, as such forfeiture is not favored, unless it clearly appear that the use was solely for profit, and not for the purpose of further improvement or experiment.

[Cited in Jennings v. Pierce, Case No. 7,283; Emery v. Cavanagh, 17 Fed. 243.]

25. The two defenses, that the patentee suffered the invention to be in public use and on sale more than two years before he applied for a patent, and that he abandoned the invention to the public before applying for a patent, may be set up in the same answer, but ought not to be blended in the same allegation, as they depend, in many respects, upon very different principles.

26. It is settled law, that mere forbearance to apply for a patent during the progress of experiment, and until the inventor has tested his invention by actual practice, affords no just grounds for any presumption of abandonment.

[Cited in Locomotive Engine Safety Truck Co. v. Pennsylvania R. Co., Case No. 8,453.]

27. Where the patentee discovered the process of preserving green corn, in 1842, continued to experiment upon it until 1853, then applied for a patent, which was refused the same year, and did nothing further toward procuring a patent until 1862, when he filed a second application, which was granted: *Held*, that the patentee had not abandoned the invention so as to invalidate the patent.

[Cited in Goodyear Dental Vulcanite Co. v. Smith, Case No. 5,598; Same v. Willis, Id. 5,603.]

28. Abandonment or dedication of an invention to the public, being in the nature of a forfeiture of a right, is not favored in law.

29. Delays in the patent office, which the inventor can not prevent, will not impair his title to his invention, nor can any use of the invention during such delays, if without his consent and allowance, afford any evidence to support the issue of abandonment.

[Cited in Henry v. Francestown Soap-Stone Co., Case No. 6,382.]

30. No one but the inventor is competent to abandon his invention to the public. His acts and declarations, if explicit, are sufficient for the purpose, or he may accomplish the same by continued acquiescence in the acts of others, of which it appears that he had knowledge; but the proof of knowledge and acquiescence must be beyond all reasonable doubt, as every presumption is the other way.

[Cited in Andrews v. Carman, Case No. 371; Anderson v. Eiler, 46 Fed. 780.]

31. A dedication to the public can not be proved by evidence, which shows only experimental practice by the inventor or his employes, whether in public or private.

32. It will not be sufficient to prove such a defense, unless it appear that the use was somewhat extensive and for the purpose of gain, evincing an intent on the part of the inventor to secure the exclusive benefits of his invention, without applying for the protection of letters patent.

33. The inventor is not to be estopped by licensing a few persons to use his invention to ascertain its utility, or by such acts of peculiar indulgence and use as may fairly consist with the clear intention to hold the exclusive privilege.

[3] [Bill in equity to restrain the defendant from preserving green corn according to the specifications of letters-patent numbered 34,928, 35,274, 35,346, 36,326. While the cause was pending the defendant died and his administrator, Rufus K. Sewall, appeared in the place of the original defendant, all other necessary facts appear in the opinion.

[William Henry Clifford, for complainants.

[R. K. Sewall, A. A. Strout, and Bradbury & Bradbury, for respondents.

[The patent of 1862 as issued, is, for a new article of manufacture, prepared by the process therein described, and notwithstanding Isaac Winslow, in his affirmation made February 18, 1862, says that the original papers are lost, and that specification filed by him of that date is substantially the same as the one filed in 1853, yet the examination of the application of 1853 and the subsequent correspondence shows beyond doubt that this statement was erroneous, so far as the manufactured article was concerned, and that if Isaac Winslow was really the first inventor of "Indian corn preserved green" (which we deny), that twenty years had elapsed before he made application to protect his invention, which in the mean time had become public property, using that term in its widest significance. The patent of April 8, 1862, p. 5, contains a description, not only of the new manufacture sought to be protected, but also of the method or process used in producing it. An analysis of this invention, as claimed and described in the patent and specification forming a part of it, shows its elements to be: Green Indian corn in its natural state and in the ear. This was not new. Removing the kernel from the cob by a curved and gauged knife or other suitable means. Packing these kernels of uncooked corn in cans hermetically sealed, and exposing these cans to steam or boiling heat for about one hour and a half longer. Puncturing the cans and immediately resealing the same while hot. Exposing the cans to the same heat, for about two hours and a half. The new and useful manufacture, then, was green Indian corn cooked in hermetically sealed cans which were punctured and resealed during the process of cooking. This patent was issued April 8, 1862, and had seventeen years to run. Now, it will be perceived that the patent of April 8, 1862, is for a new article of manufacture only, and does not include

[3] [From 3 Cliff. 563.]

the process. It is true, that in the specification, Winslow recommends a "method," but he does not claim it as a part of his invention. That he did not intend to claim the process is apparent from the fact that the language of the patent does not cover it, and that Winslow proceeded to take out, at a subsequent date, three other patents covering the process and distinct parts of the process. If it is said that the process is covered by the patent of April 8, 1862, then there was an attempt on the part of Jones, as the assignee of Winslow, to extend the life of his invention, described in the patent of April 8, 1862, by taking out letters-patent for the same process at subsequent dates, each having seventeen years to run. Now, neither of the patents embracing the process or component parts of the process, and issued subsequent to April 8, 1862, contain any reference or are in any way connected with the application made and rejected in 1853, and, inasmuch as the application of 1853 contained no allusion to Winslow's claim to obtain a patent for a new manufacture, it follows that in this hearing all the patents are to be considered as issued upon an application first made in 1862, and the application of 1853 is not of the slightest consequence, and is to be disregarded so far as the claims made by complainant in regard to it are concerned.

[As to the patent for a new manufacture. Examining carefully the claim of the complainant in this particular, and considering the state of the art at the time, we respectfully submit that there is such a palpable want of invention in the plaintiff's claim, that even if he had been the first inventor he would not have been entitled to a patent. Winslow's alleged new manufacture affords no scope for a patent, because it is destitute of ingenuity, skill, or invention. Blandy v. Griffith [Case No. 1,529]. Judge Lowell, in his opinion in the case of Jones v. Hodges [Id. 7,469], involving the very patents upon which the bill is brought, says: The ground on which I feel bound to refuse the injunction at this time is, that I entertain strong doubts whether, in view of what had been done before, there was any scope for a patent to Winslow. The English patent of Durand, enrolled in 1810, No. 3370, is for a method of preserving animal food, vegetable food, and other perishable articles, and describes the Winslow process exactly, excepting the 'venting,' as it is called. Durand is very full in his directions for putting the articles into bottles or other vessels, sealing the vessels, putting them into a boiler, filling the boiler with water and boiling it for a longer or shorter time, according to the nature of the article and other circumstances. He shows that the cooking may be done by a steam bath, or by hot air, etc. These patents are void for want of novelty. They are the application of old processes to a new material,—the double use of processes well-known,—the new use of an old invention. Bray v. Hartshorn [Id. 1,820]; Bean v. Smallwood [Id. 1,173]; Phillips v. Page, 24 How. [65 U. S.] 167; Hotchkiss v. Greenwood, 11 How. [52 U. S.] 266; Hovey v. Stevens [Case No. 6,745]; Curt. Pat. (3d Ed.) §§ 51–55, 66; Brunton v. Hawkes, 4 Barn. & Ald. 549, 550; Losh v. Hague, 1 Webst. Pat. Cas. 207; Whitney v. Emmett [Case No. 17,585]. The present is like the case of the rocking-chair in Bean v. Smallwood; the door-knobs in Hotchkiss v. Greenwood; the anchor in Brunton v. Hawkes; or the carriage wheels in Losh v. Hague [supra]. An old contrivance applied to a new object is not patentable. Winslow, the patentee, publicly used the invention patented by him, or allowed it to be used for profit more than two years prior to the date of his rejected application for the original patent, and so dedicated it to public use. Shaw v. Cooper, 7 Pet. [32 U. S.]. Pierce bought of Nathan Winslow in 1848, 1849, 1850, 1851. Provost found the Winslow corn in the market in 1848 or 1849. George Burnham says Winslow's corn was in the market as early as 1848. Testimony of complainant's witness, Jeremiah Ford, renders this conclusive. P. 277, Cross Int. 6; Record, p. 55; Ans. to Int. 30; J. W. Jones. The relations of Nathan Winslow to Isaac were such that there can be no doubt that he knew that Nathan Winslow had sold the preserved corn for profit more than two years prior to March 5, 1853, if he had not actually made sales himself. They were brothers. Nathan furnished the funds for the business. Nathan put up the corn under the direction of Isaac. Nathan was Isaac's agent, and Isaac was bound by his acts. Bedford v. Hunt [Case No. 1,217].

[The laches of the patentee render the patent void and amount to an abandonment. If an inventor, after his invention is perfected, unreasonably delays his application for a patent, and others, before such application is made, actually perfect and apply to practical use the same invention, and give the knowledge thereof to the public, and the former, after that knowledge of such subsequent use and invention fails to make objection, and apply without unreasonable delay for a patent, he cannot sustain the patent he may afterward obtain, because he has failed to give the public that consideration for the grant of exclusive privileges, upon which all valid patents are based. Ransom v. New York [Id. 11,573]. Abandonment may be inferred from an acquiescence in the use of his invention by others, or a neglect to assert his claim by suit or otherwise. Id. There must be reasonable diligence on the part of the inventor to perfect and patent his invention. Cox v. Griggs [Id. 3,302]; Goodyear v. Hills [Id. 5,571a]; Blandy v. Griffith [Id. 1,529]. No appeal was taken by Winslow, after his first application was rejected. No new application was made for the period of nine years. Meanwhile, preserved corn went into general

use. The same invention substantially had been patented in foreign countries long before the alleged invention of Winslow. By Durand in 1810. The Durand process is substantially like Winslow's, producing substantially the same result. Cahoon v. Ring [Id. 2,292]. The patentee is not obliged to state everything to which his invention is applicable in order to be protected in his right to the exclusive enjoyment of the invention. Pike v. Potter [Id. 11,162]. The sealing hermetically, puncturing, and resealing of Winslow's process, and the leaving a small aperture until the heat takes effect in Durand's process, produce substantially the same result. The process of Durand was not a new process, and he, in his specification, speaks of the invention as "communicated to him by a certain foreigner, residing abroad, of the method of preserving animal food, vegetable food, and other perishable articles." Vegetable food includes green corn. The Durand patent specifies the putting the "vegetable substances" into the cans in "a raw or crude state." If it be said that Durand's process contemplated the cooking the corn on the cob, the reply is, such is not the meaning of the language used. "Raw or crude state,"—"raw" means "uncooked"; so does "crude." Worcester defines "crude" thus: "In a raw state; raw; uncooked; undressed"; "not ripened; immature; unripe." Durand's patent does not mean by "crude" that the vegetables must be in the same state in which they grew, but as equivalent to "raw," that is, uncooked, and in this sense the corn is crude, as much so as the peas and beans that are shelled or the vegetables that may be sliced. Winslow took no such distinction, for he says that his method applies to ears of corn, though he allows that he does not recommend their use.

[The subject-matter of the first patent set up by complainants, being neither "an art, a machine, manufacture, or composition of matter" does not come within the purview of patentable things. The acts of Nathan Winslow and J. W. Jones were, in law and equity, the acts of Isaac Winslow in relation to the public use of the alleged patented rights. Bedford v. Hunt, above cited. The patentee has claimed more than his own invention. The puncturing the cans to prevent their bursting was neither original nor new. Cooking vegetables in hermetically sealed vessels was well known before the date of the invention claimed by the complainants. The patent of May 20, 1862, recites this. There has been no disclaimer by patentee. Singer v. Walmsley [Id. 12,900].[4]

CLIFFORD, Circuit Justice. Inventions lawfully secured by letters patent are the property of the inventors, and as such the franchises and the patented product are as much entitled to legal protection as any other species of property, real or personal. They are indeed property, even before they are patented, and continue to be such, even without that protection, until the inventor abandons the same to the public, unless he suffers the patented product to be in public use or on sale, with his consent and allowance, for more than two years before he files his application for a patent. 5 Stat. 123; Id. 354.

On March 8, 1853, Isaac Winslow, of Philadelphia, filed in the patent office an application for a patent, for "a new and improved mode of preserving green corn," in which he stated that he had invented a new and useful improvement for accomplishing that object, and prayed that letters patent might be granted to him for that invention. Certain portions of the invention were not illustrated either by drawing or models, and in consequence of that omission, the application, on the 1st of August following, was returned to the inventor, leaving it to his option to supply the omission or to modify his claim. He elected to supply the deficiency, and, on the 26th of October succeeding, he filed in the patent office additional drawings and a model of the invention, and samples of the patented product. Information from the patent office was communicated to the inventor on the 2d of November, in the same year, that the office did not regard the operation of cutting the corn from the cob as any part of the process of preserving the product, and requesting him to decide whether the office should examine the process of preserving or that of removing the corn from the cob, under the fee already paid, evidently showing that the office required another fee if both were to be examined. Compelled to elect a second time, the applicant decided to strike out his second claim, and consented to take a patent for the process of preserving the patented product. Nothing further was done until the 19th of the same month, when the patent office informed the applicant that the office was of the opinion that his process was substantially the same as that in common use for preserving both vegetable and animal substances. On February 18, 1862, the inventor filed in the patent office a new application for a patent, referring to the fact that his prior application, as modified, was rejected, and renewing the prayer that letters patent might be granted to him for the entire improvement. In the meantime the inventor assigned the business over to his brother and the complainant, with the stipulation that he would give the assignees the benefit of any improvement he should make, and of his knowledge of the new process. Before the second application for a patent was made, the entire inventions were duly assigned to the complainant, and it is proper to remark that the title of the complainant is admitted.

Four several letters patent were granted for the inventions, and they were all issued in the names of the inventor, but each con-

[4] [From 3 Cliff. 563.]

tains the recital that he had assigned all his right, title, and interest in the invention to the complainant. They are as follows: 1. No. 34,928, dated April 8, 1862, for a new and useful improvement in preserving Indian corn in the green state; 2. No. 35,274, dated May 13, 1862, for a new and useful improvement in preserving green corn; 3. No. 35,346, dated May 20, 1862, for a new and useful improved process of preserving green corn; 4. No. 36,326, dated August 26, 1862, for a new and useful improvement in the process of preserving green corn. Possessed, as he is, of the absolute title to those improvements, the complainant claims the full and exclusive right and liberty of making and using the said improvements, and vending the same to others to be used, and he charges that the respondent named in the bill of complaint, then in full life, from September 13, 1867, to November 19, in the same year, unlawfully and wrongfully used and practiced the described improvements claimed and patented by the complainant. Service was made, and respondent appeared and filed an answer. Amendments were made to the bill, by consent, admitting new complainants, and also to the answer, allowing the respondent to set up new defenses. Reference will only be made to such of the defenses set up in the answer as were pressed in argument at the hearing. Argument to show that the title of the complainant is valid is unnecessary, as that is admitted by the respondent, and the complainant having introduced in evidence the several letters patent described in the bill of complaint, it is conceded that they afford a prima facie presumption that the patentee is the original and first inventor of the several improvements therein described and secured to the supposed inventor. Much consideration need not be given to the question of infringement, as the respondent admits that his foreman, though, as he alleges, without his consent, put up certain parcels of green corn preserved substantially by the same process as that described in the specification of the patentee, and substantially the same as covered by his patents, amounting to seven hundred cans, which have been sold, and the proceeds and profits have been received by the respondent, as stated in the account annexed to the answer. Unless the patent is sustained, the question of infringement is an immaterial issue, and where it is admitted, and the case shows that profits have been received by the respondent to a substantial amount, the question of the extent of the infringement is usually left to be determined by the master. Viewed in the light of these suggestions, it is quite clear that the case depends upon the defenses set up in the answer, as, if no one of them is sustained, the complainants are clearly entitled to a decree.

They are as follows: 1. That the patentee was not the original and first inventor of the improvements, or either of them, as alleged in the bill of complaint. 2. That the several supposed improvements are merely old methods applied to a new use, and that the several improvements, and each of them, were well known and in public use prior to the alleged discovery and invention of the patentee. 3. That the several improvements were in public use and on sale more than two years before the patentee made his application for a patent. 4. That the patentee abandoned his invention to the public before he filed his application for a patent.

Application was made by the inventor, in the first place, for one patent to embrace all the several subject-matters described in the four patents subsequently granted by the commissioner of patents. Novelty and utility are both required to constitute a patentable invention within the meaning of the patent law, but where both of those qualities are combined, it is settled law that the right to a patent does not depend upon the "quantity of thought," ingenuity, skill, labor, or experiment, or the amount of money which the inventor may have bestowed or expended upon his production. Curt. Pat. § 31.

Defenses, involving the validity of a patent, cannot be satisfactorily examined, or their sufficiency or insufficiency determined, without first ascertaining what the invention is which is embodied in the patent constituting the subject-matter of the controversy.

I. Undoubtedly the first patent is for the product of the invention, or for the new article of manufacture—to wit, Indian corn preserved green, or Indian corn preserved in the green state. In his first attempt to preserve the corn in the green state, without drying the same, the patentee states that he did not remove the kernels from the cob, which was not satisfactory, as the article obtained was very bulky, and, when used, the peculiar sweetness of the corn was lost, the same being absorbed, as the patentee supposes, by the cob. Experiments of various kinds were subsequently made to overcome the difficulties attending the effort to preserve the corn without drying the same, which were also unsuccessful, as the kernels, when preserved, did not retain the milk and other juices of the corn, leaving the product hard, insipid, and unpalatable, and without the full flavor of fresh green corn. All such experiments were abandoned; but he finally succeeded in producing an entirely satisfactory article of manufacture, which is the one described in the specification and claim of his first patent. His description of the method of manufacturing the product is substantially as follows: Select a superior quality of sweet corn, in the green state; remove the kernels from the cob by means of a curved and gauged knife, or other suitable means; pack the kernels in cans, and hermetically seal the latter, so as to prevent evaporation under heat, or the escape of the aroma of the corn. When packed, the cans of corn are to be exposed to steam or boiling heat for an hour and a half; then

puncture the cans, and immediately seal the same while hot, and continue the heat for two hours and a half longer. Afterwards, the cans may be slowly cooled in a room, at the temperature of seventy to a hundred degrees Fahrenheit. Indian corn thus packed and treated, the patentee states, may be warranted to keep in any climate. Being preserved in its natural state, as near as possible, it retains the peculiar sweetness and flavor of fresh green corn right from the growing field, and it is only necessary to heat the corn in order to prepare it for the table, as it is fully cooked in the process of preserving. What the patentee claims in that case is: "The described new article of manufacture—to wit, Indian corn—when preserved in the green state, without drying the same, the kernels being removed from the cob and packed in cans, hermetically sealed, and treated substantially in the manner and for the purpose set forth in the specification."

II. Attention will next be called to the second patent, which purports to embody an invention for a new and useful improvement in preserving green corn, or, in other words, the patented invention is for the process of manufacturing the new product described and patented in the first-mentioned letters patent. Necessarily, the details of the process are somewhat fully given in the specification describing the patented product, but the claim of the first patent does not extend to the process, which shows that the patent office committed no error in granting the second patent, as it does not include anything patented in the first patent. Goodyear v. Providence Rubber Co. [Case No. 5,583]; [Rubber Co. v. Goodyear] 9 Wall. [76 U. S.] 788; Seymour v. Osborne, 11 Wall. [78 U. S.] 559.

Both parties agree that it is competent for the commissioner to grant a patent for the product and one for the process, and it is obvious that the patent under consideration is for the process, which is not included in the prior patent. It has long been common, says the patentee, to boil green or unripened corn, and then to dry the same for winter use, but corn thus dried must be boiled again when prepared for the table, and is more or less hard and insipid, as it loses the fine flavor of fresh green corn. Ears of corn, also, are sometimes boiled, and then hermetically sealed in cans, but the cob seems to absorb the sweetness of the kernels, or if the kernels are removed from the cob after boiling, and then preserved, still the fine flavor of the natural corn is lost. Many and varied attempts were made by the patentee to preserve green corn on the cob without drying the same, but all those efforts were unsuccessful, as the article was bulky, and the sweetness of the corn was absorbed by the cob. Subsequently, he conceived the idea of first removing the corn from the cob, and then boiling or cooking the kernels, and preserving them, as thus separated from the cob. Some benefit, doubtless, resulted from that new conception; but a new difficulty arose, as the kernels of corn were broken in being removed from the cob, and the milk and other juices of the corn were dissolved and diluted in the process of boiling, leaving the product insipid and unpalatable. Unable to overcome that difficulty in that mode, he next attempted to cook the corn, without permitting it to come in contact with the water, by exposing the cans containing the corn to boiling water, but he soon found that mode of preserving the corn was unsatisfactory, as a long time was requisite to cook the corn sufficiently for preservation, and it appears that the milk of the corn evaporated, and the corn became more or less dried.

Two other patents are set forth in the bill of complaint, but it is clear that the patents are each for the new and useful improvement in the process of preserving green corn, and that they severally embody substantially the same invention as that described in the second patent. Improvements, consisting of separate and distinct parts, may, in certain cases, be secured by separate and distinct patents, but no more than one patent can legally be granted for the same invention. 5 Stat. 192; Sickles v. Falls Co. [Case No. 12,834].

Inoperative patents, or such as are invalid by reason of a defective or insufficient description or specification, may also, in certain cases, be surrendered, and the commissioner in such cases is authorized to cause a new patent to be issued to the inventor for the same invention, but the commissioner does not possess the power to grant a second patent for the same invention, in any case nor under any circumstances, without the surrender of the first one granted to the patentee. Suffolk Co. v. Hayden, 3 Wall. [70 U. S.] 319; 5 Stat. 122.

Apply those principles to the case, and it is certain that the third and fourth patents described in the bill of complaint are void. More than one patent for the same invention can not be legally issued by the commissioner, but the irregular issuing of the second patent can not impair the right of the patentee under the first patent, if it was valid at the time it was granted. Tested by these rules of decision, it is quite clear that the bill of complaint as to the third and fourth patents must be dismissed, but that the complainants are entitled to a decree for an account and for an injunction for the infringement of the first and second patents, unless the defenses, or some one of them set up by the respondent, are sustained.

I. First defense is that the patentee is not the original and first inventor of the respective improvements. Both patents may be considered together, as all the proofs applicable to one apply equally to the other, and the positions taken in argument are the same in both, without an exception. Before examining that defense, it becomes necessary to refer somewhat more fully to the nature and peculiar characteristics of the respective improvements

in question, in order that the evidence adduced may be fully understood and properly applied. Ears of corn may be boiled and hermetically sealed in cans without infringing the inventions of the patentee; but the difficulty with that product and the process which produces it, is that the cob absorbs the sweetness of the kernels, and the article becomes insipid and unpalatable, and consequently it is not salable to much extent. So the kernels may be removed from the cob after boiling, and then be preserved in cans hermetically sealed, without any conflict with the improvements embodied in the patents described in the bill of complaint, but the process and the product which it produces are comparatively valueless, as the fine flavor of the green corn cooked in the usual way is lost in the process of manufacture.

Corn may also be preserved, when in a green state, by removing the kernels from the cob and boiling or cooking the same, before the kernels are packed in cans hermetically sealed, without subjecting the manufacturer to the charge of infringing these patents; but the difficulty with that process is that the kernels, in being removed from the cob, are broken, and consequently the milk and other juices of the corn in that state are dissolved out in the process of boiling or cooking, and the natural aroma of the green corn cooked in the usual way for the table is lost, and the product becomes of little or no value as an article of commerce. Attempts were made by the patentee in this case to remedy that difficulty by packing the kernels in cans not sealed, and exposing the cans containing the kernels to boiling water, but the process was unsatisfactory in other respects, as it required a long time to cook the corn, during which the milk and other juices evaporated, and the corn became more or less dried. All experiments of such kinds having failed to produce the desired result, the inventor adopted the process of removing the corn from the cob, packing the kernels in cans, hermetically sealing the same, and then boiling the cans until the corn therein became completely cooked; but he states that the cans must be very strong, or they may burst; and to prevent that he practiced puncturing them, after they became well heated, to allow the air to escape, immediately resealing the same to prevent the evaporation of the juices of the corn or the loss of the natural aroma. Cans, if sufficiently strong, it would seem, may be used to complete the process without the necessity of their being punctured after the boiling is commenced; but, unless the cans are very strong, it is better to puncture them, in order to relieve the internal pressure and to prevent them from bursting. Even if the cans, when not punctured, as described, do not burst, the air contained in the cans and the vapor become more or less expanded by the heat, so as to press the heads of the can outward and give the same the appearance of cans which contain the gaseous products of decomposition. Such appearances, even when the corn is perfectly preserved, diminish its value as an article of commerce, which shows that it is better to puncture and reseal the cans during the process of boiling, unless the cans are very strong.

Taken as a whole, the description in the specification of the respective patents constitutes a full compliance with the requirement of the act of congress in that behalf, showing that the claim of the patentee in the first patent is the described new article of manufacture—to wit, Indian corn—when preserved in the green state, without drying the same, the kernels being removed from the cob, hermetically sealed, and heated, substantially in the manner and for the purpose set forth, which is well justified by the description of the invention given in the specification.

His claim in the second patent is for the described process of, first, removing the corn from the cob, and then preserving the kernels, substantially in the manner and for the purposes set forth, which is also well supported by the antecedent description contained in the specification, to which it is appended. Viewed in any proper light, it is clear that the purpose of the invention, as evidenced by the language of the description throughout, is to preserve not only the farinaceous elements of the kernels, but also the milk and juices of the same, which give the peculiar aroma or flavor to green corn when cooked for the table in the usual way during the season when the kernel is full grown, or nearly so, but before the milk and juices of the kernel become concrete, as in ripe corn. Beyond all doubt, the patented process, if the directions are properly followed, will accomplish the purpose for which it was invented, and will enable the manufacturer to preserve the kernels of green corn with all the milk and other juices of the same, without any chemical or other change, except what is produced by the cooking, which is effected by putting the sealed cans containing the kernels, with their milk and other juices, just as the same were removed from the cob, into boiling water, and keeping the cans, with their contents, in the boiling water for the period or periods specified in the descriptive part of the specification. Proof to that effect, of the most satisfactory character, is exhibited in the record, and the patented product, as seen everywhere in daily use, fully attests its accuracy and truth. Sufficient has been remarked to show what the improvements are which give rise to the present controversy, and, having accomplished that purpose, the next inquiry is, whether the patentee is the original and first inventor of the respective improvements.

Tested merely by the pleadings, the affirmative of that issue is upon the complainants; but the complainants having introduced the original letters patent under which they claim, the rule is well settled that

the burden of proof is changed, and that it is incumbent upon the respondent to show, by satisfactory proof, that the patentee is not the original and first inventor of the respective improvements, as he, the respondent, has alleged in his answer. Evidence was introduced by the complainants, of the most satisfactory character, showing that the patentee, Isaac Winslow, of Philadelphia, discovered the patented process of preserving green corn early in the year 1842, and that he made successful experiments in reducing his invention to practice, at Westbrook, in the state of Maine, during the latter part of the summer or in the early part of autumn of that year, leaving no doubt that the process discovered was the same as that described in the second patent, on which the suit is founded, and that the results were satisfactory to a limited extent. All doubt as to the date of those experiments is removed by the statements of the witnesses as to the attending circumstances, which could hardly fail to impress the memory so as to prevent unintentional mistake, and there is no reason disclosed in the proofs to create any distrust as to the integrity of the deponents. Though a resident of Philadelphia, the patentee sometimes went abroad for temporary periods, and in the spring prior to making these experiments, he wrote from France to his brother-in-law, living at Westbrook, in the state of Maine, requesting him to plant a piece of ground with sweet corn, evidently for the purpose of securing the means of making such experiments, and testing the utility of the new process which he had invented, and it appears that his brother-in-law complied with his request. Pursuant to that arrangement, he visited his brother-in-law, at Westbrook, toward the close of the summer or early in the fall of that year, and commenced to make experiments to preserve green corn, occupying for that purpose a building situated on the same farm which had previously been used as a cord factory. He worked less than a week that season, and the experiments, to a large extent, were unsatisfactory, as the cans, in which the corn was packed, were not strong enough to resist the pressure within, occasioned by the boiling. Attempts were made to preserve the corn by cooking it before it was packed in the cans, both by cooking it on the cob and then removing the kernels, and also by first removing the kernels and then boiling the same; but all of those experiments proved to be wholly unsatisfactory, as all, or nearly all, of the corn in the cans spoiled, and all such as was not spoiled was found to be insipid and comparatively tasteless, and of little or no commercial value. Experiments were also made by cutting the kernels of the freshly gathered green corn from the cob with a gauged knife, and packing the same, with their milk and other juices, in cans hermetically sealed, just as the kernels came from the cob, and cooking the same, by placing the cans with their contents in a large vessel containing boiling water, and most of those experiments, when the cans proved to be strong enough to resist the inward pressure during the process of boiling, without bursting, were generally satisfactory. Few or none of the cans were properly constructed, and many of them burst during the process of boiling, and in consequence of that tendency the patentee found it necessary to take the cans out of the bath before the process of cooking the corn was completed, and to puncture or vent the cans, as described in the specification, immediately resealing and replacing the same in the receptacle of boiling water until the contents of the cans were cooked sufficiently for table use; and the proofs show that when the cans were temporarily vented in that way, the experiments were generally successful. Such experiments were repeated the next year for a few days, during the proper season, and from year to year, to the autumn preceding the time when the patentee made his application for letters patent.

Practical experience showed that the process subsequently patented was much the most successful in accomplishing the desired object, but the process required strong cans to prevent them from bursting during the boiling, even when the cans were temporarily vented, as described; and it was a long time before the manufacturer was able to furnish the inventor with an article properly constructed for the purpose, as fully appears from the testimony of the manufacturer of the cans, who was examined as a witness. Application for a patent was filed in the patent office by the inventor on March 8, 1853; but the first claim was neither illustrated by drawings nor by a model, nor did the applicant forward to the patent office any specimens of green corn preserved by his process, and the specification, on account of those omissions, was returned to the applicant, leaving it at his option to supply the deficiencies, or to modify his claim. He elected to supply what had been omitted when the application was filed, and on the 26th of October, in the same year, filed in the patent office additional drawings, together with a model of the invention and samples of the preserved green corn, and requested an early examination of the application and claims. Doubtless the proper officers of the patent office complied with his request, as they returned the specification on the 2d of November following, informing him that the office did not regard the operation of cutting the corn from the cob as any part of the process of preserving the same, and requested him to decide which part of the alleged invention the office should examine—whether the process of preserving the product, or that of removing the corn from the cob. Obliged to waive one for a time, he struck out the second claim, which

covered the process for removing the corn from the cob, and on the 4th of the same month returned the specification, as amended, expressing the hope that the office would be enabled to decide favorably on the remaining claim without delay. His hopes, however, were not realized, as the office, on the 19th of the same month, rejected the amended application, expressing the opinion that the alleged invention was substantially the same as that in common use for preserving meats and vegetable substances. Except an occasional visit of the patentee to the patent office for the purpose of consultation with the commissioner or examiners, nothing further was done by him to procure a patent until February 18, 1862, when he filed in the patent office a second application for a patent, which, in substance and effect, is the same as the one previously filed by the same party, and which, like the other, seeks to procure letters patent for the entire invention. Before the rejection took place, the claim for the product had been stricken out, so that the claim for that part of the invention had never been the subject of decision by the patent office. In view of the circumstances, the commissioner decided to review the whole case, and came to the conclusion that the proofs before him entitled the applicant to letters patent, both for the product and for the process, as shown in the two patents under consideration.

Two other patents were also issued to the same party, but the court is of the opinion that they are invalid, as having been issued for the same invention as that described in the specification of the second patent. Repeated decisions have established the rule that a patent duly issued, when introduced in evidence by the complainant in a suit for infringement, is prima facie evidence that the patentee is the original and first inventor of what is therein described as his invention, and when taken in connection with his original application is prima facie evidence that the invention was made at the time the application was filed; but when the patentee proposes to show that his invention is of a date prior to the time when he filed his original application, he takes upon himself the burden of proof, and to maintain that theory as against another patent improvement of the same construction and mode of operation, he must prove, not only that he made his invention at the period claimed, but that he reduced the same to practice as an operative machine. Johnson v. Root [Case No. 7,409].

Suppose that is so, still the respondent can not invoke that principle with much effect in this case, as he does not preserve green corn under a patent, and the proofs are entirely satisfactory that the patentee made the invention more than ten years before the application for a patent was filed in the patent office. Great difficulty was experienced by the patentee throughout the whole period in procuring cans properly constructed for the purpose, and the proofs show that it was that imperfection and difficulty more than any other which prevented him from making an earlier application for a patent. Much examination, in detail, of the parol proofs introduced by the respondent, to show that the patented process was known or used in the United States before the early experiments made by the patentee, may well be omitted, as it is not pretended, nor can it be, that any other person, resident in this country either before or since that time, ever invented such a process; and a careful scrutiny of the evidence given by those witnesses as to what was in fact done by the several deponents will show that no one of them ever preserved any green corn, in the mode of operation circumstantially described in the specifications of the patents, until the witness, in some way and to some extent, became acquainted with the process of the patentee, either from rumor or from some one who had assisted the patentee in making those experiments, and in most cases not until years after the invention was made, and in some cases long after the patentee had filed his application for letters patent in the patent office. Careful analysis of the testimony of those witnesses shows that many of them never practiced the patented mode of operation at all, as they cooked the corn before the kernels were packed in the cans, and that all those who ever did practice it in any degree, or ever made any near approximation to it, never commenced to preserve green corn in that way until they had learned something, by rumor or otherwise, concerning the mode of operation which was practiced by the patentee. They do not pretend that they invented anything of the kind, but all they claim is that they were successful in learning what the process was which was practiced by the assignor of the complainants. Beyond all doubt, the patentee was the original and first inventor of the process in the United States, and sufficient appears, even in the proofs introduced by the respondent, to convince the court that the first knowledge which those witnesses ever had of the patented process was procured, directly or indirectly—as by report or rumor—from persons residing near the place where the experiments of the patentee were made, or who had at some time been the employés of the inventor, and had assisted in his experiments. Suppose it to be true that the patentee was the first person in the United States who had practiced the patented process, and preserved green corn in that mode of operation, still it is contended by the respondent that he is not the original and first inventor of the improvement, within the meaning of the patent law, as the process had been previously known and used in some foreign country; but the decisive answer to that suggestion is that the mere previous knowledge or use of the thing patented in a foreign country will not defeat a patent

issued here to an original inventor, unless it appears that the same invention had been patented in such foreign country or had been described in some public work anterior to the supposed discovery thereof by the patentee, and it is well-settled law that patented inventions can not be superseded by the mere introduction in evidence of a foreign publication, though of a prior date, unless the description or drawings contain or exhibit a substantial representation of the patented improvement in such full, clear, and exact terms as to enable any person skilled in the art or science to which the improvement appertains to make, construct, and practice the invention to the same practical extent as he would be enabled to do if the information was derived from a prior patent. Seymour v. Osborne, 11 Wall. [78 U. S.] 555.

Next, the respondent insists that the process described in the English patent to Peter Durand supersedes the invention of the assignor of the complainant as a prior discovery and for the same improvement. Vegetable substances, intended to be subjected to that process, the specification states, are to be put into vessels selected for the purpose, in the raw or crude state; but the patentee, in enumerating the articles to be preserved, does not mention green corn, nor does he state whether the kernels are or are not to be removed from the cob, or, if to be removed, whether the removal is to be effected in a manner to leave the kernels unbroken or by means of a gauged knife, as in the mode of operation described in the complainant's patent, nor is any mention made of preserving green corn or any other vegetable substance in the natural juices of the article, as in the mode of operation set forth in the patent mentioned in the bill of complaint. Instead of packing the kernels in the vessels selected for the purpose, in their crude state, as suggested in the English patent, the process patented by the assignor of the complainant directs that the kernels should be cut from the cob in a way which leaves a large part of the hull on the cob and breaks open the kernels, liberating the juices, to use the language of the patentee, and causing the milk and other juices of the corn to flow out and surround the kernels, as they are packed in the cans in such a mode that the juices from the liquid in which the whole is cooked when the cans are subjected to the bath of boiling water.

Evidently much is due to this feature of the patented mode of operation in preserving the product, and causing it to retain the sweetness, peculiar flavor, and natural aroma of green corn as when fresh gathered in the season and boiled for the table in the ordinary way for family use. Nothing of the kind is suggested in the other specification, and it is quite clear that a careful comparison of the descriptions given of the inventions, in the respective specifications, fully justifies the opinion of the learned expert examined by the complainant, that the two patents are essentially and substantially unlike, to which it may be added that persons having no other knowledge of the complainant's process than what they derive from perusing the specification of the other patent, would never be able to preserve green corn by that mode of operation. Palpable as these differences in the mode of operation are, they can not properly be overlooked in determining the issue under consideration, nor are they merely formal, as the proofs are full to the point that the product manufactured by the process of the complainant is far superior to that preserved in any other known mode. Other vegetables, such as beets and carrots, or peas and beans, may be packed in cans in a crude state, as they retain their juices, and may be well preserved if entirely secluded from the atmosphere, as by packing them in vessels hermetically sealed, but their chemical composition is very different from green corn, which is much more difficult to preserve in its natural freshness, without loss of its peculiar flavor and aroma, as accomplished by the complainant's process. When the kernels are cut from the cob they are opened, and the milk and other juices of the same flow out and become a constituent part of the vegetable substance to be preserved, and if exposed to air in that state for any considerable time their chemical relations to each other will soon change, and the whole substance will become sour. Exposure to heat, if seasonable, will remove that tendency, as the relations of the elements of which the substance is composed will become fixed, and the danger of putrefaction or souring will be greatly lessened or entirely averted.

Throughout his experiments the aim of the patentee was to perfect the process of preserving green corn without losing any of the natural juices of the cereal, and to discover the method or means of fixing the elements of the corn in the milky state, so that when packed in vessels to be preserved, their chemical relations to each other would never change, unless the vessels containing the corn were opened. Obviously he could not accomplish that purpose by putting the corn into the cans in the crude state, or before it was removed from the cob, as the juices of the kernels would be absorbed by the cob in the cooking, nor could he accomplish his object by cutting the kernels from the cob and boiling them in water before they were packed, or by cooking them in open vessels without water, as in the one case the milk would be washed out of the kernels, and with it all the peculiar flavor of green corn, and in the other case the aroma and juices of the cereal in the green state would be lost by evaporation. Suggestion is made that the kernels may be removed from the cob without cutting, and if packed in cans in that state, before being cooked, they may be regarded as having been packed in the crude state,

which may perhaps be conceded; but two answers are made to that suggestion, either of which is sufficient to show that the suggestion can not serve to benefit the respondent.

1. Because that process is substantially different from the complainant's process.

2. Because the proofs on both sides show that the product, when the green corn is preserved in that mode of operation, is of a very inferior quality, not much better than the product when the corn is boiled before it is packed.

Viewed in the light of these suggestions and of the expert testimony in the case, which corresponds with the same, I am of the opinion that the patents of the complainants are not superseded by the aforesaid foreign patent introduced by the respondent.

II. Enough has already been remarked to show that the second defense can not be sustained, as the evidence introduced to show that the patentee is the original and first inventor of the improvements, is equally persuasive and convincing to disprove the theory that the inventions are old ones applied to a new use, which is all that need be said upon the subject. Nor is any argument necessary to show that the other defense embraced in the same proposition must be overruled, as there is no evidence in the record to support the theory that the improvements, or either of them, were well known or in public use prior to the alleged discovery and invention of the patentee. Attempts were doubtless made by various persons to preserve green corn prior to the date of the invention in controversy, but it is so manifest to every impartial inquirer that they were of a character substantially different from the process and product patented by the assignor of the complainant, that it would be a work of supererogation to repeat the explanations which demonstrate the truth of that proposition. Such an issue can not be properly investigated and determined without first ascertaining what the patented invention is, but the moment that preliminary inquiry is solved, the whole difficulty disappears, as it at once becomes self-evident that none of the methods previously practiced embraced the mode of operation invented by the patentee.

III. Patents otherwise valid may be avoided in a suit for infringement, by proof that the invention was in public use and on sale more than two years, with the consent and allowance of the patentee, before he filed his application for a patent, which is the next defense presented by the respondent. Inventions ceased to be patentable, at one time, if permitted to pass into public use or to be on sale for any time, with the consent and allowance of the patentee, before his application for a patent; but the more recent act of congress provides that such public use or sale shall not have any such effect, unless it was continued for more than two years prior to such application. 5 Stat. 123; Id. 354.

Full proof that an invention had been in public use or on sale, with the consent and allowance of the inventor, for more than two years before the application for a patent was filed in the patent office, is a good defense to such an action if the same is properly alleged in the answer. Agawam Co. v. Jordan, 7 Wall. [74 U. S.] 607; McClurg v. Kingsland, 1 How. [42 U. S.] 209; Stimpson v. Railroad Co., 4 How. [45 U. S.] 380; Shaw v. Cooper, 7 Pet. [32 U. S.] 318.

Nothing short of proof that the invention was on sale or in public use, with the consent and allowance of the inventor, for a period exceeding two years, will support such a defense, as the party charged with infringing the rights of an inventor must bring himself fairly within the words of the act of congress, which justify the acts charged as an infringement. Ryan v. Goodwin [Case No. 12,186].

Such acts, if done without the consent and allowance of the inventor, are plain violations of his rights, and of course will not afford any justification to a subsequent wrong-doer. Wyeth v. Stone [Case No. 18,107].

If the sale or use is without the consent or allowance of the inventor, or if the use is merely experimental, to ascertain the value, utility, or success of the invention by putting it in practice, that is not such a sale or use as will deprive the inventor of his title. Ryan v. Goodwin [Case No. 12,186]; Pitts v. Hall [Id. 11,192]; McCormick v. Seymour [Id. 8,726].

Such acts of an inventor, it is well held by Judge Story, are to be liberally construed as acts of an experimental character, nor is the inventor to be estopped by allowing a few persons to use his invention to ascertain its utility, or by any such acts of use or indulgence to others to use the same, as are not inconsistent with the clear intention to hold the exclusive privilege, and to secure the same by letters patent. Mellus v. Silsbee [Case No. 9,404].

Where the party has subsequently taken out a patent, the court is not authorized to give effect to such a defense to a charge of infringement, except in cases where the proof is clear and cogent. Wyeth v. Stone [supra.]

Tested by those rules, as the case must be, it is quite clear that the defense under consideration must be overruled, as there is no evidence in the record to show that the inventions, or either of them, were in public use or on sale more than two years before the inventor applied for a patent, or for any shorter period, with the consent and allowance of the patentee, or that he had any knowledge of any such sale or public use at the time it was made. On the contrary, the evidence shows that the inventor never gave his consent to any such sales, and that he constantly asserted that he intended to apply for a patent. Sales in some cases were made by his brother, but the evidence shows that the inventor disapproved of the acts, as

calculated to produce embarrassment when he presented his application for a patent at the patent office. Public use of an invention, unless by the patentee himself, for profit, or by his consent and allowance, will not work a forfeiture of his title, as such forfeiture is not favored unless it clearly appear that the use was solely for profit, and not with a view of further improvements or of ascertaining its defects, or for any other purpose of experiment in reducing the invention to practice. Pitts v. Hall [supra].

Inventors have a right to employ all means necessary and proper to enable them to perfect their inventions and to reduce the same to practice, and it is clear that no such experimental act can justly be viewed as legitimate evidence to support the defense of a prior unauthorized public sale or use of the invention, or a use inconsistent with the right to apply for a patent to secure the exclusive authority to make and use the invention, and to vend it to others to be used, as provided in the patent act. Persons charged with the infringement of letters patent may set up a defense that the inventor suffered the invention to be in public use and on sale more than two years before he applied for a patent, and they may also set up as a distinct defense, even in the same answer, that the inventor before he applied for a patent, abandoned the invention to the public, but those two defenses ought not to be blended in the same allegation, as they depend in many respects upon very different principles. Some of the amendments to the answer, however, were filed by consent, and inasmuch as no exception was taken to this part of the answer, the question of abandonment, as pleaded, may be considered as open.

As pleaded, the defense is that the inventor abandoned the invention to the public before he filed his application for a patent. His first application was filed on March 8, 1853, and he filed the second application on February 18, 1862, which, it is conceded, is substantially the same as the first one, which is still on file in the patent office. Evidence of an affirmative character to show that the inventor ever uttered a word, or did an act signifying an intention to abandon his invention to the public before he filed his first application for a patent, is entirely wanting, nor is there any circumstance introduced in evidence to support that theory, except the mere lapse of time from the discovery of the invention to the filing of the application, and it is settled law that the mere forbearance to apply for a patent during the progress of experiments, and until the party has perfected his invention and tested its value by actual practice, affords no just grounds for any such presumption. Kendall v. Winsor, 21 How. [62 U. S.] 328; Agawam Co. v. Jordan, 7 Wall. [74 U. S.] 607.

Apply that rule to the present case, and it is clear that the proofs furnish no ground for such a presumption before his first application was improperly rejected by the patent office. Such an adverse decision operates as a great discouragement to an indigent inventor, as was strikingly illustrated in the case of the inventor of the improved mode of manufacturing wool, who, in consequence of such a decision, was kept out of the enjoyment of the fruits of his genius for forty years. Agawam Co. v. Jordan, 7 Wall. [74 U. S.] 604.

Abandonment or dedication of an invention to the public, being in the nature of a forfeiture of a right, is not favored in law, and Mr. Justice Nelson decided that such a defense could not be sustained, unless the acts of the party invoked for the purpose were corroborated by some declarations manifesting such an intention; but it is not necessary to apply that rule in this case, as the evidence fails to disclose either any act or declaration to support the theory. Argument to show that the inventor was entitled to a patent at the time his first application was rejected, is unnecessary, as the proposition stands confessed by the patent office. Nothing beyond the decision of the office reversing their former action, would seem to be required to establish that proposition; but if more be needed, it will be found in the reasons which the office assigned at the time for refusing to issue the patent. Those reasons, it will be recollected, were, that the alleged invention was substantially the same as that in common use for preserving meats and vegetable substances, which shows, beyond all doubt, that the office never gave the subject a proper examination, or utterly failed to understand the nature of the improvement, or to comprehend the mode of operation, as scientifically described in the specification. Truth was crushed for the moment, but, happily for the cause of justice, the reasons given for the erroneous decision remained on file, which enabled the office, at a later period, to correct the error, and to do justice to a meritorious inventor. Construed strictly, the defense of abandonment, as pleaded, has respect only to the period of time which elapsed between the discovery of the invention and the filing of the first application, which was rejected; but the respondent insists, in argument, that the inquiry under that issue extends also to the facts and circumstances which occurred between the times when the first application was rejected and the filing of the second, which, with some hesitation, is admitted, as it is by no means certain that a second application was necessary. Suffolk Co. v. Hayden, 3 Wall. [70 U. S.] 319; Godfrey v. Eames, 1 Wall. [68 U. S.] 325.

Delays in the patent office, which an inventor can not prevent, will not impair his title to his invention; nor can any use of the invention during such delays, if without his consent and allowance, afford any evidence to support the issue that the inventor aban-

doned the invention to the public. Howe v. Williams [Case No. 6,778]; Stimpson v. Railroad, 4 How. [45 U. S.] 402; Goodyear v. Day [Case No. 5,566]; Morris v. Huntingdon [Id. 9,831].

Suppose, however, the period between the rejection of the first application and the filing of the second, is as much within the issue presented by the answer as the period between the discovery of the invention and the filing of the first application, still I am of the opinion that the defense, that the inventor abandoned his invention to the public, is not sustained by the evidence exhibited in the record. No one but the inventor is competent to abandon his invention to the public. His acts and declarations, if explicit, are sufficient for the purpose, or he may accomplish the same end by continued acquiescence in the acts of others, of which it appears that he had knowledge; but the proof of knowledge and acquiescence must be beyond all reasonable doubt, as every presumption is the other way. McCormick v. Seymour [Case No. 8,726].

Testimony is introduced by the respondent showing that the brother of the inventor made sale of small quantities of the preserved corn on several occasions, but the record does not contain any evidence that the inventor ever sold any of the patented product, or that he ever gave his consent that the product should be sold by his brother, or any other person, before he filed his application for a patent. Prior to the application for a patent, the better opinion from the evidence is that none of the product of the new process was put upon the market, as the evidence is satisfactory that he knew that sales or public use more than two years before he applied for a patent, would defeat his right. Immediately upon filing his application for a patent, he gave a license to his brother and the first-named complainant, and received a royalty from them for their manufacture. Small amounts only were manufactured, and few sales only were made subsequent to the rejection of the first application.

When a party practices his invention merely for the purposes of experiment or completion, before he takes out a patent, the inference that he intends to surrender the invention to the public does not arise, and consequently a dedication to the public can not be proved by evidence that shows only experimental practice by the inventor or his employés, whether in public or private. Such an inference is never favored, nor will it, in general, be sufficient to prove such a defense, unless it appears that the use, exercise, or practice of the invention was somewhat extensive and for the purpose of gain, evincing an intent on the part of the inventor to secure the exclusive benefits of his invention without applying for the protection of letters patent. Curt. Pat. (3d Ed.) § 389.

Exceptional cases arise, as where the invention, by acts of the inventor, had gone into general public use and got beyond his control, without any effort on his part to restrain its general use, as in such a case it is held that he can not resume the ownership dedicated to the public, and that his right to a patent is forfeited. Speaking of such a case, however, Judge Story said, in Mellus v. Silsbee [Case No. 9,404], that the inventor "is not to be estopped by licensing a few persons to use his invention to ascertain its utility, or by any such acts of peculiar indulgence and use as may fairly consist with the clear intention to hold the exclusive privilege." Tested by that rule, it is quite clear that the single license referred to, which was not granted until after the application for a patent was filed, and which was never exercised, except to a very limited extent, is wholly insufficient to support the defense that the inventor abandoned the invention to the public. All must agree that he did not intend to dedicate it to the public, as his application for a patent was then pending in the patent office, and the evidence shows that he continued to press it, with confident hopes of success, until the adverse decision was announced. Nor does the record exhibit any evidence to show that the invention got into public use with the consent and allowance of the inventor, or through any negligence or improvidence on his part, as it appears that he visited the patent office as often as it was necessary, to ascertain whether the opinion of the commissioner had undergone any change, and that he presented his second application for a patent as soon as he could obtain any hope of receiving a decision in his favor. No persons, except the two before mentioned, ever had authority from him to practice the invention, and the proofs show that all others who did practice it before the date of the letters patent obtained their information, whether from rumor or otherwise, without the consent and allowance of the patentee.

Separate examination of the other foreign patents introduced by the respondent does not appear to be necessary, as the stress of the argument to show that the patentee in the patent of the complainant was not the original and first inventor of the improvement seems to rest upon the Durand patent, which the principal expert of the complainant says would not succeed with green corn, and he supports that conclusion with reasons which are both persuasive and convincing. Due attention to the nature of the invention in question and to its described mode of operation is all that is necessary to render the reasons given by the witness conclusive, as it is clear that the patent in the other case does not contain a word to indicate that the patentee ever thought of removing the kernels from the cob by means of a gauged knife, for the purpose of liber-

ating the juices of the same, so that the kernels, as packed in the cans, would be cooked in their own juices when the cans are placed in the bath of boiling water. Sweet corn in the green state, as the witness testifies, is a peculiar substance, differing materially from any other cereal, seed fruit, or vegetable used as food. Its composition and structure are such that it is singularly susceptible to fermentative decompositions and changes, more so than any fruit or vegetable that has been successfully preserved in hermetically closed packages for any considerable length of time. Such liability to rapid change is not due to any one particular constituent, but to the presence together of several substances, such as gluten, sugar, fat, and starch, in such proportions as are best adapted for fermentation and action upon each other. Its peculiar flavor, other than its sweetness, is contained in and associated with the fat or oil present, so that very slight fermentations of the other constituents are sufficient to destroy that peculiar aroma.

Green corn, of the kind mentioned, in common with other cereals, contains more phosphorus or phosphoric acid than fruits or other vegetables. As compared with sweet peas, for instance, the kernels of sweet corn are much more delicate and liable to change, as they contain a much larger proportion of milk, juice, or sap, which itself contains more sugar, starch, and oil than the juice of sweet peas, and the glutinous or nitrogenous constituent, which acts as the ferment or primary cause of change, is much more active in the juice of sweet corn than in that of sweet peas.

Equally instructive support to the same view is derived by comparing sweet corn with such fruits as peaches, as the juice of the peach contains no oil, and the kernels of sweet corn contain only one eighth as much water as the peach, besides other differences of an equally important character, showing that such fruits as peaches are much less liable to ferment than sweet corn, and that they are much more easily packed and preserved. Examined in the light of these suggestions, as the case should be, it is quite clear that the mode of operation described in the specification of the complainant's patent differed widely from anything which preceded it, and that it effects a new and highly useful result; and for these reasons the complainants are entitled to a decree, for an account, and for an injunction.

[NOTE. A decree having been rendered for the complainant the defendant appealed to the supreme court. Mr. Justice Hunt delivered the opinion (91 U. S. 171) reversing the decree of the circuit court. Mr. Justice Clifford dissented in a lengthy opinion. It was held that the substance of Winslow's patent had been previously put forth in Durand's patent, and that to infringe a patent it is not necessary that the thing patented should be adopted in every particular. It is not necessary that the result should be the same in degree, but it must be the same in kind, to constitute an infringement. The fact that Winslow's patent provides that the corn shall be removed from the cob before the process begins, and that Durand does not specify this idea, does not matter as Durand's process is used. A recommendation is not a requirement, and when an inventor uses the term, "I recommend the following method," he does not thereby constitute such method a portion of his patent. Appert's process was held to contain everything of value in Winslow's patent.

[For other cases involving these patents, see note to Jones v. Hodges, Case No. 7,469.]

JONES (SHREW v.). See Case No. 12,818.

## Case No. 7,496.

JONES v. SLEEPER.

[2 N. Y. Leg. Obs. 131.]

District Court, D. Maine. 1843.

CONVEYANCE—ACT OF BANKRUPTCY.

1. A conveyance by a trader of the whole of his property, is, in itself, an act of bankruptcy, although made for the benefit of all his creditors without preferences.

2. But a conveyance of a part to secure a particular creditor is not an act of bankruptcy, although he may be insolvent at the time, unless made to give the creditor a preference and priority over his other creditors, and in contemplation of bankruptcy.

3. If, being insolvent, he make the conveyance in contemplation or with the intention of breaking up his business at once, this is in contemplation of bankruptcy, within the meaning of the statute, and the intention to give a preference will be presumed.

4. A transfer of goods by a general description, as "all the goods and merchandise in a certain store," is a sufficient description to convey the title, if possession is delivered pursuant to the contract. The want of a more particular description, in connection with other circumstances indicating an intention to cover the property and keep it from creditors, may be a fact from which fraud may be inferred, but it does not per se render the conveyance fraudulent and void as to creditors.

5. The record of a mortgage of personal property pursuant to the laws of the state is equivalent to a delivery. Rev. St. c. 125, § 32.

6. If a debtor's property is attached, and he remains passive and does no act to aid the creditor in obtaining judgment and seizing the goods on execution, this is not a procuring his goods to be taken on execution. To make it an act of bankruptcy there must be some direct agency and active co-operation on his part.

This was a petition of William Jones, of Boston, against George Sleeper, of Belfast, in this district, to have him declared a bankrupt. The acts of bankruptcy alleged in the petition are, 1. By willingly and fraudulently procuring his goods and chattels, lands and tenements, to be attached and sequestered and taken in execution. 2. By making a fraudulent contract with one Ralph C. Johnson, to have a certain suit defaulted and judgment entered, so that said Johnson could obtain a preference over his other creditors. 3. By making a fraudulent assignment and transfer of his property.

S. Fessenden and Mr. Willis, for petitioner.
Mr. Preble, for respondent.

WARE, District Judge. The first act relied upon as an act of bankruptcy is the conveyance in mortgage made Oct. 7, 1841, to Ralph C. Johnson. This was a conveyance of all his stock of goods in the store he then occupied and in the cellar under it, to secure a debt of $5,288. This mortgage, it is contended, was made in contemplation of bankruptcy, and for the purpose of giving Johnson a preference over the other creditors. The second section of the act [of 1841 (5 Stat. 442)] declares that all future payments, securities and conveyances thus made shall be deemed void, and a fraud upon the act, and they are without doubt acts of bankruptcy rendering the debtor liable to be proceeded against by his creditors under the act. It has been decided by an authority binding on this court that "future" in this section of the act refers to the time of the passage of the act, and not to the time when it was to go into operation generally. In re re Chadwick [Case No. 2,569]. The mortgage then falls within the terms of the act in point of time.

It has long been settled upon the construction of the English statutes of bankruptcy, that if a person engaged in trade makes a conveyance of all his property, it is in itself an act of bankruptcy, as being a fraud upon the law, although it is for the benefit of all his creditors without preferences. It is an attempt to defeat the operation of the law to a certain extent, by appointing his own administrator, instead of leaving the administration to the law. Nor will a colorable exception of a small part of his property from the conveyance exclude the application of the principle. Eden, Bankr. Law, pp. 28, 29; Kettle v. Hammond, Cooke, Bankr. Law, c. 4, § 1; Eckehardt v. Wilson, 8 Term R. 140; Ex parte Bourne, 16 Ves. 148; Dutton v. Morrison, 17 Ves. 199. But where the conveyance is of but part of the debtor's property, to render it void as a fraud upon the law, it must be made in contemplation of bankruptcy, and with the intention to give a preference. The legal effects of the act depend on the quo animo; and this is a fact which must be shown by direct proof, or made out as a presumption from the circumstances of the case. The real state of the debtor's mind, his hopes or expectations, are known only to himself, or so far as he may choose to disclose them to others. If his object is to take the benefit of the act, and to give a preference, he will not be likely to avow it, as that would be a certain mode of defeating his object. The intention must therefore ordinarily, as in other cases where it is unlawful, be inferred from the circumstances under which the act is done. When a debtor is deeply insolvent, and meaning to wind up his business, and bring it to a close at once, makes a conveyance, to secure a favorite creditor of a part of his property, his intention to give such creditor a preference will be inferred. It will be taken as a presumption of law that he intends what is the necessary and unavoidable effect of his own act.

In this case, as there is no direct evidence bearing on this fact, the quo animo, from which the legal fraud arises, it must be inferred as a presumption of law from the other facts in the case. What, then, are the facts from which it may be fairly and justly inferred that the mortgage of the 7th of October, 1841, was made in contemplation of bankruptcy, and with the intention of giving to Johnson a preference over the other creditors. It is in evidence that Johnson and Sleeper, in September, 1836, entered into a copartnership for carrying on the business of a retail store in Belfast. By the articles of copartnership, it was agreed that Johnson should furnish a capital of $5,000, without interest, and that Sleeper should be the active man in carrying on the business, his services to be considered as equivalent to the interest of the capital furnished by Johnson, the other expenses to be a common charge and the profits to be divided equally. The copartnership was continued till Sept., 1840, when it was dissolved by mutual consent. Sleeper took the stock and continued the business and gave Johnson his note for $5,000, for his interest in the property, and mortgaged the whole stock as collateral security for the purchase money. This was therefore in fact a sale by Johnson of the stock and a mortgage of the same back. The note remaining unpaid on the 7th of October, 1840, a new mortgage was made of the stock at that time in the store, to secure the same debt, and also another note of $288.34. This last mortgage was regularly recorded, pursuant to the laws of the state, in the records of the town clerk of the town of Belfast, on the 14th of the same month. This is the conveyance which is insisted upon as an act of bankruptcy. Now what are the facts in proof, from which the court can infer that this conveyance was made in contemplation of bankruptcy, and for the purpose of giving to Johnson a preference over the other creditors. It was in substance but a continuation of the prior mortgage of 1840. The stock in the store when that was given having been sold by the mortgagee, a new mortgage was taken on the new stock, and there was in fact a clause in the mortgage of 1840 that new stock, which should be added as the old was disposed of, should be held and covered by the mortgage to the amount of what was then in the store. Now admitting that the mortgage was in law inoperative on goods subsequently purchased, it is still true that the conveyance of 1841, was merely carrying out the intention of the parties in the first mortgage. Then it was not a conveyance of the whole nor of the major part of the property of the debtor. The tes-

timony of the witnesses proves that he, at that time, was the owner of a small vessel, the Three Sisters, of about 80 tons burthen; that he had merchandise, as molasses and other wet goods, to the amount of $5,000, in another store in Belfast, lumber on the wharf of the value of $1,600, and goods which he had purchased in Boston to the amount of between three and four thousand dollars, which were then on their way to Belfast, and were received on the 16th of the month. Here was then personal property openly and visibly in the possession of Sleeper, free from any incumbrance, to the amount of more than $10,000. He continued his business as before, and during the winter and spring, shipped two or three cargoes of lumber to the West Indies and brought back return cargoes; shipped one cargo of potatoes to Baltimore and purchased a return cargo of flour and corn, and continued to carry on his business, selling his stock, purchasing new goods, and paying his creditors, until the August following, when his business was brought to a close by suits and attachments of his property.

On these facts it appears to me to be extremely difficult for the court to say that the mortgage of 1841 was made in contemplation of bankruptcy. Precisely the opposite seems to me to be not only the fair but the necessary inference. This doctrine of contemplation in cases of bankruptcy, it has been said ought not to be pressed too far, as there is nothing either in the common or statute law to show what it is. Fidgeon v. Sharpe, 5 Taunt. 539; McMenomy v. Roosevelt, 3 Johns. Ch. 458. It is a fact to be proved, and though it may be inferred as a presumption from other facts, yet it ought to be made out not merely as a balance or preponderance of probability, but by such circumstances, reasonings and considerations, as leave the mind satisfied that the fact is so.

Now what evidence is there on record, not only to overcome the natural and reasonable presumption arising out of the facts here stated, but to bring the mind in opposition to them, to a satisfactory conclusion, that the debtor at that time actually contemplated bankruptcy. I admit that if Sleeper had then been deeply insolvent and had so considered himself, that it would be quite natural that he should wish to favour a creditor with whom he had been connected in business and to whom he was under personal obligations. But, allow the statement of his insolvency in all the strength in which it is made, that he in fact owed three or four thousand dollars more than the whole amount of his free and unincumbered property, and if it be further conceded, which is not in proof, that he was fully aware of the condition of his affairs, and it will by no means follow that he contemplated bankruptcy. He might have thought that a year of prosperous business would relieve him from his embarrassments. In the case of Arnold v. Maynard [Case No. 561], Judge Story says: "I agree that the mere fact of a man's being insolvent and knowing the fact does not necessarily establish that he means to stop business and break up his establishment; for he may hope and believe that he can still carry it on, and perhaps redeem himself from insolvency. But when he is deeply in debt, and intending to fail and break up his whole business at once, and makes a conveyance to a particular creditor, to give him a preference over all the rest, it seems to me irresistible evidence that he does the act in contemplation of bankruptcy." Now Sleeper, so far from intending to fail and break up his business at once, actually continued it for ten months; and though he might have been insolvent, it does not appear by the evidence in the case that he was so deeply insolvent but that he might have believed that he should be able to extricate himself from his difficulties. I cannot think that this was a transfer in contemplation of bankruptcy within the meaning of the law.

It is then contended that the transfer, although good between the parties, is void at common law against creditors, for the want of a sufficient description of the property. The description words are, "The following goods and chattels, viz.: all the stock in trade, wares and merchandise, now in the store, No. 3, in Phoenix Row, occupied by me, and in the cellar under the same, of the value by estimation of six thousand dollars." The objection is that there is no particular description of the goods, nor any statement of the quantity or kind of goods, nor of the value but by a general estimate. A conveyance by such a general description, it is argued, is not binding on the rights of creditors. But the description is sufficiently certain to convey a title between the parties when the contract is followed by delivery, and the record of the mortgage, pursuant to the statute, is in law equivalent to a delivery. Bullock v. Williams, 16 Pick. 33. If there were other circumstances tending to impeach the fairness of the transaction, and to indicate a design to cover property and keep it from creditors, the want of greater particularity in the description might fairly be urged as a circumstance of suspicion. But there is no doubt that the mortgage was made on an adequate consideration; the transaction was open, and as notorious as the public record could make it; and the want of particular specification of the articles will not alone make it fraudulent.

The other act relied upon as an act of bankruptcy, is that Sleeper made a fraudulent agreement with Johnson to have a certain suit defaulted and judgment entered, so that Johnson might obtain a preference over his other creditors. The facts applicable to this part of the case are these: In August, 1842, one Eaton commenced a suit against Sleeper and attached the stock in

his store. F. H. Sleeper, a clerk in the store, was put in possession of the goods as keeper, under the officer who made the attachment. Three days afterwards, Johnson gave an accountable receipt for the goods to the amount of $300, Johnson at the same time claiming a right in them under his mortgage, and he sued out a writ, and attached the same goods, and the officer put them into his possession as keeper. Previous to the commencement of Eaton's suit, the same officer had attached other property of Sleeper on a written favor of one Wingate. And soon after the attachment on Johnson's suit an action was commenced by R. C. Johnson, Jr., and two by Jones, the petitioning creditor, on which the goods in the store were attached. These actions, six in number, were all entered at the September term of the court. Eaton's was settled, neither party appearing, and the others were defaulted on the first calling of the docket, except Johnson's, which was defaulted about two weeks after. Before the sitting of the court, Sleeper applied to Alden & Crosby, as attornies, to get the suits against him continued, and their names were entered on the docket in all the actions except those in favor of Jones, in which they were attornies for the plaintiff. But he afterwards directed them to withdraw their appearance, and allow the actions to be defaulted. On the 30th of September, he gave his consent in writing for the default of the action in favor of Johnson; and on the 4th of October, Alden & Crosby applied to the court by petition, as the attornies of Jones, for leave to come in and defend that action, in his interest as a subsequent attaching creditor. On a hearing leave was refused by the court. It is this written consent to be defaulted that is relied on as an act of bankruptcy.

I infer from the evidence on the record, although it is not expressly stated by the witnesses, that at this time Sleeper's business was entirely broken up, and all his visible property was under attachment. Certainly here is a case in which the bankrupt law ought to apply and make an equal and equitable division of the property among the creditors, for it is a case of open and notorious insolvency; and an amendment proposed by the committee of the senate, at the late session of congress, provides for such a case. But the law as it stands does not reach it, unless the single act of Sleeper, his agreement in writing to be defaulted, was an act of bankruptcy. The words of the statute are, "shall willingly or fraudulently procure himself to be arrested, or his goods and chattels, lands or tenements, to be attached, distrained, sequestered, or taken in execution." It is not enough that he is passive, and does nothing to prevent a creditor from taking his goods in execution. The words of the act can be satisfied with nothing short of a positive agency, an active co-operation. To be passive merely, and do nothing, is not to procure an act to be done. It is not to aid, co-operate, or advise. Though the whole of a man's property is attached and taken in execution by creditors, if he does not procure it to be done, if he does nothing by the way of advice, or aid and assistance, this will not constitute an act of bankruptcy, however notorious his insolvency may be. The court can make nothing an act of bankruptcy which has not been declared to be such by the legislature. That part of a statute which enumerates the acts of bankruptcy, is in the nature of a penal statute, and to be construed strictly. It cannot be enlarged by construction to include acts that are within the reason of the law or the mischiefs intended to be provided against, but which are not within the words of the statute according to their fair and reasonable construction. There is no principle more firmly established than this in the administration of the English statute of bankruptcy. Eden, Bankr. Law, 12; Dutton v. Morrison, 17 Ves. 198.

It is not pretended that the attachment of Johnson was made in consequence of any advice or suggestion of Sleeper. The whole case is narrowed down to the single ground of the written consent to be defaulted. Can this be considered as an active co-operation on the part of Sleeper, a procuring his goods to be taken in execution. I can see nothing more in it than a determination to remain passive, and leave the plaintiff to take his own course. If no such agreement or consent had been given, the result would have been the same. A default, according to the usual course of the court, would have been entered, as it was in the other action against him. If it could be shown that a default would not have been entered but for the written agreement, then Sleeper might be considered as actively co-operating. But without this, if there had been no appearance, a default would have followed on the motion of the plaintiff. It appears to me that it is impossible to maintain that this act, which left the matter entirely to the pleasure of the plaintiff, was a procuring his goods to be taken in execution, within the meaning of the statute. My opinion on the whole is, no act of bankruptcy was committed, and the petition must be dismissed.

## Case No. 7,497.

JONES et al. v. SMITH et al.

[Brunner, Col. Cas. 255; [1] 4 Hall, Law J. 276; 5 Hughes, 40.]

Circuit Court, D. Maryland. May Term, 1812.

SHIPPING ARTICLES—CONSTRUCTION OF CONTRACT—CAPTURE OF VESSEL—SEAMEN'S RIGHTS TO WAGES.

1. Where shipping articles provided that a vessel should proceed to Batavia, and thence

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if required to ports beyond the Cape of Good Hope, *held*, that an extension of the voyage to Japan does not violate those articles.

2. Where a vessel after unloading at one port proceeds thence and is captured, the seamen are entitled to wages to the time of unloading at such port.

[Cited in Bronde v. Haven, Case No. 1,924; Pitman v. Hooper, Id. 11,186.]

Libel for seamen's wages. The libelants were shipped in December, 1807, on board the ship Rebecca, for a voyage from Baltimore to Batavia, and thence, if required, to one or more ports beyond the Cape of Good Hope, and back to Baltimore. On the 18th of May, 1808, the vessel arrived at Batavia, and completed her unlading 3d June. On the 27th April, 1809, she sailed thence for Japan, in the employment of the Dutch government. On the 24th May she was captured by the British and sent to Bombay, where she was condemned, on the 3d January, 1810, as being Dutch property, and as infringing the orders in council for the prevention of trade in enemies' ports. There were three descriptions of claimants: 1st. The administrators of seamen who died at Batavia. 2d. Those who died after leaving Japan and before the capture. 3d. Those who returned to Baltimore.

Scott, Brice, and Harper, for libelants.

It is true that where a voyage is broken up the seamen lose their wages; but this is a principle of law which should apply to them with as little rigor as possible. When a voyage is divisible into many parts, the seamen are entitled to each part as soon as it is performed. That part is an entire voyage, though a loss may happen afterwards. This is a mitigation of the former rule, by which seamen were made insurers of the voyage. In contracts of freight, if the charterer does any act by which the goods or vessel are lost, he must nevertheless pay the whole freight. So in insurance, if a deviation be committed the insurer is discharged. In this case, the long delay at Batavia was a deviation, and consequently a termination of the first voyage. What reason was there for such a delay? If the seamen could be kept there one year, their articles would hold them there half a century, or any indefinite term. Batavia was held out as the chief port, the terminus ad quem; and the ports "from thence" were to be visited in continuation of that voyage. The voyage to Japan was a new voyage, and entirely out of the usual course of business. The taking on board a Dutch governor and Dutch property was an increase of the peril, because it subjected the vessel to suspicion and condemnation, and it would be very unreasonable to make the seamen incur a hazard which was never communicated to them.

Purviance & Pinkney, for respondents.

The whole contract respecting bills of exchange arises from legal implication; not a word is inserted by legal implication. So it is in the mariner's contract; every seaman knows what his contract binds him to do. It is immaterial if he is ignorant of his duty, for the law will not believe him. What benefit has the owner derived if the mariner perform but a part of the voyage. Here the owners lost the whole voyage, and the court is called upon to apportion the contract. The vessel was at Batavia during the operation of the embargo, and the seamen subsisted at the expense of the owners. If the seamen had been brought home they would have been idle. The law of insurance may safely be allowed to apply to this case. The stay at Batavia was not only reasonable but absolutely necessary, by reason of the embargo. It is absurd to contend that seamen are entitled to know what shall be the operations of a voyage. Such a doctrine is practically pernicious to the state, and destructive of all commercial enterprise. If the sailing from Batavia be a new contract, where is it? Whether that new contract arise from implication or record is immaterial; for that voyage, if it be called a new voyage, was entirely broken up by the capture.

DUVAL, Circuit Justice. This is a case depending on the terms of the shipping article. The voyage was to commence at Baltimore, and proceed to Batavia; thence, if required, to one or more ports beyond the Cape of Good Hope, and back to Baltimore. The terms of the articles are plain, and must have been clearly understood by the parties. There is a difference of opinion as to the effect of the voyage from Baltimore to Batavia; the difference commences there. On the one hand, it has been contended that the extension of the voyage to Japan was not justified by the articles, and that the ship was engaged in an unlawful commerce; on the other, that it was in pursuance of the terms of the articles, and that that commerce was lawful. The court have no doubt on this point. It appears to them to be within the letter and spirit of the shipping articles, and that there was nothing in the voyage repugnant to the principles of neutral rights. The condemnation at Bombay under the orders in council cannot be regarded by this court. This court denies the legality of the orders in council, which are founded on the prostration of the principles of neutral rights and in their decisions they will respect only the general law of nations.

The only question about which a doubt can arise is, as to the time when the claim of the mariners for wages, whilst at Batavia, shall cease. The court think it a case in which they ought to exercise a discretion, more particularly as the vessel waited at Batavia for some time for instructions. They are of opinion, and so order, adjudge, and decree, that the mariners be paid to an

intermediate day between the 3d day of June, 1808, the time when the vessel was unladen, and the 27th April, 1809, the time of her sailing from Batavia, that is to say, until the 15th November, 1808. That the representatives of the mariners who died before that day receive wages until the time of their decease; and of them who died afterwards, receive in common with the survivors, until the 15th November, 1808.

NOTE. Seamen's Wages—When Deemed to be Earned. See Pitman v. Hooper [Case No. 11,186], approving above case; and Bronde v. Haven [Id. 1,924], criticising the same.

## Case No. 7,498.

JONES v. SMOOT et al.

[2 Cranch, C. C. 207.] [1]

Circuit Court, District of Columbia. June Term, 1820.

PARTIES TO ACTIONS—CONTRACT OF SURETY.

A third person who, at the request of a contractor, executes the contract, cannot maintain an action against the contractor upon that contract.

This was a special action upon the case, on a written contract executed by the defendant George A. Smoot, as principal, and the other defendant [John Gozler], as surety, to deliver fifty cords of wood to the plaintiff, Jones. George A. Smoot being unable to comply with the contract within the time limited, Samuel Smoot, at the request of George A. Smoot and the plaintiff, Jones, without the knowledge of Gozler, delivered the wood, and took an assignment of the contract, and gave George A. Smoot six months to return him the wood.

Mr. Key, for defendant, contended that the contract was discharged by the delivery of the wood by Samuel Smoot; and that if it was not, yet the plaintiff, by giving six months' indulgence to G. A. Smoot without the consent of Gozler, had discharged the latter from his liability.

THE COURT (MORSELL, Circuit Judge, contra) instructed the jury that if they should be of opinion from the evidence that the wood was delivered by Samuel Smoot to Jones, at the request of George A. Smoot, and in compliance with the contract between Jones and the defendants, the plaintiff could not recover in that action.

## Case No. 7,499.

JONES et al. v. UNITED STATES.

[5 Cranch, C. C. 647.] [1]

Circuit Court, District of Columbia. March Term, 1840.

FALSE PRETENSES—PROVINCE OF JURY—JOINT INDICTMENT—WHAT CONSTITUTES FALSE PRETENSES IN DISTRICT OF COLUMBIA.

1. It is not sufficient, in any case, for a jury to find testimony; they must not only believe the testimony, but must find the facts which the testimony is intended to prove.

2. The jury ought not to find the defendants guilty unless they find all the facts necessary to constitute the offence charged.

3. No person is guilty, under the clause of the penitentiary act of the District of Columbia, respecting false pretences, [4 Stat. 449,] unless he has obtained something by his false pretence.

4. If three are charged with obtaining money by false pretences, and only one receive the money, the others are not guilty under the statute which punishes those only who obtain the fruit of the fraud.

5. A person who participates in the fraud, and who obtains the benefit of the money, may well be said to obtain the money.

6. The judge may refuse to give an instruction not predicated upon a supposed finding of the jury..

7. If the jury find the false pretences and the subsequent purchase, they may infer that the purchase was made upon the faith of the false pretences.

8. If three be jointly indicted for obtaining a check by false pretences, and it happen that the check is delivered to one of the three in the absence of the two others, who afterwards participate in the proceeds of the check, they are all equally guilty.

9. A false assertion, by means of which the party fraudulently obtains money or goods, &c., is a false pretence, within the meaning of the penitentiary act.

10. Congress, in passing that act, had in view the Act of 30 Geo. II, c. 24, respecting false pretences.

11. A fraudulent intent is supposed to be a necessary ingredient in the offence of obtaining money, &c., by false pretences, under that act, although the act does not expressly require it.

12. The defendant's confession that she was free is competent evidence against her of that fact.

Error from the criminal court of the district of Columbia for the county of Washington, upon a judgment against the plaintiffs in error, on a joint indictment against them and one William H. Brewster, who was not taken. The indictment had three counts. 1. The first count stated, "that William H. Brewster, Lucretia Clarke, alias Letty Clarke, free negress, and Harriet Jones, free negress, intending to cheat and defraud one Thomas Williams of his moneys on the 26th of October, 1839, with force and arms, at, &c., did falsely, knowingly, deceitfully, designedly, and unlawfully pretend to him the said Thomas Williams, that the said Lucretia Clarke, then and there appearing with the said William and Harriet, was the slave and property of him the said William H. Brewster; whereas in truth and in fact she was not his slave and property as the said William, Letty, and Harriet then and there well knew; and whereas, in truth and in fact the said Lucretia was not a slave at all, but was a free woman, as they the said William, Letty, and Harriet then and there well knew at the time of the said false pretence; and the said William then and there unlawfully, knowingly, designedly, and falsely sold and delivered the said Lucretia to the said Thomas as the slave and property of him the said William as aforesaid, with the consent, approbation, and procurement, advice and co-operation of the said Letty and Harriet; and the said Thomas,

[1] [Reported by Hon. William Cranch, Chief Judge.]

as payment for the said Lucretia, delivered to the said William, a check in writing, for the payment of $300 to the said William, on the Patriotic Bank of Washington; being an instrument of writing for the payment of money. And the said William, by the false pretences aforesaid, of him the said William and of the said Letty and Harriet, did then and there unlawfully, knowingly, designedly, and falsely obtain from the said Thomas the said check in writing for the payment of $300, being an instrument in writing for the payment of $300, being an instrument of writing for the payment of money, with the intent then and there by them the said Letty, Harriet, and William had and entertained to cheat and defraud the said Thomas of the same; to the great damage of the said Thomas; against the peace and government of the United States and against the form of the statute in such case made and provided." 2. The second count charged the same false pretence as made to the said Thomas Williams with intent to defraud one William H. Williams, whose agent the said Thomas was, whereby the said Thomas, as agent of W. H. Williams, was induced to give to Brewster a check on the Patriotic Bank for $300, whereby he obtained the said check by the said false pretences, with intent to defraud the said W. H. Williams. 3. The third count, charged the intent to defraud Thomas Williams of his moneys by the same false pretences, &c., and that he was induced thereby to give, and did give to the said Brewster, twenty bank-notes, amounting to $300; which he thus obtained, with intent to defraud the said Thomas Williams. These two counts contained averments similar to those in the first count. At the trial in the criminal court, bills of exception were taken to ten instructions given or refused.

Mr. R. J. Brent and Mr. Hoban, for appellants.

It appears that Brewster, when he sold Lucretia to Williams, gave a bill of sale with warranty; and when a warranty is taken, the previous representation is not a criminal false pretence. King v. Codrington, 1 Car. & P. 661. Williams was not deceived. He gave no credit to the representations; but relied upon his warranty. All the pretences were merged in and covered by the warranty. Brewster did not get the mony upon his pretences, other than his warranty, and he is not liable for the pretences of the two other defendants; and they did not obtain any thing by their pretences; nor does the declaration charge that they did. A person cannot be guilty under that clause of the penitentiary act against false pretences, unless he obtains something by his pretence. A mere false assertion of a fact is not a false pretence within the statute. There is no evidence that these two defendants were free, except their own admissions. Prima facie they are slaves; and if by the admission of a slave that he is free, he can be condemned to the penitentiary, his owner may entirely lose his service. The falsity of the pretence must be established by undoubted proof. 2 Russ. Crimes, 112; Rex v. Soares, 1 Russ. & R. 25; Rex v. Badcock, 1 Russ. & R. 249; Rex v. Stewart, Id. 363; Rex v. Kelly, Id. 421; Id. 461. A check is not an instrument for the payment of money; and the indictment does not charge that the check was payable to any person. In regard to the third count, the bank-notes obtained by the check were not the notes of Williams. They never were in his possession. 2 Russ. Crimes, 114.

Mr. Key and Mr. Addison, contrâ.

In Codrington's Case [supra], it was a covenant for title when the vendor had previously sold his interest to a third person. This was held not to be sufficeint to support an indictment for obtaining money upon false pretences. But if there had been any false papers shown, it would have been a false pretence. Here the producing the woman of color, and the possession of Brewster and his assertion of title are clearly false pretences. The confessions of the appellants that they were free, are comeptent evidence against them, on this trial; but they would not have been evidence against the claim of the owner; or of any person claiming to be owner. The receipt of the money by one of the three, obtained by the joint false pretences of the three, is the receipt of all. This is a misdemeanor in which there are no accessories. The cases cited, are of felony, in which there may be accessories, and therefore do not apply. It was not necessary that Williams should have been in actual possession of the notes. The possession of the bank was his possession. Starkie, Ev. pt. 4, p. 565; 2 Russ. Crimes, 300, 302, 303, 309; Young v. King, 3 Term R. 98; 5 Wheeler, 391.

CRANCH, Chief Judge, after reciting the counts of the indictment (THRUSTON, Circuit Judge, absent).

At the trial of the defendants Lucretia Clarke and Harriet Jones (the other defendant, William H. Brewster, not having been taken), the judge, at the prayer of the district attorney of the United States, instructed the jury,

1. "That if the jury believe the testimony in the foregoing statement, and also believe, from the evidence, that the representations of the prisoners to Williams were, in part, the inducement with Williams to buy the woman, then the traversers are guilty," meaning no doubt, guilty upon this indictment. The statement of testimony referred to, does not appear among the papers submitted to the court, nor is there any transcript of the record. We ought not to be called upon to decide cases in error, until the record is fully made up and present-

ed to the court. But however the statement of the testimony may be, it is not sufficient, in any case, for the jury to find testimony. They must not only believe the testimony to be true, but they must find the facts which the testimony is intended to prove. The jury ought not to find the defendants guilty, unless they should, from the evidence, find all the facts necessary to constitute the offence charged. Whatever may have been the statement of the testimony, therefore, we think the instruction was wrong. We think it wrong, also, because the indictment does not charge these defendants with any offence under the penitentiary act. No person is guilty under that statute, unless he has "obtained" something by his false pretence. This indictment does not charge these defendants with having obtained any thing by their false pretence; and, therefore, they are not guilty upon it. The indictment may be, and perhaps is, a good indictment against Brewster, who is alone charged with having obtained the fruit of the cheat. If it should be said, as I understand it to have been said in argument, that if three join in making a false pretence, and one of them obtains the money, &c., all may be said to have obtained it; the answer is, that then the indictment should have averred that they all obtained it; not that one only obtained it, as stated in this indictment. If these defendants did every thing charged against them in the indictment, and nothing more, they cannot be guilty, because it does not charge them with the offence described in the statute, which punishes those only who obtain the fruit of the fraud.

2. The judge refused to instruct the jury "1st. That in order to convict the prisoners" (that is, these two defendants, Lucretia and Harriet) "the jury must believe, from the evidence, that they received the money and check charged in the indictment to have been obtained by false pretences;" and "2d. That in order to receive the same, they must be present when it was given." If a person, under the statute, could "obtain" the money, &c., without personally receiving it into his own hands, the judge correctly refused the instruction. A person who participates in the fraud, and who obtains the benefit of the money, &c., may well be said to obtain the money within the meaning and mischief of the statute. We think there was no error in refusing this instruction.

3. The judge, also, refused to give the following instruction: "That if the jury believe, from the evidence, that the specific twenty bank-notes, charged, in the third count of the indictment, as obtained by the prisoners, by the false pretences in the said count alleged, were never in the possession of the said party, whose property and money they are charged to be, then the prisoners are entitled to an acquittal." We think the judge did not err in refusing this instruction. 1. Because that count does not charge that these defendants obtained those bank-notes. 2. Because the bank-notes are not averred to be the goods, or chattels, or money, or property, or bank-notes of the said Thomas Williams. It is true that this count charges that Williams gave the bank-notes to Brewster, in payment for Lucretia; but it does not directly aver that they were the property of Williams, or were ever in his actual possession. If it had averred that they were the bank-notes of Williams, we doubt whether it would have been necessary to prove them to have been in his actual possession; although in Walsh's Case, 2 Russ. Crimes, 113, 117, all the English judges decided that the notes which the prisoner had received upon the prosecutor's check, could not be called the prosecutor's notes, because he never had possession of them. Upon this point, however, we do not think it necessary to give an opinion.

4. The judge also refused to give the following instruction: "That all the precedent declarations and doings of the said Jones, Brewster, and Clarke, in the said evidence in this case averred, are merged in the subsequent bill of sale and warranty of Brewster, and that the prisoners, upon this charge, are entitled to an acquittal." The evidence referred to does not appear in this case, and therefore this court cannot say that the judge erred in refusing this instruction, for it is a matter of evidence to be left to the jury, who will draw their own inferences from that and all the other evidence in the cause. The prayer is not predicated upon any supposed finding of the jury; and, for that reason, also, was properly refused.

5. The judge also refused to give the following instruction: "That if the jury believe, from the evidence aforesaid, that after the conversations and doings of the prisoners, and previous to the consummation of the bargain between Williams and Brewster, the said Williams received from the said Brewster alone, the bill of sale given in evidence, then there is no evidence that the said Williams gave credit to the assertions of the prisoners, and they are entitled to an acquittal." The evidence referred to is not before this court, and, therefore, we cannot say that the judges erred in refusing the instruction. But if the false pretences and the subsequent purchase were proved to the satisfaction of the jury, they might in the absence of all contradictory evidence, infer that the purchase was made upon the faith of such pretences. The taking of a warranty, if proved, is a fact also for the consideration of the jury; and the inferences therefrom are to be made, or not, by the jury, according to the preponderance of the evidence upon their minds; and when there is evidence on both sides, the court cannot say there is no evidence on one side, but should leave the matter to the jury. Upon such evidence the court cannot say that the prisoners were en-

titled to an acquittal. We think the judge did not err in refusing this instruction.

6. The judge also refused to give the following instruction: "That if the jury believe, from the evidence aforesaid, that the check was given to Brewster by Williams, in the absence of the prisoners, they are entitled to an acquittal, notwithstanding said Brewster may have obtained said check, through the previous countenance and management of the prisoners." This prayer supposes, that if the prisoners were not present when Williams gave the check to Brewster, they were entitled to an acquittal, although they should have participated in the proceeds of the check; and whatever other evidence there might have been. If these defendants had been charged, in the indictment, with having obtained the check jointly with Brewster, we should not have supposed it necessary to charge or to prove that the three were all present at the time of its being given by Williams to Brewster. We think it would have been sufficient to prove that these defendants obtained their share of it, or of its proceeds, through Brewster. But these defendants are not charged with obtaining any part of the check or its proceeds; and the evidence referred to in the prayer, is not before this court. The prayer, therefore, appears to us to be irrelevant; and for that reason, as well as because, if relevant, it ought not to have been granted, we think the judge did not err in refusing it.

7. The judge also refused the following instruction: "That the mere exhibition of Letty Clarke to the said Williams accompanied with the assertion that she was a slave and willing to be sold, is no false pretence, but only a lie; even if the jury should believe she was, at the time, free." This prayer is not predicated on any supposed finding of the jury. It is therefore abstract; and does not, upon its face, appear to be applicable to the cause on trial. But under the penitentiary act, upon which this indictment was framed, the false assertion by the defendants, by which it is supposed they obtained the money, the notes or the check, is, we think, a false pretence within the meaning of that statute. At common law, indeed, the obtaining money by a mere lie, which common prudence could guard against, is not an indictable offence. Rex v. Wheatly, 2 Burrows, 1127; but that doctrine was not extended to cases under the English statute of 30 Geo. II. c. 24, against obtaining money, &c. "by false pretences." Young v. King, 3 Term R. 98, 100, 102, 103, &c. In that case the counsel for the defendants, in page 100, contended that the generality of the words "false pretences," does not extend the law to cases against which common caution may guard. But Lord Chief Justice Kenyon, in page 102, says, "Undoubtedly this indictment being founded on the statute of 30 Geo. II. c. 24, is different from a common-law indictment. When it passed, it was considered to extend to every case where a party had obtained money by falsely representing himself to be in a situation in which he was not; or any occurrence that had not happened; to which persons of ordinary caution might give credit. The statute of 33 Hen. VIII. c. 1, requires a false seal or token to be used, in order to bring the person imposed upon into the confidence of the other; but that being found to be insufficient, the statute of 30 Geo. II. c. 24, introduced another offence, describing it in terms extremely general. It seems difficult to draw the line, and to say to what cases this statute shall extend; and therefore we must see whether each particular case, as it arises, comes within it. In the present case, four men came to the prosecutor, representing a case as about to take place; that William Lewis should go a certain distance within a limited time; that they had betted upon the event, and that they would probably win. He was, perhaps, too credulous, and gave confidence to them, and advanced his money; and afterwards the whole story proved to be an absolute fiction. Then the defendants, morally speaking, have been guilty of an offence. I admit that there are certain irregularities which are not the subject of criminal law; but when the criminal law happens to be auxiliary to the law of morality, I do not feel an inclination to explain it away. Now this offence is within the words of the act; for the defendants have, by false pretences, fraudulently contrived to obtain money from the prosecutor; and I see no reason why it should not be held to be within the meaning of the statute." In p. 103, Ashhurst, J., said "As to the first objection; cases which happened before the passing of the 30 Geo. II. c. 24, do not apply to this; for that statute created an offence which did not exist before, and I think it includes the present. The legislature saw that all men were not equally prudent; and this statute was passed to protect the weaker part of mankind. The words are very general; 'all persons who knowingly, by false pretences, shall obtain from any person money, goods, &c. with intent to cheat or defraud,' &c. and we have no power to restrain their operation." Buller, J., in page 104, is full to the same effect. He said, "The statute clearly extends to cases which were not the subject of indictment at common law. The ingredients of this offence are the obtaining money by false pretences, and with an intent to defraud. Barely asking for a sum of money is not sufficient; but some pretence must be used, and that pretence false; and the intent is necessary to constitute the crime. If the intent be made out, and the false pretence used in order to effect it, it brings the case within this statute;" and he cites a case in which the pretence was a bare lie, and the whole story a fiction; and in which the prisoner was convicted and condemned under the statute. It is true that those statutes were not extended in practice

to the state of Maryland, and were never in force in this county; but they were known to every lawyer in that state and in this county; and there can be no doubt that congress had them in view when they passed the penitentiary law for this district. It uses the same general terms, "false pretences," without any definition or explanation. The words of the statute are, "That every person, duly convicted of obtaining, by false pretences, any goods or chattels, money, bank-note, promissory note, or other instrument in writing, for the payment or delivery of money or other valuable thing, shall be sentenced to suffer imprisonment and labor for a period not less than one year, nor more than five years." It does not, like the English statute of 30 Geo. II. c. 24, expressly require that it should be done, "with intent to cheat or defraud any person or persons, of the same," but as the penitentiary act seems to consider the offence of obtaining money by false pretences as an offence already well known; and as it was, and could be, only known as the offence created by the English statute of 30 Geo. II. c. 24, it seems reasonable that such an intent ought to be considered as constituting an essential ingredient in the offence named in the penitentiary law. We are, therefore, of opinion that the judge did not err in refusing to instruct the jury that the exhibition of Letty Clarke to the said Williams, accompanied by the false assertion that she was a slave, and willing to be sold, was not a false pretence.

8. The judge also refused to instruct the jury, "that Letty Clarke's own statements, as against her, were not competent proof of her freedom." If the word "proof" means evidence only, as we suppose it was intended to mean, the instruction was correctly refused; her voluntary confessions were competent evidence of that fact, as against her, in this cause.

9. The judge was therefore right also in refusing to instruct the jury, "that there was no evidence of the freedom of the said Letty Clarke."

10. And also in refusing to instruct the jury, "that the United States had failed to prove the false pretence alleged, by sufficient proof." Judgment reversed; and ordered to be arrested.

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JONES (UNITED STATES v.). See Cases Nos. 15,491–15,496.

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## Case No. 7,500.

JONES v. VANKIRK et al.

[2 Fish. Pat. Cas. 586.] [1]

Circuit Court, E. D. Pennsylvania. Oct., 1865.

PATENTS—ACKNOWLEDGMENT OF PATENT—"IMPROVEMENTS IN LAMPS."

1. When defendants were licensees of the plaintiff, and stamped every article made with the name and date of the patent, this act was a public acknowledgment that the articles were made under the patent, notwithstanding their protest that it should not be so construed.

2. Vankirk's patent of July 17, 1860, for improvement in lamps, is a palpable infringement of Jones' reissued patent of January 11, 1859.

This was a bill in equity, filed to restrain defendants [C. A. Vankirk and L. D. Vankirk] from infringing letters patent [No. 20,159] for improvement in lamps, granted to complainant [Edward F. Jones] May 4, 1858, and reissued January 11, 1859, [No. 648.] The invention of Jones consisted in holding the deflector, as well as the chimney, fast to the cap of the lamp, by means of a spring, so that the chimney and deflector, or either of them, might be readily removed by merely pressing back a spring. The spring was formed of thin metal, having short bends to catch over the lip or base of the chimney. The claim of the original patent was as follows: "Securing the chimney to the removable cap, and both of them to the lamps, by means of a spring operating in the manner substantially as set forth." The claims of the reissue were as follows: "What I claim, etc., is securing the chimney to the removable deflector, and both of them to the lamp cap, by means of a spring operating in the manner substantially as set forth. Second. I claim a detached deflector in combination with a chimney, when the chimney is secured to the cap, independently of the deflector, as set forth."

The defendants claimed under a patent to J. T. Vankirk, dated July 27, 1860 [No. 29,221], of which they were assignees. Vankirk's improvement consisted of a tube containing a rod surrounded by a coiled spring, and having a collar near one end, and a disc, or other suitable handle, at the opposite end, the whole being constructed, applied to, and combined with the flange or projections which inclose the lower end of the glass chimney or shades of lamps. The claim of his patent was as follows: "Combining the tube A, its rods H, and coiled spring e, with the flange or projection which incloses the lower end of the chimney or shade of a lamp, in the manner and for the purpose set forth."

George S. Boutwell and George Harding, for complainant.

S. D. Law and Theodore Cuyler, for defendants.

GRIER, Circuit Justice. The respondents, in October, 1861, entered into an agreement with complainant, by which they obtained a license from him to use his improvements in lamps, for which he had a renewed patent, dated January 11, 1859. Since that time respondents have used the invention without interference or claim of any other person. Respondents had obtained a patent in 1860, which was a palpable infringement of complainant's patent. At the time or after the execution of this agreement, they protested

[1] [Reported by Samuel S. Fisher, Esq., and here reprinted by permission.]

that it should not be construed as an acknowledgment that the burners made with a spiral spring were subject to any of the provisions of the agreement. Nevertheless, they stamped on each burner, so made, the words, "E. F. Jones, patent, May 4th, 1858," as they had covenanted with Jones to do.

They thus publicly acknowledged, on every lamp sold by them, that it was made under Jones' patent. In doing this, they acted honestly, for their patent of 1860, which they now set up, is a palpable infringement of Jones' patent. It merely substitutes one kind of spring for another better one, described as one of the devices in the combination as claimed in Jones' patent.

The respondents have enjoyed the benefit of their license without interference—they allege no fraud or unfair dealings on the part of Jones, but have attempted to prove that Jones was not the first inventor of the combination of devices patented by him.

It is not worth while inquiring whether the respondents are not estopped from alleging any such defense under the circumstances, as the evidence does not establish the fact of a prior invention. It shows only that others have tried some of the devices used in Jones' patent. The result being that they came very near, but never succeeded, in accomplishing what Jones has accomplished. This is the history of nearly every valuable invention or discovery that has ever been made. See remarks on this subject in Goodyear v. Day [Case No. 5,569]. Let a decree be entered for an account, as prayed for in the bill.

## Case No. 7,501.

JONES v. VANZANDT.

[2 McLean, 596; [1] 1 West. Law J. 2.]

Circuit Court, D. Ohio. July Term, 1843.

PLEADING—DEMURRER TO EVIDENCE—SLAVERY—RECAPTURE OF RUNAWAY SLAVES—HARBORING RUNAWAY SLAVES—DAMAGES.

1. A demurrer to evidence admits the facts proved, and every legal presumption which may be drawn from them.

2. A motion to overrule the evidence can only be made on the ground of its irrelevancy or incompetency.

3. If there be evidence conducing to prove the case made in the declaration the court will not overrule it.

4. Slavery exists, only, by virtue of the laws of the states where it is sanctioned.

[Cited in Osborn v. Nicholson, Case No. 10,595.]

5. If a slave abscond from the state where he is held to service, into a jurisdiction where slavery is not tolerated, he is free. And this would be the law of these states, had not the constitution made a provision that such slave should be delivered up on claim of his master.

[Cited in Rodney v. Illinois Cent. R. Co., 19 Ill. 44.]

6. There is no general principle in the law of nations which requires such a surrender. It can only be required by virtue of a compact.

7. Recaption, at common law, could not be made in a foreign sovereignty.

8. Damages for harboring or concealing a slave, in a free state, are recoverable, only, by virtue of the constitution of the United States and the act of congress [1 Stat. 302]. No suit, therefore, for such an act can be sustained at common law.

[Cited in Daggs v. Frazer, Case No. 3,538; Van Metre v. Mitchell, Id. 16,865; Osborn v. Nicholson, Id. 10,595; Beckner v. Street, Id. 2,098.]

9. Notice that the colored persons harbored or concealed are fugitives from labor need not be in writing by the claimant or his agent, nor need it be given by either of them verbally.

10. Notice under this act means knowledge. And if there be evidence conducing to show such notice or knowledge, it must go to the jury, who will judge of the sufficiency of it. The same principle applies as to the evidence of harboring or concealing the fugitives.

[Cited in Van Metre v. Mitchell, Case No. 16,864.]

[This was an action of trespass on the case by Wharton Jones against John Vanzandt.]

This action is brought by the plaintiff, a citizen of the state of Kentucky, against the defendant, a citizen of Ohio, under the act of congress, in regard to fugitives from labor. The declaration contains nine counts: First. That the plaintiff, being a citizen of Kentucky, where slavery is established by law, owned nine slaves, (naming them) who, without his license, departed from his services, and came to the defendant, &c. Second. That the said slaves, being fugitives from labor, came to the defendant, &c., who, after notice that they were such fugitives, harbored and concealed them contrary to the statute, &c. Third and fourth. With some variations the same as above. Fifth. That the above slaves, &c., that the plaintiff, by his agents then and there undertook to seize and arrest such slaves as fugitives from labor, but was then and there knowingly and wilfully obstructed and hindered, &c., by the defendant from so doing, &c. Sixth. Charged the defendant with rescuing the fugitives from labor aforesaid, after they had been arrested, &c. Seventh and eighth. Were counts in trover. Ninth. That the defendant harbored and concealed Andrew, a fugitive from labor, after notice, &c.

Jones, a witness called by the plaintiff, stated that the plaintiff owned nine negroes (naming them) and resided in Boone county, Kentucky. That the greater part of them were born his, and that he purchased the others. That on Saturday evening, the 23d April, 1842, about nine o'clock, he was at the house of the plaintiff, and saw the negroes; the next day, at about twelve o'clock, he saw the same negroes, with the exception of two of them, in the jail at Covington. The plaintiff lives ten miles below Covington. Jackson, one of the absent negroes, returned in a few days; but Andrew remained absent, and has not been reclaimed. The plaintiff paid a re-

[1] [Reported by Hon. John McLean, Circuit Justice.]

ward to the persons who returned the negroes of four hundred and fifty dollars, and other expenses which were incurred, amounting in the whole to about the sum of six hundred dollars. Andrew was about thirty years old, and his services were worth to the plaintiff six hundred dollars. That he could be sold in Kentucky for that sum. Several other witnesses corroborated the statements of this witness, as to the ownership of the negroes, the reward paid, and the value of the services of Andrew. Hefferman, a witness, stated, that he lives in Sharon, thirteen miles north of Cincinnati, on the road to Lebanon. That on Sunday morning, a little after day-light, he saw a wagon which was rapidly passing through Sharon. It was covered, and both the hind and fore part of the wagon were closed; a colored man was driving it. He knew the wagon belonged to the defendant, and his suspicion was excited. The witness and one Hargrave, another witness, started, in a short time, in pursuit of the wagon. They overtook it near Bates', about six miles from Sharon. The defendant lives near Sharon. On coming up with the wagon, the boy driving it was ordered by Hargrave to stop; he checked the horses, but a voice from within the wagon directed the boy to drive over him. The wagon horses were then whipped, running against Hargrave's horse which threw him off. The horses were driven in a run some two hundred yards, but at length were overtaken by the witness, who seizing the reins of the horses drew them up into a corner of a fence. The driver jumped off and ran some distance; Vanzandt, the defendant, then came out of the wagon and took the lines, but the witness refused to let the horses proceed. Eight negroes were in the wagon; one of them called Jackson, and Andrew, the driver, escaped; the other seven were brought back to Covington and lodged in jail. Hargrave, accompanied the above witness in pursuit of the wagon, which he knew to belong to the defendant. Being acquainted with the defendant, he knew it to be his voice, which directed the colored boy to drive over the witness. That the wagon-tongue being driven against the horse of the witness, he was thrown, and the wagon-horses were driven on the run, until overtaken and stopped. Seeing the defendant in the wagon, with the negroes, the witness asked him if he did not know they were slaves. The defendant replied, that he knew they were slaves, but that they were born free. He said he was going to Springboro, a village in Warren county. This witness, and, also, Hefferman, stated the amount paid, as a reward, for bringing the negroes to Covington, as above. Hume, very early on Sunday morning saw the wagon moving very rapidly, and two men on horseback pursuing it, near Bates'. Looked into the wagon, after it was stopped, and saw the defendant in it, with the negroes. He was asked if he did not know that they were slaves, and he replied that, by nature, they were as free as any one. Witness took the negroes to Covington in a wagon. Some time after this he saw the defendant, who said to him, "if you had let me alone, the negroes would have been free, but now they are in bondage." And the defendant said it was a christian act to take slaves and set them at liberty. Bates, a witness, states that he went to the wagon after it had been stopped, looked into it, and saw the defendant with the negroes. The witness said, "Vanzandt, is that you—have you a load of runaways?" The defendant replied, "they are, by nature, as free as you and I." The witness heard the defendant say that, having been at market in the city of Cincinnati, he returned to Lane Seminary, a distance of two or three miles, to spend the night with Mr. Moore. That he left his wagon standing in the road, and, when he came to it, about three o'clock the next morning, he found the negroes standing near it; that he did not know how they came there, or where they wished to go. He had no conversation with them. He geared his horses, hitched them to the wagon, and the negroes got into it. He afterwards said that he had received the blacks from Mr. Alley. McDonald, a witness, stated that he heard the defendant say he received the negroes on Walnut Hills, the same place as Lane Seminary. That, at three o'clock on Sunday morning, he found the negroes standing near his wagon, in the road; they got into it, and he started for home. That he rose early, to have the cool of the morning. Defendant said he had done right. That he would, at all times, help his fellow man out of bondage; and that, what he had done, he would do again. Thurman, a witness, stated that he saw the defendant in the wagon with the negroes, the cover closed behind and before. The defendant said to Hefferman the negroes ought to be free, but he knew they were not. The defendant lives at Sharon, and this was six or seven miles beyond, on the road to Lebanon. This is the substance of the facts proved, on which the counsel for the plaintiff rested the case. The evidence for the plaintiff being closed, a motion was made by the defendant's counsel to overrule the testimony. This motion was argued on both sides with ability, and at great length.

Fox, Southgate & Morris, for plaintiff.

Mr. Chase, T. Morris, and Mr. Jolliffe, for defendant.

[For the defendant it was insisted: (1) That the constitution of the United States does not recognize the existence of property in human beings; but regards all men as persons and not as the subjects of property. (2) That the clause in the constitution which relates to fugitives from service, only secures to the master the right to the re-delivery of an escaping servant on claim, in a single class of cases only, namely where the person escaping has been held to serv-

ice in one state under the laws thereof and has escaped into another; subject to this claim only, the escaping servant has all the rights in the state into which he comes, that an immigrant under other circumstances would have. (3) That this clause in the constitution being in derogation of natural liberty and of state rights, must be construed with great strictness. (4) That the act of congress under which the action was brought is repugnant to the national constitution and to the ordinance of 1787, and therefore void. (5) That the act, if not void, is to be strictly construed, for the same reasons which apply to the clause in the constitution in relation to fugitives from service. (6) That the clause in the act, which saves to the claimant of a fugitive from service his right of action for injuries sustained, does not create such a right, and therefore, as no such right of action existed prior to the statute, no such exists now. (7) That proof of actual notice from the plaintiff, or some one acting in his behalf, to the defendant, that the persons alleged to be harbored or concealed were held to service in one state and escaped into another, was necessary to sustain the action, and no such proof having been made, the action must fail.

[In support of these propositions the defendant's counsel cited Hill v. Low [Case No. 6,494]; Ex parte Simmons [Id. 12,863]; Harry v. Decker, Walk. (Miss.) 36, 83; Lunsford v. Coquillon, 2 Mart. [N. S.] 401; Rankin v. Lydia, 2 A. K. Marsh. (Ky.) 470; Mr. Senator Walker's Argument, 15 Pet. [40 U. S.] Append. 72; Com. v. Aves, 18 Pick. 215; Story, Confl. Law, 203, 214; 2 Barn. & C. 448; Groves v. Slaughter, 15 Pet. [40 U. S.] 493.

[The counsel for the plaintiff controverted these positions. They cited 9 Johns. 69; [Groves v. Slaughter] 15 Pet. [40 U. S.] 493; Johnson v. Tompkins [Case No. 7,416]; [Prigg v. Commonwealth of Pennsylvania] 16 Pet. [41 U. S.] 539.] [2]

McLEAN, Circuit Justice. It is proper, first, to ascertain the precise character of the motion. By some of the counsel, in the argument, it has been treated as a demurrer to the evidence; but it can not be so considered. No demurrer has been filed, and should the motion be overruled the defendant intends to examine witnesses. A demurrer to the evidence takes the case from the jury; the facts proved are admitted to be true, and, also, every legal inference that can be drawn from them favorable to the plaintiff. The motion is not, technically, for a nonsuit. Such a motion would not be granted by the court, where there was evidence conducing to sustain the right of the plaintiff. The motion must then be considered as asking the court to overrule the evidence, on account of its irrelevancy or incompetency. Now, such a motion is never granted where the evidence is competent, and it conduces to establish the case made in the declaration. The jury are the proper judges of the sufficiency of the testimony. The range of discussion by the counsel on both sides, has not been restricted by the court. It has embraced slavery in all its forms and consequences—the federal constitution, the act of congress, and the power of the states. It may be proper to notice some of the topics thus discussed, which have a bearing upon the case under consideration. The nature of the action has been examined. It must be admitted that it arises wholly under the constitution and act of congress. Slavery is local in its character. It depends upon the municipal law of the state where it is established. And if a person held in slavery go beyond the jurisdiction where he is so held, and into another sovereignty where slavery is not tolerated, he becomes free. And this would be the law of these states, had the constitution of the United States adopted no regulation upon the subject. Recaption has been named as a common law remedy. But this remedy could not be pursued beyond the sovereignty where slavery exists, and into another jurisdiction which had entered into no compact to surrender the fugitives. There is no general principle in the law of nations, which would require a surrender in such a case. The remarks of the supreme court, in regard to a surrender of captured slaves in the Amistad Case, were made with reference to our treaty with Spain. In our colonial governments, and under the confederation, no general provision existed for the surrender of slaves. From our earliest history it appears that slavery existed in all the colonies, and at the adoption of the federal constitution it was tolerated in most of the states. The constitution treats of slaves as persons. The view of Mr. Madison, who "thought it wrong to admit in the constitution, the idea that there could be property in men," seems to have been carried out in that most important instrument. Whether slaves are referred to in it, as the basis of representation, as migrating, or being imported, or as fugitives from labor, they are spoken of as persons. Property, real or personal, takes its designation and character from the laws of the states. It was not the object of the federal government to regulate property. A federal government was organized by conferring on it certain delegated powers, and by imposing certain restrictions on the states. Among these restrictions it is provided that no state shall impair the obligation of a contract, nor liberate a person who is held to labor in another state from which he escaped. In this form the constitution protects contracts, and the right of the master, but it originates neither.

The traffic in slaves does not come under the constitutional power of congress to regu-

[2] [From 1 West. Law J. 2.]

late commerce among the several states. In this view the constitution does not consider slaves as merchandise. This was held in the case of Groves v. Slaughter, 15 Pet. [40 U. S. 449]. The constitution nowhere speaks of slaves as property. But how does this affect the case under consideration? It is clear the plaintiff has no common law right of action for the injury complained of. He must look exclusively to the constitution and act of congress for redress. The counsel for the defendant admit that, in a given case, the plaintiff has a remedy under the act of congress. If this be so, what have we to do with slavery in the abstract? It is admitted, by almost all who have examined the subject, to be founded in wrong, in oppression, in power against right. But in this case we have only to inquire whether the acts of the defendant, as proved under the law of congress, subject him to a claim for indemnity by the plaintiff. By the third section of the act respecting fugitives from labor, it is provided, "that when a person, held to labor in any of the United States, &c., under the laws thereof, shall escape into any other of the said states, the person to whom such labor is due, his agent, or attorney, may seize or arrest any such fugitive," &c. [1 Stat. 302]. And the fourth section provides "that when any person shall knowingly and willingly obstruct or hinder such claimant, his agent or attorney, in so seizing or arresting such fugitives from labor, &c., or shall harbor or conceal such persons, after notice that he or she was a fugitive from labor as aforesaid, shall, for either of the said offences, forfeit and pay the sum of five hundred dollars, &c., saving, moreover, to the person claiming such labor or service, his right of action for, or on account of, the said injuries, or either of them." As the first clause in the above section supposes the offender to come in contact with the claimant of the fugitives, his agent or attorney, and as there is no evidence showing an authority from the claimant to those who arrested the fugitives, the second clause, only, of the section will be examined. The offence under this clause consists in harboring or concealing such fugitive, after notice that he or she had escaped from labor. What acts shall constitute this offence? What shall be a notice under the statute? That a formal written notice from the claimant, his agent or attorney, is not required, must be admitted. Nor must the notice, verbal or otherwise, necessarily come from the claimant or his agent. Such a construction presupposes a knowledge, by the complainant, of the individual who harbors or conceals the fugitives. At this stage of the case it is unnecessary to say more on this point than that there is evidence before the jury which conduces to show that the defendant knew the negroes in question were fugitives from labor. Whether the proof is sufficient to establish this fact is a matter for the determination of the jury. To harbor or conceal a fugitive, in violation of the statute, the act must evince an intention to elude the vigilance of the master or his agents; and the act done must be calculated to attain this object. To relieve the hunger of a fugitive would not be within the statute, unless accompanied by acts showing a determination to disregard the law. There is evidence in the case conducing to show an intention to do this by the defendant, and also to show acts calculated to give effect to such an intention. The sufficiency of this evidence, like that which regards the notice, will be referred to the jury. The clause in the section, "saving to the claimant the right of action for the injuries received, beyond the penalty, presupposes a right of action to exist." The correctness of this will scarcely be questioned, when the constitutional provision on the subject is considered. On this motion the question of damages need not be considered, nor the alledged defects in the declaration. These points may be considered in the future progress of the case. The court overruled the motion.

An unsuccessful effort was made by calling witnesses to impeach the credibility of some of the plaintiff's witnesses.

[The cause was then argued to the jury on the facts by the same counsel, who insisted on and controverted before the court the same legal positions as on the motion to overrule. In behalf of the defendant the court was asked to give those legal positions except the fourth, fifth, and sixth, in charge to the jury, and also to charge: (1) That fraudulent concealment was necessary to constitute the offense of harboring or concealing under the statute. (2) That the concealment must be actual, the person concealed being kept out of view and sheltered from observation. (3) That no damages could be recovered from the loss of any person not thus actually concealed. (4) That no reward paid under a statute of another state, for acts done in violation of the criminal law of Ohio, could form an item of damages. (5) That unless the injuries complained of, namely, the loss of services and the expenses of recaption, were the consequences of acts done by the defendant, he could not be held liable. (6) That obstruction, to the seizure or arrest of fugitives from labor within the description of the act of congress by persons having no actual authority from the claimant to make such seizure, was no offense under the act, although the acts of such persons were subsequently approved by the claimant.][3]

McLEAN, Circuit Justice (charging jury). The attention and patience with which you have heard this case, gentlemen of the jury, show that you appreciate its importance;

[3] [From 1 West. Law J. 2.]

and I doubt not that, in deciding it, you will follow the dictates of an unbiassed judgment. (Here the judge restated the evidence, which may be omitted, as it is stated above.) The plaintiff does not seek redress for the injuries complained of on any general principle, legal or equitable, of the common law. He relies on the constitution, and the act of congress [1 Stat. 302], as the foundation of his right. The second section of the fourth article of the constitution, declares that "no person held to service or labor in one state, under the laws thereof, escaping into another, shall, in consequence of any law or regulation therein, be discharged from such service or labor, but shall be delivered up, on claim of the party to whom such service or labor may be due." And the third and fourth sections of the act of congress, of the 12th February, 1793, as above cited, define more particularly the rights of the master, and provide for him modes of redress. The seventh and eighth counts, which were in trover, have been abandoned. These counts state that the slaves were casually lost, in Boone county, Kentucky, by the plaintiff, and that they came into the possession of the defendant, a citizen of Ohio. Now, if the slaves left the service of the plaintiff with his consent, or in any other mode, except as fugitives from labor, and came into the possession of the defendant, as alledged, the plaintiff has no right to their services, and still less, to recover from the defendant their value. The sixth count, which charges the defendant with having rescued the slaves after they were seized by the agents of the plaintiff, has also been abandoned. There is no evidence which tends, in any degree, to show a rescue. The fifth count charges the defendant, under the first clause of the fourth section of the act, that he knowingly and willingly obstructed, and hindered the agents of the plaintiff, in seizing or arresting the fugitives. That the defendant resisted, to the utmost of his power, the arrest of the negroes, by Hefferman and Hargrave, is undoubted. But, in this, did the defendant violate the law? The persons who made the seizure had no authority from the plaintiff. And it is the obstruction or hindrance to the arrest, by the claimant, his agent or attorney, that incurs the penalty under the above clause of the statute, and also subjects the party to damages for the injury. The resistance, then, of the defendant to the arrest, by Hefferman and Hargrave was, in no sense, a violation of the statute. They acted without authority, and had no legal right, therefore, to make the arrest. But it seems, from the evidence, that the plaintiff, when the negroes were returned, ratified the acts of Hefferman and Hargrave, in making the arrest. And here the question arises, whether a subsequent ratification can legalize the arrest. That the subsequent ratification legalizes the original transaction, is a general principle in agencies. And, in this case, it is unquestionably good, as between the plaintiff and his agents. But the inquiry is, whether such subsequent ratification can have relation back, so as to affect the acts of the defendant. Can it so change the nature of the defendant's acts as to subject him to a penalty, which was not incurred prior to such ratification, Most clearly it can not. The statute under consideration is a penal one, and, consequently, must be construed strictly. It is not within the legislative power to make an act penal which was not so when it was done. Much less can such an effect result from the ratification, by the plaintiff, in the present case. We must look to the other counts in the declaration, which charge the defendant with harboring and concealing the negroes, after he had notice that they were fugitives from labor. If the evidence shall not sustain these counts, the plaintiff can not recover. The plaintiff is bound to show that the defendant harbored or concealed the negroes, after he had notice that they were fugitives from labor. And, first, as to the fact of notice.

In Kentucky, and every other state where slavery is sanctioned, every colored person is presumed to be a slave. This presumption arises from the nature of their institutions, and from the fact that, with few exceptions, all the colored persons within those states are slaves. On the same principle, every person in Ohio, or any other free state, without regard to color, is presumed to be free. No presumption, therefore, arises, from the color of these fugitives, alone, that the defendant had notice that they were slaves. A notice in writing to the defendant was not necessary, nor any special notice from the plaintiff, his agent or attorney. But if, at the time the defendant was connected with these negroes, he had a full knowledge of the fact, however acquired, that they were slaves and fugitives from labor, it is enough to charge him with notice. You must satisfy yourselves on this point by an examination of the evidence. The fact must be clearly proved, and, if it be so proved, it would be a reproach to the law, and to the administration of justice, to hold that the notice was insufficient. What shall constitute a harboring or concealing within the statute? This offence is not committed, in my judgment, by treating the fugitive on the ordinary principles of humanity. You may converse with him, relieve his hunger and thirst, without violating the law. In short, you may do any act which does not show an intent to defeat the claims of the master. But any overt act which shall be so marked in its character, as not only to show an intention to elude the vigilance of the master, but is calculated to attain such an object, is a harboring of the fugitive in violation of the statute. It is clearly within the mischief it was designed to prevent. To constitute the offence under the statute, it is not necessary to incarcerate the fugitive in a dungeon or room: if he be-

taken in a wagon and conveyed from the shore of the Ohio to the shore of Lake Erie which enables him to escape into Canada, I suppose no one could doubt that the individual had made himself responsible. And if carrying the fugitive the whole of this route would incur the penalty, on the same principle the conveyance of him such a part of the route as shall cause the loss of his services to the master would equally incur liability. The damages claimed by the plaintiff consist of the sum of four hundred and fifty dollars paid as a reward to Hefferman and Hargrave, and other expenses, amounting in the whole to about six hundred dollars. And, also, he claims the value of the services of Andrew, who had been lost to the plaintiff. Those services are estimated by the witnesses to be worth six hundred dollars. It is said that this sum could have been realized by the plaintiff for the boy. Under the statute you will observe that a penalty of five hundred dollars is incurred for harboring or concealing a fugitive, which the party injured may recover, but the present action is not for this penalty. In this suit the plaintiff is only entitled to recover the damages he has actually sustained by the acts of the defendant. You will first determine whether the proof under the principles here laid down entitle the plaintiff to recover. And if he be so entitled then you will consider the amount of the damages.

It is earnestly contended by the defendant's counsel, that as Hargrave and Hefferman were kidnappers and violators of the law of the state in arresting the negroes; that they were entitled to no reward, and that the payment of it by the plaintiff does not entitle him to remuneration. The principle is recognized that the commission of a crime or an agreement to commit an unlawful act, does not constitute a good consideration for a contract. Any contract is void that rests upon such a basis. But this principle does not apply to the point under consideration. It may be admitted that Hefferman and Hargrave were trespassers, if nothing more, in seizing the wagon of the defendant; but the inquiry is, whether, by the laws of Kentucky, the plaintiff was not bound to pay to Hefferman and Hargrave, for the return of the fugitives. There is no doubt of this, as the law of Kentucky is explicit on the subject. If then the plaintiff, by the law of Kentucky, was obliged to pay the sum, and if such obligation resulted from the acts of the defendant, it would seem that the plaintiff may claim indemnity for such an injury. In this incidental mode we cannot try the guilt or innocence of Hargrave and Hefferman. We can only judge of the acts of the defendant, and to what extent he injured the plaintiff. Unless you should be clearly satisfied, gentlemen, that the defendant, after notice that the negroes were fugitives from labor, did harbor or conceal them within the statute, you will find for the defendant. But if you shall find that the defendant has violated the law, then you will find for the plaintiff the damages he has suffered from such violation of the law and of his rights by the defendant. To authorize such a verdict, you must believe that, by the acts of the defendant, the plaintiff has been compelled to pay the reward stated, and the other expenses, and also that he has lost the services of the colored man, Andrew.

If the evidence showed that the defendant had taken the negroes from the farm of the plaintiff, in Kentucky, and conveyed them through Ohio until arrested, there would seem to be no doubt of the plaintiff's right to the damages he claims. But there is no proof that the defendant took the negroes from Kentucky. On the contrary it appears, by his own confession, that he received them at the Walnut Hills, near Cincinnati. Still if you shall consider the defendant is liable under the statute, and that the full amount of the injury complained of has been done to the plaintiff by the defendant, it will be your duty to find accordingly. Gentlemen, in the course of the argument much has been said of slavery in the abstract, of abolitionism, of associations with the view of promoting the abolition of slavery and of acts growing out of these exciting topics, which have no direct connection with the issues before you. Citizens, individually or collectively, have a right to express their opinions and to discuss any subject in which they may feel an interest. Unpopular and foolish as it would be for individuals to form association to alter the constitution of Ohio and annul the ordinance of 1787, so as to admit slavery into the state, yet I suppose no one would question their right to do so. And so long as they should confine themselves to topics of discussion, however erroneous, still they would be obnoxious to no legal penalty. But if they should attempt to subvert the law, by a clandestine introduction of slavery into the state, every good citizen would say they should suffer the penalties for such an offence. I know of no association whose avowed object is to subvert the law, unless it be one in a neighboring state, which I have noticed since the commencement of this trial, and which, it seems, pledges itself to oppose by force the execution of a certain law.

In the course of this discussion much has been said of the laws of nature, of conscience, and the rights of conscience. This monitor, under great excitement, may mislead, and always does mislead, when it urges any one to violate the law. Paul acted in all good conscience, when he consented to the death of the first martyr; and, also, when he bore letters to Damascus, authorizing him to bring bound to Jerusalem all who called upon the name of Jesus. I have read to you the constitution and the act of congress. These bear the impress of the nation. The principles which they lay down and enforce have been sanc-

tioned in the most solemn form known in our government. We are bound to sustain them. They form the only guides in the administration of justice in this case. I charge you, gentlemen, to guard yourselves against any improper influence. You are to know the parties only as litigants. With their former associations and views, disconnected with this controversy, you have nothing to do. It is your duty to follow the law, to act impartially and justly; and such, I doubt not, will be the result of your deliberations.

[The jury returned a verdict in favor of the plaintiff for twelve hundred dollars, which was entered, by direction of the plaintiff's counsel, as a verdict of guilty under the third and fourth counts of the declaration, which charged the defendant with harboring and concealing the fugitives after notice, thereby occasioning to the plaintiff the loss of their services for six days, and the expenses incident to the recaption. No verdict was entered on the other counts. Mr. Chase, for the defendant, filed a motion for a new trial and a motion in arrest, which motions at a subsequent day were argued together.

[The defendant's counsel insisted that judgment must be arrested for the following reasons, among others: (1) Because the declaration did not set forth a cause of action. It averred that the persons alleged to be fugitive servants "unlawfully went away from the service of the plaintiff at Boone county, in the state of Kentucky, without his consent, and subsequently came to the defendant at Hamilton county, Ohio," and that the defendant harbored and concealed them after notice that they were "fugitives from labor," which averments did not make a case within the constitution and law. (2) Because the verdict, being entered on the third and fourth counts only, did not comprehend all the issues submitted to the jury. (3) Because one of the counts on which the verdict was entered did not conclude against the form of the statute, and was therefore fatally defective. They also insisted that a new trial should be granted for the following, among other, reasons: (1) Because the verdict was against evidence. (2) Because the damages were excessive, being the full amount claimed, whereas the verdict did not comprehend the ninth count, which alone alleged the total loss of the services of Andrew.] [4]

[NOTE. The motion for a new trial was granted at the costs of defendant. Case No. 7,502. The costs not being paid, the new trial was not claimed, but was abandoned. Vanzandt, the defendant, in the meantime died, and a scire facias was issued to revive the suit against his administrator. To this scire facias the defendant demurred. The circuit court overruled the demurrer. Id. 7,503. The motion in arrest of judgment was not heard by the court until after the death of Vanzandt, and nearly eight years after the hearing of the motion for a new trial. At the April term, 1851, the circuit court overruled the motion in arrest, and entered judgment upon the verdict of the jury. Id. 7,505.]

NOTE [from original report in 1 West. Law J. 2]. There was also an action of debt brought by the same plaintiff against the same defendant, to recover the penalty of five hundred dollars given by the act of 1793 to the claimants of fugitives from labor. It was sustained by substantially the same evidence, and involved the same legal questions, except those relating to the amount to be recovered. A verdict was rendered for the plaintiff. Motions for a new trial and in arrest were filed.

This case will now go to the supreme court of the United States upon a certificate of division in opinion between the judges of the circuit court on the following points, as copied from the record: First. Whether, under the fourth section of the act of 12th February, 1793, "respecting fugitives from justice and persons escaping from the service of their masters," on a charge for harboring and concealing a fugitive from labor, the notice must be in writing by the claimant or his agent, stating that such person is a fugitive from labor under the third section of the above act, and served on the person harboring or concealing such fugitive, to make him liable to the penalty of five hundred dollars under the act. Second. Whether such notice, if not in writing and served as aforesaid, must be given verbally by the claimant or his agent to the person who harbors or conceals the fugitive, or, whether to charge him under the statute, a general notice to the public in a newspaper is necessary. Third. Whether clear proof of the knowledge of the defendant, by his own confession or otherwise, that he knew the colored person was a slave and fugitive from labor, though he may have acquired such knowledge from the slave himself or otherwise, is not sufficient to charge him with notice. Fourth. Whether receiving the fugitive from labor at three o'clock in the morning at a place in the state of Ohio, about twelve miles distant from the place in Kentucky where the fugitive was held to labor from a certain individual, and transporting him in a closely covered wagon twelve or fourteen miles, so that the boy thereby escaped pursuit, and his services were thereby lost to his master, is not harboring or concealing of the fugitive within the statute. Fifth. Whether a transporting under the above circumstances, though the boy should be recaptured by his master, is not harboring or concealing of him within the statute. Sixth. Whether such a transportation in an open wagon, whereby the services of the boy were entirely lost to his master, is not a harboring of him within the statute. Seventh. Whether a claim of the fugitive from the person harboring or concealing him must precede or accompany the notice. Eighth. Whether any overt act so marked in its character as to show an intention to elude the vigilance of the master or his agent, and calculated to attain such an object, is a harboring of the fugitive within the statute.

The cause having progressed, and the jury having brought in their verdict, the defendant moved in arrest of judgment, and assigned sundry reasons in support of his motion; on some of which points the opinions of the judges were opposed, to wit: First. Whether the first and second accounts contain the necessary averments that Andrew, the colored man, escaped from the state of Kentucky into the state of Ohio. Second. Whether said counts contain the necessary averment of notice that said Andrew was a fugitive from labor within the description of the act of congress. Third. Whether the averments in said counts, that the defendant harbored said Andrew, are sufficient. Fourth. Whether said counts are otherwise sufficient. Fifth. Whether the act of congress approved February 12, 1793, be repugnant to the constitution of the United States. Sixth. Whether said act be repugnant to the ordi-

[4] [From 1 West. Law J. 2.]

nance of congress, adopted July, 1787, entitled "An ordinance for the government of the territory of the United States northwest of the Ohio river."

[NOTE. The points stated above as having been certified to the supreme court were fully considered by that court, Mr. Justice Woodbury delivering the opinion of the court and finding upon the points in favor of the plaintiff. 5 How. (46 U. S.) 215. In an action for debt, for the amount of the statutory penalty $500, a writ of scire facias was issued to revive the action against Vanzandt's administrator. To this scire facias the defendant demurred. The court sustained the demurrer, holding that an action for a penalty abates on the death of the defendant. Case No. 7,504.]

## Case No. 7,502.

JONES v. VANZANDT.

[2 McLean, 611;[1] 1 West. Law J. 56.]

Circuit Court, D. Ohio. July Term, 1843.

JURY—CHALLENGES—SLAVERY — HARBORING RUNAWAY SLAVES—EXCESSIVE DAMAGES—PLEADING AT LAW — SUFFICIENCY OF DECLARATION—VERDICT.

1. Under peculiar circumstances a peremptory challenge, by the state laws, may be allowed to the plaintiff, after he has expressed himself satisfied with the jury, and after two peremptory challenges have been made by the defendant.

[Cited in U. S. v. Douglass, Case No. 14,989.]

2. Any overt act which intentionally places a fugitive from labor beyond the reach of his master, or is calculated to have such an effect, is a harboring of the fugitive within the statute.

3. If the defendant had full knowledge from the negroes, or otherwise, that they were fugitives from labor, it is notice under the statute.

[Cited in Van Metre v. Mitchell, Case No. 16,864.]

4. If the plaintiff was subjected to the payment of a certain reward, by the laws of Kentucky, for the return of his slaves; and the defendant was the cause of his liability to such payment, the jury may consider it in their estimate of the damages.

5. Where the defendant has been the means of the entire loss of a slave, evidence may be received of the value of such slave, by showing what his services were worth, and, as conducing to show that fact, for what sum he might have been sold.

6. The verdict having been rendered on the third and fourth counts of the declaration by the express direction of the plaintiff's counsel, the other counts can not be referred to as sustaining the verdict.

7. The above counts charge the loss of the services of the slaves for six days, and the damages to which the plaintiff was subjected. These damages, from the evidence, could not exceed six hundred dollars. The verdict was for twelve hundred dollars, and is, consequently, excessive.

8. In what cases a verdict may be amended.

9. What shall constitute a good finding by the jury, and vice versa.

[Cited in Crocker v. Hoffman, 48 Ind. 211.]

10. Under the act of Ohio a count must be abandoned before the jury retire to consult on their verdict.

11. The remedy pursued by the plaintiff is founded on the act of congress.

12. The act gives a remedy to the master for the injury done him, independently of the penalty of five hundred dollars.

13. An averment that the defendant harbored and concealed the negroes, after notice that they were the slaves of the plaintiff, and were fugitives from labor, is sufficient.

14. The word "escaped" being used in the statute, is the most appropriate term to be used in the declaration; but any word of equal import will be sufficient.

15. An averment "that the slaves escaped from the state of Kentucky and came to the defendant, at Hamilton county, in the state and district aforesaid," refers to the state and district last above named, unless the contrary be clearly shown.

16. A declaration founded upon a statute must conclude against the form of the statute, &c.

[Cited in U. S. v. Batchelder, Case No. 14,540; Fish v. Manning, 31 Fed. 341.]

17. The act of congress on the subject of fugitive slaves is constitutional. It does not conflict with the ordinance of 1787.

[This was an action of trespass on the case by Wharton Jones against John Vanzandt for damages for harboring runaway slaves.]

Fox, Southgate & Morris, for plaintiff.

Mr. Chase, T. Morris and Mr. Jolliffe, for defendant.

OPINION OF THE COURT. This is a motion for a new trial, and, also, in arrest of judgment. The jury found for the plaintiff twelve hundred dollars, in damages, on the third and fourth counts of the declaration. [Case No. 7,501.]

The first ground on which a new trial is asked, is, "that a peremptory challenge was allowed the plaintiff, after he expressed himself satisfied with the jury, and after two peremptory challenges had been made by the defendant." The statute gives a right to each party to challenge, peremptorily, two jurors. There was some difference of opinion among the members of the bar as to the state practice on the subject; and the court thought it not unreasonable to suffer a juror to be challenged by the plaintiff, under the above circumstances. One of his counsel had, inconsiderately, remarked, that they were satisfied with the jury. Both parties were allowed, in this respect, the right given them by the statute, and there was nothing in the mode of exercising that right, which could, in any degree, prejudice the cause of either.

The second ground assumes that "the court erred in charging the jury that it was not necessary to prove that the defendant, intentionally, placed the colored persons, in question, out of view for the purpose of eluding the search of the master or his agent, in order to establish the fact of concealment, or to prove that he received, sheltered, and placed them out of view for said purpose,

[1] [Reported by Hon. John McLean, Circuit Justice.]

in order to establish the fact of harboring, but charged that it was sufficient, if the jury believed from the evidence, that the defendant received the colored persons into his wagon, and transported them to Bates' from Walnut Hills, with intent to facilitate their escape from their master."

The court gave no such charge as the above, either in terms or in substance. In the published charge, which is substantially correct, the court say: "Any overt act which shall be so marked in its character, as not only to show an intention to elude the vigilance of the master, but is calculated to attain such an object, is a harboring of the fugitive in violation of the statute. It is clearly within the mischief the statute was designed to prevent." And, again: "To constitute the offence under the statute, it is not necessary to incarcerate the fugitive in a dungeon or room; if he be taken in a wagon and conveyed from the shore of the Ohio to the shore of Lake Erie, which enables him to escape into Canada, I suppose no one could doubt that the individual had made himself responsible. And if conveying the fugitive the whole of this route would incur the penalty, on the same principle the conveyance of him such a part of the route as shall cause the loss of his services to the master would equally incur liability." The counsel who make the motion assume that the court said, that the transportation of the fugitives by the defendant, in his wagon, from the Walnut Hills to Bates', if done with the intent to facilitate their escape from their master, was sufficient to charge the defendant under the statute.

It will be seen from the printed charge, which, in this respect, is literally correct, that the transportation spoken of, must be such as to cause the loss of the services of the fugitives to the master, or such as is calculated and designed to produce such a result. And this construction of the statute is said to be not as strict, as the nature of the act requires, but a liberal one, such as is given to a remedial statute. What shall be a harboring or concealing within the statute is necessarily a matter of construction. So diversified is the conduct of men and their devices to evade the law, that no statute could define, with precision, what particular acts shall constitute a harboring or concealing within its spirit. The object of the statute is, to prevent such acts as shall place the fugitive beyond the reach of his master. The word harbor means "to entertain," "to shelter," "to secure," "to secrete," "to receive entertainment," "to take shelter." In the sense of the statute it means a fraudulent receiving, securing, hiding, or placing, by transportation or otherwise, a fugitive from labor beyond the reach or knowledge of his master. The act must be fraudulent. That is, it must be done with a fixed intention to violate the law by defeating its object, which is a fraud upon the law as well as upon the rights which the law designed to protect. In the language of the charge, "the act must be so marked in its character, as not only to show an intention to elude the vigilance of the master, but such as is calculated to attain that object. Now, from this definition it would seem that no man, who respects the laws of his country, can be in danger of incurring the penalty of this act. It cuts off from no individual the exercise of humanity. He may indulge, and safely indulge, the better feelings of his nature, in sympathizing with the distressed, and in administering to their comfort. For his acts only is he amenable under the law. His advice to the fugitive does not subject him to any penalty. He may clothe him and give him food. There is only one thing which the law prohibits him from doing, and that is, he shall not harbor or conceal the fugitive so as to defeat the claims of his master. He shall not deliberately and intentionally violate the law of his country. Any thing short of this he may do.

If an individual, under cover of the night, shall possess himself of a dozen or more colored persons, and concealing them in a closely covered carriage, shall, by a rapid movement, drive them from or near the place where such persons were held to service, by the laws of the state, to a place beyond the reach of the master, could any one doubt that such an act would be a violation of the law. The court and jury must determine what shall amount to a harboring or concealing within the meaning of the statute, the same as what shall constitute treason, murder, burglary, robbery, and every other crime known to the law. The facts are as various as the cases, and in each case the facts must fix the character of the offence. I was not prepared to hear, in a court of justice, the broad ground assumed, as was assumed in this case before the jury, that a man, in the exercise of what he conceives to be a conscientious duty, may violate the laws of the land. That no human laws can justly restrain the acts of men, who are impelled by a sense of duty to God and their fellow creature. We are not here to deal with abstractions. We can not theorize upon the principles of our government, or of slavery. The law is our only guide. If convictions, honest convictions they may be, of what is right or wrong, are to be substituted as a rule of action in disregard of the law, we shall soon be without law and without protection. The pretext for violating the rights of those who may become obnoxious to censure, can easily be assumed and maintained. And the same plea of the rights of conscience, and the high motive of duty, will be asserted, however absurd, everywhere, in justification of wrongs. What one man, or association of men, may assume as the basis of action, may be assumed by all others. And in this way society may be resolved into its original elements, and then the governing principle must be force. Every approximation to this

state is at war with the social compact. If the law be wrong in principle, or oppressive in its exactions, it should be changed in a constitutional mode. If the organization of our government be essentially wrong, in any of its great principles, change it. Change it in the mode provided. But the law, until changed or abrogated, should be respected and obeyed. Any departure from this inflicts a deep wound on society, and is extremely demoralizing in its effects. No good man, in the exercise of his sober judgment, can either feel or act in violation of this rule.

The third reason for a new trial is, "that the court erred in charging the jury that it was not necessary, in order to establish the plaintiff's right to recover, to prove actual notice to defendant from the complainant, or some one acting in his behalf, that the persons alleged to be harbored or concealed, by him, were fugitives from labor within the meaning of the act of congress [1 Stat. 302], but charged that it was sufficient, if the jury should be satisfied, from the evidence, that the defendant knew that such persons were fugitives from labor, from the admission of the negroes, or otherwise." The words of the law are—if any person "shall harbor or conceal (a fugitive from labor), after notice that he or she was a fugitive, shall forfeit, &c." That this notice need not be given in writing is admitted; but it is insisted that it must come to the person who harbors the fugitive from the master, his agent, or attorney. I lay it down as a general principle, that where the law speaks of notice it is never necessary that such notice should be in writing, unless so required by the statute, commercial usage, or by practice of the courts. A notice of taking a deposition the statute requires to be in writing; and a written notice to the indorser of a bill of exchange or promissory note must be in writing by commercial usage; and in many cases written notices are required under rules of courts. But the law of notice is best illustrated, and is most appropriate to the case in hand, which applies to a purchaser of real estate, for a valuable consideration, with notice. Now, if he had notice of a prior title, at the time he purchased, the law holds him to be a fraudulent purchaser. As in the case under consideration, if the defendant harbored the fugitives from labor, claimed by the plaintiff, after notice that they were such fugitives, he committed a fraud on the law.

It is laid down in The Ploughboy [Case No. 11,230], as a general rule, "that whatever is sufficient to put the party upon inquiry is good notice." And, also, "where a party has knowledge of the facts he has notice of the legal consequence resulting from those facts." An individual who passes a counterfeit coin does not violate the law unless he knew it to be counterfeit. And this guilty knowledge is shown by proving that the same person passed similar coins at other times, or that such coins were found in his possession. Now, if the persons in question were fugitives from labor, and the defendant had full knowledge of the fact, is it important how this knowledge was acquired? Notice is information. Knowledge is equivalent to notice in cases where it is not required to be in writing. Vanzandt, the defendant, on the trial of certain persons for kidnapping at Lebanon, swore that he received these negroes near the Lane Seminary, at three o'clock on Sabbath morning, he having returned to that place, from the Cincinnati market, on Saturday evening. That they were brought to that place in two carriages, and were delivered to him by Mr. Alley. The cover of the defendant's wagon was closed at both ends of it so as to attract attention. This was done, he stated to some of the witnesses, "to keep out the cold," whilst to others he said, "he started at three o'clock in the morning, that he might have the cool of the morning." This was on the 24th April of last year. To Thurman the defendant said, "he knew the colored persons in his wagon were not free, but he said they ought to be free." Bates asked the defendant if he had a load of slaves or Kentuckians; he replied, "They are as free by nature as you are." McDonald heard the defendant say that he was not ashamed of what he had done. That he would help his fellow mortals out of bondage. He said the colored persons were free by the constitution. To Hargrave he observed: "If you had not interfered the negroes would then have been free, but now they are slaves, or in bondage." Now, taking into view the manner in which the slaves were received; the time of night; the rapid manner in which they were driven, six or seven miles beyond the residence of the defendant; and the attempt to escape from his pursuers by running his horses; the manner in which his wagon was covered, and his own confessions that the fugitives were slaves, no one of sane mind can doubt that he had full notice that the colored persons were fugitives from labor. And that he intended to place them beyond the reach of pursuit seems to be equally clear. Now, whether the law of congress be politic or not, is not a question for the court. They are bound to execute it. To require a notice, verbal or written, to the person who harbors slaves before he is responsible, under the law, from the owner or his agent, would, in effect, strike the law from the statute book. It would be unreasonable and impracticable. It would be against all the analogies of the law.

No one can look at the facts of this case with an honest endeavor to carry out and give effect to the law, who can, it would seem to me, doubt on this subject. No individual is responsible under the law, unless he has a full knowledge that the persons harbored are fugitives from labor, and he so disposes of them, as to place them beyond the reach of their pursuers, or as may be calculated to elude pursuit. The act must be an intention-

al fraud upon the law, by an utter disregard of its provisions. No law-abiding citizen need fear a liability under this statute.

The third ground of the motion is, "that the court erred in charging the jury that the plaintiff was entitled to recover from the defendant, by way of damages, the sum of four hundred and fifty dollars, paid as a reward given by a statute of Kentucky to the individuals who forcibly stopped the defendant on the highway in Ohio, seized the colored persons in question and carried them out of the state of Ohio into the state of Kentucky, without legal process and without any authority or request from the claimant or his agent or attorney." On this question the court had nothing to do with the illegal conduct of Hefferman and Hargrave, who took the slaves from the defendant. They were not upon their trial, and we could not inquire whether their acts were legal or otherwise. The only inquiry was, whether, by the acts of the defendant, the plaintiff had been compelled to pay the above sum. The matter of fact was left to the jury, and no doubt can be entertained by the court that if the payment of the money resulted from the acts of the defendant, the jury very properly included it in their verdict. This question did not arise under the law of Ohio, but under the law of Kentucky. The plaintiff was subject to the law of Kentucky, and that law imposed the duty on him to pay, as a reward, the above sum to those who should return his slaves, who had escaped from his service.

The plaintiff was only entitled to recover in this case for the injury which had been done him by the defendant. And this injury, so far as this item is concerned, is measured by the law of Kentucky. Now, could any thing be more preposterous than to hold that the plaintiff, if entitled to recover, should not recover the above damage, because, by the laws of Ohio, Hefferman and Hargrave could not have recovered the reward which was unquestionably given to them by the law of Kentucky. In regard to this reward the plaintiff was subject to the law of Kentucky, and not to the law of Ohio. The reward was paid, necessarily and legally paid, under the Kentucky statute. Whether the payment of this reward resulted from the acts of the defendant was a question exclusively for the jury.

The court, it is alledged, also, "erred in charging the jury that the plaintiff was entitled to recover the market value of Andrew, if they should believe upon the evidence that he escaped in consequence of the harboring and concealing by the defendant." The court charged the jury that if they believed, from the evidence, that the services of the boy, Andrew, were lost to the plaintiff through the acts of the defendant, that they should give the value of his services. And they called the attention of the jury to one or more witnesses who said the services of the boy were worth six hundred dollars, and that he could have been sold for that sum. It is presumed that a slave is always purchased in reference to his services. His services are bought and sold when the slave is bought and sold. They both, under the laws of Kentucky, mean the same thing. It was, however, to the value of the services of the boy that the attention of the jury was particularly directed. As to the sixth ground no remarks are necessary.

The seventh reason is, that the verdict is against evidence. And first, it is contended "that there was no evidence that the escape of Andrew was occasioned by the act of the defendant." This point was fully and fairly left to the jury. It was not a matter for the court. Andrew was received among the other slaves, by the defendant, according to his own confession, from Alley, at Walnut Hills, at three o'clock, on Sabbath morning; he was transported with the other negroes until the wagon was arrested, when Andrew escaped. He, it seems, drove the wagon at least a part of the route. Vanzandt swore in the trials at Lebanon, that "he did not know where the negroes were from or where they were desirous of going." But from the circumstance of his receiving them at three o'clock in the morning, from another individual who conveyed them to the Walnut Hills in two carriages, at that unusual hour, the jury may have presumed that the defendant and Alley acted in concert. That there was strong ground for this presumption no one will deny. And if this concert existed, it would make the defendant responsible for the loss of the services of this boy. In any point in which the question may be considered, the court cannot say that the verdict, in this respect, was against evidence; or that it was not founded on facts and circumstances which the jury had a right to weigh and determine. And this answer will equally apply to the alledged want of evidence to show that the expenses of the recapture resulted from the defendant's conduct.

The eighth ground is, "that the damages are excessive." And first, it is contended "that the liability to pay the rewards of recapture was incurred in consequence of the escape, and did not spring from any act of the defendant." This, in another form, has already been sufficiently considered. In the second place it is urged "that only the value of the services of the colored people, between their recaption by the defendant and their restoration to their master, should have been taken into consideration by the jury." The jury had, undoubtedly, a right to take into consideration the value of the services of the boy, Andrew, if, from the evidence, they believed these services had been lost to the plaintiff by the acts of the defendant. And there is no doubt that they did estimate in their verdict the value of those services. But a difficulty arises, in regard to the damages, from the counts on which the verdict was rendered.

The verdict was given on the third and fourth counts of the declaration. These counts go for the loss of the services of the slaves six days, and in the third count is superadded "and the plaintiff was thereby put to great trouble and cost in recovering the slaves." On the seven other counts there was no finding by the jury. The first, sixth, seventh, and eighth counts were abandoned on the trial; and the court instructed the jury there was no evidence under the fifth count. That count charged the defendant with obstructing the arrest. And the plaintiff now asks that all the counts except the third and fourth, on which the jury have found, be entered upon the record as having been abandoned. The second, fifth and ninth counts, were not abandoned.

Where a mistake is made in recording the verdict, the court may amend by the judge's notes (2 Strange, 1197; 3 Term R. 749); or by the notes of the clerk (1 Salk. 47, 51). So, where part of the plaintiff's claim is good and part bad, and the jury find entire damages, if it appear from the judge's notes, that damages were given only for the part which was good, the court will allow the postea to be amended. 2 Johns. Cas. 17. So, where one count in a declaration is good and the others bad, if the judge certify that the evidence applied solely to that count, &c., the verdict may be amended by applying it to the good count. 1 Caines, 381; 11 Johns. 98. In Rockfeller v. Donnelly, 8 Cow. 652, the court of errors held, that the verdict on one out of several issues, if the finding comprise the whole merits, is not error. That a mistake in not entering a verdict on all the issues may be amended, or passed over on error as actually amended. 12 Wend. 215. After a general verdict upon the counts, one good and the other bad, and after a reversal of the judgment for such cause the postea will be suffered to be amended so as to have the verdict entered upon the good count only where it appears the evidence applied to both counts. The rule established in New York is somewhat different from the English rule. In 1 Ld. Raym. 324, it is laid down that a verdict must comprehend the whole issue or issues submitted to the jury in that particular cause, otherwise the judgment founded upon it may be reversed. In Sanford v. Porter [Spencer v. Goter], 1 H. Bl. 78, it is said the court have no authority to amend or alter the verdict actually found by the jury in point of substance. But a mistake in entering the verdict will be corrected.

In [Patterson v. U. S.] 2 Wheat. [15 U. S.] 221, it is said, a verdict is bad if it varies from the issue in a substantial matter, or if it find only a part of that which is in issue; this rule results from the nature and the end of pleading, although the court may give form to a general finding so as to make it harmonize with the issue, yet if the finding is different from the issue or is confined to a part only of the matter in issue, no judgment can be rendered on the verdict. In Bac. Abr. tit. "Verdict," letter L, it is said, if part of the issue be insensible, the verdict, notwithstanding it is a general one, is good; but if part of the issue which is sensible be insufficient in law and the verdict be a general one, it is bad. Id. letter M. If a verdict only find part of the issue and be silent as to the residue, it is bad even for that part which, if it had stood alone, would have been well found; because the jury have failed in ther duty, which was to find the whole that is in issue. In Clark v. Irvin, 9 Ohio, 132, the court say the verdict in the case below was a general one of not guilty. The jury did not pass upon the issues joined by two of the defendants. This has heretofore been held a sufficient ground for reversing the judgment. 5 Ohio, 227. By the 131st section of the practice act (Swan's St. 684), it is provided, "that where there are, in a declaration, several counts, any one or more of which shall be defective and the residue good and entire damages are given, the verdict shall be good and effectual in law, provided the plaintiff, before the jury retire from the bar, apply to the court to instruct the jury to disregard such defective count or counts." And by the 142d section of the same act, where some counts are defective, and a general verdict, the court may render judgment on the good counts. These statutes are not in force in this court, as they have never been adopted by congress or the court.

The case in 8 Cow., above cited, is the only one in point, and that considers the finding of the jury for the plaintiff on a part of the counts, is a virtual finding for the defendant on the other counts. But the correctness of this rule is doubted when the counts, like the declaration under consideration, contain distinct grounds of action. In the fifth count the defendant is charged with hindering an arrest of the fugitives, by the agents of the plaintiff. In the ninth count the defendant is charged with having harbored the boy, Andrew, &c., by which his services were entirely lost to the plaintiff. Now can the court amend the verdict by entering not guilty on these two counts. It is not a formal amendment, though the objection may seem to be technical. That the jury found the full value for the services of Andrew is clear, and yet such finding, it would seem, can only be sustained under the ninth count. Damages under the third and fourth counts can only be assessed, for the expenses incurred by the plaintiff in the recaption of his slaves, and for the loss of their services, which is stated to have been six days in both the counts. If the court then shall enter an abandonment of the ninth count, I cannot see how this verdict can be sustained. Though it does not aid the plaintiff as the jury have not passed upon it. It is said that in an action of tort the court will seldom, if ever, grant a new trial, on account of excessive damages. But the data on which the damages were estimated in this

case were distinct items of expense or loss, estimated by the witnesses in dollars. The jury were instructed, if they found for the plaintiff, that there was nothing in the case which called for exemplary damages. So it would seem whether the counts not embraced by the verdict be abandoned or not, that there are great difficulties in sustaining the verdict. The damages found are double the sum which in any view the jury could take, under the third and fourth counts, should have been given. Under the ninth count, so far as the verdict is concerned, it might have been sustained.

I will take a very concise view of the reasons in arrest of the judgment. It is contended that no action is given to the master, by the act of congress, except that to recover the penalty of five hundred dollars. The latter part of the 4th section of the act declares, that if any person "shall harbor or conceal a fugitive from labor, after notice that he or she was a fugitive from labor, such person shall, for such offense, forfeit and pay the sum of five hundred dollars; which penalty may be recovered by, and for the benefit of such claimant, by action of debt, in any court proper to try the same, saving, moreover, to the person claiming such labor or service, his right of action for, or on account of the said injuries." Now it must be admitted that on the principles of the common law, the plaintiff could not sustain this action. It is founded upon the statute, under the constitution. And as it is a statutory remedy, it must clearly exist and be strictly pursued. The saving of the right of action to the claimant, is in the nature of a proviso, and to understand it every part of the statute which is connected with it must be considered. The third section provides the mode of recovering a fugitive from labor. The fourth section declares what acts shall constitute offences, for either of which the claimant may recover, as a penalty, five hundred dollars. It is made an offence to obstruct or hinder the claimant, his agent or attorney, in arresting the fugitives, or to rescue him after the arrest. It also subjects an individual to the penalty, who shall harbor or conceal the fugitive, after notice that he is a fugitive from labor; saving, moreover, to the complainant a right of action for, or, on account of, the said injuries, or either of them. The injuries are defined, and the penalty provided; but this penalty, though given to the claimant, is given as a penalty, and not to indemnify him for the injuries received. For these, or any one of them, a right of action is saved. The form of the action was not saved or given, for that existed before, as a means of redress for a wrong done. But it was the ground of action which was saved, notwithstanding the penalty inflicted. The statute, under the constitution, defined the rights of the master, and provided a mode by which his fugitive slave might be reclaimed. Now, this was a right created by the constitution and the law. Under the institutions of Ohio, this right has no other foundation than the constitution and act of congress. But, under these, it is a right, substantive and important. And, for an obstruction in the exercise of this right, by hindering an arrest of the fugitive, by rescuing him, by harboring or concealing him, whereby an injury is done to the master, his right of action is saved. The acts prohibited are unlawful, because the law punishes them, and saves a right of action to the claimant, for the injury done—the same injury for which the penalty may be exacted. This is the plain meaning of the statute.

The objection that, as no action lay at common law for the injury, and none being expressly given by statute, the action can not be maintained, is wholly unsustainable. The statute creates the right, and declares what shall constitute the wrong; and, for the redress of every wrong, the common law gives a remedy. It was only necessary for the statute to declare, having provided a penalty, that it should not bar a remedy, by action, for the injury done.

It is alledged, as a reason in arrest of the judgment, "that the third and fourth counts of the declaration, on which the verdict is rendered, are both bad. The third, because it contains no sufficient averment of escape or notice; the fourth, because it contains no sufficient averment of notice, and does not conclude against the form of the statute." The averments of escape, in both counts, are substantially the same. In the third count, after stating the names of the slaves, and ownership of the plaintiff, and that, under the laws of Kentucky, they were his property, and owed him service, and were held to labor, it is stated that they unlawfully, wrongfully and unjustly, without the license or consent, and against the will of the plaintiff, departed and went away from, and out of, the service of the plaintiff, at Boone county, and the state of Kentucky, and came to Hamilton county, in the state and district aforesaid; yet the said defendant, after notice that the said persons were the slaves of the plaintiff, and fugitives from labor, but contriving, &c., then and there, to wit: at the county and the district aforesaid. The notice is here sufficiently alledged, and, also, that the colored persons owed service to the plaintiff, under the laws of Kentucky. It need not to have been averred that they were slaves, &c.; but this, being a stronger language than the act requires, does not vitiate the count. There is, however, an important defect in the allegation, of their escape. The word escape is used in the statute, and could, undoubtedly, be most appropriately used in the declaration; but other and equivalent words may answer; and such words, I think, are found in these counts. Without the license or consent, and against the will of the plaintiff, the slaves departed; and, it is averred, that the defendant had notice, before he harbored

them, that they were fugitives from labor. But to what place did they escape? The words of the act are—"When a person, held to labor in any of the United States, &c., under the laws thereof, shall escape into any other of the said states," &c. Now, the allegation in this count, is, that the slaves escaped from Boone county, and the state of Kentucky, and came to the defendant, at "Hamilton county, in the state and district aforesaid." What state and district aforesaid? The grammatical reference is to the state and district last above named. The state of Ohio is not named in the count; and the words, "Hamilton county," are not a sufficient designation. The direct reference then, is, to the state of Kentucky, which, by the law, is a district; and, in this view, there is no escape alledged within the statute.

In the second count, which has been abandoned, the slaves are alledged to have departed and went away from the plaintiff, and out of his service, at said Boone county, and came to the defendant, at "Hamilton county, in the state of Ohio, and the district aforesaid." The first count, which has also been abandoned, being founded on the common law for enticing away the slaves, the venue is laid under a videlicet "in the district of Ohio, as aforesaid." There is no district of Ohio alledged, to which this allegation could refer, unless it be in the title of the count, as a caption to the declaration. This action being founded on the statute, great strictness is required. A good ground of recovery must be shown, if not in the words of the statute, in every material circumstance. And if, in the language of the statute, the slaves did not escape from one state, where they were held to labor, into another state, the action can not be sustained. The title, as set out, would seem to be defective. And this is not cured by a verdict. I entertain great doubts whether the reference to the preceding counts, as regards the escape, can make good the third count. At least, there is great uncertainty in the reference. A reference to the margin may be sufficient for the venue, but the allegation under consideration is a part of the title. The fourth count, in this respect, is liable to the same exception as the third. But there is another exception taken to the fourth count—"that it does not conclude against the form of the statute."

Mr. Chitty (1 Chit. Pl. 246) says: "If, however, an offence be created by a statute, and a penalty be inflicted, the mere statement of the facts constituting the offence will be insufficient, for there must be an express reference to the statute, as, by the words, 'contrary to the form of the statute,' in order that it may appear that the plaintiff grounds his case upon, and intends to bring it within, the statute." In 405 he further remarks: "It is material, in all cases, that the offense or act charged to have been committed, or omitted by the defendant, appear to have been within the provision of the statute; and all circumstances necessary to support the action must be alledged." This principle is fully sustained by Mr. Justice Story, in the case of Smith v. U. S. [Case No. 13,122]; and, also, in Sears v. U. S. [Id. 12,592]. He says: "The offence charged in the declaration, is not alleged to be contrary to the form of any statute. The necessity of such averment, in an action founded upon a penal statute, is abundantly supported by authority." 1 Saund. 135, note. These, it is true, were penal actions; or, actions brought to recover the penalty given in the statute. The same degree of strictness may not be essential, in an action for damages, under a statute. But if the action be founded exclusively upon the statute, and can not be maintained at common law, a reference to the statute, as showing the right of the plaintiff, it seems to me; is essential. The defendant is charged with harboring the slaves of the plaintiff, who had escaped from his service in Kentucky. But the wrong charged is no legal wrong, except as it is made so by statute; and the fourth count does not refer to the statute. The statute is a public one, but it is the foundation, and the only foundation, of the plaintiff's right. It may not be necessary to adopt the formal conclusion, as was held necessary in the above cases, where the action was brought for the penalty. But, it seems to me, that the declaration must refer to the statute, as an essential part of the plaintiff's right. I have not had time to look into the authorities extensively on this point; but I think from analogy, and the reason of things, the fourth count is defective in this particular.

The constitutionality of the act of congress is questioned, on the ground that the sixth article of the compact, in the ordinance of 1787, for the government of the Northwestern Territory, provides "that any person escaping into the territory, from labor or service, is lawfully claimed in any one of the original states, such fugitive may be lawfully reclaimed, and conveyed to the person claiming his or her labor or service, as aforesaid." This, it is insisted, is paramount to the act of congress, and imposes no obligation on this state to deliver up a fugitive from labor, except when claimed by a citizen of one of the original states. The six articles of this ordinance are declared to be "a compact between the original states, and the people and states in the said territory, and forever to remain unalterable, unless by common consent." The act of congress, respecting fugitives from labor, does not conflict with the above provision. It does not purport to repeal the article, nor to modify it. A new and substantive provision is adopted, which carries out the principle of the ordinance. And it extends the right of claimants to the new states. The ordinance does not prohibit this. It is, indeed, carrying out its spirit and inten-

tion. For it can hardly be supposed that congress, in adopting the ordinance, could have intended to secure rights, in regard to claiming fugitives from labor, to the citizens of the original states, which should not be extended to the citizens of all the states. I deem it unnecessary to consider this subject at large; and I will only say, as there is no repugnancy between the act of congress and the above article, I do not see how, if the ordinance retains its full force, the act can be unconstitutional, upon the ground assumed.

As a motion for a new trial was first in order, and as the third and fourth counts, on which the jury found their verdict, claim only compensation for the loss of the services of the slaves for six days, and an indemnity for the expenses to which the plaintiff had been subjected by the acts of the defendant, which do not, from the evidence, exceed six hundred dollars, and, as the verdict rendered was for twelve hundred dollars, I feel bound to set aside the verdict.

In the ninth count, the plaintiff claims for the entire loss of the services of Andrew; but as the jury did not find under this count, and it has been abandoned, it must be considered, for the purposes of this motion, as stricken from the record.

A new trial is granted at the costs of the defendant.

[NOTE. The costs not being paid by the defendant, a new trial was not claimed, but was abandoned. Vanzandt, the defendant, in the meantime died, and a scire facias was issued to revive the suit against his administrator. To this scire facias the defendant demurred. The circuit court overruled the demurrer. Case No. 7,503. A motion in arrest of judgment was overruled, and a judgment entered upon the verdict. Case No. 7,505. For a statement of the points in controversy in the trial of the principal case, see note to Case No. 7,501.]

## Case No. 7,503.

JONES v. VANZANDT.

[4 McLean, 599.] [1]

Circuit Court, D. Ohio. Nov. Term, 1849.

ADMINISTRATOR—SURVIVAL OF ACTION—HARBORING RUNAWAY SLAVES—MEASURE OF DAMAGES.

1. An action of trespass on the case charging the defendant with certain wrongful acts, by which means the plaintiff lost the services of his slaves, and was subjected to expense, etc., survives under the act of Ohio of 14th February, 1824, it having been adopted by the act of congress of 1828 [4 Stat. 278].

2. At common law all actions founded on contracts express or implied, survive to the representatives of the deceased.

[Cited in Warren v. Furstenheim, 35 Fed. 696; U. S. v. De Goer, 38 Fed. 82.]

3. But an action of tort does not survive.

4. If by the act complained of the master loses the services of his slave, it is an injury done to his property within the above act of Ohio.

5. The damages are measured by the extent of the injury.

[This was an action of trespass on the case by Wharton Jones against John Vanzandt for damages for harboring runaway slaves. There was a verdict of $1,200 in favor of plaintiff upon certain counts of the declaration. Case No. 7,501. The defendant moved for a new trial, and also in arrest of judgment. The motion for a new trial was granted, at the costs of defendant. Id. 7,502. These costs not being paid, the new trial was abandoned, after which the defendant died. A scire facias was issued to revive the case against his administrator. To this the defendant demurred. The case is now heard on this demurrer.]

Mr. Fox, for plaintiff.

Mr. Chase, for defendant.

OPINION OF THE COURT. This is a scire facias to revive an action of trespass on the case commenced against Vanzandt, on a charge that he assisted certain negroes to escape from the service of the plaintiff in Kentucky, by reason of which one of them was lost to the plaintiff, and for the recaption and return of the others, the plaintiff was subjected by the law of Kentucky to the payment of a large sum of money. The jury rendered a verdict in favor of the plaintiff, for twelve hundred dollars in damages. [Case No. 7,501.] A motion was made for a new trial and also a motion in arrest of judgment. The court, for reasons stated, granted a new trial at the cost of the defendant. [Id. 7,502.] But, as the costs were not paid, a new trial was not claimed, and was abandoned. During the course of the trial certain important points were raised, on which there was a division of opinion, between the judges, and the points were certified to the supreme court. That court decided the points favorable to the plaintiff, and they were so certified to the circuit court. But before this decision was entered in the circuit court, Vanzandt the defendant, died; and a scire facias was issued to revive the suit against his administrators. To this scire facias the defendant on the 29th of July, 1848, demurred, and this raises the question of law in the case. Does the action survive? If it does, under the 31st section of the judiciary act of 1789 [1 Stat. 90], the administrator is a proper party, and the suit may be revived against him.

Causes of actions on contracts survive by the common law to the executors or administrators of both parties. Mellen v. Baldwin, 4 Mass. 480. But except by statute, actions of torts, replevin, etc., do not survive against the executors or administrators, unless the estate of the deceased received some gain from the wrong, when some form of action will lie. Pitts v. Hale, 3 Mass. 321; Mellen v. Baldwin, 4 Mass. 480; Cravath v. Plympton, 13 Mass. 454; Wilbur v. Gilmore, 21 Pick. 250, 252. But by the statute of

[1] [Reported by Hon. John McLean, Circuit Justice.]

Edw. III. c. 7, such actions survive to him if any personal property of the plaintiff was injured by the tort. Jenney v. Jenney, 14 Mass. 231; Badlam v. Tucker, 1 Pick. 389. In the case of the United States v. Ex'rs of Daniel, 6 How. [47 U. S.] 11, the supreme court held that an action on the case will not lie against the executors of a deceased marshal, for a false return made by the deputy. The court says, "If the person charged has received no benefit to himself, at the expense of the sufferer, the cause of action does not survive. But where, by means of the offense, property is acquired, which benefits the testator, there an action for the value of the property survives against the executor." And as to the form, that no action will lie at common law, against an executor, "where the general issue plea is not guilty."

Where there is a duty as well as a wrong, an action will lie against executors. Bacon, Abr. tit. "Executors and Administrators." The rule is, that at common law a personal action dies with the person, and this has been construed to apply to injuries done by, or to the testator. But it has been held under the 4 Edw. III. c. 7, that the rule does not extend to an injury done to the testator of the plaintiff, when it would apply to the testator of the defendant. Mason v. Dixon [Levaston v. Diskins cited] Cr. Car. 297; 1 Rolle, Abr. 921. If a sheriff suffer an escape, the executor of the party at whose suit, the defendant was in custody, may maintain an action. But, if the sheriff had died the plaintiff could have no remedy against his executor. For a false return the executor of the plaintiff maintained an action, against the sheriff, but no remedy could have been had against the executor of the sheriff. This decision was placed upon the ground, that the injury was not done to the person of the testator of the plaintiff, but to his estate. 1 Salk. 12. But the right to revive an action must depend upon some statutory provision, the common law applies only to the cause of action. The act of congress, May 19th, 1828 [supra], provides, "that the forms of mesne process except the style and the forms and modes of proceedings in suits in the courts of the United States, held in those states admitted to the Union since September 29th, 1789, in those at common law shall be the same in each of those states respectively, as are now used in the highest court of original general jurisdiction of the same, except so far as may have been otherwise provided by acts of congress," etc. This act regulates the practice of the court, and consequently, adopts any act of the state which regulates the practice of the courts. The act of Ohio of February 18th, 1824 [22 Ohio St. p. 65], provides, "if in any action of trespass on the case, for an injury done to property, real or personal, or action of trespass on property, real or personal, either of the parties shall die before judgment, such an action or suit shall not thereby abate, but may be proceeded in to final judgment and execution in the same manner as herein before provided for in other cases." This statute refers to an action pending and before judgment. Whether it may be construed so as to save the cause of action in the cases named, no suit having been commenced it is not necessary now to decide. Does this statute embrace the case under consideration? The Ohio statute was passed before the act of congress of 1828, which adopted the state practice, consequently the statute governs the practice of this court. It applies to all actions of trespass on the case for injuries to property real or personal, and this is an action of trespass on the case; but it is contended it is not brought for an injury done to personal or real property, as slaves can not be considered property under the constitution and laws of the United States. They are no where denominated property in the constitution or laws of the United States; but they are treated as property under the laws of the slave states, and those laws must govern in all matters of controversy respecting the rights of property in those states. This is a principle universally acknowledged by all courts in the free as well as in the slave states.

This suit, as has been often held in similar cases, as regards the remedy, is founded on the act of congress and the constitution of the United States. Had there been no such remedy provided, the master could not have reclaimed his fugitive slave in a free state, nor recovered damages for his abduction. But the statute, in this form of action, merely gives a remedy for a wrong done. The extent of the injury will measure the amount of damages to be recovered. And the only question that can arise is, whether the injury complained of was done to the property of the plaintiff. It was not done to his person nor to his character. If he has sustained an injury for which damages may be recovered, it must then have been in his property. Property is the exclusive right of possessing, enjoying and disposing of a thing which is in itself valuable. It is ownership. Now, the plaintiff, residing in Kentucky, owned the slaves named in the declaration, who escaped from his service by the wrongful acts of the defendant, and which subjected the plaintiff to certain losses and charges, for which a verdict for twelve hundred dollars in damages was given him by the jury. Is not this an injury to property—not property in Ohio, but property in Kentucky, the right of which is guarantied by the constitution and act of congress. Literary property is the exclusive right of printing, publishing and making profit by one's own writings. The property in a slave consists, under the laws of Kentucky, in the right of the master to his services; and when he is deprived of this right illegally, he sustains an injury which the law redresses. And it is immaterial whether the injury complained of be

done in Kentucky or Ohio. If the act be in violation of the law, and it shall deprive the master of the services of his slave, an action of trespass on the case is sustainable. But it is insisted that the part of the Ohio act of 1824, which relates to the abatement of suits, does not apply to this court, as the act of 1789 provides, that suits may be prosecuted where either party dies, by the representatives of the deceased, if by law the cause of action survive; and that this excepts the clause in question from the operation of the act of 1828. That act does except, from its operation, any state statute regulating the practice, where an act of congress has regulated the same subject. The act of 1789 provides, that no suit shall abate, where the cause of action survives. The state statute goes further and provides, that an action of trespass on the case, or trespass on real or personal property, shall also survive. Here is no conflict. Both laws are consistent with each other, and may well stand together. At the time the act of 1828 was passed, the state act of 1824 was adopted, and may be presumed to have been known to congress. By the act of 1828 congress did not intend to repeal any express provisions made by them respecting the practice; but to facilitate the transaction of business in the courts of the Union, by adopting the practice of the courts of the respective states, which was best known to the profession. We think that this suit is embraced by the act of 1824, and, consequently, does not abate, but may be prosecuted by the executor or administrator of either party. The demurrer is overruled.

[There was a motion in arrest of judgment made in this case before the death of Vanzandt. This motion was not heard until the April term, 1851, of the circuit court; at which time the motion was overruled, and judgment entered upon the verdict. See Case No. 7,505. For a statement of the points in controversy in the trial of the principal case, see note to Case No. 7,501.]

## Case No. 7,504.

JONES v. VANZANDT.

[4 McLean, 604.] [1]

Circuit Court, D. Ohio. Nov. Term, 1849.

ADMINISTRATOR — SURVIVAL OF ACTION ON TORT.

An action for a penalty abates, on the death of the defendant. This is the common law, and there is no act of congress which, by the adoption of the state act or otherwise, causes such an action to survive. Nor is there any rule of court on the subject.

[Cited in Pennsylvania Co. v. Davis, 4 Ind. App. 52, 29 N. E. 425; Davis v. State, 119 Ind. 557, 22 N. E. 9.]

[At law. This was an action by Wharton Jones against John Vanzandt for the purpose of recovering the statutory penalty of $500 (1 Stat. 302) for harboring runaway slaves. Defendant having died, a scire facias was issued to revive the suit against his administrators. To this the defendant demurs. The case is now heard on the demurrer.]

Mr. Fox, for plaintiff.

Mr. Chase, for defendant.

OPINION OF THE COURT. In this action the plaintiff, a citizen of Kentucky, claims from the defendant the penalty of five hundred dollars, under the act of congress of 1793 [1 Stat. 302], respecting fugitives from labor, on the ground that the defendant did harbor certain fugitives who escaped from his services, into the state of Ohio. The defendant pleaded not guilty, but he died before trial, and a scire facias was issued to revive the suit against his administrators. To this scire facias the defendant demurs, and this presents the question whether the suit can be revived. All actions which arise ex delicto, die with the person. Actions of trespass, trover, assault and battery, slander, deceit, diverting a water course, and many other cases where the declaration charges a tort done to the person or property of the plaintiff, by the deceased, and the plea of the general issue must be, not guilty, abate on the death of the defendant. 1 Ld. Raym. 433, 434; Cowp. 375. If the plaintiff's goods were taken away by the testator, and still continue in specie in the hands of the executor, replevin or detinue will lie against the executor. W. Jones, 173, 174. Or if they be consumed, then an action for money had and received, to recover the value. Cowp. 377.

This action is not founded on an injury done to the property of the plaintiff, but upon an act charged to have been done by the defendant, and which may not have resulted to the injury of the plaintiff, but which the law prohibits and punishes by a penalty of five hundred dollars. By the 64th section of the practice act of Ohio, passed March 8, 1831, it is provided, that no suit or action pending in any court except those mentioned in the 27th section, which are actions of libel, slander, malicious prosecution, assault and battery, action of nuisance, or against justices of the peace, shall abate by the death of either or both of the parties thereto. This section embraces all actions, except those specified, which do not include the action under consideration, consequently, this suit does not abate, if the section apply to this court. The act of congress of 1828 [4 Stat. 278], adopting the state practice, being prior to this act, does not adopt it, and it has not been adopted by a rule of court. The act of congress of August, 1842 [5 Stat. 499], declares that "the provisions of an act entitled, 'An act to regulate process in the courts of the United States,' passed the 19th May, 1828, shall be, and they are hereby made applicable to such states as have been admitted into the Union since the date of said act." But, this act can only apply to states admitted into the Union since 1828. Unless, therefore, this suit survives un-

[1] [Reported by Hon. John McLean, Circuit Justice.]

der the judiciary act of 1789 [1 Stat. 73], or the act of Ohio of February 18th, 1824, it must abate. It does not survive under the latter act, as the suit is not founded on an injury done to the property, either real or personal, of the defendant. And, under the act of congress, it does not survive, as that act applies only to cases where the cause of action survives. The 34th section of that act which declares, "that the laws of the several states, except, etc., shall be regarded as rules of decision in trials at common law, in the courts of the United States, in cases where they apply," has been held not to "apply to the process and practice of the courts." Wyman v. Southard, 10 Wheat. [23 U. S.] 1. In the same case it is also said, by the court, "that the 34th section authorizes the courts of the United States to issue writs of execution as well as other writs."

There is no practice of the court in cases similar to the one before us, from which a rule of court may be presumed. From these considerations, it appears that this action for a penalty abated on the death of the defendant, and there is no statute or rule of court under which it may be revived in the name of the administrator. The demurrer to the scire facias is, therefore, sustained.

[For a statement of the main points in controversy in this litigation, see the note to Case No. 7,501.]

## Case No. 7,505.

JONES v. VANZANDT.

[5 McLean, 214.] [1]

Circuit Court, D. Ohio. April Term, 1851.

PLEADING AT LAW—DECLARATION — DESIGNATION OF PLACE—ABANDONED COUNTS—ACTION FOR STATUTORY PENALTY.

1. Where the cause of action is local, a reference to the "district aforesaid" named in any preceding count, is a sufficient designation of the place.

2. Though a state be named, which is in law a district, the reference being to the "district," a term used in the law, the reference will be held to mean the district before named, and not the state named.

3. If counts be abandoned, they are not for all purposes considered as stricken from the record.

4. As matters of reference in subsequent counts, they are held good.

5. Under the act of 1793 [1 Stat. 302], for the reclamation of fugitives from labor, if the action be for the penalty, the acts of the offender must be alleged, contrary to the statute. This may not be necessary when the action is brought to recover damages.

[This was an action of trespass on the case by Wharton Jones against John Vanzandt for damages for harboring runaway slaves. There was a verdict for plaintiff in the sum of $1,200. Case No. 7,501. The defendant moved for a new trial, and also in arrest of judgment. The motion for a new trial was granted at the costs of defendant. Case No. 7,502. Pending this proceeding there was also an action of debt between the same parties for the penalty of $500, provided by the statute for harboring runaway slaves. The cases were heard by the supreme court upon questions duly certified, which were determined in favor of the plaintiff. 5 How. (46 U. S.) 215. The defendant having died, a writ of scire facias was issued to revive the action of trespass on the case against his administrator. A demurrer to this writ was duly overruled. Case No. 7,503. The case is now heard upon the motion in arrest of judgment.]

Mr. Fox, for plaintiff.

Mr. Chase, for defendant.

OPINION OF THE COURT. This cause was tried in December, 1842. A verdict being found for the plaintiff, a motion was made for a new trial, and also in arrest of judgment. The motion for a new trial was granted, at the costs of the defendant, and an intimation was given that certain counts in the declaration were defective, but there was no decision on the motion in arrest. [Case No. 7,502.] The case was certified to the supreme court, on points of division of opinion between the judges, which, and the death of the defendant, have delayed the decision of the case until this time. The decision of the supreme court, on the points certified, being favorable to the plaintiff, the motion in arrest of judgment has again been argued.

As before remarked, this court at the former term, did not decide this motion, although its views were expressed in regard to the third and fourth counts in the declaration, which are the only ones that were not abandoned before the verdict was rendered. It was intimated by the court that there was a defect in these counts, in stating the place to which the fugitives escaped. The words of the law are: "When a person held to labor in any of the United States, &c., under the laws thereof, shall escape into any other of the said states," &c. And the court remarked, the allegation in these counts is, "that the slaves escaped from Boone county, and the state of Kentucky, and came to the defendant, at Hamilton county, in the state and district aforesaid." And they say, "What state and district? The grammatical reference is, to the state and district last above named in the count; and the words, Hamilton county, are not a sufficient designation. The direct reference then, is, to the state of Kentucky, which, by the law, is a district; and in this view, there is no escape alleged within the statute." It is also said: "I entertain great doubts whether the reference to the preceding counts, as regards the escape, makes good the third and fourth counts. At least there is great uncertainty in the reference." And in the conclusion of the opinion

[1] [Reported by Hon. John McLean, Circuit Justice.]

the court said: "As a motion for a new trial was first in order, and as the third and fourth counts, on which the jury found their verdict, claim only compensation for the loss of the services of the slaves for six days, and an indemnity for the expenses to which the plaintiff had been subjected," &c., the new trial was granted at the costs of the defendants, which was not accepted by their counsel.

A more mature consideration which I have since given to the case has convinced me that, after verdict, the counts may be sustained. In the caption of the declaration, the district of Ohio is stated; and in the first count the district of Ohio is again stated as the place of venue. In the second count it is averred that the slaves, against the will of the plaintiff, "departed and went away from the plaintiff, and out of his service, at said Boone county, and came to the defendant at Hamilton county, in the state of Ohio, and the district aforesaid." And in the third count it is alleged that "unlawfully, wrongfully, and unjustly, the slaves departed and went away from and out of the service of the plaintiff at Boone county, and the state of Kentucky, and came to the defendant at Hamilton county, in the state and district aforesaid." In the fourth count the averment is, that the fugitives "came to the defendant at said Hamilton county, in the district aforesaid."

The first and second counts have been abandoned, and are consequently inoperative as the foundation of a recovery; yet, they are not, in every sense, to be considered as stricken from the record. A reference in subsequent counts to the venue as laid in those counts, or to fix the place where the act complained of was done, may be held to be sufficient. There is no other district than that of Ohio named in the caption of the declaration, or in the first and second counts, and a reference in the third and fourth counts to the state and district aforesaid, must be held to refer to the state and district of Ohio. This is not a strained construction, and is called for by the import of the terms used in the declaration, especially after verdict.

The other defect noticed in the fourth count was the want of averment, that the offense charged in the declaration, was contrary to the statute. In considering this objection formerly, the court said: "That it may not be necessary to adopt the formal conclusion, as is held to be necessary where the action is brought on a penalty; but it seems to me that the declaration must refer to the statute as an essential part of the plaintiff's right. I have had no time to look into the authorities extensively on this point, but, I think, from analogy, and the reason of things, the fourth count is defective in this particular." When the case was before the supreme court on certified points, the court say, in regard to the sufficiency of the declaration: "No specific point, not otherwise designated, has been called to our attention, except that all the acts alleged in the declaration, are not said to be contrary to the statute. This last expression, they say, follows the concluding portion of the count, and this expression may be necessary in a penal action." This point was certified in the action against the defendant for the penalty, but the action before us is one for secreting the fugitives, by reason of which their services were lost to the plaintiff. The remark of the court would seem to imply that although the averment may be necessary in a penal action, it is not necessary where the action is not for the penalty. In one or two cases it has since been held, in an action for the value of the fugitives, that the above averment is not necessary. Had there been no provision in the constitution or act of congress on the subject, it is clear there could be no reclamation of fugitives from a free state, nor damages recovered for secreting them. This right, as has often been decided, must depend, as between slave states and free ones, upon treaty stipulations, or upon some general law equally binding upon states, as the constitution of the United States, or the acts of congress. The proviso in the act of congress, that a recovery of the penalty should not bar an action by the master for damages, would seem to recognize such a remedy as existing at common law. The form of the action is found in the common law, but the right arises under the constitution and act of congress. As these laws are general throughout the Union, the court, I suppose, are bound to take notice of them without any special reference to them in the declaration.

Upon the whole, I feel it to be my duty to say that the suggestions formerly made, in relation to the defectiveness of the fourth count, on further examination, are not sustained. A decision was not made, nor intended to be made, on either of the above counts. The intimations were hastily thrown out that the defects, if considered important, might be remedied at a future stage of the proceeding by amendments.

The motion in arrest is overruled, and a judgment entered upon the verdict.

[For a statement of the points in controversy in the trial of the main case, see note to Case No. 7,501.]

## Case No. 7,506.

JONES et ux. v. WALKER et al.

[Brunner, Col. Cas. 25;[1] 2 Hayw. N. C. 291.]

Circuit Court, D. North Carolina. 1803.

ADMIRALTY COURT — EFFECT OF APPEAL FROM — DEPOSITIONS — TO PROVE ACTS OF COURT NOT ON RECORD — DECREE IN ADMIRALTY — WHO BOUND BY.

1. An appeal from an inferior court of admiralty takes the cause from that court, and it

[1] [Reported by Albert Brunner, Esq., and here reprinted by permission.]

can no longer act in such cause; but it still retains power to take care of the goods seized, which are the subject of the suit, and to that end may order a sale of such as are likely to perish.

2. Where the records of an admiralty court appear to have been loosely and carelessly kept on slips of paper, depositions may be read to prove that an order for the sale of property was made in a cause.

3. All persons are bound by a decree in admiralty on the point then in controversy. But those who become interested by a purchase, under orders and proceedings of a court of admiralty are not bound by a decree as to right of property between libelants and claimants.

[Appeal from the district court of the United States for the district of North Carolina.]

In admiralty.

PER CURIAM. An appeal from an inferior court of admiralty takes the cause from that court, and such court can no longer act in it. But it still retains power to take care of the goods seized, which are the subject of the suit; and to that end it may order a sale of such goods as are likely to perish. What raised the greatest doubt with us was the uncertainty whether the goods in question were sold by order of the court. The proceedings show that after the appeal the now plaintiff was ordered to pay for salvage one third in value of the property by a certain day, or otherwise an order of sale should issue. Then it appears that the counsel for the claimant procured a postponement of the sale till the 4th of February. It appears also, by a deposition of the marshal, that he sold by order of the court. And it appears by other depositions that the papers of this court were kept very loosely, on slips of paper, which were often removed from the office, as applied for by individuals. From all these circumstances we have concluded that the evidence is in favor of the order of sale. Then if the court ordered a sale, those who purchased under it should be protected; and the defendants are those persons. It was argued that all the world are parties to a prize cause in the admiralty, and are affected by a decree in the appellate court. This should be understood with some restriction. Upon the publication made of the suit depending, in order that all persons interested may come in and defend, all persons are bound by the decree pronounced upon the point then in controversy. But there is no controversy between the libelants or claimants, and those who afterwards became interested by a purchase, under orders and proceedings of the court in the cause between the libelants and claimants. Such intervening persons are not bound by a decree made between the libelants and claimants in the appellate court. The defendants are entitled to retain the property they have purchased, although the decree of the appellate court declared it to belong to the claimant.

## Case No. 7,507.

### JONES v. WALKER.

[2 Paine, 688.] [1]

Circuit Court, Virginia.[2]

SEQUESTRATION OF ALIEN DEBTS—WAR LEGISLATION—PAYMENT BY DEBTOR TO STATE—TREATIES—EFFECT OF PROVISION RESTORING ANTE-BELLUM RIGHTS.

1. The term "validity," applied to treaties, admits of two descriptions, "necessary" and "voluntary." By "necessary validity" is meant that which results from the treaty's having been made by persons authorized by, and for purposes consistent with the constitution. By "voluntary validity" is meant that validity which a treaty, become voidable by reason of violation, afterwards continues to retain by the silent volition and acquiescence of the nation. It is called "voluntary" because it entirely depends on the will of the nation, either to let it continue to operate, or to annul and extinguish it.

2. The principles which govern and decide the necessary validity of a treaty are of a judicial nature; while those on which its voluntary validity depends are of a political nature.

3. The power given to the judiciary to decide on the validity of treaties, is restricted to their necessary validity.

4. As every law derives its obligation from the will of those who had authority to enact it; so every treaty derives its obligation from the will of those who had authority to conclude it.

5. When the department authorized to annul a voidable treaty, shall deem it most conducive to the national interest that it should longer continue to be obeyed and observed, no right can be incident to the judiciary to declare it void.

6. It is a maxim in the interpretation of treaties, that if he who can and ought to have explained himself clearly and plainly, has not done so, he cannot be allowed to introduce subsequent restrictions which he has not expressed.

7. It is a maxim in the law of nations, that whatever tends to render an act null and without effect, either in the whole or in part, and, consequently, whatever introduces any change in the things already agreed upon, is odious and to be rejected.

8. Again: everything that tends to the common advantage in conventions, or has a tendency to place the contracting parties on an equality, is favorable; and in such cases it is safest and most consistent with equity to extend the signification of terms, rather than to limit them.

9. Whatever injuries result to subjects by imputing to them the acts of their sovereign, run back through the same channel from them to the sovereign.

10. Every judgment, therefore, against a subject grounded on such imputation, is a judgment mediately against the sovereign or moral person with whom the treaty was made, and which moral person is composed of all the people or nation collectively considered.

11. Recovery when applied to debts or demands, means recovery by process and course of law.

[Cited in People v. Reis, 76 Cal. 279, 18 Pac. 309.]

12. The judicial acts of one nation are to be respected by another, and are conclusive on the subjects of the other, relative to all matters within the national jurisdiction. But in order to render them conclusive, it is further necessary that they should be matters cognizable by the court, and fairly decided.

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[1] [Reported by Elijah Paine, Jr., Esq.]

[2] [District and date not given.]

13. The claims of creditors which existed prior to the American Revolution, were not destroyed by the dissolution of the government, although the judicial means of compelling payment in this country were for the time lost.

14. A debtor cannot voluntarily transfer his obligation to pay to a third person without the consent of his creditor; and whenever he does it, the validity of the transfer must depend on the event of his creditor's afterwards ratifying it.

15. Where, therefore, a debtor accepted the offer held out by the act of Virginia, of October 20, 1777, whereby it was enacted that any citizen of the commonwealth owing money to a subject of Great Britain, might pay the same or any part thereof into the loan-office, and take therefrom a certificate for the same in the name of the creditor, with an endorsement under the hand of the commissioner of said office, expressing the name of the payer, and deliver such certificate to the governor and council, which should discharge him from the debt, and the commonwealth did not extinguish the demand of the creditor, either by payment at the end of the war, or by confiscating the money and making its receipt a good bar to an action; it was held, that as the creditor had not consented that the state should be substituted in his place, his claim against the debtor was still valid and subsisting.

16. Whether the legislature of Virginia had a right to do anything more relative to such debts than to prevent the payment of principal or interest during the war; and whether it had the right, by the law and usage of nations, to change the nature of the debt without the creditor's consent, and without his consent to substitute one debtor for another, quaere.

17. But admitting that the customary law of nations did permit such discharge and substitution on the part of the state, they were within the reach of the treaty of peace, and were liable to be modified, impaired or totally annulled by it.

18. It having been stipulated, therefore, in the treaty of peace, that creditors should be restored to the exercise of their rights as creditors, and that all impediments which hostile laws had interposed to prevent or suspend the recovery of their debts should be done away, the act of Virginia in question, and everything done under it, so far as they affected the creditors, were extinguished by the treaty.

19. The right belonging to the society, or to the sovereign, of disposing, in cases of necessity, and for the public safety, of all the wealth contained in the state, is called the "eminent domain." This right is necessary to him who governs, and is consequently a part of the empire or sovereign power.

Declaration—On a writing obligatory sealed and dated 11th May, 1772, to Joseph Farrell and William Jones for 2,903l. 15s. 8d. sterling. 1st Plea.—Payment and issue thereon. 2d Plea.—That as to $7,173, equal to 2,151l. 18s. 0d. Virginia money, part of the debt demanded, the plaintiff ought not to recover, because, that on the 4th July, 1776, the defendant [Thomas Walker] became a citizen of Virginia. That on the 4th July, 1776, the plaintiffs were and continued British subjects. That then, and until the 3d September, 1783, the plaintiffs were enemies at open war, &c. That on the 20th October, 1777, Virginia passed an act, entitled "An act for sequestering British property, enabling those indebted to British subjects to pay off such debts, and directing the proceeding in suits where such subjects are parties;" whereby it is enacted, "that it shall and may be lawful for any citizen of this commonwealth, owing money to a subject of Great Britain, to pay the same, or any part thereof, from time to time as he shall think fit, into the said loan-office, taking thereout a certificate for the same in the name of the creditor, with an endorsement under the hand of the commissioner of the said office, expressing the name of the payer, and shall deliver such certificate to the governor and council, whose receipt shall discharge him from so much of the said debt." That on the —— day of ——, 177–, the defendant paid into the loan-office on account of the said debt, $7,173, and took out a certificate as directed by the act, which he delivered to the governor and council, who gave him a receipt as follows: "Williamsburgh, May 25, 1779. Received from the hands of the honorable Thomas Walker, a loan-office certificate for $7,173, being so much due from the said Thomas Walker, Esq., to Farrell and Jones of the kingdom of Great Britain, and sequestered according to the act of assembly for that purpose made. Given under my hand, date above. P. Henry. 2,151l. 18s. 0d." Wherefore the defendant prays judgment, &c., for the said 2,151l. 18s. 0d., part of the debt. 3d Plea.—That on the 4th July, 1776, the defendant became a citizen of Virginia; that the plaintiffs were always British subjects, and then, and until the 3d September, 1783, enemies at open war with Virginia and the United States. That Virginia, on the 3d May, 1779, passed an act, entitled "An act concerning escheats and forfeitures from British subjects," whereby it was enacted, "that all property, real and personal, within the commonwealth, belonging at this time to any British subject, or which did belong to any British subject at the time such escheat or forfeiture may have taken place, shall be deemed to be vested in the commonwealth, the land, slaves and other real estate by way of escheat, and the personal estate by forfeiture." That on the 6th May, 1782, Virginia passed an act, entitled "An act to repeal so much of a former act as suspends the issuing of executions upon certain judgments, until December, 1783;" whereby it is enacted, "that no demand whatsoever, originally due to a subject of Great Britain, shall be recoverable in any court in this commonwealth, although the same may be transferred to a citizen of this state, or to any other person capable of maintaining such action, unless the assignment hath been, or may be made for a valuable consideration bona fide, paid before the first day of May, 1777." That the debt demanded was comprehended in the first act, and that it has not been transferred, &c., wherefore, &c. 4th Plea.—That Great Britain has violated the treaty of peace by not evacuating the ports, by supplying Indians at war with the United States, &c. 5th Plea.—That the debt was

annulled by the dissolution of the former government or declaration of independence, &c.

JAY, Circuit Justice. This is certainly a cause of great magnitude and expectation; all causes which affect many persons and much property, are so. It has been ingeniously and industriously managed, and it has been attentively and patiently heard. The action is for the recovery of money due on bond prior to the war. The first plea is payment, and on that the parties are at issue. The other pleas have terminated in demurrers, and the court is thereby called upon to decide on their legal efficiency.

The first which I shall consider is the last on the record. It produces this question: Was the debt annulled by the dissolution of the government which existed when the debt was contracted? This plea, that the debt was annulled when the then existing government of this country was dissolved, appears to me to be unsupported by any principle recognized by the laws of nature or nations. It is not pretended that the debt was not contracted bona fide, or that the parties, or either of them, were under legal disabilities. The creditor, by the contract, then acquired a perfect right to demand, and a perfect obligation was at the same time imposed on the debtor to pay. By the dissolution of the government, the creditor necessarily lost the judicial means of compelling payment in this country, but the mere dissolution of the government could not destroy his right to compel it whenever and wherever he should find such means. If the debt did on that event become annulled, not only the creditor lost his right to demand, but the debtor must, consequently, have ceased to remain under any obligation to pay. We find, however, that the pleas speak a different language, and that the acts of Virginia, specified in those pleas, considered those debts as still existing, and as proper objects of legislative regard and provision. If the debt was annulled and annihilated, why enable the debtor to pay into the loan-office sums which, according to this doctrine, he was under no obligation to pay at all? Why give him a formal receipt to discharge him from so much of the debt as he should pay, when, by the prior dissolution of the government, he had been discharged from the whole of it? The subject affords room for more extensive investigation; and it would not be difficult to show that these rights do not originate in human institution, although human institutions may enforce or suspend their operation, or in certain cases declare them forfeited.

The plea which it appears to me proper next to consider is, that the king of Great Britain, by reason of the facts specified in it, is an enemy of the United States, and, therefore, that the plaintiff, who is his subject, ought not to have or maintain his action aforesaid. The question arising on this plea, is whether (admitting the facts plead to be true) the king of Great Britain hath become the enemy of the United States, in that sense which would justify the court in considering his subjects as being alien enemies, and, consequently, incapable of maintaining actions in our courts. There is a wide distinction between a power who is unfriendly and inimical to, and a power actually at war with the United States, and they with him. There is, also, a wide distinction between the existence of causes which would justify a war, and the existence of actual war in consequence of them. Whatever causes or reasons there may be to justify war, yet these causes and reasons must remain and be considered as mere inducements, until the power vested with the right to make war shall think proper, by declaration or deeds, to cause a state of war to exist. It is the duty of the court to know that peace between Great Britain and the United States has been concluded and published; that peace between them still exists; that the two nations regard each other in that light, and that the president's late proclamation banishes every doubt on the subject. The defendant having plead in bar, that pursuant to an act passed by Virginia during the war, he had paid the debt into the loan-office of that state, and that the debt had thereby been discharged; the plaintiff replies the fourth article of the treaty of peace, which stipulates that "creditors on either side shall meet with no lawful impediments to the recovery of all bona fide debts heretofore contracted." To this the defendant rejoins that the king of Great Britain had, in the instances there specified, violated the treaty, and further, that the said debt having been discharged in pursuance of a pre-existing act of Virginia, was not one of those bona fide debts mentioned in the fourth article. To this rejoinder the plaintiff demurs.

The first question which these pleadings naturally suggest is, whether this court has authority to take cognizance of infractions of the treaty by Great Britain, and by reason of them to declare the treaty to be void as to the United States. It is strenuously insisted that the court has such authority: (1) Because, on the distribution of the sovereignty into the three departments of executive, legislative and judicial, such authority became incident to the latter; (2) because, treaties being laws of the land, they fall within the jurisdiction and cognizance of the judiciary; (3) because the authority in question is given by the constitution, and is recognized to have been so given by the judicial act of congress.

I begin with the last, for as the power of the judiciary might have been extended, or limited, according to the pleasure of those who, by the constitution, established it, it is proper to inquire whether the constitution does extend that power to the case now before us in the sense now contended for.

If it does, it ought to be exercised; if not, it ought not to be assumed. The constitution expressly declares that the judicial power shall extend to all cases in law and equity arising under treaties. It also declares that treaties shall be the supreme law of the land.

The twenty-sixth section of the judicial act [1 Stat. 87] recognizes its power to determine cases where is drawn into question the validity of treaties. Perhaps it may tend to elucidate the subject if we were to consider "validity," applied to treaties, as admitting of two descriptions, viz., "necessary" and "voluntary." By "necessary validity," I mean that which results from the treaty's having been made by persons authorized by, and for purposes consistent with the constitution. To this kind of validity all such questions as these relate, viz.: Has the treaty been made and ratified by the president, by the advice and consent of three-fourths of the senators present? Is it temporary, and has it expired? Is it perpetual? Has it been dissolved with mutual agreement? Has it been annulled and declared to be void by the nation, or by those to whom the nation has committed that power? Does it contain articles repugnant to the constitution? Are those articles void? Do they vitiate the whole treaty? &c., &c. By "voluntary validity," I mean that validity which a treaty, become voidable by reason of violations, afterwards continues to retain by the silent volition and acquiescence of the nation. I call it "voluntary," because it entirely depends on the will of the nation, either to let it continue to operate, or to annul and extinguish it. To this head such questions as these relate, viz.: Has the treaty been so violated as justly to become voidable by the injured nation? Is it advisable immediately to declare it void? Would such a measure probably produce a war? Would it be more prudent first to remonstrate and demand reparation, or to direct reprisals? Are we in condition for war? Ought we at this juncture to risk it, or shall we postpone that risk until we can be better prepared for it? Shall we at this moment take any measures, or would it be more prudent to remain silent for the present, and let the treaty go on and continue to operate as if nothing had happened? &c., &c., &c. On comparing the principles which govern and decide the necessary validity of a treaty, with those on which its voluntary validity depends, we cannot but perceive that the former are of a judicial, and that the latter are of a political nature. That diversity naturally leads to an opinion that the former are referable to the judiciary, and the latter to those departments which are charged with the political interests of the state. If the order and proper disposition of the thing strongly indicates this distribution, there is great reason to presume it was intended by the constitution and the judicial act; and, therefore, that the power given the judiciary to decide on the validity of treaties, was, by the nature of the subject, restricted to their necessary validity; necessary, because while performed by one party it rests not on the volition of the other, but on that perfect obligation which contracts authorize and not improperly impose on both the parties.

The history of nations, even the most free, and whose governments were the most popular, affords no examples of their having committed the voluntary validity of treaties to the decision of courts of justice; and thence there is reason to argue, that if an idea so new and singular had been adopted by the convention, they would have pointedly and particularly expressed it in the constitution, and not have left it to be inferred from any enlarged sense in which the word "validity" was capable of being understood; especially as it was natural to apprehend that the tribunals of the United States, like the tribunals of all other countries, would understand it only to mean the necessary validity of treaties. When it is considered that the voluntary validity of treaties (except so far as may concern their voidability) is to be decided not by fixed and immutable rules and principles, but entirely by prudential considerations, the inexpediency of committing its decision to two concurrent jurisdictions, that is, to the judiciary and to congress, (it being necessarily incident to the right of making war,) and that, too, without appeal to any third body, is very apparent; for, in cases of disagreement in opinion, the same treaty might be annulled by the one against the opinion and judgment of the other, and the people would be at a loss to determine how to act, or which opinion ought to prevail. That two such concurrent and probably clashing jurisdictions would unavoidably introduce many inconveniences, is obvious; but it is not easy to discern in what respect they would be useful. In short, it is not, in my opinion, to be presumed that a power so pregnant with discord, political contradiction and national inconsistency, could have been within the intention and meaning of the convention, when, by the constitution, they extended the power of the judiciary to all cases arising under treaties.

2. That treaties being laws of the land, fall within the jurisdiction and cognizance of the judiciary. Whatever distinction there may be between a treaty considered as a great national contract, and a treaty considered as a law of the land, yet it will not warrant the conclusion that as a treaty its voluntary validity may be exclusively determinable by congress, but that as a law of the land, the judiciary are to decide whether it be in force. Every law derives its obligation from the will of those who had authority to enact it. Every treaty derives its obligation from the will of those who had authority to conclude it. Neither of them can be repealed

or annulled but by the will of those who have authority to repeal or annul them. It has been shown that the judiciary are not authorized to annul a treaty; and it will not be contended that they are authorized to repeal a law. So that, whether a certain instrument be called a treaty or a law, it belongs not to the judiciary to abrogate it. Indeed, the objection is doubled to those who consider it as having a twofold capacity of being both a treaty and a law.

From this topic another argument, more specious and also more intricate, is drawn; it is this: That every engagement in a treaty between sovereigns, which gives reciprocal rights to and imposes reciprocal obligations on their respective subjects and citizens relative to each other, becomes, in virtue of the treaty's being a law of the land, an engagement or contract between them, and that such contracts, standing essentially on the same footing with other contracts between individuals, must be cognizable by the judiciary. That the mala fides (affecting the treaty) of one of the sovereigns is imputable to his subjects, and so becomes their mala fides. That the voidability of the treaty resulting to the injured sovereign from this mala fides, also descends to his citizens, and that they thence acquire a right to take advantage of that voidability in all actions brought against them on that contract by the other sovereign's subjects, and to plead their imputed mala fides in bar. That in cases so circumstanced, the courts are to try the merits of that plea, and to consider the matter in difference as a matter in difference arising on a contract between the parties. This argument appears to me to be not only ingenious, but also fallacious. The article or engagement in question is not a several contract between the supposed plaintiffs and defendants, but between two moral persons, of whom they, with every individual of their respective nations, are joint members, governed as relative to the treaty not by their several wills, but by the sole will of the moral person whose members they are; as in the natural body, whatever rights belong to the hand belong to the man, and every injury offered to the hand is offered to the man. In the case supposed, the mala fides of the plaintiff's sovereign necessarily becomes the gist of the action; for, until this mala fides be found to exist, it cannot be imputed, and until it be imputed, his right to action cannot be impeached, and, consequently, the defendant's plea cannot be supported. Hence, it follows, that in all such causes the first questions to be tried and decided by the court are, first, whether the plaintiff's sovereign has been guilty of the mala fides averred in the plea; and if he has, then, secondly, whether it be of such a nature and degree as to give to the injured sovereign a right to annul the treaty; for, until these questions are decided in the affirmative, the mala fides of one sovereign, and the rights resulting from it to the other, cannot descend and attach to their respective subjects and citizens even by fiction of law. A charge of mala fides is odious, and ought not to be judicially inquired into and decided in the absence of the party charged. Sovereign nations acknowledge no common tribunal on earth; their bona fides or their mala fides are questions not to be litigated in courts of justice. We are not warranted to say that only the mala fides of the plaintiff, and the consequent rights of the defendant, derived by imputation from their respective sovereigns, are in question; and, therefore, that the sovereigns remain foreigners both to the question and the decision. The fact is otherwise. The contracts of sovereigns or nations are made for the benefit of all the subjects or people; and, therefore, every sovereign or nation is interested in every act which necessarily limits, impairs or destroys that benefit. Can American citizens be divested of rights accruing to them by treaty, and the American sovereignty remain untouched? Whatever injuries result to subjects by imputing to them the acts of their sovereign, run back through the same channel from them to the sovereign. He is bound to protect them, and consider all injuries done to them by such imputation as done to himself; that is, as done to the whole nation. Every judgment, therefore, against a subject, grounded on such imputation, is a judgment mediately against the sovereign or moral person with whom the treaty was made, and which moral person is composed of all the people or nation collectively considered. It is true, as has been alleged, that the judicial acts of one nation are to be respected by another, and are conclusive on the subjects of the other, relative to all matters within the natural jurisdiction; but in order to render them conclusive, it is further necessary that they should be matters cognizable by the court and fairly decided.

3. That on the distribution of the sovereignty into the three departments, of executive, legislative and judicial, the authority in question became incidental to the latter. No right can be incident to one department which necessarily goes to the suspension of a right incident to another, or to control, suspend or defeat its operation. If this principle be just, it follows that, where the department authorized to annul a voidable treaty shall deem it most conducive to the national interest that it should longer continue to be obeyed and observed, no right can be incident to the judiciary to declare it void in a single instance. There is a tide in human affairs which statesmen are to watch and profit by for the good of the nation, but which they should never be compellable, by the interference of any tribunal, to stem. The obstacles interposed by the before-mentioned pleas being removed, the fourth article of the definitive treaty of

peace comes into view; and the great question which remains to be decided is, whether the defendant's pleas to bar the plaintiff from the benefit of it are sufficient? The first of these pleas is, that the debt was discharged by the plaintiffs having paid the amount of it into the loan-office of Virginia, pursuant to an act of that commonwealth, passed the 26th October, 1777, entitled "An act for sequestering British property, enabling those indebted to British subjects to pay off such debts, and directing the proceedings in suits where such subjects are parties;" whereby it is enacted, "that it shall and may be lawful for any citizen of this commonwealth owing money to a subject of Great Britain, to pay the same, or any part thereof, from time to time, as he shall think fit, into the said loan-office, taking thereout a certificate for the same in the name of the creditor, with an endorsement under the hand of the commissioners of the said office, expressing the name of the payer; and shall deliver such certificate to the governor and council, whose receipt shall discharge him from so much of the said debt." The plea then proceeds to aver such payment and receipt. The second of these pleas is grounded on another act of Virginia, passed the 3d May, 1793, entitled "An act concerning escheats and forfeitures from British subjects." The fourth section of this act contains the following words: "But this act shall not extend to debts due from British subjects and payable into the loan-office, according to the act of assembly for sequestering British property." This act, therefore, has no relation to the matter in controversy, and must have been inadvertently pleaded. The third of these pleas is grounded on an act of Virginia, passed the 6th of May, 1782, entitled "An act to repeal so much of a former act as suspends the issuing of executions upon certain judgments until December, 1783," whereby it is enacted, "that no demands whatsoever, originally due to a subject of Great Britain, shall be recoverable in any court of this commonwealth, although the same may be transferred to a citizen of this state, or to any other person capable of maintaining such action, unless the assignment hath been or may be made for a valuable consideration, bona fide paid before the first day of May, 1777." The defendant avers that these acts are unrepealed and in full force and virtue, and that the debt in the declaration mentioned is a demand originally due to a subject of Great Britain, and not transferred to any person whatsoever.

I shall first consider the third, or last of these pleas. It is a well-known principle that an alien enemy cannot maintain an action in our courts; and it is not easy to presume that the design of the act was to declare or ordain that to be law which was evidently and undeniably law before. It would be odious to presume that the design of the act was to prohibit and disqualify British subjects to bring and maintain actions in the courts of Virginia, even after peace should be restored, and these subjects had ceased to be alien enemies. It would be odious, because such a prohibition and exclusion would have been contrary to the laws and practice of civilized nations, and would have been carrying the enmities of war into the bosom of peace. Neither of these constructions, therefore, is to be adopted in case one more consonant to reason and the usage of nations can be found. There is a very obvious one; it is this: In Virginia, assignees may bring actions in their own names. To prevent the payment of money to enemies during a war was just and expedient, and prudence directed that alien enemies should be prevented from recovering their debts by means of fraudulent assignments. It was wise, therefore, in Virginia, to provide that no debt due to an enemy should be recoverable, in virtue of an assignment from him to a citizen, unless the consideration had really been paid before the time specified in the act. If this construction of the act be just, then it follows that it left British subjects precisely under the same, and no other disabilities, than the laws of war and nations had already placed them—the object of the act being only to provide against the evils of fraudulent and collusive assignments. This is the only act pleaded which has any relation, either direct or consequential, to those British debts which have not been paid into the loan-office. It makes no alteration either in the rights of the creditor or the obligation of the debtor, and therefore, in my opinion, the creditor, on the return of peace, had good right to bring and maintain his action for the recovery of his debt, even if the fourth article of the treaty had been omitted. Before the war, the creditor had a perfect right to payment, and the debtor was under a perfect obligation to pay. The right of the one, and the obligation of the other, were suspended by the war and during the war; but when the war ceased, that suspension ceased with it, the peace replacing both the parties in their pristine situation relative to each other. Much time, learning and industry have been employed in endeavoring to prove that debts due to an enemy were res hostiles, and liable to confiscation. Many questions incident to that doctrine have been ably and eloquently discussed, and many authorities have been adduced and applied; and yet it does not appear, from any of the acts of Virginia, that are pleaded, nor, to my knowledge, from any which are not pleaded, that Virginia ever did, either expressly or impliedly, confiscate a single British debt. I am constrained, therefore, to regard these discussions as having been foreign to the subject.

The only plea which remains to be considered is the one which respects those debts which have been paid into the loan-office, pursuant to the act of October, 1777. The whole force of this plea depends, in my opinion, on the operation which the receipt or discharge pleaded may be found entitled to. But it may be proper previously to inquire, whether

the right of the plaintiff, as well as the obligation of the defendant, is affected by the act? If the debt justly could be, and really was, confiscated by the act, there is no doubt but that the plaintiff's right became extinguished; but neither the word confiscate, nor any words tantamount to it as applied to debts, are to be found in it—nor is it a clear point that debts were even sequestered by the act. If they had been, the plaintiff's right to the money, unless barred by the subsequent treaty of peace, would have been perfect after the war.

Let us carefully examine this act. A preamble cannot annul enacting clauses; but when it evinces the intention of the legislature and the design of the act, it enables us, in cases of two constructions, to adopt the one most consonant to their intention and design. The preamble is in these words, viz.: "Whereas, divers persons, subjects of Great Britain, had, during our connection with that kingdom, acquired estates real and personal within this commonwealth, and had also become entitled to debts to a considerable amount, and some of them had commenced suits for the recovery of such debts before the present troubles had interrupted the administration of justice—which suits were, at that time, depending undetermined; and such estates being acquired, and debts incurred, under the sanction of the laws, and of the connection then subsisting—and it not being known that their sovereign hath as yet set the example of confiscating debts and estates under the like circumstances, the public faith and the law and usages of nations require that they should not be confiscated on our part; but the safety of the United States demands, and the same law and usages of nations will justify, that we should not strengthen the hands of our enemies during the continuance of the present war, by remitting to them the profits or proceeds of such estates, or the interest or principal of such debts." From this preamble, it is plain and manifest, that the legislature were so far from entertaining or adopting the idea of confiscation, that they do, in express terms, reject it as being contrary to the public faith and to the law and usages of nations. Of sequestration, the preamble says nothing; but from the title, it would seem as if it were intended. It is in these words: "An act for sequestering British property, enabling those indebted to British subjects to pay off such debts, and directing the proceedings in suits where such subjects are parties." The words "sequestering British property" lead to an opinion that debts, being comprehended within the common acceptation of the word property, were intended to be sequestered; but this opinion is far from being confirmed by the enacting clauses. The first of them enacts: "That the lands, slaves, stocks and implements thereunto belonging, within this commonwealth, together with the crops now on hand, or hereafter to accrue, and all other estate of whatever nature, not herein otherwise provided for, of the property of any British subjects, shall be sequestered into the hands of commissioners." This is a complete and general sequestration of all British property not therein otherwise provided for. It seems, then, that there was some kind of British property respecting which the legislature deemed it proper to make other provision. Other than what? The obvious answer is—other than sequestration.

The next enacting clause informs us what that kind of property was which was to be otherwise provided for by the act. It enacts: "That it shall and may be lawful for any citizen of this commonwealth, owing money to a subject of Great Britain, to pay the same or any part thereof, from time to time, as he shall think fit, into the loan-office, taking thereout a certificate for the same in the name of the creditor, with an endorsement under the hand of the commissioner of the said office, expressing the name of the payer, and shall deliver such certificate to the governor and council, whose receipt shall discharge him from so much of the said debt." Thus we see that the legislature were pleased to separate British debts from that general sequestration in which they involved all other British property. There must have been some good reason for this discrimination. The act does not inform us what it was, but the nature of the subject points to the following: Had debts been sequestered, it would have been necessary to make it the duty of debtors to pay, and to have appointed and authorized commissioners to demand and collect them. Such a measure in the then situation of public affairs, would not have been advisable; it would have alarmed the debtors, whose numbers were not inconsiderable, and it would have been particularly disgusting to those among them who might not find it convenient to pay, or who might then have imbibed an opinion that the dissolution of the government dissolved all pre-existing debts. The legislature were apprised that these creditors, being alien enemies, could not recover these debts at law, and that there was no danger of the enemy's hands being strengthened by payments obtained in that way. It was, nevertheless, desirable that as much of this money as could be collected with the consent of the debtors, should be paid to the government, to the end that the hands of the government might thereby be strengthened.

These and similar considerations probably induced the legislature to leave every debtor at liberty to pay as much or as little of his debt into the loan-office as he might from time to time think fit. It is at least doubtful whether the measure taken by this clause of the act, can, with propriety, be called sequestration: (1) Because the word "sequester" or "sequestration" is not used to operate it; (2) Because it does not extend to all debts under similar circumstances, but only to such as the debtor might think fit to pay; (3) Because it

permits a debt to be divided into as many parts as the debtor pleases, and at his pleasure attaches sequestration to one part, leaving the other parts free. But by whatever name this procedure may be called, its influence on the question before us is the only important object of inquiry. Here it may be proper to observe, that the debtor was perfectly at liberty to pay or not to pay, and to pay only as much, and at such times, as he might think fit. I take it for granted that a debtor cannot voluntarily transfer his obligation to pay to a third person, without the consent of his creditor; and that whenever he does it, the validity of that transfer must depend on the event of his creditor's afterwards ratifying it. When the debtor, in the present instance, voluntarily accepted the offers held out by the act, and without actual or legal constraint paid his debt to the state, agreeable to those offers and terms, he saw and yet exposed himself to the risk of the state's extinguishing the right and demand of the creditor either by payment at the end of the war, or by confiscating the money and making their receipt a good bar to an action, and also to the further risk of the provisions which the treaty of peace might make on the subject. But the state has not confiscated the money, nor have they paid it to the creditor. The creditor hath not released the debtor, nor hath he consented that the state shall be substituted in his place. Here three great questions arise: (1) Whether such discharge and substitution are valid by the laws of nations? (2) If not, whether they could be annulled by treaty? (3) If they could, then whether the treaty of peace does annul them?

1. Whether such discharge and substitution are valid by the laws of nations? This is a question on which I regret not having more time to investigate and reflect upon. If I was certain that the ideas which the legislature of Virginia appear to have entertained on this subject were accurate, I should have fewer doubts. They acknowledge, in the preamble of the act we have been considering, that these debts have been incurred under the sanction of the laws, and the connection before subsisting between the two countries. They acknowledge that Britain had not, to their knowledge, confiscated debts under the like circumstances, and that the public faith, and the laws and usages of nations, required that they should not be confiscated on their part. It is to be remarked, that Virginia hereby recognized the customary law of nations, and the respect due to it. They proceed to assert that they were justified by the same law and usages of nations in not strengthening the hand of their enemies, during the war, by remitting to them the interest or principal of such debts. From these declarations, it appears that all which the legislature conceived they were authorized by the law and usages of nations relative to these debts, was to prevent the payment of the interest or the principal during the war, lest the hands of their enemies should thereby be strengthened. If their power over such debts rightfully extended only to the prevention of such payments and remittances, then it will follow that they had no right, by the law and usages of nations, to change the nature of the debt, without the creditor's consent, nor without his consent to substitute one debtor for another. Their mere legislative powers could not operate such alterations in contracts so circumstanced; for, however extensively their constitution had authorized them to legislate for and over their own citizens, it could not give them authority to legislate for and over the subject of foreign powers residing out of their jurisdiction in foreign parts.

2. But supposing that the customary law of nations does permit and validate such discharge and substitution, or, as has been contended, that the customary law of nations had not been adopted by or did not extend over Virginia and the other United States, we are next to inquire: Whether they could be annulled by treaty? Here a wide field for investigation opens to our view, too wide to be minutely explored in the little time allowed me on this occasion. To me it appears to be a rule, that a treaty is competent to every stipulation which the interest of the contracting nations may indicate. A nation is a moral person composed of all the citizens comprehended in it. Their sovereign, duly authorized to treat with another nation, speaks their conjoint voice, pledges their conjoint faith, and makes their conjoint promises. It is questioned, whether a nation has a right, by a treaty of peace, to impair or destroy the private rights of citizens. No principle is better established, nor more generally acknowledged, than that the right of eminent domain is inseparably attached to national empire and sovereignty, and that it accompanies the right of making peace, whether that right be vested in one or in many hands. "Everything," says Vattel, "in the political society ought to tend to the good of the community; and if even the citizens' person is subject to this rule, their fortunes cannot be excepted." "The right belonging to the society, or to the sovereign, of disposing in cases of necessity, and for the public safety, of all the wealth contained in the state, is called the 'eminent domain.' It is evident that this right is necessary to him who governs, and is, consequently, a part of the empire or sovereign power." "If a nation disposes of the public property, in virtue of his eminent domain, the alienation is valid." "When he disposes in like manner, in cases of necessity, of the possessions of a community or an individual, the alienation will be valid; but justice demands that this community or this individual be recompensed. It is necessary that nations should treat and transact their affairs with validity, without which they could have no method of terminating them, and of placing themselves in a state of tranquility. Whence it follows, that when a nation has ceded any part of its

property to another, the cession ought to be valid and irrevocable. The necessity of making a peace authorizes the sovereign to dispose of things even belonging to private persons, and the eminent domain gives him this right. But these cessions being made for the common advantage, the state is to indemnify the citizens who are sufferers by them. The domain of a nation extends to everything it possesses: the goods even of individuals in their totality, ought to be considered as the goods of the nation, in regard to other states; in short, it cannot be otherwise, since nations act and treat together in a body, in their quality of political societies, and as so many moral persons—all those who form a nation being considered by foreign states as making one whole, one single person. Its domestic regulations make no change in its right with respect to strangers." "When a field or house or garden, belonging to a private person, is made use of for building the rampart of a town or some other piece of fortification, when his standing corn or his store-houses are destroyed to prevent their being of use to the enemy, such damages are to be made good to the owner, who should bear only his quota. It is very evident, from the very act of civil or political association, that each citizen subjects himself to the authority of the entire body in everything that relates to the common welfare. The authority of all over each member, therefore, essentially belongs to the body politic of the state; but the exercise of it may be placed in different hands, as the society shall ordain." It would be useless to multiply authorities on a point so clear. These which have been adduced abundantly prove the authority and right of the nation to dispose of the goods and property of individual citizens whenever the safety and welfare of the state shall render it necessary; of this necessity the nation only, or the sovereign, are to judge; in such cases, the suffering individual is to be recompensed. I shall conclude my observations on this head with one made by an eminent writer. He compares a nation involved in war to a vessel in a storm, and justly remarks that in such cases it is better to cast goods and merchandise overboard than men. These rights belong to the nation, and, in my opinion, the exercise of them touching peace was clearly vested by the articles of confederation in the congress by whose authority the treaty of peace with Great Britain was concluded, and by whom it was ratified. The present national constitution recognizes that treaty among others. No objection, to my knowledge, hath ever been made in the councils of America to what I call its necessary validity; nor, in my opinion, is there the most distant reason for drawing it into question. From what has been said, it necessarily follows that the discharge and substitution in question were within the reach of a treaty, and were liable to be modified, impaired or totally annulled by it.

3. We are now arrived at the last question which remains to be decided, viz.: Whether this discharge and substitution is annulled by the definitive treaty of peace? The fourth article of that treaty is in these words, viz.: "It is agreed that creditors on either side shall meet with no lawful impediments to the recovery of the full value in sterling money of all bona fide debts heretofore contracted." Suppose such a man as Mr. Locke could be raised from the dead, and, without knowing anything of or concerning the treaty, this article was given him to decide, from the tenor of it, whether any creditors on either side, whether any lawful impediments, and whether any bona fide debts theretofore contracted, were excepted by any implication or construction growing out of and warranted by the terms in which the article is expressed, I think he would decide that there were none. To me the article appears to be plain, explicit and unequivocal; and that its true intent and meaning is so prominent and clear, as to require no rules of interpretation to discover or elucidate what the true intent and meaning of it is. Vattel lays it down as a maxim, "that it is not permitted to interpret what has no need of interpretation. When an act is conceived in clear and precise terms, when the sense is manifest, and leads to nothing absurd, there can be no reason to refuse the sense which this treaty naturally presents. To go elsewhere in search of conjectures in order to restrain or extinguish it, is to endeavor to elude it. If this dangerous method be once admitted, there will be no act which it will not render useless. Let the brightest light shine on every part of the piece; let it be expressed in terms the most clear and determinate; all this will be of no use, if it be allowed to search for foreign reasons in order to maintain what cannot be found in the sense it naturally presents."

Here it becomes necessary to inquire: (1) Whether the plaintiff is a creditor on either side? (2) Whether the payment into the loan-office, and the receipt and discharge thereupon given by Virginia to the debtor, is a lawful impediment? (3) Whether the debt sued for was a bona fide debt theretofore contracted? If these three questions are answered in the affirmative, the plaintiff ought to recover; if either of them is answered in the negative, judgment ought to be on this plea for the defendant.

1. Is the plaintiff a creditor on either side? It stands confessed by the record that he was a British creditor prior to the date of the receipt and discharges, the present validity of which is now in question. It is admitted that he has not received the amount of his debt, either from the debtor or from the state, and, therefore, being a British subject, to whom money is due from an American citizen or citizens, he is, in that sense, a creditor within the fourth article. There being no evidence that this money so due to him has been either released by him, or confiscated or forfeited by law, his right to demand and receive it

still remains perfect; so that he stands before the court and the treaty as a creditor entitled to the money due to him. It is objected that his debtor being discharged by act of Virginia, he had, before the treaty, ceased to be a creditor quoad that debtor. Suppose it so, yet he remained a creditor quoad the debt in the hands of the debtor's substitute, and, therefore, may, with propriety, be deemed and called a British creditor. It appears that Virginia so considered him, and, in her acts, called him a creditor, and that both before and after the treaty of peace. In the fourth section of the act last before mentioned, they direct the governor and council to make such allowances as they shall think reasonable out of the said profits and interest arising on money so paid into the loan-office, to the wives and children of such proprietors or creditors; nor could they consider him in any other light while their own certificate remained uncanceled. This certificate certifies that the defendant had paid into the loan-office a certain number of dollars, to be applied to his credit, in account with the plaintiff. There can be no credit where there is no creditor. In the second section of an act of Virginia, passed the 3d January, 1788, entitled "An act concerning moneys paid into the public loan-office in payment of British debts," are these words, "And whereas it belongs not to the legislature to decide particular questions of which the judiciary have cognizance, and it is, therefore, unfit for them to determine whether the payment so made into the loan-office as aforesaid be good or void between the creditor and debtor." Here, then, the legislature of Virginia recognizes the plaintiff in the capacity of creditor, and the defendant in that of debtor, although, with great delicacy, they forbear touching the question in difference between them. For these various reasons, I am of opinion that the plaintiff is one of the creditors mentioned in and intended by the fourth article of the treaty.

2. The next question is whether the receipt and discharge given by Virginia is a lawful impediment to the plaintiff's recovery? If it is not, I cannot conceive why it was pleaded as a bar; and if it is, I cannot see how it can consist with the treaty to let it stand as a barrier to the defendant against the plaintiff's recovery. But payment to the plaintiff is a lawful impediment to his recovery; and can it be supposed that the treaty meant to authorize a creditor to obtain a double payment? There is no doubt that such a construction cannot be admitted, and for the very reason which one of the defendant's counsel assigned, because such a construction would be inconsistent with common sense and common justice. But that is no reason why a construction consistent with both should not prevail, and that construction, in my opinion, is this, viz.: The lawful impediments mentioned are those which, on either side, had grown out of the war, and been caused by the hostile laws of either nation. The object of the treaty was peace, and to cause all hostilities, both military and civil, to cease. In pursuance of this object, it was stipulated that creditors should (as I understand the article) be restored to the free exercise of their rights as creditors, and that all impediments which hostile laws had interposed to prevent or suspend the recovery of their debts, should be done away. It appears to me that the act of Virginia, and everything done under it, the payment into the loan-office, the certificate taken out in the creditor's name, and the receipt and discharge given to the creditor, all grew out of the war; and so far as they affected the creditors, were, by this article, extinguished with it. If the lawful impediments created during the war by these payments into the loan-office, receipts and discharges, ought to be excepted, why was not that exception insisted on when the treaty was forming, and expressly mentioned and reserved in the article? We see, however, that the words are as general as they can be, and comprehend all lawful impediments.

This remark is confirmed by the second, third and fourth general maxims on the subject of the interpretation of treaties, viz.: (2) "If he who can and ought to have explained himself clearly and plainly, has not done it, it is the worse for him: he cannot be allowed to introduce subsequent restrictions which he has not expressed. The equity of this rule is extremely visible, and its necessity is not less evident. There can be no secure conventions, no firm and solid concession, if they may be rendered vain by subsequent limitations which ought to have been mentioned in the price, if they were included in the intentions of the contracting powers." (3) The third general maxim is, "that neither the one nor the other of the interested or contracting powers has a right to interpret the act or treaty at his pleasure. If I am allowed to explain my promises (to you) as I please, I may render them vain and illusive by giving them a sense quite different from that in which they were presented to you, and in which you must have taken them in accepting them." Which is most natural to suppose, that Great Britain understood this article as comprehending all lawful impediments, or as excluding a certain class of them? (4) The fourth maxim is, "On every occasion when a person has and ought to have shown his intention, we take for true against him what he has sufficiently declared." Can it be said that the United States could not have shown their intention to reserve and except these payments into the treasury, or that they ought not to have done it had they so intended, or that they have not sufficiently, in the fourth article, declared their intention to comprehend all lawful impediments? "This is an incontestable principle applied to treaties; for if they are not a vain play of words, the contracting parties ought to express themselves in them with truth and according to their real intentions. If the intention sufficiently declared was not

taken for the true intention of him who speaks and binds himself, it would be of no use to contract and form treaties." From the fourth article it appears evident that the debts due on either side had become a subject of negotiation; this is the only article in the treaty which respects them. The next clause, which is called the recommendatory clause, relates only to confiscated property; so that if the class of debts now in question (I mean those paid into the loan-office) shall, by construction, be deemed excluded from the fourth article, they will remain entirely unprovided for by the treaty; although it was exceedingly important to British creditors affected by those payments, that they should not have thus been passed over in silence. This silence respecting these debts cannot be accounted for otherwise than by supposing that both parties considered them as included within the terms of this article. But this article, according to the construction contended for, would, as to them, be rendered null and without effect; and yet it is a maxim in the law of nations, that "whatever tends to render an act null, and without effect, either in the whole or in part, and, consequently, whatever introduces any change in the things already agreed upon, is odious," and to be rejected. Again: "Everything .that tends to the common advantage in conventions, or has a tendency to place the contracting powers on an equality, is favorable; and in such cases it is safest and most consistent with equity to extend the signification of the terms, than to limit them." These maxims apply strongly to the law before us.

The fourth article is perfectly reciprocal and equal. No advantage is given to the one party which is not also given to the other. What right can we have to interpret the article to mean, that although no American creditors shall meet with lawful impediments, yet that some British creditors shall meet with lawful impediments? An interpretation so violent, so unauthorized by language of the treaty, and so destructive of the equality which characterizes it appears to me to be utterly inadmissible. That the creditor will meet with no lawful impediments in applying to the commonwealth for the money, is true; but that construction cannot consist with the treaty, which contemplates lawful impediments to recovery, and not to petitions or such like applications. "Recovery" is a word well understood; and when applied to debts or demands, means recovery by process and course of law. At that time states were not liable to actions, nor could it then have been foreseen or conjectured that they would be in future. In short, I am, for my part, well persuaded that the receipt and discharge pleaded, is one of the lawful impediments mentioned in the treaty, and, therefore, that it ought not to stand in the way of the plaintiff's recovery. Let the state repay the money to the defendant, and neither the state nor the parties will have reason to complain of the treaty, nor of injustice. We confiscated British property to an immense amount, and, under the recommendatory article, still keep it. Under the fourth article, all American creditors are secured, and it is but fair that all British creditors should be so likewise. Britain neither sequestered nor confiscated any of our property; she interposed no lawful impediments to the recovery of our debts. Equality in treaties is favored by the law of nations, and every of its maxims applicable to the case, ought to confine us to the reciprocity and equality which marks this article.

3. The only question which remains to be decided is whether the debt sued for was a bona fide debt theretofore contracted. It stands admitted by the record that the debt was theretofore contracted. Nothing appears to induce a doubt of its having been bona fide contracted. It is not pretended that it hath ever been paid to the creditor, or released or forfeited by him. It is, therefore, a debt bona fide due as well as bona fide contracted. The payment to the state was no payment to him; admit that he thereby lost his right to demand it of the debtor in the courts of Virginia, until after the peace, yet the treaty, as I understand it, restored him the exercise of that right by removing the lawful impediments which the law of that state, and the acts done under it, had during the war created.

## Case No. 7,508.

JONES v. WETHERILL.

[1 MacA. Pat. Cas. 409.]

Circuit Court, District of Columbia. Sept., 1855.

PATENTS—INTERFERENCES—JURISDICTION OF COMMISSIONER AND JUDGE—PROCESS PATENTS—INVENTION—ADMISSIBILITY OF EVIDENCE.

[1. Under Act 1836, §§ 6–8 (5 Stat. 119, 120), the jurisdiction of the commissioner in interference cases is not restricted to the mere question of priority, but extends to the consideration of the patentability of the invention. And on appeal from his decision, under Act 1839, § 11 (5 Stat. 354), the district judge has a like jurisdiction.]

[2. In respect to a process patent, patentable novelty and utility require that the result produced shall be an "improvement in the trade," in the commercial sense, meaning an advantage to the public either by the manufacture of a new article. a better article, or a cheaper article than was produced by the old method.]

[3. In an interference proceeding, a caveat filed by one of the parties is admissible in evidence, so far as it describes the machinery then constructed, as being a declaration of his invention, and forming part of the res gestae.]

[4. Letters and memoranda of a witness who was engaged in experiments according to suggestions by the inventor, describing appliances, processes, and results, are not admissible as evidence per se, but only for the purpose of refreshing the witness' recollection.]

[This was an appeal by Samuel T. Jones from an adverse decision of the commissioner of patents in an interference proceeding between the appellant and Samuel Wetherill.]

John L. Hayes, for appellant.

MORSELL, Circuit Judge. The subject of this case was brought before me on a former occasion (Burrows v. Wetherill [Case No. 2,208]) when John E. Burrows was also a party; and the issue then was as to the right of invention of an improvement of the furnace by perforated grate-bars. On that appeal it was decided as between the two parties, Burrows and Wetherill, that Burrows must be considered the prior inventor of the improved perforated grate-bars in the furnace for the manufacture of the white oxide of zinc, as particularly described in his specification. I decided no point on the subject as between Burrows and Jones, there being no appeal as between them. I have had no sufficient reason since to be dissatisfied with the opinion. Subsequently, on the 2d of October, 1854, an interference was declared between the appellant Jones and the appellee Wetherill in the matter of the process of making white oxide of zinc, in which the commissioner says: "According to the views of the appellate judge, there is no conflict between Burrows and Wetherill in regard to the subject-matter of this second claim; but I think it clear that Jones claims this same process; so that between him and Wetherill there is a second interference, for reasons already set forth in a previous decision between the three contestants above named. I believe Wetherill to be fairly entitled to priority as the inventor of this process, and patent will issue accordingly, unless an appeal from this decision be taken previous to the first Monday of November next," &c. On the appeal from which decision the appellant Jones duly filed his reasons. The first and second are general, because the commissioner did not award priority of invention to appellants, and because his decision was contrary to the evidence in the case. The third and fourth rely on the caveat filed by Jones in 1848, on the written description in 1849 of his said discovery, and on the testimony applicable to said subjects, as substantially showing and proving appellant's invention of the process now claimed by the appellee to have been prior in point of time. The fifth and sixth are because the commissioner decides that Jones was not successful in making white oxide of zinc, and because he had not carried his discovery so far as to be patentable. The seventh, because the commissioner decides that the non-user by appellant of his discovery was an abandonment which affected his right to a patent.

This new issue appears to have been tried and decided upon the proofs and evidence in the former case alone, a statement of which, as far as it was deemed necessary for the points involved, was given in the opinion delivered on that occasion, and will not, therefore, be repeated now. On due notice being given to the parties interested of the time and place appointed for the hearing of the appeal, the commissioner produced and laid before me all the additional papers, with his opinion; the parties, by their counsel, respectively, filed their arguments in writing; and thereupon the case was submitted for my decision. On the part of the appellee, it is contended that the only question before the judge on this appeal is which of the two parties, Samuel Wetherill or Samuel T. Jones, on the evidence submitted, is, in judgment of law and fact, the prior inventor of the process claimed under both applications; and that the jurisdiction of the judge cannot be extended to the consideration of the patentability of the invention of the parties.

It is contended that that question cannot be considered as included in the decision of the commissioner hereinbefore recited; that according to the construction of the seventh and eighth sections of the act of 1836, it ought not to have been; that according to the eleventh section of the act of March 3d, 1839, that point, therefore, cannot be considered as coming within the revision of the appellate judge. How is it as respects the fact? The commissioner says (after stating that Wetherill is fairly entitled to priority as the inventor of the process): "And patent will issue accordingly, unless," &c. That he did act upon it, therefore, there can be no doubt. Ought he so to have done? I cannot agree to the correctness of the construction given by the counsel for the appellee to the seventh and eighth sections of the act of 1836 in support of his position. I think the sixth, seventh, and eighth sections must be taken together in construction, from which it will appear clear that the nature of the interference alluded to in the eighth section is a patentable interference, and that it cannot exist before the commissioner has satisfied himself by the examination as directed that there is prima-facie evidence (from the vouchers produced by the applicant) that all the conditions exist and all the previous requirements of the sixth and seventh sections have been fulfilled; and without such interference no question of priority of invention can arise in which is included the patentability of the invention. This idea is confirmed by that part of the eighth section which gives the right of appeal. After giving that right to either of the parties who shall be dissatisfied with the decision of the commissioner on the question of priority of right of invention, on the like terms and conditions as are provided in the preceding section of the act, then it is said, "and the like proceedings shall be had to determine which, or whether either, of the applicants is entitled to receive a patent as prayed for." This being the view taken of the point, it will be seen that the decision of Judge Cranch in Pomeroy v. Connison [Case No. 11,259], referred to, is entirely inapplicable. This preliminary objection is therefore not sustained. The invention for which a patent is claimed in this case on the part of the appellant is for a process of making the white oxide of zinc by a mode or

means of certain arrangements, in combination with the improved perforated grate-bars in the said furnace, for the manufacture of the white oxide of zinc, as patented to John E. Burrows, No. 13,416, August 14th, 1855. The issue embraces no claim by either of the parties to said patented invention, nor any improvement of the same, but is confined solely to the process. The use, therefore, in this connection must be by the license or permission of said patentee or his assigns. In order to constitute patentable novelty and utility, it must appear that the result produced by the combination was an improvement in the trade, and for the public good or advantage, by the manufacture either of a new article, or a better article, or a cheaper article to the public than that produced before by the old method. The terms "improvement in the trade," as used, applicable to the law of patents, should be considered in the commercial sense, and as meaning, of the article, as good in quality and at a cheaper rate, or better in quality at the same rate, or with both these consequences partially combined, leading to a cheaper production of the white oxide of zinc of as good or better quality. In this class of cases the result is considered all-important. There must, however, be thereby evolved a principle such as will regularly, not merely occasionally, in the use thereof produce a like effect.

These general remarks are made in this place to show the principles by which I shall be guided in the further investigation of this case. With respect to the character of the manufacture, both parties agree that a successful method or arrangement of means in the process will result in an improvement of the trade, by a great economy of fuel and in the expense required by the old mode in the constant renewal of vessels—the old method requiring a ton of coal to the one of ore, and the new mode only about six hundred pounds of coal to the ton of ore; and that the invention of the appellant, whatever it was, was long anterior to that of the appellee. The appellant, to support his claim, offers his caveat as evidence, amounting to a declaration of his invention, and as forming part of the res gestae, to which point the third and fourth reasons are intended to apply. I can perceive no sufficient objection to the position, so far as it extends to the description of the invention and the machinery which was then constructed. The caveat says: "For the improvements in the reduction of zinc ores, * * * for which purpose * * * I subject the crude ores to the direct action of heat, either in a blast or draft furnace, along with the fuel, whereby the zinc is separated in the form of white oxide, sometimes called the 'flower of zinc,' and which is to be collected in a chamber or prolonged flue connected with the furnace and with the chimney, wherein the flower will have time to settle, while the smoke and gases pass off into the atmosphere," &c. It is admitted that Mr. Jones did not contemplate the use of the white oxide of zinc as a pigment, and that in some respects this was analogous to the arrangements in the furnace used for the smelting of iron, though substantially different in other respects. With this the appellant connects the testimony of Major Farrington, his memorandum book, and sundry letters. As appellant states the testimony, it is that in the year 1848 Jones told him he believed he had made an important discovery; that his efforts had hitherto been to make metallic zinc directly from the ore; that he had succeeded as well as he expected, but found he could make the white oxide easily. He directed witness, after describing his plan, to make a quantity of white oxide, for the purpose of being reduced to metallic zinc. Witness adopted the plan suggested by him, and obtained white oxide of zinc. Occasionally alterations were made in the plan of working and collecting. He states then the plan—"working ore and fuel together"—and then describes the furnace. The furnace bottom was about twenty inches square, having an ash-pit about two feet deep. The body of the furnace was then carried about three to three and one-half feet above the grate, with a draft-hole or flue near the top, for the purpose of working the furnace described, and afterwards to collect the white oxide. Instead of covering the top of the furnace, a sheet-iron cap was adopted, connected with pipes leading to receivers. The chimney was very high and the draft very good. The principal alterations or modifications in the plan of working were more in the receiving apparatus than the furnace. The method of charging was first starting a fire in the furnace, placing on ore and fuel in alternate layers, till the furnace was nearly filled, the ore having first been brought to a uniform size, or nearly so, by breaking. The white oxide was obtained in small quantities. He formed an unfavorable opinion of the process in consequence of the difficulty of collecting. He says the furnace put up by Mr. Jones at Newark after December, 1848, was carried about two and a-half to three feet above the grate-bars. At first an arch was turned over the top of the furnace, having a door or hole near the top to put in the charge; the ash-pit was closed, a blast introduced under the grates. The method of charging and working was similar to that described in Elm street. He is asked to state the difference, if any, in the two furnaces in the method of reducing the ore; to which he replies: "It was reduced more readily by blast than draft. I do not know that there was any other difference than that described in the reduction." In his answer to the thirtieth question, he describes an alteration in the grate-bars, to prevent the ore from falling through. He is asked whether he made a record or memorandum of his experiments which he had described in Elm street

and Newark. In answer, he says: "I made a record of every experiment tried and drawings of all the furnace apparatus." These memoranda were made in a small memorandum-book or on loose sheets of paper. But before the 1st of April, 1850, he copied the substance of them into a book, which book is in evidence, and marked "Exhibit A." In this book are to be found drawings of the furnaces; the last one used having a blast underneath the grate. From this record it will be seen that the difficulties encountered were in collecting. He says, in charging the furnace put up in Elm street: "We tried it at various heights—from five or six inches to two feet; they found a light charge to work the best; the thinner the fire, the better it worked; when crowded too much by piling in the ore the draught became obstructed." On his cross-examination he says: "When the furnace was too heavily loaded, or the body of the furnace was too much filled up with ore and fuel, an invariable result was the finding of some part of the ore forming slag and obstructing the passage of air through the grate." They found the difficulty did not exist when working a very light charge. In his answer to the one-hundred-and-tenth cross-question on the part of Burrows, he says: "After enjoining confidence as to what he (Mr. Jones) was about to communicate, Mr. Jones said: 'I think I have made an important discovery in experimenting to make metallic zinc; I have not succeeded in all respects as I would wish to; the mechanical combinations of zinc and iron render it difficult of reduction in crucibles, as the iron will fuse and cut out the crucibles; but I have found that white oxide of zinc can be made, and believe a plan can be devised to collect it; and we all know that can be reduced very readily to metallic zinc, and probably in iron retorts. Now, the plan I propose is to work the ore when broken to a hickory-nut size, in the body of the furnace and in immediate contact with the fuel; the fuel itself will furnish sufficient carbon to deoxidize the ore, and probably sufficient oxygen will pass through the charge to oxidize the vapor of zinc; if not, atmospheric air can be admitted near the top of the furnace to oxidize the vapor of zinc. I propose placing a sheet-iron cap on the top of the furnace, connected with an elbow-pipe leading into a receiver, where I hope to collect it.'"

The letters of Mr. Farrington—one written to Mr. Jones, dated March 22d, 1849, and one to Mr. Curtis, dated March 29th, 1849—which are to be found annexed to the testimony of Mr. Duguid, are relied on to confirm the evidence given by him from recollection; said letters having been written before any controversy existed, and one, if not both of them, having the post-marks proving that they were written at the same time they bear date. In the letter of March 29th, 1849, written to S. T. Jones, Mr. Farrington says: "I put a barrel and a half of coke in the furnace, and, when thoroughly ignited, put on the sifted ferric ore, using one of our sheet-iron tubes as a charger, holding fifteen pounds. We can in this way scatter it well over the fire. When I left this evening we had been subliming zinc about two hours." In the letter to Mr. Curtis of same date Mr. Farrington says: "I have this morning shipped a box of oxide by Stephens & Conduit's line, foot of Dey street. To-morrow I shall send more. The storm for two days has prevented my sending over, as well as interfering with our operations here." Various grounds have been urged on the other side against the sufficiency of this proof; that it appears on scientific grounds that Jones never had a correct idea of the invention; that the process involves many chemical conditions, none of which can be departed from without total failure as a practical process. The first condition is the complete admixture of the pulverized ore and coal, in contradistinction to the charging of the furnace in alternate layers of coal and ore, as practiced by Mr. Jones in his unsuccessful experiments. The second condition is the depth of charge three or four inches, instead of eighteen inches or two feet, tried by Mr. Jones. The third is the blast forced through the numerous small holes in the perforated bed of the furnace, each acting as a blow-pipe, in contradistinction to a general blast. With respect to the reasons given for this theory, it will be proper to take some notice of the learned discussion between the counsel on the subject of the treatment of zinc oxide and carbonaceous matter in a furnace to which a blast is attached. The counsel on the one side supposes the deoxidizing agent to be carbonic oxide; on the other side, carbonic acid. I have endeavored to inform myself on the subject from all the light I could derive from those arguments and from other sources, and from which it appears to me that the solution of the question cannot be very material as to the result, in the view I have taken of the point intended to be established; but I will briefly state my conception of it: Both sides agree to the ingredients necessary to be present in the furnace and the supply of air from below by the blast—all which must be gotten to a high heat, such as will be sufficient to volatilize metallic zinc. In that state carbonic acid, as such, could not exist; and if forced in, would be instantaneously resolved into carbonic oxide, by taking up more carbon. The oxygen of the air, therefore, on entering the burning mass, unites with carbon, forming carbonic oxide, and that of the zinc oxide also unites with another portion of carbon to form carbonic oxide gas, which gas escapes from the fuel-burning mass, with the zinc vapor, into the flue, and so passes off. In either case, therefore, it would be impossible for the gaseous products escaping through the burning mass of fuel and ore to be sufficient for the purpose of reoxidizing the zinc. Whilst it is es-

caping through the fire, or when it has risen above it into a flue or chamber, it must be re-oxidized by the admission of air in some other way. And whether the charge of ore and coal be mixed intimately, as stated by the appellee, or arranged in layers of zinc ore, alternating with layers of pulverized coal, (if it be a light one,) I cannot perceive that there could be any material difference in the effect. In the further consideration of this point, it will be proper to consider the kind of furnace which it is contended was used, in combination with the process claimed by the appellant, as made out in the evidence. The grate was used; also one grate immediately above another; a perforated plate resting upon a grate and a bed with no perforations, and other similar forms of grate-bars; all of which, according to the theory I have adopted, are objectionable, because the proper quantity of air or oxygen, which ought to be the largest amount possible, never could be obtained with a sufficiently-perfect dissemination throughout the charge, which should be entirely free from all obstruction, as in the case of Burrows' furnace—the simple, finely-perforated bed or grate-bars alone, and unobstructed by other fixtures, admitting at once the proper quantity of air, and properly and effectually disseminating it when aided by the blast. Under any circumstances, the charge must be a light, well-regulated charge, to avoid unreasonable slagging, and to produce the pure white oxide of zinc, to make the invention patentable.

Major Farrington's testimony conflicts with this theory, the weight and effect of which will be next considered. With respect to the "record of memoranda," as it is called, and the letters, they certainly cannot be considered as evidence per se. The originals might have been used to refresh the memory of the witness, but this does not appear to have been the intent. They appear to have been used as confirmatory of the testimony of the witness, but according to the rule of evidence on the subject they were inadmissible for this purpose also. See Ellicott v. Pearl, 10 Pet. [35 U. S.] 438, 439. The omission, also, of the experiments at Newark as a part of the record, which would have shown the latest experiments, was a mutilation which affords ground for an unfavorable inference. The substance, also, of the other part of Major Farrington's testimony has been stated. The weight and effect of this testimony, it is contended, is destroyed by inconsistencies and contradictions. Thus the witness says there was no difficulty in producing the white oxide of zinc by the plan pursued, and that it was produced in New York. If such was the case, is it reasonable to suppose that the same plan would not have been adopted at the Franklin furnace, New Jersey, where it had been experimented with for three months? But instead thereof the reverberatory process was preferred, and that with the advice and approbation of both the witness and the appellant Jones. This inference, I think, is a fair and strong circumstance to show from the action of the parties themselves that the witness was under a delusion, and that they were satisfied that the appellant's plan was not according to the true and essential principle of the invention. The further objection is with respect to the box of metallic powder sent to H. H. Day. The witness says that some of the product, which he called the white oxide of zinc, made by the furnace of Jones (the appellant), was sold, boxed up by him, and sent to Day for the preparation of India-rubber. Day swears that the box so sent to him was not the white oxide of zinc, but blue powder; and Reiff proves that it was not only blue powder, but produced by the retort furnace, commenced by Hitz in April, 1849, and constructed first for making metallic zinc. In this it appears that the witness was incorrect in his statement both as to the character of the powder and the furnace from which it was sent. The witness Reiff also proves that the first white oxide of zinc ever produced in that establishment was in a retort furnace constructed by Hitz; and that it was a matter of such novelty and astonishment that S. T. Jones (the appellant) huzzahed at the results; and from what Farrington himself says, Hitz must have come there (into the establishment) with the approbation of the appellant; from which it is inferred that appellant must have become satisfied of his utter failure at this time. It is further objected, as an inconsistency in the testimony of the witness, that after having fully described the furnace on the first day, giving minutely the dimensions, and, amongst others, the depth—two to two and one-half feet above the grate—on his examination the next day (and after conversations with others on the subject of his testimony) he is then asked amongst other things, to state how the furnace was charged; to which he replied: "The method of charging was first starting a fire in the furnace, placing ore and fuel in alternate layers until the furnace was nearly filled," &c. He says: "While carrying it on, we sometimes charged two or three times a day." It is therefore probable that the slagging must have been unreasonably great. The testimony of Bartlet and Keenan is relied on also to show additional contradictions and to destroy the credibility of the witness Farrington. The testimony also of Richard Jones, which strongly tends to prove, by the admissions of appellant, his failure and abandonment of his experiments, is relied on by appellee. There is also other proof of the same kind urged by the appellee against the credibility of this testimony, which I do not think it necessary particularly to state.

According to the best judgment I have been able to form upon a deliberate consideration of the whole case, I am satisfied that the appellant was ignorant of an essential feature of the invention, and that he did not succeed in producing the white oxide of zinc accord-

ing to a patentable sense thereof. I do therefore decide that the decision of the commissioner that the said appellant was not the prior inventor, and his refusal to grant letters-patent to said appellant Jones, was correct, and ought to be affirmed.

[Patent No. 13,806 was granted to Samuel Wetherill November 13, 1855. For other cases involving this patent, see note to Wetherill v. New Jersey Zinc Co., Case No. 17,463.]

JONES v. WETHERILL. See Case No. 2,208.

JONES (WHITE v.). See Case No. 17,550.

JONES (WHITEHEAD v.). See Case No. 17,563.

JONES (WICKERSHAFF v.). See Case No. 17,609.

## Case No. 7,509.

JONES v. WOODROW et al.

[1 Cranch, C. C. 455.] [1]

Circuit Court, District of Columbia. Nov. Term, 1807.

PLEADING AT LAW—RULE TO SHOW CAUSE—GENERAL CHARGES—EXTORTION.

It is not necessary, upon a rule on a constable to show cause why he should not be removed "for extortion under color of his office," that there should be any specification of the particular facts relied upon.

Rule upon the defendants to show cause, why they should not be removed from office "for extortion under color of their office." This rule was laid last Saturday (CRANCH, Chief Judge, absent). Woodrow & Neal [constables] brought a large subscription of certificates of character, which they showed as cause.

Mr. Jones, for the United States, called witnesses.

Mr. Youngs and F. Lee contended that there ought to be a specification of charges, and objected to evidence under such a general charge.

Mr. Jones was permitted to proceed.

CRANCH, Chief Judge, contra, because the charge was too general.

## Case No. 7,510.

JONES v. YEAGER.

[2 Dill. 64; [2] 16 Int. Rev. Rec. 142; 5 Chi. Leg. News, 25.]

Circuit Court, E. D. Missouri. Oct. 3, 1872.

PROPRIETOR OF STEAM-POWER—LIABILITY OF MASTER FOR INJURIES TO SERVANTS BY BOILER EXPLOSION — FELLOW-SERVANTS OF SAME MASTER IN SAME COMMON EMPLOYMENT.

1. The proprietor of machinery propelled by steam is bound, as respects his employes, to use reasonable care, proportioned to the danger, to see that such machinery is kept in a safe and sound condition; and is liable for damages occasioned to servants not in fault, from the failure to perform this duty.

[Cited in Dillon v. Union Pac. R. Co., Case No. 3,916.]

2. Ordinarily, a master is not liable for an injury to a fireman of an engine, caused solely by the neglect of the engineer to discharge his duty; for example, the duty to see that the boilers are properly supplied with water, where both the engineer and fireman are servants of the same master in the same employment.

On the 7th of August, 1871, the boiler at the Union Mills, corner of Florida street and Levee, in St. Louis, owned by Henry C. Yeager & Co., exploded, instantly killing John Scott, the engineer, and John Jones, the fireman. The coroner's jury empaneled at the time rendered a verdict that the explosion was caused by a scarcity of water in the boilers, and the boilers being heated to a high degree through the carelessness of the engineer in charge. Mary Jones, the widow of the fireman, institutes suit against Mr. Yeager, under the state statute, for $5,000 damages, claiming that the explosion was caused by the defective condition of the boilers. At the trial there was some evidence showing that the boilers were old, and their iron in some places less than the ordinary thickness and brittle, and the plaintiff contended that the explosion was caused by such defects. On the part of the defendant, the testimony disclosed that the boilers had been regularly inspected according to ordinance, and had been overhauled and put in good repair but a few months preceding the explosion. Defendant contended that at the time of the explosion, which occurred at two o'clock on Monday morning, and almost instantaneously after the mill was started, there was, owing to the carelessness of the engineer, a scarcity of water in the boilers; that the boilerplates being over-heated, generated super-heated steam, and that the sudden introduction of water into the boilers so filled with super-heated steam, necessarily caused the explosion.

Hallum, Bereman & Smith, for plaintiff.

R. E. Rombauer and Geo. M. Stewart, for defendant.

Before DILLON, Circuit Judge, and TREAT, District Judge.

DILLON, Circuit Judge (charging jury). 1. The plaintiff is the widow of John Jones, deceased, and as such brings this action under the statute of Missouri (Gen. St. Mo. 1865, c. 147), to recover from the defendant damages for the death of her husband, on the 7th day of August, 1871, caused, as she alleges, by the wrongful act, neglect, or default of the defendant as hereinafter mentioned. That the boilers in the mill of the defendant, where the plaintiff's husband was employed in the capacity of a fireman, exploded on the day last named, and that the explosion caused his instantaneous death, are facts respecting which there is no dispute. By the statute of this state it is pro-

[1] [Reported by Hon. William Cranch, Chief Judge.]

[2] [Reported by Hon. John F. Dillon, Circuit Judge, and here reprinted by permission.]

vided that "whenever the death of a person shall have been caused by the wrongful act, neglect, or default of another, and the act, neglect, or default is such as would (if death had not ensued) have entitled the party injured to maintain an action to recover damages in respect thereof, then the person who would have been liable if death had not ensued shall be liable to an action for damages, notwithstanding the death of the person injured." And it is under this statute that this action is brought by the present plaintiff, to recover damages for the death of her husband, which she alleges was caused by the wrongful act, neglect, or default of the defendant. And the specific neglect or default alleged in the petition, and upon which she grounds her action, is, that the boilers which were in defendant's mill, the explosion of which killed the plaintiff's husband, "were old and patched, and the plates of which they were constructed were worn and weakened by long use and exposure to the action of fire and water, thereby rendering them unfit, unsafe, and dangerous" to use; which was known to the defendant and not known to plaintiff's husband, nor discoverable by him by the exercise of due care on his part. And it is further alleged, that the boiler's gauges, appendages, and machinery were unsafe, dangerous, and unfit for use, and that this was the cause of the explosion. This is denied by the defendant, who also claims that the explosion was caused, not by defective boilers or machinery, but by the negligence and carelessness of the engineer, who is claimed to be the fellow-servant of the plaintiff's husband, and by the negligence of the plaintiff's husband himself.

2. This makes it necessary for you to determine from the evidence what was the cause of the explosion in question. The plaintiff's theory is, that the explosion was caused by the defective boilers. What is the duty towards employes of the owner of a steam engine and boilers, in respect to their safe condition? This is an important question, and must be carefully answered. The employer does not, impliedly, engage to insure his servants that there shall be no accidents resulting from the use of such machinery. Steam, which is a necessary, is at the same time a dangerous, power, and the danger which attends the use of it imposes upon the owner of machinery propelled by it certain duties and obligations, and these are to use ordinary care and prudence (the degree of which must be proportioned to the danger) to have and to keep the boilers and machinery in a safe and sound condition. If the employer knows that his boilers are defective, or if under all circumstances, as a reasonable man, he should have discovered, though he did not, their defective condition, or if he negligently remained ignorant of their defective condition, if the defective condition thereof was the direct and proximate cause of an explosion which injured servants who are blameless, and who did not contribute towards the production of the accident by their own fault or neglect, then the law is that the employer is liable to such servants in a civil action for damages thus occasioned.

If the defective condition of the boilers, and the danger liable to result therefrom, were known to the servant, and if, after such knowledge, he voluntarily remained in the service of the master, this would preclude him, or, in case of his death, his representative, from the right to recover damages caused by defects of which, and of the nature of which, the servant had knowledge. If, by the nature of his employment, it was the duty of the servant himself to examine and ascertain the condition of the boilers and machinery as to the suitableness or safety, then, in case of an accident resulting from unsuitable or unsafe machinery, the servant, or his representatives, could not recover if the servant had failed to discharge this duty.

But in the absence of a contract, or of usage to that effect, brought home to a fireman of an engine, he would not, by his ordinary employment, be under any special duty or obligation to make examination as to the safe condition of the engine and boilers, and could only be charged with a knowledge of such defects as a person in his situation and employment ought, as a reasonable man, to have foreseen, would or might endanger his safety. In the application of these principles to the evidence, you will first inquire whether the boilers in this case were unsafe or unfit for use; and if so, whether the defendant knew it, or as a reasonable man, having a due regard for the safety of his employes, ought to have known it, for if he ought, his neglect in this respect would be equivalent in imposing liability to actual knowledge; and in the next place, you must inquire, and, in order to hold the defendant liable, must find, from the evidence, that this defect was the direct and immediate cause of the accident, without which it would not have happened; and if you thus find, then defendant would be liable, provided you also believe, from the evidence, that the plaintiff's husband was guilty of no fault or neglect which contributed to bring about the explosion, and was not remaining in the service of the defendant with knowledge of the defective condition of the boilers, and the danger reasonably to be apprehended therefrom. You will perceive that it is implied in what has been above said, that the defendant is not liable, even though the boilers were defective, provided you are of opinion that their defective condition did not cause the explosion, and that the explosion was owing to other causes.

3. And this leads us to make some observations respecting the defendant's theory

of the explosion, and the law applicable to it, if found by you to be the true theory. The engineer on duty at the time of the explosion was Mr. John Scott, employed by the defendant, and who, under authority from the defendant, had, it seems, employed in the behalf of the defendant, plaintiff's husband, who acted as one of the firemen. The explosion occurred about two o'clock on Monday morning. The day before (Sunday), the boilers had, it seems, by the undisputed evidence, been cleaned by the firemen, including Jones, and for this purpose all the water had been let off from them.

Now, it is claimed by the defendant that the engineer, Scott, whose duty it was to see that the boilers were duly supplied with water before resuming work, either failed to cause them to be thus supplied, or if he did not thus fail, he failed to see that the valve whose function it is to keep the water from wasting or flowing from the boilers, was properly adjusted or closed, in consequence of which the water in the boilers gradually ran out during Sunday afternoon and night, so that when the boilers became heated an explosion was the result. If, upon the evidence, you find this to be the true explanation of the explosion, find, in other words, that the explosion was due to the default or negligence of the engineer, in not ascertaining that he had sufficient water in the boilers, he at the time acting in the scope of his employment and in the general line of his duty, without any special directions from the defendant, and that it was not owing to the defective character of the machinery or boilers, then the defendant is not liable; for in the case just supposed, the engineer, who was to blame, and the plaintiff's husband would be fellow servants in the same common employment, and the master, or common employer, would not be answerable to the fireman for negligence of this character on the part of the engineer, there being neither allegation nor evidence that the master was guilty of negligence in employing or retaining in his service an engineer who was incompetent.

So you will perceive, gentlemen, that you must determine upon the evidence what was the real cause of the explosion, the defective boilers as maintained by the plaintiff, or the neglect of the engineer, or of the plaintiff, as contended for by the defendant.

You will take the case, and I am confident that you will not strain the evidence to defeat a recovery, and equally confident that you will not, by sympathy with the unfortunate plaintiff, give her a verdict unless upon the evidence and the law, as we have laid it down to you, she is entitled to it as a matter of legal right.

The jury found for the defendant.

Liability of master to servant for negligence of fellow servant. Fort v. Union Pac. R. Co. [Case No. 4,952]; Hines v. Union Pac. R. Co. [Id. 6,521].

JONES (YOUNG v.). See Case No. 18,159.

JONES, The JENNY. See Case No. 7,286.

JONES, The MAGGIE. See Case No. 8,947.

JONNSON (UNITED STATES v.). See Case No. 15,497.

## Case No. 7,511.

In re JORDAN et al.

[2 Hask. 362.] [1]

District Court, D. Maine. May, 1879.

INSURANCE — CREDITOR'S LIEN UPON POLICY IN MAINE.

1. A policy of life insurance is subject to a lien in favor of creditors, under section 65, c. 50, Rev. St. Me. 1871, for the excess of premium over $150 per year paid by the debtor for two years.

2. A quarterly payment amounting to less than $150 will not subject the policy to such lien.

[In bankruptcy. In the matter of Jordan & Blake.]

Petition by assignees of a bankrupt [Jordan] who died after bankruptcy, against his administrator, to subject, under Rev. St. Me. 1871, c. 50, § 65, a policy of insurance on his life to a lien for annual premiums in excess of $150 per year, paid by the bankrupt within two years of bankruptcy.

That statute is as follows: "All life policies and money due thereon are exempt from attachment, and from all claims of creditors during the life of the insured, when the annual cash premium paid does not exceed one hundred and fifty dollars; but when it exceeds that sum, and the premium was paid by the debtor, his creditors have a lien on the policies for such sum over one hundred and fifty dollars per year, as the debtor has paid for two years, subject to any pledge or assignment thereof made in good faith."

Thomas H. Haskell, for assignees.

Henry W. Swasey, for administrator.

FOX, District Judge. Upon the application of the assignees in this case, praying that the administrator on the estate of said Jordan may be ordered to pay to said assignees not only the excess of the annual cash premium on the policy of insurance on the life of said Jordan over and beyond the sum of one hundred and fifty dollars for the year for which full premium was paid, but also a pro rata proportion of the quarterly payment of $89.61 paid for premium on the first quarter of the next year, deducting one-fourth of one hundred and fifty dollars therefrom, the court is of opinion, and doth so adjudge, that said assignees are not entitled to receive any part of that premium so paid for the first quarter of the second year, as the entire sum of one hundred and fifty dollars had never been paid for premiums for said second year, and the case is not brought

[1] [Reported by Thomas Hawes Haskell, Esq., and here reprinted by permission.]

within the provisions of the statute. The assignees are entitled to receive from said administrator, the excess of premiums over one hundred and fifty dollars so paid for the first year. So ordered.

## Case No. 7,512.

In re JORDAN et al.

[19 Int. Rev. Rec. 20.]

District Court, D. Massachusetts. 1873.

CUSTOMS DUTIES—FRAUDS ON REVENUE—WARRANT TO SEIZE PAPERS—SEPARATION OF PAPERS BY MARSHAL.

1. Under act of March 2, 1867, c. 188, § 2 (14 Stat. 547), it is sufficient in the warrant so to specify the papers, etc., to be seized, that the marshal can identify them from their contents.

2. The papers, etc., so specified, should be separated from all others by the marshal or by the court before an examination is allowed by the collector or officers authorized by him; and the officers authorized to examine the papers after they have been duly seized, should not be employed to make this separation.

3. Semble: The court would interfere, upon application, and veto the appointment of revenue officers as deputies to the marshal in the service of a warrant under the above act.

[Cited in U. S. v. Hughes, Case No. 15,419.]

[In the matter of Jordan, Marsh & Co.]

B. F. Brooks and F. W. Hurd, for petitioners.

G. P. Sanger and E. L. Barney, for the government.

LOWELL, District Judge. The act of March 2, 1867, § 2, requires the district judge, whenever it shall be made to appear to his satisfaction, by complaint and affidavit, that any fraud on the revenue has been committed, in the importation or entry of merchandise at any port within his district, to issue his warrant requiring the marshal, by himself or deputy, to enter any place or premises where any invoices, books, or papers are deposited relating to the merchandise in respect to which such fraud is alleged to have been committed, and to take possession of such books or papers and produce them before said judge; and any invoices, books, or papers so seized shall be subject to the order of said judge, who shall allow the examination of the same by the collector of customs of the port into which the alleged fraudulent importations have been made, or by any officer duly authorized by said collector. And such invoices, books, or papers may be retained by said judge as long as in his opinion the retention thereof may be necessary. But no warrant shall be issued unless the complainant shall set forth the character of the fraud alleged, the nature of the same, and the importation in respect to which it was committed, and the papers to be seized. This act having been pronounced constitutional by the circuit court for this circuit, I have endeavored to enforce it in accordance with what I consider its true intent. Stockwell v. U. S. [Case No. 13,466]. I require that the evidence shall be such as to satisfy the mind of a reasonable person that one or more specified frauds have actually been committed in the importation or entry of merchandise into some port within this district. When this is established by an affidavit which shows sufficient grounds for the belief of the affiant, I consider it my duty to issue my warrant. I have heretofore ruled (and that ruling is for the purposes of this case admitted by the defendants to be sound) that from the nature of the case it is impossible that the papers to be seized should be so specified that the marshal can identify them without examining their contents. For this reason the warrant in this case, as in others, identifies the papers by a reference to the particular importations mentioned in the complaint and recapitulated in the warrant. It follows that the marshal must usually make inspection of papers not called for before he can be sure that he has obtained those which he may properly bring before the judge. The objection now taken is that in making what is admitted to be a necessary separation between the papers which ought to be taken and those which there is no right to take, the marshal or the court ought not to employ the very officers who, by the statute, are to examine the papers after they are duly seized and returned. I consider this objection to be well taken. It is the intent of the statute that only those papers should be examined by the collector, or other officers of the revenue, acting under him, which may lawfully be taken, and those are only such as relate to the specified importations. The separation, which, in a case of this kind, it is admitted somebody has a right to make, ought to be made before the examination by the revenue officers begins. In this case the marshal acted in good faith and without objection, and, indeed, with the acquiescence of the defendants, in taking certain books and papers and bringing them into court before the separation was completed. As the marshal had appointed for his deputies the very same gentlemen who were appointed by the collector to examine the papers, it was of no particular consequence to the defendants in which capacity they acted in separating the papers. The marshal then made return that he had brought certain papers before the judge, and the usual order was passed that they be examined by the designated officers. The defendants then applied for permission to be present at the examination, and the court granted leave for them to attend by counsel while the separation was going on. This work has been begun and is not very far from completion. If this were an ordinary case, in which the course of proceeding was well understood, I should probably consider that the defendants were estopped at this late period, after so much had been done with their consent, to object to the

matter being finished as it was begun. But these cases being rare and without any very well settled course of practice, I ought not to hold any very rigid rule in respect to laches. It has now occurred to the defendants that the officers of the revenue are interested parties, and that if they are permitted to inspect whatever papers the marshal has taken, though he may have taken them by consent, information may be obtained concerning matters not specified either in the complaint or in the warrant, and thus the safeguards of the statute be practically lost to the defendants. It is argued on behalf of the government that the statute requires me to permit examination by the revenue officers of whatever papers the marshal may return as having been taken under his warrant. This is literally so; but the statute also requires that the marshal should take only specified papers, and I think it entirely clear that all the papers are subject to the order of the court, and if it is suggested to the judge that there are papers brought into court which the warrant does not call for, it is his duty in some mode to ascertain whether the fact is so, and if it be so, to return to the defendants all such papers. It is further argued that no harm has been done as yet, and none is likely to occur if the examination proceeds as before. This I am happy to believe is true. We are fortunate in having officers upon whose integrity no imputation has ever been cast. But the rights of the defendants do not depend upon the character of the officers, and it is the duty of the court to ascertain the papers which the revenue officers may inspect before that inspection is permitted. It is said I once ruled that I could not interfere with the marshal in the execution of such a warrant. I think I did so rule in general terms. But if the question were to be raised, which it never yet has been, whether I could not veto the appointment of revenue officers as deputies to the marshal, in a case of this kind, it might, perhaps, be found that such a power is expressly conferred on the district judge by the judiciary act of 1789. As the task of separation is a somewhat delicate one, and that no imputation may seem to rest upon the persons who have examined the books and papers thus far, I will myself finish the work in the presence of counsel on both sides, or at least attempt to do so.

## Case No. 7,513.

In re JORDAN.

[3 N. B. R. 182 (Quarto, 45).] [1]

District Court, North Carolina. 1869.[2]

JUDICIAL SALES—PRIOR LEVY—TITLE UNDER MARSHAL'S DEED—PROCEEDS OF SALE.

The plaintiff in judgment obtained in the federal court on which execution issued and under which the marshal sold, is entitled to the proceeds of such sale, although that judgment, execution, and levy under it was subsequent to the judgment, execution, and levy of the process from the state court.

[In the matter of William G. Jordan, a bankrupt.]

BROOKS, District Judge. Joshua Barnes filed his petition in this cause, in which he states that at fall term, 1867, of the superior court for Wilson county, he recovered a judgment against one Wilie Lamm, for the sum of three thousand dollars, principal money, with interest on the same, from the 2d day of December, 1867, until paid, and for fifteen dollars costs; that execution was issued thereon from said term, returnable to the spring term of 1868. That the same came to the hands of J. W. Davis, sheriff, and was by him levied and returned to spring term, 1868, indorsed as follows: "Levied on the lands of Wilie Lamm, in the Contention district, adjoining the lands of Thomas Lamm, and others, containing seven hundred and six acres, more or less. J. W. Davis, Sheriff." That after the said levy had been made, Wm. M. Gay, as assignee in bankruptcy of Wm. G. Jordan, obtained a judgment against said Wilie Lamm, in the district court of the United States, upon which execution issued and came to the hands of the marshal, and was by him levied upon the lands previously levied upon by the sheriff, Davis. That the execution so levied by the marshal was returned to the district court, and thereupon a vend. exponas issued, under which the marshal sold the lands and executed a deed to the purchaser. That after deducting the costs and expenses of the sale, the marshal paid over the net proceeds of the sale to said Gay, the plaintiff in the process under which he acted, who now holds the same as assignee. The petitioner further states that he was prevented from issuing a venditioni exponas and executing the same, by the stay law then in existence in North Carolina.

The petitioner prays this court, as a court of bankruptcy, to declare upon these facts (which are admitted by Gay, the assignee to be true), that Barnes, the plaintiff in the judgment in the state court, is entitled to the net proceeds of the sales realized by the marshal, and by him paid over to the assignee; and asks the court to make such order as will oblige the assignee, to pay over the same to Barnes, the sum so realized being less than his judgment. I have not been aided by argument in this case, yet I am fortunate in having had this question presented and fully argued at the last term of the circuit court for this district, by gentlemen of great learning and ability on both sides. In that case the court decided that the plaintiff, in the judgment obtained in the federal court on which the execution issued and under which the marshal sold, was entitled to the proceeds of such sales,

[1] [Reprinted by permission.]

[2] [District not given.]

although that judgment, execution, and levy under it was subsequent to the judgment, execution, and levy of the process from the state court. I must refuse the order prayed for in this case for the same reasons that influenced the decision in that case. The marshal, like a sheriff, can only sell and convey such right or interest in property as the process in his hands will warrant; though he may declare that he sells more or a higher interest, or even so states in his conveyance, yet his conveyance transfers no more or greater interest to the purchaser than the law, by virtue of the process and the proceedings upon which the same is based, allows to pass.

It follows, then, that if a prior lawful incumbrance or lien exists, the sale is made subject to such incumbrance, and can only be made subject to such incumbrance. A purchaser at execution sale is as much bound to know of the existence of a prior lien or incumbrance existing against the property offered by force of a judgment, execution, and levy as if it was an incumbrance existing by mortgage or in any other way. If the plaintiff Barnes has lost his lien, it is not from any unauthorized act of the marshal, but from his observance of the stay law passed by the legislature of North Carolina, so recently declared unconstitutional by the supreme court of the state, and which, if unconstitutional, was never of any force. Let this be certified to Mr. Register Lehman.

## Case No. 7,514.

In re JORDAN.

[8 N. B. R. 180;[1] 5 Leg. Op. 169; 30 Leg. Int. 296.]

District Court, W. D. North Carolina. June, 1873.

CONSTITUTIONAL LAW — POWER OF CONGRESS TO IMPAIR OBLIGATION OF CONTRACT — VESTED RIGHTS — UNIFORMITY REQUIRED IN BANKRUPT LAWS—BANKRUPTCY—EXEMPTIONS.

1. The amendment of March 3, 1873 [17 Stat. 577], to the bankrupt act [of 1867 (14 Stat. 517)], as relates to liens acquired on property previous to the passage of the increased exemption acts, on debts contracted prior to the passage of the bankrupt act, *held* constitutional. The present bankrupt law is not unconstitutional for want of uniformity in the exemptions allowed in different states.

[Cited in Re Jordan, Case No. 7,515; Re Smith, Id. 12,986; Darling v. Berry, 13 Fed. 670.]

2. The uniformity contemplated by the constitutional restriction was to the general policy and operation of the law; that no preferences should be created, but the property uniformly or equally distributed among all creditors; that all questions under the act should be decided in the same courts; that the modes and proceeding in all the courts should be uniform. Congress, by virtue of the power given it to pass a bankrupt law, has authority not only to impair but to destroy the obligation of contracts.

[Cited in Re Smith, Case No. 12,986.]

[Cited in Wooster v. Bullock, 52 Vt. 50.]

3. A lien by judgment does not create any vested right in the property subject to such lien.

4. Congress has power to destroy any lien upon property of the bankrupt, whether created by contract, by statute, or by judgment. The power given it to destroy the principal, the contract a fortiori, includes the power to destroy all the incidents or remedies for the enforcement of the contract.

In this case it is certified by the register, that the following questions arose in the course of proceedings, were stated and agreed to by the counsel of the opposing parties, and presented to this court for adjudication: 1st. "Is our present bankrupt law unconstitutional because not uniform?" 2d. "Can the bankrupt law have a retrospective effect without impairing the obligation of contracts, and has congress such power?" 3d. "Is the petitioner entitled to said lands (the homestead set apart by assignee) as part of his rightful exemptions as against a judgment rendered prior to the ratification of the constitution of North Carolina, upon a contract made before the present bankrupt law was enacted?" 4th. "Should not the lands be sold by the assignee, and the proceeds arising from said sale be distributed among the creditors whose debts were made before the ratification of our present state constitution?" A written opinion was filed by H. G. Ewart, Esq., register in bankruptcy, upon the various questions certified, citing, in support of the negative of the first question, Day v. Bardwell [97 Mass. 246]. The word "uniform" has reference only to uniformity of administration. Story, J., in Mitchell v. Great Works Mill., etc., Co. [Case No. 9,662]. On the second question, the inhibition to the impairment of contracts, does not apply to the national government. Bloomer v. Stolley [Id. 1,559]; Evans v. Eaton, 1 Pet. [26 U. S.] 337. On the question as to the retrospective effect of the amendment of March, 1873, In re Vogler [Case No. 16,986].

Graves & Hyman, for bankrupt.

Mr. Pickins, for creditors.

DICK, District Judge. I concur in the able and well prepared opinion of the register upon the several questions which have been certified to this court for adjudication. In Re Beckerford [Case No. 1,209], the United States circuit court of Missouri decided that, "the provisions of section fourteen of the bankrupt act adopting the exemptions in favor of execution debtors established by the laws of the several states does not destroy the uniformity of the bankrupt act, nor violate any of the provisions of the federal constitution." The question decided was directly presented for adjudication, and the opinion of Miller and Krekel, JJ., is positive and forcible, and seems to have been well considered. I feel safe in relying upon any legal decision of Mr. Justice Miller, as there is no judge in any country whose judicial opinions are entitled to more consideration or greater weight of authority. The amendment of June 8, 1872

[1] [Reprinted from 8 N. B. R. 180, by permission.]

[17 Stat. 334], does not materially vary the question of uniformity decided in Re Beckerford [supra], as it only changes the date when the state exemptions are adopted; and the act of March 3, 1873, declares the true intent and meaning of the act of June 8, 1872, and re-enacts it with some alterations renuered necessary by the circumstances of the times. The general policy and purpose of bankrupt laws is to make an equal distribution of the effects of an insolvent debtor among all of his creditors, and then discharge an honest debtor from all prior debts. Before the adoption of the federal constitution, each state possessed the general powers of sovereignty and could pass bankrupt laws to operate upon its own citizens, but could not affect the rights of the citizens of other states. As it was easy to foresee that there would be many business transactions and much commercial intercourse between the citizens of the several states which would necessarily produce considerable individual indebtedness, which might result in extensive financial embarrassments, it was obvious to the framers of the federal constitution that the benefits of a wise, humane and general system of bankruptcy, which might, under certain exigencies, become necessary to promote the happiness and commercial prosperity of the nation, could only be effectually established by the federal government adopted by the people of the several states for general and national purposes.

To provide for any emergency that might arise for a general bankrupt law, the constitution vested the necessary sovereign power in congress with no other limitation than that the laws upon such subject should be uniform in their operation among the several states. The uniformity required is as to the general policy and operation of such laws; as, for instance, that the common law right which a debtor has to prefer one creditor over another shall be taken away and his property be equally distributed among all of his creditors; that bankrupts who make an honest surrender of their effects shall be discharged from all prior debts; that all questions relating to bankrupts, their estates and creditors, shall be adjusted and administered in the same courts, and by the same forms and modes of proceeding. These general purposes of bankruptcy are certainly provided for in the present bankrupt act, and are everywhere administered with uniformity in the federal courts; and this is the extent of the uniformity required by the constitution to make such laws operate equally, justly, effectually and beneficially in every part of the nation. The bankrupt act, in some minor particulars, must necessarily operate differently in the different states. Thus, the bankrupt law regards as valid the legal and equitable liens existing by law in the several states; and as the nature, force and effect of such liens are dependent upon local laws, they will, in some respects, be different in the different states. The English doctrine of the equitable lien of a vendor or purchaser of real estate is recognized in some of our states, and not in others; and where it exists it is enforced in the courts of bankruptcy. A bankrupt court adjusts the rights of creditors, and administers the effects of a bankrupt, subject to the charges, whether by way of lien or exemption, which are created by the laws of the states in which such court is held or the property to be disposed of is situated. This rule was adopted to make the bankrupt law as uniform as possible among the states, by recognizing local laws and thus preserving the harmony and spirit of comity which should always exist between the federal and state governments. This rule does not violate, but carries into effect, that provision of the constitution which requires all national bankrupt laws to be uniform in their operation among the several states.

The principles involved in the second question certified by the register are too obvious and too well settled by numerous adjudications to need any further discussion. Congress certainly has the plenary and paramount power, save the restriction above considered, to pass bankrupt laws which will not only impair the obligation of contracts, but entirely discharge the debtor from such obligation, no matter when or where contracted. Congress, also, has the power in establishing a uniform system of bankruptcy to do away with the effects of liens created by the judgments of any court. If a judgment can be discharged by a bankrupt law there is no reason why a lien which is an incident to a judgment, cannot also be discharged. A lien by judgment does not create any vested right in the property subject to such lien which the constitution protects from legislative encroachment. It is neither a right in, nor to, such property, but simply a charge imposed thereon by statute. It is a part of the remedy which the local law gives a creditor in the collection of his debts, and a particular remedy is not a vested right. As a general rule every state has complete control over the remedies which it shall afford to parties in its courts. Horton v. McCall, 66 N. C. 159; Ladd v. Adams, Id. 164; Cooley, Const. Lim. 358, 361. The extent, force and effect of a lien created by a state statute must depend upon the interpretation given such statute by the highest court of the state. We have seen, in the cases above cited, that in this state a judgment lien is not a vested right. As a remedy it may be modified by the legislature, and any change that does not virtually destroy the remedy does not impair the obligation of existing contracts. The homestead laws of this state do not abolish judgment liens, but merely postpone the time of their enforcement. This modification of a legal remedy may well be regarded as reasonable by a court of justice which takes into consideration the anoma-

lous condition of things existing when the modification was made, and that it was prompted by a wise and humane policy which must necessarily result in the general public good. While the states are prohibited by the constitution from impairing the obligation of contracts—either directly, or by virtually abolishing existing remedies—no such inhibition is imposed upon congress. The power expressly conferred upon congress to enact uniform bankrupt laws, is necessarily an express power to do away entirely with contracts, as such a result is the very object and essence of bankrupt laws. But it is insisted that while congress may have this paramount power over contracts, it exceeds its authority in enacting that state exemptions shall be "valid against liens by judgment or decree of any state courts." This is equivalent to saying that the contract may be impaired, but the remedy must not be interfered with—the principal may be destroyed, but the incident is protected against legislative action. There is nothing in the nature of liens why they should be thus specially protected, as they are not vested rights; but there are strong reasons why they should not be recognized and enforced by bankrupt laws. The enforcement of liens is certainly contrary to the policy of a general system of bankruptcy, the object of which is to distribute the estate of an insolvent debtor among all of his creditors, upon the principle that equality is equity. Liens, upon general principles, certainly deserve no special favor and protection in bankrupt laws. The bankrupt act, before the amendment of March 3, 1873, in express terms avoids liens valid under state laws and created by the levy of an attachment within four months before the commencement of proceedings in bankruptcy, and this action of congress is generally conceded to be constitutional. Congress has even interfered with vested rights, for by the thirty-fifth section of the bankrupt act, assignments and conveyances made under certain circumstances are avoided, although such assignments and conveyances are valid at common law and under the laws of the state, and the parties have acquired a complete title and possession of the property conveyed. I have a very decided opinion that congress did not exceed the limits of its constitutional powers in enacting the act of March 3, 1873. I also think that congress, under its general powers over the subject of bankruptcy, could avoid all liens, whether existing by statute, by usage, by express contract, or at common law.

The case of Gunn v. Barry [15 Wall. (82 U. S.) 610], recently decided in the supreme court of the United States, has been called to my attention in the argument, and is worthy of my most careful consideration, as it is an exposition of the law by the supreme judicial tribunal of the nation. The opinion is read with great interest, both by lawyers and laymen, in every section of the country, and the decision may result in serious consequences to many of our people. The questions of law involved have been frequently discussed by able counsel, and have been decided differently in many of the supreme courts of the states. The opinion of Mr. Justice Swayne is not elaborate, and the questions presented are not as fully considered as I had supposed they would have been, on account of their importance and general public interest, when the homes of tens of thousands of our unfortunate citizens may depend upon the decision, and when the action of so many state conventions, legislatures and supreme courts may be overruled. The abstract principles decided in Gunn v. Barry, supra, are announced in almost the same language to be good law in Hill v. Kesler [63 N. C. 437], in the supreme court of this state, and the apparently different decisions in the two cases may be easily reconciled. The decision in Gunn v. Barry would have been made in Hill v. Kesler under a similar state of facts. The exemption law of Georgia gave a homestead absolutely to the debtor, and deprived the creditor of all remedy. In Hill v. Kesler, it is conceded that if a state abolish or injuriously change the legal remedy existing at the time a contract is made, such action would be void, as in violation of the constitution of the United States. In both the cases which we are considering it is agreed that a state may change legal remedies provided such change does not impair a substantial right. Such changes are usually made to meet some new condition of things, and are influenced by reasons of public policy. The legislature is the proper body to consider and act upon questions of public policy, and the legislative will, upon such subjects, ought to be regarded as the law of the land by the judiciary, unless it is manifestly in violation of the constitution. Imprisonment for debt was a remedy in this state for the enforcement of contracts. The legislature thought this remedy a relic of barbarism and ought not to exist in a free, enlightened and Christian state, and such remedy was abolished. The constitutionality of this legislative action would be sustained in any court, although it impaired existing and substantial rights. The enlightened legal principles that control this question will certainly sustain the homestead laws of this state, upon the grounds of humanity and a wise public policy. These laws do not destroy vested rights, disturb specific liens, or abolish any legal remedy, but only postpone the time of their enforcement. I do not regard the case of Hill v. Kesler as overruled by Gunn v. Barry, but I will not consider the question further, as it belongs more appropriately to another tribunal.

The question presented for my determination is—how far does the case of Gunn v. Barry affect the homestead rights of insolvent debtors in a court of bankruptcy. In that case it is decided thus: "Congress can-

not, by authorization or ratification, give the slightest effect to a state law or constitution in conflict with the constitution of the United States. This instrument is above and beyond the power of congress and the states, and is alike obligatory upon both." I admit the soundness of the legal principle so clearly and forcibly expressed. A state statute that is in violation of the constitution of the United States is absolutely void, and no power in the government can give it vitality or authorize its operation as a state law. But there are some subjects upon which a state cannot rightfully legislate, and yet congress may do so under the constitution. A state cannot coin money, emit bills of credit, make anything but gold and silver coin a tender in payment of debts, &c., but congress can pass laws upon such subjects, and in legislating may adopt and enact the very principles and terms of an unconstitutional state law. If this state had adopted the present bankrupt law it would have been unconstitutional, as it impairs the obligation of contracts and affects the rights of the citizens of other states. Congress, however, could adopt the very language and principles of such state law and enact it as a national law, and such action would be constitutional; as it would constitute a system of bankruptcy uniform among the states. The act of March 3, 1873, does not profess, by "authorization or ratification," to make valid, state exemption laws which are unconstitutional, but adopts the principles of such laws and to a certain extent makes them a part of the general bankrupt law. The act says in express terms "that the exemptions allowed the bankrupt shall be the amount allowed by the constitution and laws of each state respectively as existing in the year eighteen hundred and seventy-one." It will be observed that the act of March 3, 1873, makes a material change in re-enacting the act of June 8, 1872, by substituting the words "as existing" in place of the words "in force." It is manifest from the terms of the act of March 3, 1873, that the object of congress was to do away with a difficulty that arose under the act of June 8, 1872, by some state court declaring that exemptions to debtors in state constitutions and laws were not in force as to antecedent debts; as such part of such laws were in conflict with the constitution of the United States.. Congress therefore expressly declared that such state exemptions should be valid against antecedent debts; and ex industria substituted the words "as existing" in place of the words "in force," and intended that the exemptions allowed under the bankrupt law should be the amount designated in the constitution and laws of the states respectively in existence in the year 1871, even if such laws, as state laws, should be declared to be unconstitutional by the courts. As the power of congress over the subject of bankruptcy is plenary and paramount, and as its intent is so clearly manifested by its action, we are of the opinion that the act of March 3, 1873, is constitutional and must be administered in the bankrupt courts according to its true intent and meaning unmistakably expressed in its language. The exceptions to the report of the assignee are disallowed, and said report is in all things confirmed.

## Case No. 7,515.

In re JORDAN.

[10 N. B. R. (1874) 427.] [1]

District Court, N. D. Georgia.

CONSTITUTIONAL LAW—BANKRUPTCY—EXEMPTIONS.

The amendment of the bankrupt act of March 3, 1873 [17 Stat. 577], in respect to exempt property, is constitutional, and the exemptions allowed by that amendment are valid against debts of the bankrupt, without regard to the time when contracted, whether before or after the amendment, and also against liens by judgment or decree of any state court.

[Cited in Darling v. Berry, 13 Fed. 670.]

On the 12th day of June, 1873, Willis A. Jordan filed his voluntary petition in bankruptcy, annexing thereto a schedule of his debts and assets, and in schedule B, 5, claimed to have exempt to him, in addition to necessary household and kitchen furniture and other articles and necessaries, to an amount not exceeding five hundred dollars, personal property to the value of one thousand dollars in specie, and real estate to the value of two thousand dollars in specie. To this claim of the bankrupt S. B. McWilliams and Wm. S. Heronton except, and each alleges that his debt against the bankrupt was contracted in the year 1860, when the homestead allowed by the laws of Georgia was fifty acres of land, and five acres additional for each child under sixteen years of age, and objects to the setting apart of any other or greater homestead than that allowed by law when his debt was contracted; they contending that any law allowing a greater homestead than the one allowed by law at the date of their contract, which was long anterior to the adoption of the constitution and laws of Georgia, under which this large homestead is claimed, is, as to their debts, unconstitutional and void. These facts are not controverted.

By ALEXANDER G. MURRAY, Register:

This is a question involving the constitutionality of the amendatory bankrupt act of March 3, 1873, and the movers of the objections are prompted by the recent decision of Chief Justice Waite in Re Deckert [Case No. 3,728]. The constitutionality of this amendment has been sustained by Judge Dick in Re Jordan [Id. 7,514]; by Judge Rives in Re Kean [Id. 7,630]; and by Judge Erskine in Re Smith [Id. 12,986]; and the same principle has been sustained by Judges Miller and Krekel in Re Beckerkord [Id. 1,-209]. When we reflect that the two houses

[1] [Reprinted by permission.]

of congress, many members of each being well versed in our constitution and laws, have given this amendment their approval, and that it has been examined and sustained by this array of legal talent, we should be slow to throw aside that theory which has been approved and acted on for seven years, to adopt a new one, advanced by one justice, and he a new man in the position he occupies. If this amendment is unconstitutional for lack of uniformity, because it exempts as a homestead the amount allowed by the states respectively in 1871, so was the original act, wherein it exempted the amount allowed by the state law of force in 1864. Each state in our Union allows a homestead to suit the condition of its own people, and congress, in adopting the amount of the state homestead, has approached as near uniformity as could have been done by any other plan. Land in some localities is worth a great deal more than in others. Hence, if a homestead be measured by acres and all homesteads made uniform as to acreage, there would be great discrepancy in value. And on the other hand, if homesteads are to be made uniform in value, the area of land covered by them would be as variant as the localities in which they might be situated. Uniformity in area and value too, at the same time, is impossible; and we therefore cannot believe that the framers of our constitution intended to so far stultify themselves as to require an impossibility. In granting to congress the power to pass uniform laws on the subject of bankruptcies throughout the United States, they only intended to require that uniformity which is possible; that is to say, that a bankrupt law should be uniform in its application to all the states alike. To require that it should be uniform in the effects to be produced by it, and set off to each bankrupt a homestead of uniform area and value, would be requiring an impossibility, and such requirement would destroy the utility of the grant itself, by requiring that which could not be done in the exercise of the grant. Any theory which would lead to such a result is most certainly erroneous. To allow the theory of Chief Justice Waite, would require that a bankrupt law "must be uniform in its operations, not only within a state, but within and among all the states. If it provides that property exempt from execution shall be exempt from assignment in one state it must in all. If it specially sets apart for the use of the bankrupt certain property, or certain amounts of property, in one state, without regard to exemption laws, it must do the same in all. If it provides that certain kinds of property shall not be assets under the law in one place, it must make the same provision for every other place within which it is to have effect." Now, any one need only read over these requirements and then call to mind how different—how variant the conditions of the people, and the circumstances surrounding them, in the different sections of our country; how the soil itself varies in productiveness in different localities, and consequently in value; how the value of the same kind of soil varies according to locality and surroundings; how much more money it requires to support a family in some places than in others; how that a farm of sufficient area to support a family anywhere near the city of New York, or Boston, or Philadelphia, would cost several thousand dollars, whereas two hundred dollars' worth in some other localities would be amply sufficient—to show the unreasonableness, not to say the absurdity of such a theory. The object of the law in allowing a homestead, is to leave the bankrupt sufficient real and personal property to make a support for his family in the locality where he resides, and to apply whatever other property he has to the satisfaction and discharge of his debts. To exempt less than sufficient, or more than sufficient, would be equally erroneous; and any uniform value, or uniform quantity or amount, which might be proper in one place would in others be too little and in others still more than sufficient. Hence, a theory which for the sake of uniformity as to value should set apart four times as much land as would be necessary in one locality, and perhaps not half enough in another; or for the sake of uniformity as to quantity or amount, should set apart several thousand dollars' worth in one locality and perhaps not exceeding one hundred dollars' worth in another, would utterly fail to accomplish the object intended. Congress has arrived at the reasonably required uniformity when it has exempted to each bankrupt enough, and to none more than enough, for his necessary support in the locality where he resides; and in order to ascertain what is a necessary support in each locality no better method can be adopted than to exempt the amount specified by local laws. Let the required uniformity consist in a sufficiency and no more than a sufficiency for support, and the theory is practicable in any locality. But to require uniformity as to value or amount, and to apply it to all localities, is impracticable and therefore absurd. If any state in the Union in 1871 allowed a homestead too large or too small, it is no fault of congress, which body doubtless acted upon the legitimate presumption that each state had been honest in its legislation, and by its local law had designated a proper homestead to meet the necessities of its people.

There is another view of this amendment taken by Judge Waite that I deem it proper to notice. He says, "The first question that presents itself to our consideration is, whether the act of 1873, in so far as it seeks, in the administration of the bankrupt law, to give effect to the exemption laws of a state different from that which is given by the state itself, is constitutional?" This shows clearly that he understood the act of congress as intending to give effect to state law. I do not

so understand it. The history of this amendment, or the cause which led to its enactment, shows what construction should be put upon it; and explains the reason why the act recites that "the exemptions to be allowed in bankruptcy shall be valid against debts contracted before the adoption and passage of such state constitution and laws, as well as those contracted after the same," etc. June 8, 1872 [17 Stat. 334], congress, in reference to the allowance of homesteads as provided by state laws, struck out of the original bankrupt act the words "1864," and inserted in lieu thereof "1871," so as to provide for the setting apart in bankruptcy exemptions corresponding in amount with those allowed by state laws of force in 1871, instead of 1864, as by the original act. After this amendment of June 8, 1872, went into operation, Judge Rives, of the Western district of Virginia (in Re Wyllie [Case No. 18,112]), decided that "it did not purport to embrace the homestead in the terms employed by the constitution of Virginia, so as to make it good against debts heretofore contracted, which, it is conceded, congress might have done if it had chosen." And some state court decisions were made to the same purport. As a rejoinder to these decisions the amendment of 1873 [17 Stat. 577] was passed, and was intentionally so worded as to cover the whole ground of these decisions. Hence its peculiar phraseology. But the meaning of it, stated in plain terms is, that in the administration of the bankrupt law, exemptions shall be set apart corresponding in amount with those allowed by the constitution and laws of each state respectively, as existing in 1871, and that such exemptions shall be valid against debts without regard to the time when contracted, and against liens by judgment or decree of any state court; and the concluding words of the act show conclusively that congress intended to set apart these exemptions independently of and unrestricted by any state law as declared by the decision of any state court. It was only intended to look to state law to ascertain what amount should be allowed as exempt in each locality. In all other respects it was intended to set apart exemptions as above stated. The amount of the homestead shall be that "allowed by the constitution and laws of each state respectively, as existing in the year 1871." But further than this, state laws have no bearing upon the exemptions. If this be the true interpretation of the act, and I cannot, from a careful reading, see any good reason to doubt it, the idea that congress sought "to give effect to the exemption laws of a state different from that given by the state itself," falls to the ground. With these views, the register cannot do otherwise than sustain the act in question as constitutional.

ERSKINE, District Judge. The opinion of Register Murray is correct. See In re Smith [Case No. 12,986].

## Case No. 7,516.

JORDAN v. AGAWAM WOOLLEN CO.

[3 Cliff. 239.] [1]

Circuit Court, D. Massachusetts. May Term, 1869.

PRACTICE IN EQUITY—TAXATION OF COSTS—PRINTING THE RECORD.

The expense of printing the record and evidence in an equity suit is, under the second additional rule of May 25, 1842, part of the costs, and properly taxable as such.

[Cited in The Alice Tainter, Case No. 196; Ferguson v. Dent, 46 Fed. 95.]

[This was a bill by Eben D. Jordan to recover damages for the alleged infringement of certain letters patent, for an injunction, and for other relief. A decree was entered in favor of complainant, from which respondents appealed to the supreme court; Mr. Justice Clifford delivering an opinion sustaining the decree. 7 Wall. (74 U. S.) 583. The case now appears upon appeal from the taxation of costs by the clerk.]

John D. Bell, for complainant.

J. B. Robb, for respondents.

Before CLIFFORD, Circuit Justice, and LOWELL, District Judge.

CLIFFORD, Circuit Justice. Appeal to the court by the respondents from the taxation of costs in this case as made by the clerk. When made the appeal embraced two charges in the taxation, but, the objection to one of the charges being withdrawn, it is only necessary to inquire and determine whether the charge of three thousand one hundred and thirty-four dollars and fifty-one cents for printing the record preparatory to the final hearing is a proper charge in the taxation of costs in this suit against the respondents as the losing party. No objection is made to the amount if the complainant, as the prevailing party in an equity suit, is entitled by law to tax such expenses as costs in the suit, but the respondents contend that no part of the charge is warranted by law. Objection could not well be made to the amount, as it is conceded that it is no more than a fair remuneration for the printing of such matter, and the proof is that it does not much exceed what it would have cost to have procured the necessary number of written copies for the hearing, as appears by the report of the clerk. Respondents' objections are to the entire charge, and they frankly avow that they have taken the appeal in order to have the question settled by the court, whether anything can be taxed as costs in an equity suit, except what is specified in the fee bill prescribed in the act of congress upon that subject. 10 Stat. 161. They maintain that nothing can be taxed as costs, either in a suit at law or equity, except what is specifically authorized in that act; but the court is of a different opinion for several reasons.

[1] [Reported by William Henry Clifford, Esq., and here reprinted by permission.]

Costs are recognized as taxable in favor of the prevailing party, in several sections of the judiciary act, but that act contains no fee bill, and affords no means of ascertaining or determining what may properly be included in this taxation. Writs and other processes are also recognized therein as essential in judicial proceedings, but the act does not prescribe forms for any such purposes, or refer to any source from which they may be derived. 1 Stat. 84, 87. Left without other provision than that provided in the judiciary act, it is quite clear that the judicial system as organized by that act could not have been administered unless the courts had assumed the responsibility of supplying the deficiencies under the authority conferred by the seventieth section of the act, to make and establish all necessary rules for the orderly conducting of business in the said courts. Id. 83. Such a resort did not to any considerable extent become necessary, as congress five days later passed the act entitled "An act to regulate processes in the courts of the United States." Id. 93. Rates of fees, as well as the forms of writs and executions, and the modes of process in the circuit and district courts, were prescribed by the second section of that act, and the provision was that they should "be the same in each state respectively as are now used or allowed in the supreme courts of the same." Fees for the travel and attendance of the prevailing party have always been taxed in the federal courts for the district under that provision, because such fees were the proper subject of taxation at the date of the passage of that act in the supreme court of the state.

Reasonable compensation also has been constantly allowed, as occasion required, in those courts for the services of auditors, referees, masters, and assessors, upon the same principle and without hesitation or objection. Proper allowance was also made for the copies of records and other necessary documents, and for the abstracts of the proofs and exhibits in equity suits even before the adoption of any rule in that behalf by the supreme court. Jurisdiction in equity in the state courts of this district was much less comprehensive at that date than under existing laws, but it is believed that the practice as here described was well known and understood in those courts as authorizing a reasonable taxation for copies, and the abstracts of the proofs and exhibits of the record. Written copies of records and abstracts of equity cases were formerly used in the supreme court, but the power of the court to require them to be printed was never doubted as derived under the seventeenth section of the judiciary act. Circuit courts possess the same power, as the words of the section are, "that all the said courts of the United States" may "make and establish all necessary rules for the orderly conducting business in said courts." Suggestion may be made that the process act referred to was a temporary act, but it was continued by subsequent acts, and made permanent by the act of the 8th of May, 1792, subject to certain important alterations in respect to the forms and modes of proceeding in suits in equity, and in those of admiralty and maritime jurisdiction. 1 Stat. 123; Id. 191; Id. 276. By the original process act the rates of fees in causes of equity and of admiralty and maritime jurisdiction were prescribed to be "the same as are or were last allowed in the states respectively in the court exercising supreme jurisdiction in such causes." Id. 94. No change was made in respect to the rates of fees taxable between party and party in such causes by the subsequent act, whereby the original process act was made permanent. Express provision is made, in the third section of the last-named act, for the fees and compensations of marshals, clerks, jurors, witnesses, and district attorneys, but no provision whatever is made regulating the fees for the travel and attendance of the party, for the services of an auditor, referee, master, or assessor, or for any taxation for copies of the case in a writ of error, appeal in equity or in admiralty, or for the abstracts of the proofs and exhibits in a final hearing in equity. Other statutory regulations upon the subject of fees were passed by congress prior to the act of the 26th of February, 1853, but none of them touch the matters herein enumerated as prescribed in the act making permanent the original process act. 1 Stat. 624. Nothing of the kind is pretended by the respondents, but they insist that every charge not expressly authorized by the act of the 26th of February, 1853, must be regarded as unwarranted, and to support that proposition they rely upon the language of the first section of the act.

Provision is there made to the effect "that in lieu of the compensation now allowed by law" to attorneys, solicitors, proctors, district-attorneys, clerks, marshals, witnesses, jurors, commissioners, and printers, "the following and no other compensation shall be taxed and allowed." Repeated decisions have established the rule that the fees and compensations enumerated in the act are exclusive of all others, and that none other as respects the officers and persons therein described can be taxed and allowed; but it is clear that neither the provisions in the act of congress nor the decisions of the courts have any respect to any matters not enumerated in the act. They do not touch the question whether the prevailing party is entitled to costs for his travel and attendance, nor whether an auditor, referee, master, or assessor is entitled to a reasonable compensation for his services, nor whether it is competent for the court by rule to require that the record in a writ of error or appeal shall be printed before trial, or to require that the record or an abstract of the proofs and exhibits in an equity suit shall be printed before the final hearing. Untouched as these matters are in the subsequent legislation of congress, the absence of any rule of court would be still regulated by the provi-

sion in the original process act, that the rates of fees in causes of equity shall be the same as are and were last allowed by the states respectively in the exercise of supreme jurisdiction in such causes. Power was conferred upon the supreme court by the sixth section of the act of the 23d of August, 1842, "to regulate the whole practice of the" district and circuit courts, and by the seventh section of the same act to make and prescribe regulations to the said courts as to the taxation and payment of costs on all suits and proceedings therein. By that section the supreme court might also "make and prescribe a table of the various items of costs which shall be taxable and allowed in all suits to the parties, their attorneys, solicitors, and proctors, to the clerk of the court, to the marshal of the district and his deputies, and other officers serving process, to witnesses, and to all other persons whose services are usually taxable in bills of costs." 5 Stat. 518. Doubtless the power therein conferred so far as respects attorneys, solicitors, proctors, clerks, and marshals, and their deputies, and all other officers and persons named in the subsequent fee-bill act is repealed; but it is a great mistake to suppose that no costs of any kind can be allowed except what are enumerated in that fee-bill. Justice could not well be administered if that was the rule; and there is nothing in any act of congress to support the proposition. Hathaway v. Roach [Case No. 6,213]; Prouty v. Draper [Id. 11,447]. Costs in equity suits are regulated by the twenty-fifth equity rule, and also by the sixty-second rule, which provides that the same solicitor, in cases where there are two or more defendants and they file separate answers, shall not be allowed cost for more than one answer, unless a master upon reference shall certify that separate answers were necessary. Rule 82 provides that the compensation to be allowed to every master in chancery for his services in any particular case shall be fixed by the circuit court in its discretion, having regard to all the circumstances thereof, and the compensation shall be charged upon and borne by such of the parties in the cause as the court shall direct. Both judges concurring, the circuit courts may make other and further rules and regulations for the practice, proceedings, etc. in their respective districts not inconsistent with the rules prescribed by the supreme court. Rule 89. Pursuant to that authority, the judges of the circuit court for this district, on the 25th of May, 1842, adopted the second additional rule, which, among other things, provides that in all causes in equity set down for a hearing, a printed copy of the whole record shall be delivered to each of the judges of the court at least seven days before the day of the hearing, . . . . "and that the costs of the printing are to be deemed costs in the cause." Prior to that date the parties had been required to furnish to each of the judges before the final hearing of the cause full "abstracts of the bill answers,—evidence in documents in the cause"; but since the adoption of that practice has been uniform to require the whole record to be printed. No doubt is entertained by the court of the legality of the rule, and, its utility having been proved by an experience of more than a quarter of a century, the court is not inclined to repeal it or to adopt any other in its place. The taxation of the clerk is sustained.

JORDAN (CAMPBELL v.). See Case No. 2,362.

## Case No. 7,517.

JORDAN v. CASS COUNTY.

[3 Dill. 185.] [1]

Circuit Court, W. D. Missouri. 1874.

TOWNSHIP RAILROAD AID ACT—REMEDY OF BONDHOLDER.

1. The act of the general assembly of Missouri of March 23, 1868 (Laws 1868, p. 927; 1 Wag. St. p. 312), authorizing township aid to railways, is not in conflict with the constitution of the state.

[Cited in Foote v. Johnson Co., Case No. 4,912.]

[See note at end of Case No. 7,518.]

2. Article 11, § 14, of the constitution of the state, which prohibits the legislature from authorizing any "county, city, or town" to subscribe for the stock of any railroad company, unless authorized by two-thirds of the qualified voters therein, does not restrain the legislature from authorizing township aid to railways, if two-thirds of the voters of the township shall sanction the proposition.

[Cited in Jarrott v. Moberly, Case No. 7,223.]

3. Whether the legislature could, in the case of townships, dispense with the popular sanction, doubted, but not decided.

4. As townships were not incorporated bodies, the act of March 23, 1868, above mentioned, when the proposal has been adopted by the voters of the township, authorized the county court to issue bonds, in the name of the county, on behalf of the township voting the aid. *Held* (construing the legislation of Missouri): (1) That the owner of bonds thus issued by a county (or a township) had no remedy by action against the township, or taxable inhabitants therein. (2) That the remedy of the owner of the bonds was by mandamus to the county court, to compel it to levy and collect the special tax which the act provided as the means to pay the bonds and interest thereon. (3) That such an owner could sue the county in whose name the bonds were issued, in the federal court, and recover judgment thereon; but that such judgment could not be enforced against the county or its property, or the tax-payers of the county at large, but only by mandamus to the county court to compel the levy and collection of a special tax, according to the statute in such case provided.

[Cited in Harshman v. Bates Co., Case No. 6,148; Blair v. West Point Precinct, 5 Fed. 267; Kimball v. Board of Com'rs, 21 Fed. 147; Liebman v. City and County of San Francisco, 24 Fed. 721; Vincent v. County of Lincoln, 30 Fed. 753; Aylesworth v. Gratiot Co., 43 Fed. 352.]

[See note at end of Case No. 7,518.]

[1] [Reported by Hon. John F. Dillon, Circuit Judge, and here reprinted by permission.]

This is an action [by Elizabeth J. Jordan] against the county of Cass, upon coupons attached to what are known as "township bonds." The material part of one of the bonds is as follows: "$1,000. State of Missouri. Cass County Bond. Know all men, etc., that the county of Cass, in the state of Missouri, acknowledges itself indebted and firmly bound to the Pacific Railroad of Missouri, in the sum of $1,000, which sum the said county of Cass, for and on account of Mt. Pleasant township, hereby promises to pay said company, or bearer, at, etc., seventeen years after date, with interest, etc. This is one of twenty-five bonds for $1,000 each, issued pursuant to an order of the county court of said county of Cass, made by authority of an act of the general assembly of the state of Missouri, entitled 'An act to facilitate the construction of railroads in the state of Missouri,' and approved on the 23d day of March, A. D. 1868, and authorized by a vote of more than two-thirds of the voters of said township, to aid in the construction of the Pleasant Hill and Lawrence Branch of the Pacific Railroad of Missouri." The bond is signed by the presiding justice and attested by the clerk, and sealed with the seal of the county court of Cass county. The petition is in due form, and asks a judgment against the county for the amount of the coupons in suit, with interest, damages, and costs. The county demurs to the petition, on the grounds that the bonds are not the bonds of the county, but of Mt. Pleasant township, on which alone they are binding; that two-thirds of the qualified voters of the county did not assent to the issue thereof; and that the act of March 23, 1868, under which they purport to have been issued, is unconstitutional. The constitution of the state of Missouri, which went into force in 1865, contains the following: "The general assembly shall not authorize any county, city, or town to become a stockholder in, or loan its credit to, any company, association, or corporation, unless two-thirds of the qualified voters of such county, city, or town, at a regular or special election to be held therein, shall consent thereto." Article 11, § 14. At the time when the constitution of 1865 was adopted, and when the act of March 23, 1868, under which the bonds in question were issued went into effect, there were statutes, authorizing counties, cities, and incorporated towns to aid in the building of railways; but the above mentioned act of March 23, 1868, is the first that gave such powers to townships. This act (Laws 1868, p. 92; 1 Wag. St. p. 313) provides that, upon the petition of twenty-five "taxpayers and residents of any municipal township for election purposes," the county court shall order an election to be held in the township, to determine whether the proposed subscription to the capital stock of the company building or proposing to build a railroad into, through, or near the township, shall be made. The further provision is, that if "not less than two-thirds of the qualified voters of such township, voting at such election, are in favor of such subscription, it shall be the duty of the county court to make such subscription in behalf of such township;" and if so voted, "the county court, in payment of such subscriptions, shall issue bonds, in the name of the county, with coupons for interest attached." To pay for the subscription, or to pay the principal and the interest on the bonds, if bonds have been issued, the provision is, "that the county court shall, from time to time, levy and cause to be collected, in the same manner as county taxes, a special tax, which shall be levied on all the real estate lying within the township making the subscription." The further provision is that the revenue officers of the county are to collect this special tax, and apply the same exclusively to pay such subscription or bonds; and the county court is required to cancel bonds which shall be paid. Under this state of the law, the question on the demurrer was, whether an action upon the bonds issued by the county court, under this act, in the name of a county in behalf of a township, could be maintained against the county. Many similar actions are pending, and the question was argued by—

W. B. Napton, T. K. Skinker, and others, for the bondholders.

W. P. Hall, N. Holmes, Gage & Ladd, Robert Adams, Jr., Glover & Shepley, and others, for the county.

Before DILLON, Circuit Judge, and KREKEL, District Judge.

DILLON, Circuit Judge. The bonds under consideration were issued under the act of March 23, 1868, by the county court of the county, in the name of the county, on behalf of the township. This act has been held constitutional by the supreme court of the state (State v. Linn County Court, 44 Mo. 505), and it is our opinion that the constitution of the state (article 11, § 14), which prohibits the legislature from authorizing any "county, city, or town" to subscribe to the stock of any railroad company, unless authorized by two-thirds of the qualified voters therein, does not prohibit the legislature from authorizing township aid to railways, if two-thirds of the voters of the township shall sanction the proposition. Whether the legislature could authorize township aid to railways without the assent of two-thirds of the voters therein, need not be determined, for it has not undertaken to do so. The section of the constitution above mentioned does not in terms limit the legislative power, except as respects "counties, cities, and towns;" but other municipal creations would be within the mischief the constitution intended to remedy, and hence, it would seem, within its spirit and meaning. Supposing this to be so, however, the only limitation on the legislature would be, that it could not authorize the

aid by townships, or by the people within them, without the popular sanction which the constitution requires. It would not be a fair or legitimate construction of the provision of the constitution, to hold that it absolutely disabled the legislature as respects municipal creations or civil divisions of the state not therein mentioned.

Treating the act of 1868 as valid, the next question is, whether the holder of bonds issued in accordance with its provisions—that is, by the county court, in the name of the county on behalf of the township, pursuant to a two-thirds vote of the citizens of the township—can maintain an action thereon, for any purpose, against the county in whose name the bonds are made. At the outset of this inquiry, it may be remarked that we do not understand the plaintiff's counsel to contend that the bonds are the proper debt or obligation of the county, or that payment thereof may be enforced against the property of the county, or against the tax-payers or property in the county at large. The bonds recite that they were authorized by a two-thirds vote of the township; and, under the provision of the constitution above mentioned, not having been authorized, or purporting to have been authorized, by a vote of the qualified voters of the county, it is clear that they impose no obligation on the county, and equally clear that the real or ultimate liability is on the taxable property within the township. But how, and against whom, is this liability to be enforced and made available?

It is urged by the counsel for the county that the remedy of the bondholder is by an action against the township, or against the tax-payers and residents of the township, in whose behalf the bonds were issued. But there is no statute in Missouri creating "municipal townships for election purposes" bodies politic, and no provision is made for suits by or against them.

Undoubtedly the legislature designed that there should be a remedy upon these bonds; and if it were consistent with the legislative intent, the court would be justified in holding, if necessary to afford an effectual remedy, that the township was created by implication, as to this particular matter, a body corporate, and, as such, liable to be sued. But such a view is not necessary to give a remedy, and seems not to be consistent with the express provisions that the bonds should be issued in the name of the county, and the necessary taxes to pay them be levied and collected by the officers of the county. We are impressed with the conviction that this was done by the legislature because of the want of corporate power in the "municipal township for election purposes."

The next suggestion is that the action should be against the tax-payers and residents of the township in analogy to the principle of the well known case of Russell v. Men of Devon, 2 Term R. 667, and to the personal liability of the inhabitants of towns in New England for judgments against the town corporations. Beardsley v. Smith, 16 Conn. 368; Dill. Mun. Corp. §§ 446, 687, 693, note.

Such a personal liability on the part of the inhabitants for the debts of a public, municipal, or quasi corporation, is not elsewhere recognized to exist, and could not be enforced by an action at law without contravening the mode prescribed by the act under which the bonds were issued for acquiring the means of making payment thereof. The legislature has provided the mode of raising the means for making payment of the bonds, which is by the levy and collection of a "special tax" for that purpose, to be "levied on all the real estate lying within the township," and it has specially enjoined upon the county court the duty of levying and causing such to be collected; and, undoubtedly, this is such a duty as, supposing the bonds to be valid, may be enforced by mandamus. It is, to our mind, clear that the bondholder, if he chose to resort to the state tribunals, might, without first obtaining a judgment against either the county or township, file an information for a writ of mandamus, to be directed to the county court, to compel it to levy and cause to be collected the special tax from which alone can come the funds that the law has provided for the payment of the bonds. Dill. Mun. Corp. § 685, etc. But this court has no original jurisdiction in mandamus. It cannot acquire jurisdiction by an original proceeding in mandamus, but when jurisdiction otherwise exists it may issue the writ when necessary to the exercise of such jurisdiction, agreeably to the principles and usages of law. Bath Co. v. Amy, 14 Wall. [81 U. S.] 244; U. S. v. Union Pacific R. Co. [Case No. 16,599]. Therefore, the holder of these bonds cannot have any remedy in the federal court unless he is entitled to recover a judgment thereon, and to enforce such judgment, if necessary, by mandamus. This results not from any intrinsic difference in this respect between the state and federal courts, but from the peculiar language in which the jurisdiction of the circuit court of the United States is conferred by the judiciary act.

We are thus brought to the question whether a holder of bonds issued pursuant to the act of March 23, 1868, may recover judgment thereon against the county in whose name they are issued, to be enforced, if necessary, not by an execution against the county, but by mandamus against the county court to compel it to levy upon the property in the township the special tax which the law has enjoined as a duty upon it.

After some hesitation we have reached the conclusion that such an action will lie, and that this view will best carry out the design of the legislature in the enactment in question. The expressed purpose of the statute was "to facilitate the construction of railroads in the state of Missouri," and to this end it provided for the issue of negotiable bonds with coupons for interest attached. These

were to be negotiated and sold, and as townships were not known to the law as corporate bodies, some provision must be made whereby payment could, if necessary, be enforced. The act met the difficulty arising from the non-incorporation of townships by directing the bonds to be issued in the "name of the county." By the legislation of Missouri, the county has a corporate or quasi corporate capacity, with limited power to contract and sue and be sued. Wag. St. 407, 408.

And the county as a civil subdivision or arm or agency of the state is under the supreme control of the legislature, except so far only as its power is limited by the constitution. It seems clear when the legislature directed the bonds to issue in the name of the county that it meant to give to the bonds additional legal value, and this intent should be carried into effect by the court so far as it is consistent with the provisions of the organic law. The theory of the act is to use the county and the officers of the county to effect the purposes of the enactment. Hence the petition for the election is required to be presented to the county court, which is the official organ of the county; the election is to be ordered by the county court, and by this tribunal, also, the subscription "in behalf of the township" is to be made, and bonds "in the name of the county," issued. The county court is to levy and cause to be collected the taxes to pay the bonds, and the sheriff of the county and the county treasurer are required to see to the collection, and application of the taxes. Thus we see the county and the county officers are the instruments employed by the legislature to give effect to the act under which the bonds were issued. There must have been a purpose in requiring the bonds to be issued in the name of the county; but the constitution will prevent any liability attaching to the county—that is, to the people of the county, for the payment of these bonds. The constitution, however, will not be infringed by allowing the county to be sued if the judgment which is rendered is one which is not to be satisfied out of the private property of the county, if it owns or can own any which is subject to execution, or by a tax upon the people or property of the county at large. It seems to us that the provision that the bonds shall be issued in the name of the county implies a liability on the part of the county to be sued so far as is necessary to give effect to the rights of the holders of the bonds consistently with the provisions of the constitution. The right of the non-resident citizen to resort to the courts of the United States is one which is given by the constitution and laws, and it is a right which a citizen would be apt to regard as specially desirable, where if he be compelled to resort to the state courts it must be to a county whose citizens in whole or in part are his real adversaries, and who may constitute the jury to decide the case. This right, so valuable to a plaintiff, but which deprives the defendant of no just advantage, since the federal courts are by their constitution to stand wholly indifferent between all parties, ought not to be considered as unavailable to a non-resident citizen unless a fair construction of the enactments applicable to the question so requires.

It is in our judgment practicable consistently with established legal principles to protect the constitutional rights of the counties, and at the same time to recognize the constitutional right of the non-resident citizen to come with these securities into court to have his rights in respect to them determined. This is to be effected by the nature of the judgment we render, which is not a personal judgment against the county, but only a judgment judicially establishing the plaintiff's debt if no defense shall be sucessfully made. If the debt shall be thus established we must suppose that the proper county court will levy and collect from the property within the township, the necessary tax to pay the debt, but if it should not, this court has the power and in that event it would become its duty, by mandamus, to cause such tax to be levied and collected.

This view, in effect, makes the county a trustee for the township, which is one of the subdivisions of the county, and a necessary party to the action, but not the party personally liable for the payment of the debt which the plaintiff may establish; and such, by the act under which the bonds in suit were issued, is the real relation which is established between the county and the township.

This, it is to be remembered, is a law action, and the judgment to be rendered must be one which, so far as the anomalous legislation under review will admit of it, is consistent with the restricted powers and somewhat rigid rules of a common law court. The provisions of the state statutes warrant the kind of judgment which it is proposed to render, if the plaintiff shall recover: that is, such judgment as may be found necessary to effectuate the rights of the parties. Wag. St. 1051, §§ 1, 2.

But the common law adjudications show that the judgment may be moulded so as to conform to the rights of the parties under the law, and by analogy support the view we take. Thus, in Peck v. Jenness, 7 How. [48 U. S.] 612, where the plaintiff attached goods of his debtor before the latter was proceeded against in bankruptcy, and where, pending the action, the debtor was discharged, the supreme court of the United States held that it was competent and proper for the court to render a judgment, notwitstanding the discharge, for amount of the debt, damages and costs, "to be levied only of the goods of the defendant attached on plaintiff's writ, and not otherwise." "The books," says Mr. Justice Grier, in this case, "are full of precedents for such a judgment. When an administrator pleads plene administravit, the plaintiff may

admit the plea, and take judgment of assets, quando acciderint. When the defendant pleads a discharge of his person under an insolvent law, the plaintiff may confess the plea and have judgment, to be levied only of defendant's future effects." [Peck v. Jenness] 7 How. [48 U. S.] 623. So, subsequently, the supreme court held that when contracts made payable in coin are sued upon, judgments may be entered for coined dollars and parts of dollars. Bronson v. Rodes, 7 Wall. [74 U. S.] 229.

Upon the whole, our judgment is that the action is well brought against the county; that the county may make defense, but if the plaintiff shall be found entitled to recover, he may have judgment against the county for his debt, damages and costs, to be enforced, if necessary, by mandamus against the county court, or the judges thereof, to compel them to levy and collect a special tax according to the statute in such case provided, and not otherwise. Demurrer overruled.

NOTE. The principle that debts incurred by or in the name of a public or quasi corporation, under legislative authority, cannot under any circumstances be enforced against the private property of the inhabitants, has recently been decided by the supreme court of the United States, in the case of Rees v. City of Watertown (which went up from Wisconsin) 19 Wall. [86 U. S.] 107.

## Case No. 7,518.

JORDAN v. CASS COUNTY.

[3 Dill. 245.] [1]

Circuit Court, W. D. Missouri. 1875.[2]

TOWNSHIP BONDS—BRANCH RAILROAD ACT.

1. Bonds negotiable in form, issued by a county in Missouri, on behalf of a township therein, reciting that they "are issued by the order of the county court, made by authority of an act of the general assembly of Missouri, entitled 'An act to facilitate the construction of railroads in the state of Missouri,' approved March 23, 1868, and authorized by a vote of more than two-thirds of the voters in said township, to aid in the construction of the Pleasant Hill & Lawrence Branch of the Pacific Railroad, of Missouri," said railroad having legal power to build branches and receive such subscriptions, are valid in the hands of a holder for value without actual notice of the facts relied on to defeat a recovery on such bonds.

2. The proceedings of the county court in this case, considered by Krekel, J., to be binding even if the bonds were in the hands of the original takers thereof.

The coupons sued on [by Elizabeth J. Jordan] are from bonds issued by Cass county on behalf of Mt. Pleasant township, in that county, to the Pacific Railroad Company, of Missouri, a corporation created by an act of the general assembly (Sess. Acts Mo. 1849, p. 220), and authorized to build branches to any point in any county in which the road might run. At the time of the issue of the bonds, and when the steps preliminary thereto were taken, a part of its road was constructed in Cass county. The company therefore was authorized to build a branch in that county, and on the 15th day of June, 1869, formally announced its intention to build a branch to the western limits of the county, to be known as the Pleasant Hill & Lawrence Branch of the Pacific Railroad. This was done by filing in the office of the secretary of state, in pursuance of the branch railroad law of March 23, 1868, an offer to Cass county and all other interested to build said branch. The bonds now in question recite that they "are issued under and pursuant to an order of the Cass county court, made by authority of an act of the general assembly of Missouri, entitled 'An act to facilitate the construction of railroads in the state of Missouri,' approved March 23, 1868, and authorized by a vote of more than two-thirds of the voters of said township, to aid in the construction of the Pleasant Hill & Lawrence Branch of the Pacific Railroad, of Missouri." The county court records show, that the proceedings preliminary to the issue of the bonds were taken strictly in pursuance of the statute. 1 Wag. St. 313, § 51. There was a petition of more than twenty-five tax payers and residents of the township presented to the court, praying it to submit to a vote of the qualified voters of the township the question of subscribing $25,000 to the capital stock of the Pacific Railroad Company, which proposes to build a railroad through said township, to be known as the Pleasant Hill & Lawrence Branch of the Pacific Railroad. Thereupon an order was made in accordance with the prayer of the petition, and the sheriff was directed to give notice of the election, which was fixed for the 13th of July, 1869. The election was duly held, and more than two-thirds of the qualified voters of said township, voting thereat, voted in favor of the subscription. The court thereupon ordered the subscription to be made to the capital stock of the Pacific Railroad and the bonds to be issued. Before anything further was done, the Pacific Railroad Company appeared by its attorney, and offered the court a contract for building the branch, the only part of which material to be noticed is the following: "It being distinctly understood and mutually agreed by and between the parties hereto, that the stock so to be issued shall be stock in the branch railroad, * * * * and none other, as provided by an act of the general assembly of the state of Missouri, entitled 'An act to aid the building of branch railroads in the state of Missouri,' approved March 23, 1868." This contract was at first rejected by the court on account of this obnoxious clause. Subsequently petitions were presented signed by more than two-thirds of the qualified voters of the township, in which the petitioners state to the court that "whereas, there are ambiguities and uncertainties in said original petition as to the meaning

[1] [Reported by Hon. John F. Dillon, Circuit Judge, and here reprinted by permission.]

[2] [Affirmed in 95 U. S. 373.]

thereof, * * * * we represent that it was the understanding, meaning, object, and design of your petitioners for said bonds to be issued to said Pacific Railroad, and that the certificates of stock to be issued and provided therefor as provided by law be issued on the stock of said branch road, all of which we hold legal and binding on us, and pray the court to act according to the premises aforesaid." Thereupon the contract offered by the Pacific Railroad Company was accepted, the branch stock received, and the bonds issued and delivered to the Pacific Railroad Company, which forthwith built the branch road. The next step was an order for a levy of a tax of 8-10 of one per cent upon the township to pay the interest to accrue. This order was repeated in each of the years 1870, 1871 and 1872. In the latter year an order was made for the funding of such coupons as then remained unpaid, amounting to some $1,500; the rest had been paid amounting to about $3,500, gold. Finally the revoking order of February, 1873, was made. By this it appears that some of the taxes had been paid, and some remained unpaid. It appears from one of the orders, that the stock held by the company was voted on one occasion by commissioners appointed by the court. The plaintiff is the holder of the coupons in suit for value, and without notice of any informality or illegality in the issue of the bonds, except so far as notice is imputed by law.

T. K. Skinker, for plaintiff.
Gage & Ladd, for defendant.

[Before DILLON, Circuit Judge, and KREKEL, District Judge.]

KREKEL, District Judge. 1. One view of this case is, had the county court of Cass county power to subscribe to, and accept, the stock of the Pleasant Hill & Lawrence Branch road, when the petition under which the order to submit the question of subscription to the voters was made, stated "that they desire as a township, to subscribe twenty-five thousand dollars to the capital stock of the Pacific Railroad Company which proposes to build a railroad through said township, to be known as the Pleasant Hill & Lawrence Branch of the Pacific Railroad?"

The order of submission followed the petition. If the necessary two-thirds vote under this petition and order, favorable to the subscription, was given, I am of opinion that the court was authorized to subscribe to and accept the stock in the branch. The petition itself, in other parts than those quoted, abundantly shows that the proceeding was had under the act of 23d of March, 1868 (page 92, Sess. Acts 1868),—for prior to that time no law authorizing townships to subscribe stock to a railroad existed in Missouri.

The petition says that "the Pacific Railroad Company proposes to build a railroad through the township." The proposition here spoken of is verified by the resolution of the board of directors of the Pacific Railroad Company, filed with the secretary of state on the 15th day of June, 1869—after the petition, but prior to the day of election—declaring in favor of building the branch road as authorized and required by the act of the 23d of March, 1868 (page 90, Sess. Acts 1868). From the proceedings of the tax-payers, the action of the county court of Cass county, as well as the action of the Pacific Railroad board, it is very evident that all were acting under the acts cited and attempting to comply with the provisions thereof.

The tax-payers in their petition for submission, employ the very words of the first section of the act of the 23d of March, 1868, "proposing to build." The authority of the first section is, "to subscribe to the capital stock of any railroad company of this state," and this, taken together with the petition and order, that the subscription is to be made for the construction of the Pleasant Hill & Lawrence Branch of the Pacific Railroad, it may well be, that had the Pacific Railroad Company accepted the subscription to its stock, it would have been bound only to issue stock as of the branch. This view gains strength from a close examination of the second section of the act of the 23d of March, 1868, which provides, that a railroad may receive "subscriptions to stock to aid in its construction in the name of such branch, which shall be expressed in the certificate of stock issued." The third and fourth sections of the act last cited are in harmony with this view, and indeed tend to support it.

The authority to subscribe to and accept the stock of the branch road is then not only justified by the law, but in strict compliance with the design and intention of the tax-payers and the order of the court. In the petition of two-thirds of the tax-payers of the township, they declared this to have been their understanding, and though such a petition cannot be substituted for a two-thirds vote required by law, yet it shows, at least, that the question now raised is a technical one.

2. But supposing the views above expressed should be erroneous, the question arises, in how far are innocent holders of bonds for value affected by the proceedings had in the premises. Here is a bond reciting the law and the facts required to make it a vital commercial obligation payable to bearer—is the purchaser of such bond bound to make inquiry and ascertain whether the issuer of the instrument set out the truth, when the facts at least were peculiarly within its reach, and under the law to be ascertained by the county court, and it alone?

The power being conferred on the county court by law to issue the bonds on a given state of facts, to be ascertained by it, is either an untruthful statement of the facts on the face of the bonds, or even an erroneous exercise of an unquestionable legal power to affect an innocent holder for value?

There has been no actual notice to the plaintiff of any irregularity, if such has occurred. The proceedings in court and the filing of the declaration of intention to build the branch road by the Pacific Railroad Company in the secretary of state's office, impart no constructive notice. The levy and collection of taxes, and the payment of coupons for several years show beyond question how the matter was viewed by all the parties, and though such acts might not estop the defense here interposed, if legal authority was entirely wanting in the county court to issue the bonds, yet they strongly tend to show the wrong that would be done to permit a technicality to stand in the way of substantial justice. In my view the case is with the plaintiff.

DILLON, Circuit Judge. I concur in the result, on the second ground stated in the foregoing opinion of KREKEL, District Judge, without giving any opinion on the view first therein expressed. Judgment for plaintiff.

[NOTE. This case was reviewed in error by the supreme court. Mr. Chief Justice Waite, in delivering the opinion of the court, said: "It appears with reasonable certainty that the vote of the township was for a subscription to aid in the construction of the branch road, and was intended to authorize the taking of the stock in the Pacific Railroad set apart, under Act March 21, 1868, to the Pleasant Hill & Lawrence Branch." The opinion in this case is very short, and refers to the case of Cass County v. Johnson, in which the opinion is also delivered by Mr. Chief Justice Waite, and in which he decides that the subscriptions of Cass county are valid, as are also the bonds. The township aid act (1 Wagner's St. 313) of Missouri is not repugnant to the constitution of that state; and, further, that although the bonds may be in fact the bonds of the township, yet an action may be maintained upon them against the county. Upon this last point the learned chief justice says: "The reasoning of the learned circuit judge in Jordan v. Cass (Case No. 7,517) is to our minds perfectly conclusive, and we content ourselves with a simple reference to that case as authority upon that point." Cass County v. Johnson, 95 U. S. 360; Same v. Jordan, Id. 373.]

JORDAN (CURRIE v.). See Case No. 3,491.

## Case No. 7,519.

JORDAN v. DOBSON et al.

[2 Abb. U. S. 398; 4 Fish. Pat. Cas. 232; 7 Phila. 533; 27 Leg. Int. 292.] [1]

Circuit Court, E. D. Pennsylvania. Sept. 12, 1870.

PATENTS—PARTIES—EXTENSIONS—POWERS OF CONGRESS.

1. It is a fatal defect in a bill to enjoin the infringement of a patent for an invention, that all the owners of the patent have not been made parties.

2. But those persons only are deemed owners, within the rule, to whom the patent was issued, or to whom interests in it have been transferred by assignment in writing, duly authenticated.

[Cited in Tilghman v. Proctor, 125 U. S. 143, 8 Sup. Ct. 898.]

3. In a suit founded upon a re-issued patent, the courts must presume that the commissioner duly performed his duty of ascertaining that the defect in the original specification was owing to inadvertence, accident, or mistake; and that the amended description is of the same invention as was covered by the original patent. It seems, that this presumption is conclusive, except against the allegation of fraud in the transaction.

[Cited in Kerosone Lamp Heater Co. v. Littell, Case No. 7,724; Combined Patents Can Co. v. Lloyd, 11 Fed. 151.]

4. When fraud is alleged, the burden of proving it is upon the party making the charge.

5. Congress has power to authorize, by special act, the extension of a patent, notwithstanding the fact that original patent has previously expired, and the invention has been introduced to public use.

[Cited in The Fire-Extinguisher Case, 21 Fed. 43.]

6. A special act of congress, authorizing an extension of a particular patent, should not be read and construed in connection with the general acts on the subject of patents.

7. The decision of the commissioner of patents in granting an extension is conclusive evidence of all the facts which he is required to find before issuing it; e. g., of the fact that there has not been an abandonment of the invention.

[Cited in brief in Fassett v. Ewart Manuf'g Co., 58 Fed. 364.]

8. The issue, re-issue, and extension of a patent, and the fact that it has been sustained in previous suits, create a strong presumption against a defense of want of novelty in the invention.

9. The requisites of an answer seeking to set up want of novelty in the invention, in defense to a bill for an infringement of a patent, and the sufficiency of the evidence to sustain such defense,—considered.

[Followed in Jordan v. Wallace, Case No. 7,523.]

10. The validity of the extended patent, granted August 20, 1862, under special act of May 30, 1862 [12 Stat. 904], for improvements in manufacture of fibrous materials,—examined and sustained.

11. A license granted by the patentee of an invention, permitting the invention to be manufactured and used upon certain terms and conditions, cannot be deemed evidence of an acquiescence in infringements of his right. It implies the assertion of an exclusive right in the invention.

[Followed in Jordan v. Wallace, Case No. 7,523. Cited in Gordon v. Anthony, Id. 5,605; Atwood v. Portland Co., 10 Fed. 283.]

12. When a patent expires during the pendency of a suit for infringement, no perpetual injunction can be granted, but complainant may obtain a decree for an accounting.

[This was a bill in equity filed to restrain the infringement of letters patent for "improvement in machinery for the manufacture of wool and other fibrous material," granted to John Goulding, December 15, 1826, and reissued July 29, 1836. The original patent expired December 15, 1840, but

[1] [Reported by Benjamin Vaughan Abbott, Esq., and by Samuel S. Fisher, Esq., and here compiled and reprinted by permission. The syllabus and opinion are from 2 Abb. U. S. 398, and the statement is from 4 Fish. Pat. Cas. 232.]

by special act of congress, passed May 30, 1862, the commissioner of patents was authorized to extend the patent, upon application, and an extension was accordingly granted for seven years from August 30, 1862. The extended patent was assigned to complainant and reissued to him June 28, 1864. [No. 1,714.]

[The claims of the reissue of 1864 were as follows: "(1) In combination, the following sets of apparatus or elements making up a machine, namely: first, a bobbin stand or creel; second, bobbins on which rovings may be wound; third, guides or pins; fourth, a carding machine; fifth, condensing and drawing off apparatus; and, sixth, winding apparatus, all substantially such as are herein described, whereby rovings may be fed to a carding machine, carded, condensed, drawn off, and wound again in a condensed state, substantially in the manner hereinbefore set forth. (2) The feed rollers of a carding machine, in combination with bobbins and proper stands therefor, and guides or pins whereby slivers or rovings may be fed to be carded by mechanism, substantially as herein described. (3) A delivering cylinder of a carding machine, in combination with apparatus for drawing off, condensing or twisting, and winding carded filaments, the apparatus being substantially such as herein described, whereby carded filaments may be delivered, drawn off, condensed, and wound in a condensed state upon bobbins, as hereinbefore set forth. (4) A mule or spinning frame, provided with spindles mounted on a carriage, and with jaws or their equivalents, for retaining roving, in combination with bobbins whose axes are parallel or nearly so with the line of spindles, and rest upon drums revolving to unwind the bobbins, the combination being and operating substantially as hereinbefore set forth."] [2]

H. T. Fenton and F. Sheppard, for complainant.

N. H. Sharpless, R. P. White, G. H. Earle and C. Guillon, and George Junkins, for defendants.

STRONG, Circuit Justice. In the year 1863, the complainant, by sundry assignments, became the owner of a patent for a new and useful improvement in machinery for the manufacture of wool and other fibrous material, originally granted to John Goulding. The patent was first issued December 15, 1826, and it granted to the patentee the full and exclusive right and liberty to make, construct, and use, and vend to others to be used, the invention therein described for the period of fourteen years from its date. It was surrendered July 29, 1836, and letters patent for the same invention were then reissued for the residue of the term for which the patent was at first granted. For some reason which does not clearly appear in the evidence, but which the bill alleges to have been accident and mistake, the patentee failed to obtain an extension of the patent before the expiration of the time for which it was originally issued. But on May 30, 1862, an act of congress was passed by which the commissioner of patents, on application to him made by the patentee, was authorized to grant a renewal and extension of the patent for seven years from the time of such renewal and extension, or withhold the same under the existing laws, in the same manner as if the application therefor had been seasonably made, with a proviso, however, that such renewal and extension should not have the effect, or be construed to restrain persons, who might be using the machinery invented by said Goulding at the time of the renewal, from continuing to use the same; nor to subject them to any claim for damage for having so used it. Under this act of congress, the patent which had been granted to Goulding, and which had expired, was renewed and extended by the commissioner of patents for seven years from the date of its renewal, viz.: August 30, 1862. It was in the year next following, that the complainant succeeded to its ownership. On June 28, 1864, this extended patent was surrendered, and reissued to the complainant for the remainder of the seven years. Such is the right asserted by the complainant in the bill now before me, and it is established by the evidence.

The bill further complains that since the date and issuing of the last above-mentioned reissued letters patent, and while the exclusive right was in the complainant, the defendants have, without his license, and in disregard of his right, manufactured, used, and sold, and that they continue to manufacture, use, and sell, in large numbers, cards and jacks, and machinery which were made after August 30, 1862, embracing and containing the improvement invented by said Goulding, and secured to the complainant by the last above-mentioned reissued letters patent; or embracing and containing mechanism substantially the same in principle, construction, and mode of operation as the said improvement.

All that need be said of this allegation of infringement is, that, in part, it is incontrovertibly proved. It is true, the defendants have not manufactured or sold the cards, jacks, and machinery described in the patent, but the evidence is full that they have used the patented improvement; that they bought numerous sets of the machinery after the patent was extended, and used them until this bill was filed. Indeed, I do not understand the fact of infringement as being seriously contested. It was not directly denied in the answer, nor was it in the argument. The defense is rested upon other grounds, which I shall proceed to consider.

It is first alleged that all the owners of the

[2] [From 4 Fish. Pat. Cas. 232.]

patent have not been made parties to the bill. If this averment is well founded, of course there is a fatal defect. But I do not think it is sustained by the evidence. So far as the written evidence extends, it shows beyond doubt that the entire ownership of the patent to Goulding, was vested in the complainant in 1863, and that in 1864 the reissued lettters were granted to the complainant alone. No grant, or assignment from him to any other person has been shown. The act of congress authorizes assignments only in writing, and legal ownership can be acquired only by written instruments. No successful attempt has been made to prove that the complainant has ever made any written assignment or grant of any part of the title to the patent. It is true, one of the witnesses testified that the parties interested in the patent are Jordan, Marsh & Co., consisting of Eben D. Jordan, B. L. Marsh, Charles Marsh, and James Fisk, Jr., and the firm of Frances, Skinner & Co., and the firm of Brooks & Ball, and that all these parties hold an interest as owners, and are part owners. Had the witness said nothing more, his testimony would have been insufficient to establish legal ownership in the persons named. That, as already said, can only be created by written instruments of transfer, and the witness knew of none. But he has explained and corrected his testimony, saying that, upon reflection, he found he was mistaken in his statement, that other parties than Eben D. Jordan (the complainant) were interested as owners, in the patent; that he knew of no other than the said Jordan who is interested as an owner; that he had never seen or known of the existence of any writing or instrument which conveys any part of the patent to the parties above named, and that he had never heard any of the said parties claim to be part owners with Eben D. Jordan. He has stated farther, that when he testified others than Jordan were joint owners of the patent, he confounded those who, under an arrangement of which he had been informed, were to receive a portion of the net proceeds of the collections under the patent, with owners. I need not say an interest in the net proceeds of collections under a patent does not necessarily amount to legal ownership of the patent itself. It is plain, therefore, as the case appears, that there has been no want of joinder of the necessary parties.

The other matters of defense set up relate mainly to the patent itself, and the defendants have attempted to show its invalidity for many reasons. It is contended that when the surrender of the original patent was made in 1836, and the new patent issued, the surrender was not made as alleged, because the original was inoperative and invalid by reason of a defective specification (the error having arisen by accident and mistake), without any fraudulent or deceptive intention; but that the surrender was made and the reissued letters were obtained with a fraudulent and deceptive intention of including important changes, not a part of the invention of the patentee.

The same allegation is made respecting the surrender of the extended patent and its reissue in 1864, and it is argued that by reason of such fraudulent and deceptive intention, the reissued patents were void. The 13th section of the act of July 4, 1836 [5 Stat. 122], enacted that when any patent which had been granted, or which should thereafter be granted, should be inoperative or invalid by reason of a defective or insufficient description, or specification, or by reason of the patentee claiming in his specification as his own invention more than he had, or should have a right to claim as new, he may surrender the patent and obtain a new one for the same invention, for the residue of the period then unexpired, for which the original patent was granted in accordance with the patentee's corrected description and specification, if the error had arisen, or should arise from inadvertency, accident, or mistake, and without any fraudulent or deceptive intention. Under this act it is the duty of the commissioner of patents, when an application is made to him for a reissue, to inquire and determine whether the defect or insufficiency of the original specification was owing to inadvertence, accident, or mistake, or originated in a fraudulent intention; and also to inquire and determine whether the amended description is of the same invention. It must be assumed that he performed his duty, when the first reissue was made in 1836, and the second in 1864. There is always a presumption that a public officer acts rightly. If the defect or insufficiency of the specifications of the surrendered patents had not arisen from inadvertence, accident, or mistake, and without fraudulent intention, the commissioner had no right to reissue the patent, nor had he any right to reissue it if the invention described in the amended specification was not the same as that originally patented, or intended to be patented. It must be assumed, therefore, he did determine there were defects in the former specifications arising from inadvertence, accident, or mistake, without any fraudulent intention. And having thus determined, his decisions are conclusive. They are not re-examinable except, so far as he decided there was no fraud. It is now settled that the granting of a renewed patent, is so far conclusive upon the question of the existence of error in the original patent arising from inadvertency, accident, or mistake, that it leaves nothing open but the fairness of the transaction. Stimpson v. West Chester R. Co., 4 How. [45 U. S.] 380; Woodworth v. Stone [Case No. 18,021]; Allen v. Blunt [Id. 216]; Curt. Pat. 280.

It must also, I think, raise a presumption against the existence of any fraudulent in-

tent. But if not, a party who alleges fraud must prove it, and there certainly is no evidence in this cause of any such fraud either in the original patentee, or in the complainant. It is not asserted that there is any, if the reissued patents were for the same invention, as that attempted to be described in the patent first granted. That they were for the same I have no doubt. I have said that it is the commissioner's duty, when a patent is offered for surrender, and application is made for reissue, to inquire and determine whether the amended description and specification cover the same invention as that which was sought to be covered by the surrendered patent. That they are for the same invention is a fact that he must find before he can reissue the patent. The fact of reissue then must raise the presumption that the invention is the same. It may even be doubted whether this is not a conclusive presumption, unless, to use the language of Judge Story, in Allen v. Blunt [supra], "it is apparent on the very face of the patent itself, without any auxiliary evidence, that the commissioner was guilty of a clear excess of authority, or that the patent was procured by a fraud between him and the patentee." But conceding that the decision of the commissioner is not final, what there is in this case that would justify my holding against the presumption mentioned, the invention described and patented in the reissued letters of 1864, to be a different one from that attempted to be described in the original patent of 1826, and the reissue of 1836, I can not discover. There are some slight, very slight changes in the specification, and there are changes in the form of the claim. But the surrender of a patent for reissue contemplates a change or an amendment to the former specification, or claim. It is allowed for that purpose in order to make that operative, which was inoperative before. It appears to me that the specification of the original patent described a combination of machines, and mechanical devices to effect a specified result. Some of the devices combined were themselves combinations invented by the patentee. The elements of these subordinate combinations were old, and were not claimed as new, but the combinations themselves were described. Goulding's invention, as described by him, was, therefore, not only of the entire combination of all the machines and devices used, but of some of the elements of that combination. This is evident to me from the description given. All the combinations mentioned in the claims of the reissue of 1864 are described, and represented in the drawings of the reissue of 1836, which are not shown to have differed materially from the description and drawings of the original patent. The language of the descriptive parts of both patents is nearly identical, and the drawings which make part of the descriptions are precisely alike. But though the specification of the earlier patent described the arrangement and primary combination of each element, the claim was in terms only for that larger combination which embraced all the elements. The reissued patent of 1864, in claiming, as it does, not only the entire larger combination, but also those single elements, or constituent parts thereof, which are themselves combinations alleged to have been invented by the patentee (Goulding), is plainly, therefore, for the same invention. I need not say that a patentee's claim is as amendable under the statute, as is his specification. Battin v. Taggart, 17 How. [58 U. S.] 74. See, also, Act March 3, 1838, § 8 (5 Stat. 191).

It has been further contended, on behalf of the defendants, that the act of congress of May 30, 1862, under which the patent was extended, was unauthorized and beyond the power of congress, because the patent had expired in 1840, and the invention had become the property of the public, and because, therefore, the act was in effect taking property which belonged to the public and giving it to an individual. It assumes that every person had a right of property in Goulding's invention immediately after the expiration of his first patent, even before any attempt to appropriate it. It puts a right to appropriate that which is common, and in which there can be no private property until there has been an actual appropriation, on the footing of property acquired. And it overlooks the express grant of power to congress by the constitution. The 8th section of the first article of that instrument ordains, that congress shall have power "to promote the progress of science and useful arts, by securing for limited times, to authors and inventors, the exclusive right to their respective writings and discoveries." This is a large power. It is not said when those limited times shall commence, how long they shall continue, or when they shall end. All that is left to the discretion of congress. I see no reason why, under this commission, congress may not secure to an inventor an exclusive right to his invention for a limited period, beginning at any time after the invention is made, and after it became publicly known. Congress may be trusted, and they are trusted, to take care that in protecting the inventor, the public shall not be injured. And it is in view of this, that our patent laws generally provide that the limited time during which an exclusive right may be enjoyed by the inventor, shall commence with the first revelation of his discovery to the patent office. Even in the act of 1862, which the defendants assail, all persons who had secured rights in the invention by appropriation, before the authorized extension of the patent, were protected. I am not aware that it has ever been seriously thought congress has not power, after a patent has expired, to provide for its extension. In Blanchard v. Sprague [Case No. 1,518], Judge

Story said, in effect, that there is no restriction upon the power of congress to extend a patent, to cases only where the invention had not been known or used by the public; and that an act of congress granting a patent is not unconstitutional because it acts retrospectively to give a patent for an invention which is in public use; that all that is required is, that the patentee should have been the inventor. And in Evans v. Eaton [Id. 4,559], it was asserted that the grant of an exclusive right to an invention for a limited time does not imply a binding contract that at the expiration of the period the invention shall become public property. And still more: it has been decided directly, that congress has power to confer a new and extended term upon the patentee, even after the expiration of the first. Blanchard Gunstock Turning Co. v. Warner [Id. 1,521]; Blanchard v. Haynes [Id. 1,512]. And such is my opinion.

Next it is urged that even under the act of 1862, the commissioner was not authorized to grant the extended patent of that year, because the failure to obtain an extension before the expiration of the time for which the original patent was granted, precluded the patentee from obtaining a valid renewal. This would have been so, doubtless, but for the act of congress I have just been considering. But that act is to be considered as engrafted on the general laws, and they must be construed together. If, however, it be meant by this objection, that the lapse of twenty-two years between the expiration of the patent of 1826, and the application for its extension, established that the invention had been abandoned to the public, the answer is: (1) That congress was not of that opinion, or the act of 1862 would not have been passed. And (2) that the question has been passed upon by the commissioner of patents, and it has been decided that there was no abandonment. The action of the commissioner in granting an extension is conclusive evidence of all the facts he is required to find. Clum v. Brewer [Id. 2,909]. Why it was that the first patent to Goulding was not extended before December 15, 1840; and why, therefore, there was an interval of more than twenty years after its expiration, and before the act of 1862 was passed, and before the extension, I am not informed by any thing that appears in this case, though it was shown in a former suit on the extended patent. I must infer there were sufficient reasons for it, without concluding that the patentee had given up his invention to the public. There could hardly have been an abandonment without an intention to abandon, and whether such an intention existed was a proper subject for the commissioner's inquiry. I should not be justified in reversing the conclusion to which he came.

The next objection urged against the complainant's claim is, that the extended letters patent were granted for a period of seven years from August 30, 1862, the date when the letters were issued, instead of for the residue of a period commencing with the first issue of the patent of 1826. In other words, it is said the commencement of the period was wrong. To this it may be answered, that the act of congress expressly authorized the renewal and extension for the term of seven years from the time of such renewal and extension, and not for the residue of the period to be computed from the date of the original patent. The extension was, therefore, precisely in accordance with the provisions of the law. Reading the special act and the general acts together, the commissioner was authorized to issue letters patent for the invention for fourteen years from December 15, 1826, and for seven years from August 30, 1862, the latter term being an extension of the former.

The objection that the complainant's patent is void because the alleged improvement is only a mode of operation, and therefore not patentable, is not correct in fact. I understand the patent to be for a combination of mechanical devices, by which new and useful results are obtained.

Another defense earnestly urged during the argument, rests upon an allegation of want of novelty in the Goulding invention. The defendants insist that the invention as claimed in the third and fourth claims of the patent (the claims which it is alleged have been infringed) was known before 1826, and was described in "The Operative Mechanic," published in Philadelphia in 1826, the publication purporting to have been from a second London edition.

It is by no means certain that this defense, if it be one, is open to the defendants. It is not distinctly asserted in their answer to the bill. Indeed, the novelty of the invention is not denied in any way (except, perhaps, parenthetically). Much less is there any assertion that the invention had been described in any printed publication in this or any foreign country, prior to Goulding's application for a patent. The nearest approach to an assertion of such a defense, which I can find in the answer, is the following clause, viz.: "And these defendants, further answering say, that they are informed, believe, and so charge, that if said reissued letters patent, so dated the 29th day of July, A. D. 1836, were surrendered by the said complainant, and instead thereof there was obtained by him certain reissued letters patent for the same invention, as is alleged and described in said complainant's said bill of complaint, that such surrender was not made because of the said first reissued letters patent being inoperative and invalid by reason of a defective specification, the error having arisen by accident and mistake, without any fraudulent or deceptive intention on the part of the said John Goulding, but that the same were fully operative and valid for all the in-

tents and purposes that the said John Goulding pretended or designed that they should be, without any defective specification, and without any accident or mistake; that the said surrender, if made, was so made, and the said reissued letters patent obtained by the said complainant with the fraudulent and deceptive intention of comprising and embracing in the said reissued letters patent certain important changes and alterations in said first reissued letters patent, which changes and alterations had become known and used by the public, and which were extensively used as public property, and did not belong or have any part in the invention of John Goulding, and he was not the original inventor thereof, by reason thereof and because of which said fraudulent and deceptive intention the said reissued letters patent were null and void." It is evident that the purpose of this clause was primarily, if not solely, to charge fraud in procuring the reissue of 1836. And this is all that it really means. It does not set forth that there was no novelty in the invention, and I doubt whether it ought to be considered as presenting such a charge, even by any fair implication. If not, the defendants have no right to set up that defense now. A patentee who complains of an infringement, has a right, when his patent is to be assailed for want of novelty in the invention, to be informed distinctly by the answer to his bill, if he proceeds in equity, that such a ground of defense will be taken. I might, therefore, dismiss this defense with the single remark that the defendants can not now be permitted to assert it.

But if it be admitted that the defendants are in a condition to allege want of novelty in the invention against the complainant's patent, they must begin with very strong presumptions against them. Not only is there a presumption in favor of the validity of the patent arising from its issue, its reissue, its extension, and the reissue of the extended letters, but suits have been brought upon it at law and in equity, and the patent has been sustained. The evidence shows that in the district of Massachusetts, in the first circuit, an action at law was brought by the owner of the patent in 1863, against Bickford & Lombard, for an alleged infringement, and that a verdict and judgment for a large sum of money were recovered against those defendants. [Case unreported.] It is also proved that in 1864, the complainant filed his bill in equity, in the same circuit, against the Agawam Woollen Co. [Case No. 7,516], complaining of an infringement of his patent, and praying for an injunction and account. To this bill an answer was put in, denying that Goulding was the first inventor, and asserting the invalidity of the reissued patent. Proofs were taken, the case was subsequently heard on the evidence, and the circuit court entered a decree according to the prayer of the bill, sustaining the patent. On appeal to the supreme court the decree was, after argument, affirmed on its merits. Agawam Woollen Co. v. Jordan [7 Wall. (74 U. S.) 583]. It is alleged in the defendants' answer to the present bill, and it was insisted at the argument, that these suits were collusive; that the first was not contested, and that the second was an amicable one, gotten up for the special purpose of procuring a decision when the real defense would not be shown. There is not a tittle of evidence in the case to sustain these allegations. And it is manifest in regard to the second suit, at least, that it was a seriously contested case. The cases must, therefore, have full effect in strengthening the presumption that Goulding was the first inventor of the improvements described in the patent, the extension and the reissues, and that the patent is not void for want of novelty of invention. Such a presumption is further confirmed by evidence that various persons took licenses from the owner of the patent. In view of all this, it would not, in my opinion, be enough to sustain the defense, if the defendants had succeeded in raising doubts respecting the novelty of the invention. I agree, the cases decided in the first circuit, and at Washington, are not conclusive upon them, but, as was said by Shipman, J., in Tompkins v. Gage [Case No. 14,088], they must show by satisfactory and preponderating evidence, that they antedate the invention set forth in the patent. In this I think they have failed. The witness relied upon by them is Barton H. Jenks, a most respectable manufacturer of machinery, and who had manufactured and sold the machinery patented to the complainant, under a license from him granted April 12, 1864. Before referring to his testimony, I may remark that the question is respecting the novelty of the improvements mentioned in the third and fourth claims of the reissued patent of 1864. It is those which the complainant asserts the defendants have infringed. In Mr. Jenks' testimony he has expressed his opinion that there is nothing new in the third claim, that is, in the claim itself. Whether he means by this that there is nothing new in the claim, regarded separately from the specification to which it refers, he does not state. Probably he does. He is also of the opinion that if there is any thing new in the fourth claim, it is the combination of bobbins, lying parallel with spindles for twisting, and with jaws, or their equivalents, for retaining the roving. The opinions of experts are evidence as to matters of science within their peculiar departments of knowledge, but the value of such opinions must be tested by the reasons on which they are built. Mr. Jenks does not appear ever to have seen any machine or combination older than Goulding's patent, substantially the same in principle as those described in the third and fourth claims of the reissued patent of 1864. His opinions rest upon a comparison of those claims with

plates of machines, or combinations of mechanism found in "The Operative Mechanic," published in Philadelphia in 1826 (whether before or after the Goulding patent does not appear), and on a resume and plate of Arkwright's patent of 1776, found in the American Journal, Vol. I, published in Washington in 1828. Comparing the reissue of the extended Goulding patent with these, he thinks there is no difference in principle, though there is in mechanical construction. And yet when asked, what is there new in the combinations of the reissued patent, he answers that he finds none, "other than the peculiar combination with the carding machine," previously mentioned by him.

After reviewing carefully the testimony of this witness, I am inclined to think when he gave his opinion that there is nothing new in the combinations claimed in the reissued patent, he meant only that the machines, devices, or elements, out of which the combinations are formed, are all old. But if this was not his meaning, and if the largest latitude be allowed to his opinion, there is still a decided preponderance of evidence that the combinations described in the patent were new when the patent was first granted. Henry B. Renwick has been produced as a witness for the complainant, an expert of extensive knowledge. His opinions are before me. They are that, to the extent of his knowledge, the combinations mentioned in the third and fourth claims of the complainant's patent were new, at the time when the original patent was granted, his knowledge extending to all patents, English and French, before that date, and to descriptions from such books as he could find published prior to that time. More than this, he has compared the combinations with the plates and descriptions in "The Operative Mechanic" and Law Journal, referred to by Mr. Jenks, and has pointed out what appear to me very substantial differences. He has testified that one of the machines which Mr. Jenks thinks the same in principle as one of the combinations claimed by the complainant, has no feed apron, and no condensing apparatus of any kind, that it does not form a roving, that the bobbins are not revolved by means of a drum (in all these particulars unlike Goulding's combination), and that the machine is merely a bobbin and flyer machine for spinning flax. He is equally positive that the other machine referred to by Mr. Jenks is entirely different in principle from the combinations claimed as the fourth in the reissued patent, and he gives as reasons for his opinion that it is not a twisting machine, it has no reel or bobbin from which roving is taken, it has no row of spindles to which the bobbin is parallel, no traveling carriage, and no jaws, or their equivalents for retaining rovings—that, in fact, it is a machine for winding silk into skeins. Without pursuing this examination further, it is manifest that if Mr. Renwick is to be believed (and no attempt has been made to show that he has stated the facts incorrectly), the improvements claimed in the complainant's patent, differ entirely from the machines or devices with which Mr. Jenks compared them, alike in principle, in mode of operation, in mechanical construction, and in the results produced. The defense of want of novelty of invention consequently fails.

The only other defense set up by the defendants that requires notice, is that the complainant has acquiesced in invasions of his rights, until it would be inequitable now to assert them. Of this I discover no evidence. What is relied upon is a license granted by the patentees to Alfred Jenks & Son, given April 12, 1864, to make and sell at Bridesport, or Philadelphia, Pennsylvania, the machinery patented upon the terms in the license specified. The terms were that the licensees should purchase a license for the use of the machinery manufactured and sold by them before delivery; that they should furnish monthly to Jordan (then the assignee of the patent), a statement of all persons to whom they had sold and delivered such machinery, and that they should stamp on such machinery, so delivered, before its delivery, the words "Patented by John Goulding, December 15, 1826. Reissued July 29, 1836. Extended August 30, 1862," or some equivalent marks. How such a license as this can be regarded as acquiescence in any invasion of the complainant's rights, is more than I can comprehend. It is rather a distinct and positive assertion of them, a plain indication of an intent to hold responsible any and all persons who might purchase the machinery from the licensee and use it. There is evidence that the machines were sold to some parties without exacting any royalty for the patentee, but there is nothing to show that the patentee ever acquiesced in the use by the purchasers.

Upon the whole, I am of opinion that every defense set up has failed, and that there is nothing which could justify my withholding a decree in favor of the complainant. But as the extended patent has now expired, there can only be a decree for an account. Let a decree be prepared accordingly.

[For other cases involving this patent, see note to Jordan v. Wallace, Case No. 7,523.]

## Case No. 7,520.

JORDAN v. EATON et al.

[2 Hask. 236.] [1]

District Court, D. Maine. March, 1878.

PAROL CONTRACT—CONTRADICTORY STATEMENTS—WEIGHT OF EVIDENCE—SHIPPING—DAMAGES.

1. To determine the truth from contradictory statements, the court will consider which statement is the more probable, aided by such corroborative evidence as there may be.

[1] [Reported by Thomas Hawes Haskell, Esq., and here reprinted by permission.]

2. The damages, for breach of a charter by the shipper, is the difference between the price stipulated and the freight that could be obtained for the same voyage by reasonable diligence.

In admiralty. Libel in personam [by Fritz H. Jordan] in behalf of the owners of a vessel against the shippers [Eaton and O'Brion] for breach of charter in not furnishing cargo as stipulated. The answer denied the terms of the charter to be as averred in the libel, and denied any breach of charter as agreed to by the respondents.

Geo. E. Bird and William W. Thomas, for libellant.

Hanno W. Gage and Sewall C. Strout, for respondents.

FOX, District Judge. This libel is to recover for breach of a parole contract by defendants for the charter of the schooner Bowdoin to transport a cargo of coal from New York to Portland. The libel alleges that defendants entered into such a contract absolutely and without qualification.

The answer admits that they did charter the vessel at the time alleged, but avers that it was on the express stipulation and condition that the schooner was then at New York, ready to receive her cargo; that, in fact, she was not at that port, and did not arrive there for a week, and that they were compelled to procure another vessel for this purpose.

Nickerson, the ship broker, says that some short time previous to November 19, 1877, one of the defendants, who are coal dealers in this place, informed him they were then in immediate need of a vessel to bring a cargo of coal from New York, but he had none for them at that time; that shortly after, he was notified by Jordan, the libellant, that the Bowdoin had sailed, or would be ready to sail from Baltimore for New York, November fifteenth, and that he would like to get a charter for her from New York to Portland, and, at the time, Jordan exhibited to Nickerson the letter of the master of the Bowdoin, stating that he expected to sail on the fifteenth from Baltimore. Nickerson testifies that he thereupon, November nineteenth, called on defendants, saw Eaton and expressly stated to him that he had been informed by Jordan that the schooner had or would be ready to sail from Baltimore for New York, November fifteenth, and he had no doubt she had arrived; that although they had no news of her arrival, that Eaton offered $1.30 per ton and discharge, which Jordan declined, but would accept $1.35 and discharge, which offer, on being communicated to Eaton, was accepted, and a written order was given by defendants, on Pardee & Co. of New York, to load the Bowdoin on their account with all dispatch. Nickerson states positively that at no time did he say to Eaton that the schooner was in New York; but that as she had been out long enough to have made the trip, he did, after stating when she was expected to have sailed from Baltimore, say that he supposed she had arrived at New York, as that was his real belief.

Eaton, who has withdrawn from the firm and has no real interest in the controversy, although nominally a party, testifies in his deposition that, when Nickerson came to their office, "he inquired if we wanted a vessel from New York; told him we did; wanted one there at once to load coal; that we had a cargo of coal there we were anxious to ship to Portland immediately. Nickerson said: 'The schooner Bowdoin is now in New York and her owners want to get her down here; what freight will you pay?' Made him an offer which he did not accept. That night or next morning, he said 'owners would not accept our offer'; they stated their price, which he brought to us and we agreed to give it, as we were anxious to secure a vessel. He at once telegraphed to Pardee & Co. O'Brion went to New York and sent me dispatch that Bowdoin had not arrived, and I cancelled the charter. Notified Nickerson." On cross examination he says: "Until after we had chartered the schooner, I never heard anything about the Bowdoin having sailed from Baltimore. When we chartered her, Nickerson said she was then in New York. After I had cancelled the charter, Nickerson for the first time stated that the Bowdoin was on her way from Baltimore."

O'Brion's testimony is, that on the twentieth of November, "I went into Nickerson's office and asked him if the vessel was ready to load. Nickerson replied, as far as he knew or supposed, she was there. I told him I wanted to send a dispatch to load her immediately; he gave me a blank and I filled it up in his office."

The Bowdoin actually sailed from Baltimore November fifteenth; but by stress of weather was detained at Hampton Roads until November twenty-fifth, and arrived at New York November twenty-seventh.

There is a direct conflict between Nickerson and Eaton in their testimony, as to whether Nickerson at the time stated positively that the Bowdoin was then in New York, or only, that she had sailed, or expected to sail the fifteenth from Baltimore, with the addition thereto, that he supposed she was in New York, merely as an expression of his opinion and judgment, and not as a positive assertion of the fact of her arrival, as she had more than the usual time for the trip.

So far as the court is advised, or has any reason to form an opinion in respect to these two witnesses, both of them are respectable men, alike entitled to the confidence and regard of the court, and nothing is disclosed which leads the court for an instant to entertain the belief that either of them has designedly misrepresented the facts as they

understood and now think they remember them to have occurred.

It is quite clear that one of them is mistaken in his testimony as to this contract; and it is to be regretted that but little testimony is produced directly corroborative of the statement of either of them. The court is therefore obliged, with some doubt as to the correctness of its conclusion, to determine the cause to a great degree upon the reasonable probabilities of which statement is most likely to be correct.

Nickerson had no authority from the libellant, or from any facts within his own knowledge, to assert that the schooner was then in New York, as he admits he had not heard of her arrival. The owner had communicated to him the master's letter, giving him all the information he had from the master as to her sailing, and it cannot well be believed, that without any apparent motive, so far as is disclosed, that Nickerson would voluntarily assume and assert the fact of her being in New York as an element of the contract, not only without any right or authority from his principals so to do, but in the face of the information which they had given to him, and upon which they had authorized him to charter her. It is true, the broker did express his opinion that the schooner had arrived; and he gives his reason therefor; but this he had a perfect right to do, if honestly entertained by him, which is not questioned; and in such a contract, an honest error of judgment is without effect.

Nickerson testifies, without qualification, that he never informed Eaton that the schooner was in New York; that he merely gave it as his opinion that she was there; and so positive a statement can not well be made by this witness, if untrue, without a direct violation of his oath, as it must be within his actual knowledge, whether such a positive assertion of the fact was or not made by him at the time of the contract, or whether it was an expression of his opinion simply. It is difficult, therefore, to exonerate Nickerson, if his statement as to this point is untrue, from a wilful falsehood in his testimony; and such a charge, under all the circumstances, the court does not feel authorized to inflict on this witness.

Eaton's position is somewhat different from Nickerson's. A party generally knows and comprehends his own statements; but it is quite often the case, that a witness, when called upon to repeat what has been said in his presence, is quite incorrect in his testimony in relation thereto; this may be owing to a mere misapprehension of the statement, or to the witness mingling what had been the subject of a prior conversation with the subsequent one, or to the impossibility of recollecting the precise words used by the party.

In the present instance, all other things being equal, I think Nickerson would be the most likely to remember correctly the exact statements he made; and when we consider that, just before the contract was made, Eaton had applied to Nickerson to procure a vessel then in New York, and that, in a day or two after, Nickerson called upon him and offered to him the Bowdoin, without particular attention to the exact language used by Nickerson, Eaton might conclude that the Bowdoin was all ready at that port to receive her cargo; especially as Nickerson admits that he expressed to Eaton the opinion that she was there. Contracts of this nature are frequently made off hand, with but few words; and from Nickerson's calling upon him and offering to him the Bowdoin, Eaton might, and I have no doubt did, understand that this vessel would answer his purpose and afford him prompt dispatch, and that she was such a vessel as he had applied to Nickerson for, although Nickerson may at no time have actually represented the vessel as being in New York. The circumstances may have reasonably led him to draw such a conclusion, although particular attraction to the language of Nickerson would have disclosed that, after all, it was a mere matter of opinion on Nickerson's part that the vessel was then in that port.

The testimony of O'Brion affords some corroboration to this view, as he states that the next day after the contract, when in Nickerson's office and he asked him if the vessel was ready to load, Nickerson replied, as far as he knew or supposed, she was there. If the day previous, his statement had been a positive, direct assertion of the schooner's arrival and readiness, we should hardly expect that he could at this time have modified and qualified his statement, leaving it clearly to be merely a matter of judgment and opinion as to her being there. Both statements would, in all probability, as to their effect, correspond; and it being apparent that the latter is in accordance with the testimony of the witness as to what he said at the time of the contract, the court can not but feel that some corroboration is thus given to the testimony of Nickerson, which affords some aid in the solution of the discrepancy in the statements of witnesses.

The result is, that the libellant is entitled to recover his damages for breach of the charter by defendants, which is the difference between the price stipulated therefor and the freight which they were able to obtain by proper diligence together with the brokerage, in all amounting to $82.42. Decree for libellant.

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JORDAN (EVANS v.). See Case No. 4,564.
JORDAN v. GATES. See Case No. 7,528.
JORDAN v. HODSON. See Case No. 7,523.
JORDAN (HUTSON v.). See Case No. 6,959.
JORDAN v. LEWIS. See Case No. 7,523.

JORDAN (LIVINGSTON v.). See Case No. 8,415.

## Case No. 7,521.

### JORDAN v. SAWYER.

[2 Cranch, C. C. 373.] [1]

Circuit Court, District of Columbia. April Term, 1823.

DEMURRER TO EVIDENCE — SLAVERY — RIGHT OF SLAVE TO FREEDOM—STATUTE AGAINST IMPORTING SLAVES.

1. To obtain freedom under the Maryland act of 1796 (chapter 67), the slave must have been imported "for sale," or "to reside."

[Cited in Johnson v. Mason, Case No. 7,396.]

2. The court will not compel a party to join in a demurrer to the evidence, unless the other party will admit all such facts as might be fairly inferred from the evidence.

3. A slave imported into the county of Washington for sale, and sold within three years after such importation, is entitled to freedom, although the object and intention of both purchaser and seller were that the slave so purchased should be carried, forthwith, out of the District of Columbia, by the purchaser.

[Cited in Battles v. Miller, Case No. 1,110; Maria v. White, Id. 9,076.]

4. Quaere, whether the actual sale of the slave, within three years after the importation, is conclusive evidence that the importation was "for sale."

5. The act of Maryland of 1796 (chapter 67), concerning the importation of slaves, is in force in the county of Washington, although in terms it is applicable only to the state of Maryland.

This was a petition for freedom [by the negro William Jordan].

Mr. Hay, for defendant, offered to demur to the plaintiff's evidence.

Cox & Key, for plaintiff, refused to join in the demurrer, unless the defendant [Lemuel Sawyer] would admit that the petitioner was imported by one Peyton "for sale;" and contended that upon a demurrer to evidence the party demurring must admit all the facts which the evidence conduces to prove; and cited Tidd, Prac. 854; Phil. Ev. 216; and the case of Patty v. Edelin [Case No. 10,840], in this court at January term, 1802.

THE COURT (THRUSTON, Circuit Judge, absent) said that when a demurrer to evidence is joined, the court is to draw all the inferences of fact which a jury could reasonably draw; and that a party cannot be compelled to join in the demurrer, unless the party demurring will admit all the facts which the jury could reasonably infer from the evidence.

THE COURT was of opinion that the jury, from the evidence, might infer that the petitioner was imported "for sale," and refused to compel him to join in the demurrer unless the defendant would admit that fact.

Mr. Hay, for defendant, took a bill of exceptions to the court's refusal to compel the petitioner to join in demurrer. Mr. Hay, then contended that this county was not a part of the state of Maryland in 1796, when the act was passed, so that it was never in force here, and therefore could not continue in force here under the act of congress of the 27th of February, 1801 (1 Stat. 103). This part of the District was ceded by Maryland to the United States, on the 19th of December, 1791, and ceased to be a part of that state.

THE COURT (THRUSTON, Circuit Judge, absent) stopped Mr. Hay, and told him that the question had been long settled, both by this court and the courts of Maryland, that the jurisdiction of Maryland continued until congress provided by law for the government of the District, which did not take place till the 27th of February, 1801, and that the Maryland act of 1796 (chapter 67), was adopted with the other laws of Maryland, by the act of congress of 27th February, 1801 (1 Stat. 103). That this court would not now undertake to overrule all the decisions which have been had upon those points, and declined hearing any further argument thereon.

Mr. Key, for petitioner, then moved the court to instruct the jury, that if they believe from the evidence, that Valentine Peyton brought the petitioner from Wheeling, in Virginia, into this county, in the beginning of the last winter, and that in March last, some time after such importation, the said Peyton determined and intended to sell the petitioner in this county, and did actually sell him therein to the defendant, then the petitioner is entitled to recover, unless the defendant can prove that the said Peyton came into this county with a bona fide intention of settling therein, and had resided there three years before such sale, or that he came within the provisions contained in the 2d, 4th, 7th, 8th, 9th, or 11th sections of the act of 1796.

But THE COURT refused to give the instruction, being of opinion that in order to give a right of freedom to a slave on the ground of importation, he must have been brought in "for sale or to reside."

Mr. Key, for petitioner, then prayed the court to instruct the jury that if they should be satisfied by the evidence, that Peyton brought the petitioner here from Virginia in March last, and sold him here, he is entitled to freedom.

Mr. Key cited the case of Dunbar v. Ball [Case No. 4,128], in this court, at October term, 1821, in which he contended this point was directly decided by the court. He cited also the case of Lanna v. Pumphry [unreported], decided at the last term in this court (CRANCH, Chief Judge, absent).

Mr. Hay submitted the question without argument.

THE COURT (THRUSTON, Circuit Judge, absent) said that the Maryland act was very obscure. The first is the only section which gives freedom to the slave, and it gives it only when the slave is imported "for sale or

[1] [Reported by Hon. William Cranch, Chief Judge.]

to reside within the state." The 2d section provides, that citizens of the United States, who may come into the state with a bona fide intention of settling therein, may, at the time of their removal, or within one year thereafter, bring in the slaves owned by them at the time of their removal. But the 3d section provides, that nothing therein contained shall be construed to enable them to sell such slaves, unless they shall have resided in the state three whole years next preceding such sale. The 4th section provides that nothing in the act shall be construed to affect the right of persons travelling or sojourning with any slave; such slave not being sold, or otherwise disposed of, in the state, but carried, by the owner, out of the state, or attempted to be carried. The 4th section does not give any penalty for selling; and such sale is not within the first section, unless the traveller brought the slave "for sale or to reside." Yet it seems to be the intention of the legislature to prohibit such sale. If such was their intent, we must construe the 4th section to mean that such a sale must be considered as conclusive evidence that the slave was imported for sale; and such we are inclined to think must be the construction, if, to bring a person under the penalty of the 1st section, it be necessary that the importer should bring him in "for sale."

The jury found a special verdict, stating the following facts:—That the petitioner, early in January, 1823, was brought into this county, from Wheeling, in Virginia, by Valentine Peyton, who never has been a resident of this county or district, and who sold the petitioner to the defendant in this county some time in March, 1823. That it was agreed between the seller and the purchaser, (the defendant,) that the petitioner should be sent by the defendant, forthwith, to Norfolk in Virginia, which was done; and that when he was put on board the steamboat for Norfolk, the purchase-money was paid by the defendant. That the petitioner returned in the steamboat, and filed his petition. That Peyton was not a person coming into this county to reside therein; but as a sojourner or traveller, and that he did not carry the petitioner with him when he went away, without selling him, or attempting to carry him away without selling him. And that there is no evidence from which the jury can find that the said Peyton brought the petitioner into this county under any of the circumstances set forth in the provisos contained in the 7th, 8th, 9th, 10th, and 11th sections of the act of 1796 (chapter 67).

THE COURT (MORSELL, Circuit Judge, contra) was of opinion, that upon this special verdict, the law was for the defendant, because the jury had not found that the petitioner was brought in "for sale or to reside."

But at the request of Mr. Key, in the absence of Mr. Hay, THE COURT suspended the judgment until the next term, when the case was settled by the parties.

JORDAN v. SCHOFIELD. See Case No. 7,523.

JORDAN v. SCHOLES. See Case No. 7,523.

JORDAN (SMITH v.). See Case No. 13,068.

JORDAN (TEASDALE v.). See Case No. 13,814.

## Case No. 7,522.

JORDAN et al. v. UNION MUT. FIRE INS. CO.

[Brunner, Col. Cas. 608; [1] 21 Law Rep. 83.]

Circuit Court, D. New Hampshire. May Term, 1857.

MUTUAL INSURANCE COMPANIES — LIABILITY OF MEMBERS—DIRECTORS OF MUTUAL INSURANCE COMPANY, PERSONAL LIABILITY OF.

1. Where a claim against a mutual insurance company is presented, if the validity of the claim is denied and litigated, the necessity of an assessment is not superseded, but merely suspended, and if policies expire which were running when the loss occurred, the directors have no right to surrender the deposit notes thereof, without providing for the contingency of the validity of the litigated claims.

2. If a judgment is eventually recovered, the omission by the directors to make, if necessary, a special assessment for the payment thereof will render them personally liable for such an amount towards the judgment as an assessment, seasonably made and enforced with due diligence, would have produced.

[This was a suit in equity by Lindsey Jordan and others against the Union Mutual Fire Insurance Company.]

CURTIS, Circuit Justice. The directors of this corporation were trustees, primarily for the corporation, but also for the individual members; and if they have illegally neglected and refused to exercise their powers, and such neglect and refusal has inflicted a special injury on an individual member, he may have the appropriate relief in a court of equity. Dodge v. Woolsey, 18 How. [59 U. S.] 331. Under the charter of this corporation, it was the duty of the directors to assess upon the signers of the deposit notes of the fourth class, whose policies were in existence when the plaintiffs' loss happened, and was duly notified to the company, a sum sufficient to pay that loss. This duty was not finally superseded by the refusal of the directors to admit the validity of the plaintiffs' claim. In the fair exercise of a sound discretion, the directors might rightfully omit to make an assessment to pay a loss which they thought not justly payable, until it should be decided either by arbitrators or a court of law, whether the claim was valid. But such refusal merely suspends the assessment until the necessity for it is conclusively ascertained. The directors cannot, by refusing to pay a loss, acquire the power to destroy or diminish the fund out of which the claimant is to be paid, provided his claim prove valid. And if policies expire which

[1] [Reported by Albert Brunner, Esq., and here reprinted by permission.]

were running when the loss occurred and was duly notified to the company, the directors are bound to consider the claim for a loss, though litigated, as a contingent charge on the deposits made under such expired policies, and have no right to surrender the deposit notes without providing for such contingency. The defendants admit that they have not exercised their power to make an assessment to pay the loss due to the complainants, and they assign the following reasons for the omission: "And these defendants further answering say, that upon the rendition of said final judgment against said company, the directors of said company, for the time being, did not make an assessment upon the deposit notes liable to be assessed for the payment of the amount of said judgment, because there was then due to said company and assessed upon premium notes liable to be assessed for the payment of said loss of said complainants, a sum much greater than was necessary for the payment and discharge of said judgment; and the said directors hoped and believed that from the balance thus due, and assessed upon said notes at the time of the rendition of said judgment, a sum might be collected sufficient to pay and satisfy said judgment. And these defendants, Treadwell, Chandler, Fowler and Lang say, and these defendants, Gass, Carter and Stevens say, that they are informed and believe it to be true that the directors of said company have made all reasonable endeavors by suit and otherwise, to collect the same, but their efforts in this respect have been almost entirely unsuccessful. And although the said directors still retain in the hands of the treasurer of said company, a large amount of deposit notes liable to be assessed for the payment of said judgment, to wit, notes amounting in all to the sum of forty-two thousand three hundred and forty-eight dollars and forty-two cents, included in which amount is the premium note of these complainants for the sum of one hundred and seventy-six dollars, they have hitherto neglected to order an assessment thereon, for the payment of said judgment, because the said directors had good reason to believe that it would be utterly impracticable to enforce the collection of said assessments, in consequence of the makers of said notes having so long ceased to be members of said company by being insured therein, and being so scattered abroad throughout all the New England states, and for the further reasons that very many of said makers were insolvent, had deceased, or had gone to parts unknown. Under these circumstances, these defendants say that they did not believe any further assessment practicable, the said directors not conceiving themselves justified in making, or required as directors to make an assessment which they did not believe could be made available. But the said defendants, directors, say, and the said Lang saith, that he is informed and believes that the said directors upon notice of the rendition of said final judgment against said company, informed the said complainants that a special assessment upon the notes liable to pay said judgment, might be made if said complainants desired it, and the treasurer of said company directed to pay over to said complainants such sums as he might collect of the same; but said complainants did not signify their desire that such course should be pursued by said directors."

I am of opinion that upon the proofs in this case, neither of these grounds of defence is made out. If, when the plaintiffs' judgment was recovered, an assessment adequate in amount to pay it, and which the directors believed would be available to pay it, had already been laid, they were not obliged to do more until they found such assessment would not be available for that purpose. When they did discover its inadequacy, they were bound to make a special assessment in behalf of the plaintiff. When this discovery was made, is not stated. They say their efforts "have been almost entirely unsuccessful." If they have collected any amount, why was it not appropriated towards satisfying the plaintiffs' judgment? But further; these grounds now assumed in the answer are not consistent with the letter written by the president to Mr. Cozzens, in answer to his notice of the recovery of the judgment. That letter was as follows: "Office Union M. Fire Ins. Co., Concord, N. H., Oct. 11, 1855. Benj. Cozzens, Esq.,—Sir: In reply to yours of yesterday, addressed to Mr. Lang, I will say that for the loss of Lindsey Jordan & Co., the directors of this company, believing they had no legal or just claim against it, have never ordered an assessment for that loss. The fire, for which they claim damages, occurred Jan'y 8th, 1851. All insurances in the class in which Jordan & Co. were insured run for three years; and all the policies then existing, and liable for this loss, expired in Jan'y 16, 1854. Most of the premium notes on these policies liable to be assessed, have been settled and given up to the signers—a very few of the unsettled ones remain with the company, among which is that of Jordan & Co., for $176. These are the only notes that could now be assessed to pay this loss. How much might be realized from an assessment on them, I am unable to say; but little or much, they are the only means of the company responsible for this claim. I have thus frankly stated to you the means of the company, applicable to this loss. Yours, &c., Ths. P. Treadwell." Surely, if an assessment had then been laid, which the directors expected would afford the means to pay the judgment, that was the proper time to say so. Instead of that, the president says, in effect, there are no considerable means of payment applicable to that demand. Nor do I think it is true that the sum of $42,348.42, which the answer ad-

mits was liable to assessment, was wholly unavailable for the plaintiffs' benefit, or ought to have been so treated by the directors. Precisely how much was thus available, is the proper subject of inquiry by a master. But the proofs satisfy me that enough of this fund was available, and ought to have been known to the directors to be so, to make it their clear duty to make an assessment in behalf of the plaintiffs. Nor does it appear that they waived their right to an assessment. If they had done so, it would have been difficult to have allowed the defendants the benefit of such waiver, because the president's letter of the 11th October, already quoted, did not contain a fair statement of the condition and amount of the means of the company applicable to the payment of the plaintiffs' judgment. It represents a state of things materially different from that disclosed in the answer; and still more unlike that shown by the proofs. I think the omission of the defendants to make an assessment for the payment of the plaintiffs' judgment, was the neglect of a plain duty, which has rendered them personally liable for such an amount of money towards the payment of that judgment, as an assessment, seasonably made, and enforced with due diligence, would have procured.

Let a decree be drawn up referring the cause to a master, to inquire and report what sum, applicable to the payment of the plaintiffs' loss, might, and with the use of due diligence would, thus have been raised. And in taking this account, the master is to include notes applicable to the payment of the plaintiffs' loss at the time when it occurred and was duly notified to the company, though such notes have been surrendered by the defendants, unless such surrender was made in the fair exercise of discretion, with a view to obtain all that could by due diligence be obtained from such notes.

JORDAN (UNITED STATES v.). See Case No. 15,498.

## Case No. 7,523.

JORDAN v. WALLACE et al.

[5 Fish. Pat. Cas. 185;[1] 8 Phila. 165; 28 Leg. Int. 373; 1 Leg. Gaz. Rep. 354; 3 Leg. Gaz. 371; 19 Pittsb. Leg. J. 82.]

Circuit Court, E. D. Pennsylvania. Nov. 11, 1871.

PATENTS—INFRINGEMENT—PLEADING IN EQUITY—SUFFICIENCY OF ANSWER—IMPLIED ADMISSIONS.

1. Infringement being alleged in the bill, the defendants should answer it distinctly and unevasively.

2. An answer which only denies that the defendants used the patented invention, "with a full knowledge of the premises mentioned in said bill of complaint, and in violation of the complainant's exclusive right secured by the patent of 1864," is an implied admission of its actual use, and the complainant is not required to make any further proof of infringement.

Final hearing on pleadings and proofs. Suits brought [by Eben Jordan against David Wallace and others] upon letters patent for "improvement in machinery for the manufacture of wool and other fibrous material," granted to John Goulding, December 15, 1826 [reissued July 29, 1836], and, by virtue of a special act of congress [12 Stat. 904], extended for seven years from August 30, 1862. The nature of the invention is more particularly referred to in the report of the case of Jordan v. Dobson [Case No. 7,519].

H. T. Fenton and Furman Sheppard, for complainant.

N. H. Sharpless, R. P. White, and G. H. Earle, for defendants.

McKENNAN, Circuit Judge. The original answers in these cases present the same defenses which are set up in Jordan v. Dobson, 7 Phila. 533; Id. [Case No. 7,519]. That case was exhaustively argued before a full bench of this court, and all the questions involved in it were carefully considered and decided, and an elaborate opinion was delivered by Mr. Justice Strong. The conclusions therein announced are now reaffirmed, and are, therefore, to be taken as decisive of the same questions presented in these cases.

Amendments of the respondents' answers have since been filed, which contain, as their only new feature, an averment of the incapacity of the patentee, by reason of mental unsoundness, to comprehend the specifications attached to the reissues of his patent in 1836 and 1864. As this averment is unsupported by any proof, it is unnecessary to consider it. A decree in favor of the complainant is now opposed, upon the ground that he has not furnished satisfactory proof of infringement by the respondents. Infringement is alleged in the bill, and the respondents are therefore bound to answer it distinctly and unevasively. In their original answers, their response to this allegation is qualified and equivocal. They do not deny the use of the invention described in the patent, but only that it was used "with a full knowledge of the premises mentioned in said bill of complaint, and in violation of the complainant's exclusive rights secured by the patent of 1864." This clearly implies an admission of its actual use. And this implication is strengthened by the express admission in the amended answers that the cards, jacks, and mules stated, in their answers, to be in use by the respondents, were made and constructed, in some respects, substantially in imitation of the improvement claimed by the patentee. Thus, not only failing to deny their alleged use of the complainant's invention, which he has a right to treat as a confession of its use, but, by their mode of answering, im-

[1] [Reported by Samuel S. Fisher, Esq., and here reprinted by permission.]

pliedly admitting it, the complainant is not required to make any further proof of infringement. The complainant is, therefore, entitled to a decree, but as his patent expired August 30, 1869, it can only be for an account, which is accordingly directed in each case.

[For other cases involving this patent, see Jordan v. Dobson, Case No. 7,519; Agawam Co. v. Jordan, 7 Wall. (74 U. S.) 583.]

## Case No. 7,524.

JORDAN et al. v. WARREN INS. CO.

[1 Story, 342;[1] 4 Law Rep. 12.]

Circuit Court, D. Massachusetts. Oct. Term, 1840.

MARINE INSURANCE—UNCOMPLETED VOYAGE—NEW FREIGHT EARNED—PARTIAL LOSS—MASTER'S ACTS.

1. Insurance on freight, on a voyage at and from New Orleans to Havre: The vessel was compelled to put back to New Orleans in consequence of an accident. The cargo, consisting principally of cotton, was so much damaged, that it would require several months to repack it in a condition to be reshipped, and it was sold by consent of the masters and shippers; and the vessel, having taken another cargo on board, proceeded on a different voyage. *Held*, that the underwriters were not liable.

[Cited in Hugg v. Augusta Insurance & Banking Co., 7 How. (48 U. S.) 606.]

2. Underwriters cannot avail themselves of a freight earned in a new voyage, which they have not insured, by way of recompense for losses on another voyage, which they have insured, and which has already terminated. Thus, where freight was insured at and from New Orleans to Havre, and the ship, meeting with an accident, put back, and another voyage to England was substituted, on which freight was earned; It was *held*, that the underwriters were not entitled to the freight of the substituted voyage, as in the nature of a salvage freight.

[Cited in Weston v. Minot, Case No. 17,453; Bradstreet v. Heron, Id. 1,792.]

[Cited in Lord v. Neptune Ins. Co., 10 Gray, 124; Parsons v. Manuf'g Ins. Co., 16 Gray, 468.]

3. Underwriters take no risk with regard to the length, retardation, or interruption of a voyage, if it be subsequently resumed or be capable of being resumed.

[Cited in Murray v. Aetna Ins. Co., Case No. 9,955.]

[Cited in Willard v. Millers' & Manufacturers' Ins. Co., 24 Mo. 567; Able v. Union Ins. Co., 26 Mo. 58; Cox v. Foscue, 37 Ala. 509.]

4. In cases of necessity, or calamity, during the voyage, the master is by law created agent for the benefit of all concerned; and his acts, done under such circumstances, in the exercise of a sound discretion, are binding upon all the parties in interest in the voyage.

[Cited in Soule v. Rodocanachi, Case No. 13,178; Copeland v. Phoenix Ins. Co., Id. 3,210.]

[Cited in Richardson v. Young, 38 Pa. St. 172; Thompson v. Hermann, 47 Wis. 608, 3 N. W. 579; Allen v. Mercantile Mut. Ins. Co., 44 N. Y. 442; Pierce v. Columbia Ins. Co., 14 Allen, 323.]

5. Where a cargo is so much injured, that it will endanger the safety of the ship and cargo, or it will become utterly worthless, it is the duty of the master to land and sell the cargo at the place, where the necessity arises, even although it might have been carried to the port of destination, and there landed.

[Cited in The Ann D. Richardson, Case No. 410; Moore v. Hill, 38 Fed. 334; The Eliza Lines, 61 Fed. 314.]

[Cited in Indianapolis Ins. Co. v. Mason, 11 Ind. 192.]

6. The shipper has no right to demand the cargo at an intermediate port, without paying full freight, whether it be damaged, or not.

[Cited in The Ann D. Richardson, Case No. 410.]

[Cited in Rogers v. West, 9 Ind. 406; Bailey v. Damon, 3 Gray, 94.]

Assumpsit on a policy of insurance. The policy was underwritten on the 30th of May, 1838, by the Warren Insurance Company; and thereby they caused Oliver Jordan, for whom it concerns, to be insured, lost or not lost, seven thousand dollars on the freight of the ship Franklin, at and from New Orleans to Havre, at a premium of 1¼ per cent. The declaration alleged, that the ship sailed on the voyage on the 6th of June, with a cargo on board, and was, during the voyage, driven by the violence of the waves and currents, upon a bank in the river Mississippi, where the vessel remained hard and fast in the mud, and while lying upon the said bank, was violently struck by a steamboat, called the Tyger, by which disasters the vessel was so injured and broken, that the cargo of the vessel was destroyed, and the vessel prevented from performing her voyage, and the freight was totally lost. Plea, the general issue. The facts, as they were agreed by the parties, or proved in the case, were, that the plaintiffs were the owners of the ship. That she took on board a cargo at New Orleans, on freight, for Havre, consisting of cotton, worth about $60,000; tobacco, worth $10,500; and woods and wax, about $500; in the whole, worth about $71,000. The freight bill was about $9,916. While the ship was proceeding down the river Mississippi, on the voyage, on the 7th of June, 1838, being in tow of the steamboat Tyger, towards the bar, the current of the river running with great rapidity, caused the ship to sheer and surge so violently on the tow line, that the steamboat lost her steerageway, and before she could recover her position, the ship took ground, and remained hard and fast. The eddy current then taking the steamboat, she swung round, and driving stern foremost, struck the ship with great violence on the larboard side, and thereby did considerable damage to her. The ship was then found to have considerable water in her hold, increasing from six feet to thirteen feet. The cargo was thereupon taken out to lighten the ship, and save the cargo; and it was carried back in steamboats, &c. to New Orleans. The ship, being lightened by taking out her cargo, was also carried back to New Orleans;

[1] [Reported by William W. Story, Esq.]

and was repaired and fitted again for sea before the 21st of July following. After the cargo arrived at New Orleans it was surveyed by experts; and being found wet and damaged, a large portion of it was, by their advice, sold at public auction. The damaged part of the cargo sold for about $19,774.22. The residue, amounting in value to about $2,210, being in a sound state, was shipped for Havre in another vessel.

It further appeared in the case, that the cotton, if shipped again in the ship, in its wetted and damaged state, would have been very liable to spontaneous ignition; but it could, by a process of drying, sorting, and repacking, be put in a state for reshipment, for commercial purposes; and that there were conveniences for the purpose. But the process was slow, and would occupy a considerable length of time to be perfected, as long, as some of the witnesses thought, as six months. But it did not appear, that the cotton might not have been dried, so as to be safe for transportation, against ignition, in a shorter period. After the Franklin was repaired, she took another cargo on board, for England, the freight of which was worth $10,000, and sailed therewith on the 21st of July, and safely landed that cargo, and earned the freight.

At the trial, one of the principal questions argued to the jury, (the questions of law arising on the case being reserved by consent, for the consideration of the court,) was, whether the master acted according to his duty, in allowing the cargo to be given up, and sold on account of its damaged state. The jury, after finding a verdict for the plaintiff for $7,000, further found; "That it was the absolute duty of the master to the owners of the cargo, not to undertake to carry forward the cargo; but that he acted properly in suffering it to be taken out of the ship, and disposed of."

Daniel Webster and J. P. Healey, for plaintiffs.

Theophilus Parsons and Theo. P. Chandler, for defendants.

The argument for the plaintiffs was, in substance, as follows:

There is no decision of authority here, which would impose upon the owners of the vessel the duty of carrying forward the damaged cargo, under these circumstances. The cases cited for the defendants, from the New York Reports, do not reach this question, even though the doctrines, there laid down, should be admitted. In all those cases the ship-owners endeavoured to excuse themselves for not proceeding on their respective voyages, either because the vessel had been slightly injured, or because the cargo had been so damaged, as to render its reshipment merely inexpedient. In every instance, the performance of the voyage was practicable, and would have been attended with no danger to life or health.

But the principle, which seems to have been adopted in New York, that it is the duty of ship-owners to carry forward every cargo, when its carriage is possible, in order to protect the underwriters on freight, even though they should thereby sacrifice the interests of the shippers to any amount, is unjust. It finds no support in reason, and can never receive the sanction of an enlightened commercial community. There are parties, having interests at stake, which are usually much larger, than those of the underwriters on freight, and which are equally with theirs deserving of protection. It is the duty of ship-owners, in all cases, to act as a prudent man would act, who should be the owner of both vessel and cargo, without insurance on either; that is to say, it should be their object to save the greatest possible amount of property, without stopping to inquire to whose benefit it would enure. Green v. Royal Exch. Assur. Co., 6 Taunt. 68. The case of Mordy v. Jones, 4 Barn. & C. 394, which, so far as it is entitled to weight, goes against the plaintiffs in this action, is happily answered by Mr. Phillips in his Treatise on Insurance (volume 2, p. 190). The case of Whitney v. New York F. Ins. Co., 18 Johns. 208, is precisely in point. All the circumstances in that case are similar to those in the case now before the court; and if the decisions of New York were to govern here, this one would be decisive of the question in issue. The damage or loss of cargo, whereby the ship is prevented from earning freight, is a loss of freight. 1 Phil. Ins. 290; McGaw v. Ocean Ins. Co., 2 Law Rep. 363. But it is unnecessary to cite authorities further on this part of the case. We consider, that the question, as to the duty of the ship-owners to have carried forward the cargo, or to have attempted to carry it forward, was disposed of by the finding of the jury.

(2d.) The authorities cited, for the defendants under this head, are not applicable to this case. A policy on freight does not attach to a cargo, which there is merely an intention to ship, but which is never taken on board. The risk cannot commence, until something is put at hazard. But when a cargo is once received, and the voyage commenced, the policy attaches to that specific cargo, and does not shift to another cargo for the same voyage; much less to another cargo for another and a different voyage. 6 Taunt. 68; Everth v. Smith, 2 Maule & S. 278.

(3d.) There are cases in which underwriters on freight, who have become liable to pay a loss under their policy, may avail themselves of the subsequent earnings of the ship, by way of salvage. But there are some limits to this right. The right remains with the underwriters, only so long as the ship continues under the protection of their policy. They cannot claim the earnings of the ship, when they would disclaim all responsibility for any losses or accidents, that might happen to her. In the present case we contend, that if the ship, when she was ready for sea, had taken another cargo at New Orleans for Havre, it would have been an entirely new undertaking, and an entirely

new voyage, which would not have been protected by this policy. The policy surely did not cover the risks incurred by the voyage, which the ship did perform.

The cases cited for the defendants are not analogous to the present one. If a ship, having received no injury, loses a part of her cargo, and procures other in its stead, and completes her voyage, the freight earned with the new cargo, is taken to be salvage on that, which was lost by the old one. But there is not a case on record, where the earnings of a ship on one voyage are treated as salvage on another and a different voyage. In the case of Green v. Royal Exch. Assur. Co., 6 Taunt. 68, the jury found a verdict for the plaintiffs; and the only ground, upon which the court ordered a new trial, was, that the jury might inquire, whether the master had acted in good faith, as a prudent man would act, under like circumstances, who had no insurance. That question settled in the affirmative, the case would be with the plaintiffs. The broad and equitable principle, that the master should act prudently, without reference to the parties, that are to be affected by his action, is recognized in all the cases. This is a principle so just and reasonable, that all parties should be willing to abide by its operation; and it a principle, which, if admitted, settles this case in favor of the plaintiffs.

On behalf of the defendants it was argued as follows:

It was the duty of the owners to repair the vessel and carry forward the cargo, whether damaged or not. To this position the following authorities were cited. Herbert v. Hallett, 3 Johns. Cas. 93; Griswold v. New York Ins. Co., 1 Johns. 204, 3 Johns. 321; Saltus v. Ocean Ins. Co., 14 Johns. 138; Mordy v. Jones, 4 Barn. & C. 394; McGaw v. Ocean Ins. Co. [40 Mass. 405]. The decisions in New York were made after the most thorough examination and argument by the ablest counsel, and they have never been overruled or questioned. In Saltus v. Ocean Ins. Co., in 12 Johns. 107, it was intimated by Yates, J., that when it is impracticable to reship, the cargo may be sold. But the same judge, in giving the opinion of the court, in Saltus v. Ocean Ins. Co., 14 Johns. 144, says, the remarks in the former case, were not called for, and were unnecessary, and they afforded no ground to infer, that the court meant to decide, that a damaged cargo would at any time authorize an abandonment of the voyage, so as to entitle a recovery on the freight policy, when an opportunity to earn freight had existed. Whitney v. New York F. Ins. Co., 18 Johns. 208, was decided on entirely different grounds. The judge, who gave the opinion of the court, recognized and approved the foregoing cases. He says (page 210): "The rule is now perfectly established, that a policy on freight does not insure the soundness of the goods, but merely their safe carriage to the port of destination. It is immaterial to the insurers, whether the cargo arrive in a good or bad condition, provided the goods specifically remain." The remarks made in regard to the impracticability of procuring another ship to take on the cargo, have no bearing on this case. This decision was made after Chief Justice Kent left the court. Mordy v. Jones is similar to the present case, and it clearly shows, that the plaintiffs could not prevail in the English courts. The same doctrine is laid down in 2 Phil. Ins. (2d Ed.) p. 211.

(2d.) When the earning of one freight is prevented, and other is obtained, the insurers on freight are not liable. Everth v. Smith, 2 Maule & S. 278; McCarthy v. Abel, 5 East, 388.

(3d.) If a loss has arisen under this policy, for which the defendants are liable, they are entitled to the freight earned on the second cargo, as salvage. 1 Phil. Ins. (1st Ed.) 427; 2 Phil. Ins. (2d. Ed.) 356, 357; Green v. Royal Exch. Assur. Co., 6 Taunt. 68. In Brocklebank v. Sugrue, 1 Moody & R. 102, Lord Tenterden held, that when a ship carried freight, though not that intended for her, the owners cannot recover for the delay and expense as a partial loss.

STORY, Circuit Justice. Two questions of law have been presented for the consideration of the court, by the counsel for the defendants. (1.) That, under the circumstances of the present case, there has been no loss of the freight for the voyage, for which the underwriters are liable under the policy. (2.) If there has been, then the underwriters are entitled to the freight of the substituted voyage to England, as in the nature of a salvage of freight. The latter ground is maintained upon the footing of the authority of the case of Everth v. Smith, 2 Maule & S. 278, and that of McCarthy v. Abel, 5 East, 388. In both of those cases, the voyage insured was actually performed, and freight was earned. In the case in 5 East, 388, the very freight insured was earned; but the owner of the ship had abandoned it to the underwriters on freight, while the vessel was held under a hostile embargo in a foreign port, from which she was afterwards released, and earned her freight; and the court held, that the loss of freight, if any, was by the abandonment, and not by any peril insured against. In the case in 2 Maule & S. 278, freight was earned on the very voyage insured (at and from Riga, and any other ports in the Baltic, to any ports in the United Kingdom); but it was not the very freight stipulated in the charter party, under which the ship sailed on the original outward voyage; but a freight from Riga to London, obtained from other persons; and thus a substituted freight was earned, which was properly treated by the court, as a salvage freight. The court said, that this was an insurance on freight gen-

erally, and not on any specific freight. The underwriters did not insure, that any particular freight should be brought home; but if any freight is brought home, a loss has not happened, for which he undertook to indemnify the assured. There seems no reason to doubt the authority or correctness of either of these decisions. But they are founded altogether upon a consideration, which has no existence in the present case. There, the voyage on which freight was earned was the very voyage insured, and which had not then terminated. Here, the voyage was entirely new, to a new port. The terminus of the old voyage was Havre; of the new voyage, was England. The old voyage to Havre was terminated; and the new voyage had not the slightest connexion with it. I know of no principle or authority, upon which the court can say, that the underwriters have a right to avail themselves of a freight earned in a new voyage, which they have not insured, by way of recompense for losses on another voyage, which they have insured, and which has already terminated.

The real question, then, and the only one before the court, is that first stated. The question is not, whether the freight insured has been lost, (although the circumstances of the case are so imperfectly stated, that there is great obscurity, as to the manner of settling the controversy between the owners and the freighters,) but whether it has been lost by any peril insured against, so as to make the underwriters liable therefor. The ship was duly refitted for the voyage, and capable of resuming it within a reasonable time; and if the condition of the cargo had been then such, that it could have been reshipped for the voyage, the master had a right to require it to be shipped, and was bound to proceed with it on the voyage; or, if he did not, the freight, if lost, would be lost by his default, and not by any peril insured against. It has been suggested, that the time of the detention of the ship to refit was longer than the actual voyage to Havre; and, therefore that the master might reasonably refuse to proceed on the voyage. But the underwriters take upon themselves no risk whatsoever, as to the length or duration of the voyage insured. What they undertake is, that, notwithstanding any of the perils insured against, the ship shall be capable of performing the voyage, so as to earn the freight insured; not that the voyage shall be performed in a longer or a shorter period. The owner takes upon himself the chances of a short, or of a protracted passage. This doctrine was fully recognized in Anderson v. Wallis, 2 Maule & S. 240, and applied to the very case of an insurance on freight in Everth v. Smith, 2 Maule & S. 278. In the latter case, the court held, that the underwriter had nothing to do with the temporary retardation, or protraction, or interruption of the voyage, if it was ultimately resumed, or capable of being resumed and performed. And upon that occasion, Lord Ellenborough alluded to the doctrine in the former case, and repeated the question: "What case has ever yet decided, that such a temporary retardation (not going, as he added afterwards, to a destruction of the contemplated adventure) is a good cause of abandonment, so as to amount to a total loss? Disappointment of arrival is a new head of abandonment in insurance law."

The jury have, indeed, found, that the master in delivering up the cargo, and allowing the sale thereof at New Orleans, performed his absolute duty to the owners of the cargo, and ought not to have undertaken to carry it forward to its destination in its then damaged state. And I think, that the jury were well warranted in this finding; for when a cargo on freight is so much injured, that, though capable of being carried to the port of destination and there landed, yet, from its present state, it will endanger the safety, as well of the ship, as of the cargo, or it will become utterly worthless on arrival at the port of destination, it is the duty of the master, exercising a sound discretion for the benefit of all concerned, and especially of the shippers of the cargo, to land and sell the same at the place, where the necessity arises, whether it be the original port of the shipment to which the ship returns, or any intermediate port, at which the ship arrives in the course of the voyage. It would be contrary to common sense and common justice for him to sacrifice the cargo for the benefit of another party in interest; or to elect the party, upon whom the ruin, caused by a common calamity, should fall. In a case of necessity, or of unexpected and pressing calamity, emergent in the course of the voyage, the master is by law created an agent from necessity for the benefit of all concerned; and what he fairly and reasonably does, under such circumstances, in the exercise of a sound discretion, binds all the parties in interest in the voyage, whether owners, or shippers, or underwriters. But, then, the question still remains, upon whom is any given loss to fall? And it by no means follows, because a sale of the goods has taken place at a port, short of the port of destination, by reason of a damage sustained by the cargo, the cargo specifically remaining, and capable of being carried to its destination, that there is no freight due thereon by the shippers; but that the whole loss is to be borne by the underwriters on freight. That is assuming the very point in controversy.

Let us see, then, how upon principle the case stands, as between the shippers of the cargo and the owners of the ship. We must take it, in the present case, that the sale was with the entire consent and approbation of the shippers, as well as the master, and for the benefit of the former. Now, nothing is better founded in the law on this subject, than that the shippers are bound to pay the full freight for the voyage, if the cargo is

carried to the port of destination, and specifically remains, notwithstanding at its arrival it is, by reason of sea damage, utterly ruined and worthless. This doctrine, although formerly a matter of some doubt, is now firmly established, and, indeed, must be manifestly correct upon principle.[2] It is as clear, that after the shipment of the cargo on the voyage, the shippers have no right to demand it at any intermediate port, short of the port of destination, without payment of the full freight for the voyage, whether the cargo arrive there in a damaged, or in an undamaged state. The reason is obvious. The master has a right to carry on the cargo to the port of destination; and if his ship be capable, either then, or within a reasonable time, of carrying the cargo to the port of destination, there is no ground to say, that he is not entitled to earn a full freight; and the shippers of the cargo cannot insist upon changing the original contract in invitum, and cut him off from all freight, or dismiss him with a pro rata freight. The contract of the ship-owner is to carry the cargo to the port of destination; but he by no means warrants the state, in which it shall arrive, as it may be affected by the perils of the seas, or other perils, against which his contract does not bind him. It is no answer to say, that if the cargo is carried on in a damaged state, it will be ruined. The true reply is, that the ship-owner has nothing to do with that; and that the shippers have no right to throw the loss of freight upon him, because the cargo is in danger of ruin by a calamity against which he did not warrant them. Stev. & B. Av. (by W. Phillips) 286, note 1; Id. (Ed. 1833) pp. 357–360; 3 Kent, Comm. (4th Ed.) l. 47, p. 225.

How, then, do these principles apply to the circumstances of the present case? The ship was repaired and capable again of taking on board the cargo, at New Orleans, within a reasonable time. The master had a right to require, that it should be so taken on board and carried on the voyage, as soon as it should be in a condition to be safely reshipped. He had a right to wait until the cargo could be dried, sorted, repacked, and prepared for reshipment. The delay, arising thereby, would be a mere retardation or temporary interruption or suspension of the voyage, and not an utter prostration or destruction of it. If, then, the freight has been lost, it has been lost by his own voluntary act, and not by the necessary operation of any of the perils insured against. The whole evidence shows, that the cargo could have been dried, sorted and repacked safely for the voyage, and at the farthest, within six months. Mere delay in the voyage, or disappointment as to the time of arrival, constitutes, as we have seen, no ground for an abandonment of the voyage. So that, here, the loss of freight has been by a voluntary abandonment of the voyage by the master; and not from necessity, superinduced by any perils insured against.

Then, how stands the case, as to the shippers of the cargo? They could not require the cargo to be redelivered to them without the payment of freight for the voyage; and if they did not choose to pay the freight, the master had a right to retain the cargo for the payment thereof, or to prepare it again for reshipment, as soon as it could be safely done, unless the owners refused to allow it to be again shipped on the voyage. If they did so refuse, then the contract for full freight would have been complete on the part of the ship-owner, from the default on the other side. But we must take the case here to be, what in reality it was, a mutual voluntary agreement on the part of the master and the shippers, that the damaged cargo should be sold. The sale must, therefore, be treated as a sale, reserving all the rights of the respective parties. And, in my judgment, the ship-owner was, for the reasons already stated, upon principle, entitled, under all the circumstances, to a full freight for the voyage, upon all the goods so sold, or relinquished. He has, therefore, not lost his freight for the voyage, from any perils insured against; but it is a clear right now existing against the shippers of the cargo, or, if lost, it has been lost by the voluntary relinquishment of the master and owner, by their own act or default. So far, I think, the principles of law would conduct us, in my judgment, upon general reasoning, independent of authority.

But let us see, how the case stands upon the footing of authority. And, in this case, in my judgment, there is not only no authority adverse to the doctrine already stated; but there are authorities positively in its favor, and which, in effect, if admitted to prevail, decide the very case before this court. The case of Herbert v. Hallett, 3 Johns. Cas. 93, very nearly approaches the present. There, the insurance was upon freight on a voyage from New York to Havana. The ship was stranded on the voyage, in a gale of wind at Sandy Hook, the cargo was unladen, being undoubtedly damaged, and was brought back to New York, and delivered back to the shippers. The ship was repaired in a fortnight, and was soon afterwards sent on a different voyage. The court held, that the underwriters on freight were not liable on the policy; that the ship-owner ought to have insisted on carrying on the cargo, after the ship was repaired; and that he had, by his negligence or folly, and not by any peril insured against, lost the freight. The court said, that if the ship be injured by the perils of the sea, but is repaired within a reasonable time, and the goods are damaged, the owner will be entitled to his freight, if he offers to carry on the goods, although damaged, on the voyage,

[2] See Abb. Shipp. pt. 3, c. 7, §§ 7–9, and notes to American edition of 1829; Griswold v. New York Ins. Co., 3 Johns. 321.

and the shippers refuse. Nothing but a physical destruction thereof, will exempt the shipper from payment of freight in such a case. It did not appear in this case, that the cargo was incapable of being reshipped. The case of Griswold v. New York Ins. Co., 1 Johns. 204, was an insurance on freight, at and from New York to Barcelona, with liberty to touch at Gibraltar. In proceeding on the voyage, the ship was stranded on Long Island, and the cargo (flour) was, with a small exception, damaged. The cargo was taken out, and the ship got off, and repaired in six days. The cargo was received by the shippers, and sold at auction, at a loss of 27 per cent. The ship-owner abandoned to the underwriters on freight; and brought an action on the policy for the loss. The court affirmed the doctrine of the former case, holding that the ship-owner ought to have insisted on carrying on the cargo to the port of destination, so as to entitle himself to a full freight; and that there was no ground for the abandonment. Here the cargo was perishable; and upon the new trial, ordered by the court, it appeared, that if it had been carried to the port of destination, it would not have been worth the freight. But notwithstanding this fact, the court adhered to their former opinion, that the ship-owner was not entitled to recover. Griswold v. New York Ins. Co., 3 Johns. 321. In Saltus v. Ocean Ins. Co., 14 Johns. 138, there was an insurance on the ship, freight, and cargo (rye, flour, and corn); and the vessel, in the course of the voyage, was obliged to to put into a port of necessity to repair; and, there, the cargo was found to be greatly deteriorated, and in a state not fit to be reshipped; and it was accordingly sold. The vessel was repaired, so as to be able to resume the voyage. The court held, that the ship-owner could not recover on the policy on freight, as the cargo though damaged, still remained in specie; and the authority of Griswold v. New York Ins. Co. was fully recognized. The case of Whitney v. New York F. Ins. Co., 18 Johns. 208, is supposed to trench upon the principles of the former cases. It strikes me, that it is entirely consistent with those principles; and that the decision turned upon peculiar circumstances. It was a policy on freight. The cargo was hemp, which was wetted, and the master could neither dry the hemp, nor ship it on board another vessel for the voyage, in the wet and perishing condition, in which it was, there being great danger of ignition. His own ship was disabled, and could not be repaired for half her value; nor could the hemp be reshipped in another vessel to the port of destination for one half of the value of the freight, as valued in the policy. The master, therefore, broke up the voyage. The court held, that the voyage was rightfully broken up, and the ship-owner having abandoned on the policy, was entitled to recover for a total loss of the freight. The case of McGaw v. Ocean Ins. Co., 2 Law Rep. 363, manifestly proceeded upon similar principles. Thus far, the American authorities have gone; and they uniformly sustain the same doctrine.

The question has also arisen in England; and has there received a similar determination. In Mordy v. Jones, 4 Barn. & C. 394, there was a policy on freight of the ship at and from Kingston, in Jamaica, to Liverpool. The vessel sailed on the voyage with a cargo of cotton, coffee, sugar, hides, and other goods, belonging to various shippers. The ship having started a plank was obliged to put back to Kingston to repair, and was there repaired. The cargo was landed, and was found so wetted by the sea water, that it could not be reshipped without danger from ignition to the rest of the ship and cargo, unless it underwent a process of drying, which would detain the ship six weeks, and this would have been attended with an expense equal to the freight. Under these circumstances the shippers refusing to interfere, but approving of a sale by the master, the master sold the damaged goods, and sailed with the proceeds thereof to Liverpool, and safely arrived there. The master's proceedings at Kingston were found to be such, as a prudent man uninsured would have adopted. The master, at Liverpool, paid over the proceeds of the goods to the parties interested, without any deduction of freight. The question was, whether, under these circumstances, there was such a loss of the freight of the goods so sold, as entitled the ship-owner to recover under the policy. The court held, that he was not. The reasoning of the court is certainly not very full, or satisfactory. But it is plainly in coincidence with what has been already stated, as the just result of the principles of law on the subject of the earning of freight. It may be added, that the same doctriue may be fairly deducible (although the very case is not put) from the reasoning of Pothier, on the point where full freight is due (Pothier Traité de la Charte-Partie, notes 70–77; Id. note 121); and it is not unimportant to remark, that Mr. Stevens and Mr. Benecke, both of them gentlemen of great practical experience in this branch of the law, assert the same doctrine, as one well established (Stev. Av., Ed. 1817, 81, note 6; Id., Phillips' Ed. 1833, p. 286, note 1; Benecke, Ins., Ed. 1824, 447–449; Id., Phillips' Ed. 1833, pp. 357–367).

Upon the whole, my opinion upon a deliberate survey of the whole matter is, that the plaintiffs are not entitled to recover, in the present case, for a total loss of the freight insured. But that their claim is limited to the general average, and the loss of the freight of such of the goods, as were physically lost and destroyed by the perils of the seas.

## Case No. 7,525.

JORDAN v. WELLS.

[3 Woods, 527.] [1]

Circuit Court, N. D. Georgia. March Term, 1878.

PRACTICE IN EQUITY — SUIT AGAINST RECEIVER— RAILROAD COMPANIES—LIABILITY FOR NEGLIGENCE—FELLOW SERVANT.

1. A court by which a receiver has been appointed ought not to allow the receiver to be sued, unless the petition for leave states a prima facie cause of action against him.

[Cited in Davis v. Duncan, 19 Fed. 481.]

[Cited in brief in Lyman v. Central Vermont R. Co., 59 Vt. 170, 10 Atl. 348.]

2. To justify a recovery against a master by one servant for an injury caused by the carelessness or negligence of a fellow-servant, it must be shown that the servant by whom the injury was caused was incompetent, and that the master was guilty of willful negligence in employing him.

This was a petition wherein leave was asked by the petitioner [William R. Jordan] to bring suit against B. E. Wells, as receiver of the Rising Fawn Iron Company. The principal cause was a suit in equity in this court to foreclose a mortgage on the property of the Rising Fawn Iron Company, executed to secure a series of bonds made and sold the defendant company. On motion of the complainants, B. E. Wells had been appointed receiver of the property and effects covered by the mortgage, with authority to take care of the property and carry on the business of the company. The petition of Jordan alleged that, in order to perform the duties imposed on him by the order of the court, it became necessary for Wells, the receiver, to cause to be run a locomotive engine belonging to the company over a railroad track, also the property of the company. That on May 13, 1878, the engineer who was usually in charge of said locomotive was off duty, with the consent of the receiver, and one Tidwell, a person unskilled in the running of locomotives generally, and of this one in particular, was put in charge of the same by the receiver and required to run it. The petitioner was employed by the receiver as fireman and coupler on said engine, and it was his duty to make all couplings and change all switches as necessity required, and after changing a switch he was required to get back on the engine while the same was in motion, the order of the receiver not allowing the engineer to stop the engine, but merely to bring it to a slow rate of speed. That petitioner, on May 13, 1878, after adjusting the switch, undertook, as usual, to mount the engine, but was unable to do so, because of the speed at which the said Tidwell caused it to run, he being unacquainted with it and unable to control it. The petitioner's foot slipped from the step and was caught under the wheel of the tender and so badly crushed that amputation became necessary, and was performed on May 25, 1878. Petitioner alleged that he had sustained great damage in the premises, and asked for leave to sue the receiver in order that the measure of his damage might be fixed and ascertained. The substantial facts alleged in the petition are verified by an affidavit of the petitioner, and are not upon this hearing disputed.

E. W. Hoge, for petitioner.

J. L. Hopkins, J. T. Glenn, and H. C. Erwin, contra.

WOODS, Circuit Judge. It may be laid down as a general rule that leave should be granted to sue a receiver where the petitioner makes out by his petition and affidavits a prima facie cause of action. The court ought not to undertake in advance, on such a petition, to decide the case against the petitioner. But it is essential that the petition should, on its face, show that the petitioner has a case. The court should not allow its receiver to be harassed by a suit where, according to his own showing, the plaintiff has no cause of action. Do the facts set out in this petition show that the petitioner has a case against the receiver on which he ought to recover? It is settled by the great preponderance of adjudicated cases that the master is not liable for an injury sustained by one servant from the carelessness or negligence of his fellow-servants. To justify a recovery in such a case, the master must knowingly and negligently employ incompetent servants, and the injuries for which redress is sought must be caused by the incompetency of the servant. Cooley, Torts, 559. The averment of the petitioner in reference to the employment of the engineer alleged to be incompetent, is as follows: that "one L. S. Tidwell, a person unskilled in running locomotive engines, and this engine in particular, was put in charge by said receiver, and required to run said engine." There is no averment that the receiver negligently and knowingly employed an unskillful and incompetent engineer. From all that appears either in the petition or affidavit, the receiver may have believed and have had good grounds to believe that Tidwell was a competent and skillful engineer. It appears to me to be clear that, if the facts set out in the petition and affidavit were embodied in a declaration, it would be demurrable, because it did not set forth a good cause of action. The petitioner, to justify a recovery, must not only aver, but prove, willful negligence on the part of the receiver, in the employment of an unskillful person, and an injury to him by reason of such unskillfulness of the person so employed. As this is not shown either in the petition or affidavit, the petitioner does not make out a prima facie case, and his petition for leave to sue the receiver must be denied.

[1] [Reported by Hon. William B. Woods, Circuit Judge, and here reprinted by permission.]

## Case No. 7,526.

### JORDAN v. WILKINS.

[2 Wash. C. C. 482.] [1]

Circuit Court, D. Pennsylvania. Jan., 1811.

ALLEGATA AND PROBATA—VARIANCE—PRODUCTION OF PAPERS AT TRIAL.

1. This court directed a nonsuit to be entered, because the evidence varied from the case stated in the declaration; the latter stating the goods as belonging to the plaintiff, of which the defendant, as bailiff, was to make profit for him; and charging the defendant as receiver, by the hands of A, B, C, being the money of the plaintiff; and the evidence proved that the money received was that of himself and his partners, and was received on joint account.

[Cited in Early v. Friend, 16 Grat. 30.]

2. If one party gives notice to another to produce certain papers at the trial, he has no right to inspect them, unless he will consent that they shall be used in evidence.

[Cited in Edison Electric Light Co. v. United States Electric Lighting Co., 45 Fed. 59.]

This was an action of account, brought by the plaintiff; and the declaration stated, that the defendant was bailiff of the plaintiff, and had the care and management of divers goods of the plaintiff, viz. flour, &c. of the value of 20,000 dollars, to merchandise and make profit of for the plaintiff, and to render a reasonable account thereof to the said plaintiff, when he should be required; and that the defendant was also receiver of the money of the plaintiff, from such a time to such a time (stating it); and received of the money of the plaintiff, by the hands of certain persons (whose names are stated), other 20,000 dollars, to render an account thereof when required: yet, though often required, the defendant had not rendered an account to the plaintiff, but had refused, &c. The case upon the evidence was, that the plaintiff, together with the defendant, Charles Wilkins, and John A. Sayles, entered into a mercantile partnership in 1803, which was dissolved in September, 1804, upon the death of Sayles. And the subject of this dispute was, a number of shipments of cotton, made to England, on joint account, the proceeds of which, it was contended, had been received by the defendant. But no evidence was given of any sum having been received by the defendant, by the hands of any one of the persons mentioned in the declaration.

The defendant moved for a nonsuit, upon the following grounds: 1st. That the evidence should prove the receipt of money by the hands of the persons mentioned in the declaration; and the declaration should state the names of the persons from whom each sum was received, and none other can be recovered but such as are stated and proved. 2d. That though one joint merchant may bring this action against another, yet the declaration must state that the money was received on joint account, in which case he would be liable only for the balance. But a receiver is not, and a bailiff is chargeable for the profits made, or which might have been made. Cases cited for defendant, 1 Vin. Abr. 140, 143, 146; Co. Litt. 172; 1 Mod. Ent. 47, 48, 49; [James v. Browne] 1 Dall. [1 U.S.] 339; Plead. Assist. 35, 36.

For the plaintiff, it was answered, that St. 4 & 5 Anne, c. 27, which is in force in this state, allows one joint tenant, or tenant in common, to sue the other as bailiff; and therefore, it is not necessary to state that the receipt was on joint account, but that it was received as bailiff. 7 Co. Inst. 199.

Ingersoll, Chauncey & Dallas, for plaintiff.

Hare, Hopkinson & Tilghman, for defendant.

WASHINGTON, Circuit Justice. The objection to the recovery is, that the declaration charges the defendant as bailiff of certain goods belonging to the plaintiff, to make profit of for the plaintiff; and as receiver of certain sums, by the hands of A, B and C, being the money of the plaintiff, to whom he was to render an account; and has given in evidence sums of money received by the hands, not of the persons mentioned in the declaration, but of a person not named there; and these sums, so received, not the money of the plaintiff, but the money of the partners, and received on joint account. The allegata and probata, therefore, are totally at variance with each other; and the defendant's only remedy is by moving for a nonsuit. The declaration states a case at common law; and a case of one tenant in common suing another is proved. If the plaintiff meant to proceed upon the statute, he should have stated his case truly, and that the money was received on joint account, by the hands of the person who really received it. This appears by the case from [James v. Browne] 1 Dall. [1 U. S.] 339, where it was decided, that if the proof established the receipt from one of the persons named in the declaration it would be sufficient. But in this case, no proof has been given going even so far as that, and in that case the receipt was stated to be on joint account. Besides, the court, in that case, gave the most liberal construction to the statute, in consequence of the want of chancery jurisdiction in the state. This court has chancery jurisdiction. The plaintiff, therefore, must be called. Nonsuit.

The defendant produced certain papers, which the plaintiff had given notice would be required at the trial; but prayed the opinion of the court, if he was obliged to show them to the plaintiff, until he declared his intention to read them in evidence.

BY THE COURT. The plaintiff has no right to see the contents of these papers, but on this condition.

[1] [Originally published from the MSS. of Hon. Bushrod Washington, Associate Justice of the Supreme Court of the United States, under the supervision of Richard Peters, Jr., Esq.]

## Case No. 7,527.

JORDAN v. WILKINS.

[3 Wash. C. C. 110.] [1]

Circuit Court, D. Pennsylvania. Oct. Term, 1811.

WITNESS — EXAMINATION — PARTNER SUED FOR FIRM DEBT—RIGHT OF PARTNER TO SUE IN HIS OWN NAME FOR FIRM DEBT.

1. The defendant offered in evidence, a receipt for money, to prove the same to have been paid by C. W. to the plaintiff, on account of the defendant. The court refused to permit it to be read, as C. W. might, and ought, to have been examined, to prove that the money was paid by him, on defendant's account.

[Cited in Craig v. Craig, 3 Rawle, 476; Mellendy v. New England Protective Union, 36 Vt. 33.]

2. Although one partner is not bound singly, to pay a debt due from him and his partner, if, when sued, he plead in abatement, the omission to join his partner in the action; yet he is not entitled to recover in his own name a partnership debt; and if he sue in his own name, the defendant may take advantage of it on the trial on the general issue.

Action of assumpsit against the defendant, upon indebitatus assumpsit, for goods sold, &c., quantum meruit—money had and received, account stated, and money laid out and expended. The writ, as recited in the declaration, is against John Wilkins, Jun. carrying on trade under the firm of John Wilkins, Jun., & Co., but the declaration is against John Wilkins, Jun., only. It appeared in evidence, that on the 15th of December, 1803, the plaintiff [John Jordan], the defendant, John A. Steitz, and Charles Wilkins, entered into an agreement, in writing, by which it was stipulated that the plaintiff, Steitz, and Charles Wilkins, should each, upon his own account, and upon his own funds, conduct a store at Lexington, and the defendant, another at Natchez; each party to stand by any losses which he might encounter, without the others participating in it; but that whatever profits were made by either, after deducting his expenditures, should be equally divided between all. That the parties to be established at Lexington, should supply the defendant's store at Natchez with country produce; which he was to dispose of for the person sending it, free of commissions. The connexion to continue for four years. Soon after this, the defendant inserted in a newspaper at Natchez, a notice, signed John A. Steitz, that this connexion had taken place, by which each party was to keep a store, three at Lexington and one at Natchez; and that the store at Natchez, would be conducted by John Wilkins, under the firm of John Wilkins & Co. Upon the death of Steitz, the surviving parties to the above contract, dissolved their partnership, and agreed that whatever profits or losses either party had made or sustained, should be enjoyed and borne by such person severally, and each to be liable for his own engagements; but that as to purchases made by Steitz, at Natchez, (not specifying what they were,) each party should be entitled to a fourth of the profits, and sustain a proportionate loss, if any. The advertisement inserted in the Natchez paper, as above mentioned, has the signature of John A. Steitz to it, and on this account it was objected to by the defendant. But the tacit acquiescence of the defendant, strengthened by a letter from the defendant, strongly intimating that Steitz was authorized to give such a notice, was deemed by the court sufficient to authorize the admission of the evidence, to be left to the jury.

The plaintiff offered to give in evidence an account current, by which John and Charles Wilkins acknowledge a large balance due to the plaintiff. In support of this item, it was contended, that if one of two partners is sued for a partnership debt, and he omits to take advantage of the other partner's not being sued, by a plea in abatement, the plaintiff may recover the whole against him; because he is severally as well as jointly bound. 5 Burrows, 2611. The only exception is, where the obligation or contract appears on the face of the declaration to be joint, and that the other co-obligor is alive and can be sued. 1 Saund. 291, note 4.

On the other side, it was said, that in the notice given by the plaintiff, of the account he should rely on at the trial, there are items against the defendant, separately, and against him as John Wilkins & Co., but none against John and Charles Wilkins; and that to such an action, the defendant could not have pleaded both in bar and in abatement.

Before WASHINGTON, Circuit Justice, and PETERS, District Judge.

WASHINGTON, Circuit Justice. The principle laid down in the case from 5 Burrows, 2611, is, that one co-obligor or co-contractor, cannot be charged singly, if, in due time, he takes advantage of the plaintiff's omission to sue the others, who are also bound, by giving to him a better writ; which, by a plea in abatement he must do. But, if he fail to protect himself by such a plea, he cannot turn the plaintiff round, at the trial, by proving that another is jointly bound with him, and he is himself bound, severally, as well as jointly. This principle is certainly correct, in every case where the plaintiff gives notice to the defendant, of the nature of his demand, so as to put it in his power to plead in abatement. In actions on bonds, or special actions on the case, the declaration gives notice, and the rule is strictly applicable. But in actions of general indebitatus assumpsit, which this is, how is it possible for the defendant to know, whether the plaintiff means at the trial to give evidence of a joint or several debt, or both; and, in this state of ignorance, how can he plead in abatement? Upon the face of the declara-

[1] [Originally published from the MSS. of Hon. Bushrod Washington, Associate Justice of the Supreme Court of the United States, under the supervision of Richard Peters, Jr., Esq.]

tion, the claim is for a debt due from the defendant alone; and to permit the plaintiff to give evidence of a debt due from him and another, would be subversive of the rule, which declares that he shall not be made re sponsible singly, unless he has waived the privilege which the law allows him, of pleading in abatement.

We understand it to be the constant and established practice of this state, in actions of this sort, for the plaintiff to furnish the defendant, before he pleads, with a copy of the account which he means to offer at the trial. Where this is done, the defendant has notice as fully as if it had appeared on the face of the declaration; and we see no rea son, why he may not shape his pleading, as if the declaration had been special, and plead in abatement. In this case, the account delivered by the plaintiff to the defend ant, contains no item of a debt against John and Charles Wilkins; and, therefore, the defendant could not have known that such evi dence would be offered at the trial, so as to put it in his power to plead in abatement.

It is very clear, that the defendant cannot plead in bar to a part, and in abatement to other parts of the action. And it is equally clear, that if the plaintiff joins in the same declaration, inconsistent counts, such as against the defendant singly, and against him as partner with some others, he must avail himself of this, by demurring to the declaration; because, if he would take advantage of his partner not being joined in the counts where he is sued for a partnership debt, he cannot plead in abatement, and also in bar to the other counts. But whether, if these inconsistent demands appear in the account rendered to him by the plaintiff, he can demur to a declaration correct on the face of it, may be a question. If he cannot the defendant ought, in some way or other, to be protected against the necessity of meeting such inconsistent demands at the trial.

PETERS, District Judge, was of opinion, that the account might be admitted; and the court being divided, the account went to the jury, to which the defendant's counsel took an exception.

The defendant then offered as an offset, a receipt by Charles Wilkins, of a certain sum of money, which Charles had paid to the plaintiff, on account of the defendant; hav ing first proved, that this sum was paid by Charles Wilkins to the plaintiff.

BY THE COURT. This receipt is offered as evidence that the money paid by Charles Wilkins to the plaintiff, was paid for the account of the defendant. This would have been better proved by Charles Wilkins himself, who is alive, and might have been examined. The receipt, therefore, cannot be given in evidence.

The defendant then offered an account of money paid to the plaintiff, by John and Charles Wilkins, which was objected to.

BY THE COURT. This was said, by the defendant's counsel, to be precisely like the case which has, by a division of the court, been decided against the defendant. That since the plaintiff has been permitted to give in evidence a demand against John and Charles Wilkins, John, the defendant, ought to be at liberty to offset demands of John and Charles Wilkins against him. This has the appearance of fairness, particularly, as Charles will have to contribute to any judgment which may be recovered against John, for a debt of John and Charles. But still it is inconsistent with legal principles, for the defendant to offset a debt, which is due not to him alone, but to him and another. Were it to be allowed, the admission of it as an offset, would be no bar, in an action to be brought by John and Charles against the plaintiff; although one partner is bound singly, to pay the whole of the partnership debt, unless he compels the plaintiff, by a proper plea, to join his partner with him, yet he is not entitled to the whole of a debt due to the partnership; and if he sue singly for a partnership debt, he may be defeated at the trial on the general issue, for he knew who were his partners.

In summing up, it was contended, by the defendant, that the articles of the 15th December, 1803, constituted a partnership; that they were to share in loss in effect, since there can be no profit, but what remains after the losses are deducted; and that at all events, the advertisement at Natchez, was sufficient to bind them, as partners, to third persons. If so, then the defendant may be made liable for all the debts contracted by the plaintiff or his other partners; and it would be unreasonable for the plaintiff to recover even a separate demand, much less, those demands which were on partnership account, until the partnership accounts are settled, and a balance struck. As to the articles of dissolution, this is not binding on third persons; and the plaintiff, if he would avail himself of it, should have brought his action on this agreement, it being under seal. Case cited, 4 Term R. 670.

WASHINGTON, Circuit Justice (charging jury). To decide this cause correctly, it is necessary for the jury to have a very distinct conception of the nature of the connexion formed between the parties to the agreement on the 15th December, 1803. Each party was to carry on trade upon his own capital, credit, and responsibility. Neither was to be answerable in any manner, for the engagements of the others, nor were the whole to be answerable for the engagements of any one. There was to be a participation of profits, but not of losses. Thus, if the plaintiff had, on the business separately carried on by him, sustained a loss of 5,000 dollars, and the defendant, on his separate business, had made a profit of 10,000 dollars, upon the principle of co-partnership, the loss

of the plaintiff would be borne by the profit fund of the defendant, and not be left singly on the shoulders of the plaintiff; and only the remainder, viz. 5,000 dollars, would be divided. But in this case, the plaintiff would have to bear the whole loss of the 5,000 dollars, and would share with the other members of this association, in the 10,000 dollars made by the defendant. Purchases made by one of these parties, or moneys borrowed, either from another of the parties, or from a stranger, to enable him to carry on his separate store, was a private debt between those persons; as much so as if they never had formed a connexion of any kind. This was most unquestionably the case, as between the parties to that contract; and it could never be allowed to one of the parties, to repel the claim of another, who, by money lent or goods sold, had become his creditor, by saying it was a partnership debt, in the face of their agreement, which declared, that each party was to be severally bound for his own engagements. Indeed, we are not prepared to admit, that a stranger, who had dealt with one of these parties, with full knowledge of the articles, and of the true nature of the connexion between them, could charge the other partners. The advertisement published at Natchez, might possibly produce this effect; but as to that, we give no opinion, otherwise than by saying, that if it would bind all the parties for the engagements of one, to third persons, it would have no such effect, as between the parties themselves; who, notwithstanding any thing stated in that notice, knew very well the real nature of their connexion. If any possible doubt could exist, upon the articles of the 15th December, 1803, there can be none under those of the 19th September, 1804, which even destroy the community of profit, as to the business carried on separately by the parties, and contain an express stipulation, that each party shall be responsible for his own engagements. This, to be sure, would not affect the rights of third persons; but we hold it conclusive between these parties. The word copartnership, mentioned once or twice in this agreement, is of no consequence; it cannot alter the nature of things, and constitute a partnership, where, from the essence of the connexion, there was none. This paper not being the foundation of the plaintiff's action, may well be resorted to, to explain the nature of the connexion between these parties.

It is said, that it is hard to charge the defendant with the separate demands of the plaintiff, and yet leave him exposed to the claims of strangers, who have sued, and may yet sue him, as a copartner, for the debts contracted by the plaintiff. This is true, but it is not in this action that the defendant can be relieved. Although in the store transactions of these parties, they acted separately, and not as partners, yet, by the express terms of the agreement of the 19th September, 1804, they all agreed to share in profit and loss, as to purchases made at Natchez, by Steitz. Of course, should it appear to the jury, that any of the items in the plaintiff's account, arise on these transactions of Steitz, as, for example, if any of the bills drawn on the plaintiff, and now charged by him to the defendant, were drawn to enable Steitz to make the purchases, in the profit and loss of which all the parties were to participate, the jury will exclude such items from the plaintiff's account.

JORDAN (WILKINS v.). See Case No. 17,665.

## Case No. 7,528.

JORDAN v. WILLIAMS.

SAME v. GATES.

[1 Curt. 69; 14 Law Rep. 421.] [1]

Circuit Court, D. Massachusetts. Oct. Term, 1851.

DUTY OF MASTER TO QUELL AN AFFRAY ON VESSEL — LAYING COMPLAINTS BEFORE CONSUL — WHAT ARE CONTEMPLATED—LIABILITY OF CONSUL FOR ABUSE OF POWER—DETENTION OF SEAMEN'S CLOTHING BY MASTER.

1. It is the duty of the master to interpose and quell an affray between the mate and the crew, and to use such means and such a degree of force as a competent master, of ordinary coolness, judging of the emergency upon the instant, might fairly deem necessary.

2. Under the act of congress of July 20, 1840, § 16 [5 Stat. 396], the phrase, "to lay their complaints before the consul," applies only to such causes of complaint as are specified in the act, viz., that the mariner is detained contrary to his agreement, or that the vessel is unseaworthy, &c., &c., and not to affrays or quarrels between the officers and crew.

3. The liberty given to the crew by said act, to lay their complaints before the consul, is to be exercised under the fair and reasonable discretion of the master of the vessel, as to the time and mode of landing; and a refusal of duty on the part of the crew, because such permission is not given, would be justifiable only when such refusal is necessary to prevent the loss of the right.

4. Since the passage of the act of July 20, 1840, when the master of a vessel, in a foreign port, lays a complaint against any of his crew fully and fairly before the consul, and the complaint is such that a competent master may fairly believe it to be within the consul's jurisdiction, and the consul, upon examination, finds it expedient or necessary to make use of the local authorities to keep the men safely, the master is not responsible for their imprisonment as for a tort, the consul being answerable to the injured party for any malversation or abuse of power.

[Followed without approval in Chester v. Benner, Case No. 2,660. Cited in Shorey v. Rennell, Id. 12,807; Coffin v. Weld, Id. 2,953; The Elwin Kreplin, Id. 4,427; The Elwine Kreplin, Id. 4,426; Snow v. Wope, Id. 13,149.]

5. The detention by the master of the clothes of men imprisoned by the local authorities upon request of the consul, by reason of information

[1] [Reported by Hon. B. R. Curtis, Circuit Justice. 14 Law Rep. 421, contains only a partial report.]

given him by the master, while still belonging to the vessel, and also after their discharge therefrom, is a breach of duty on the part of the master.

[Cited in The Elwin Kreplin, Case No. 4,427.]

[Appeal from the district court of the United States for the district of Massachusetts.]

These were libels filed in the district court by [Robert] Williams and [Samuel] Gates, two of the crew of the bark Gibraltar, against [Harvey] Jordan, the master, complaining of an assault on board the bark, an imprisonment in the jail at Matanzas, and a conversion of the clothing of each libellant. The libellants testified for each other, and produced no other evidence.

R. H. Dana, for appellant.

J. H. Prince, for appellees.

CURTIS, Circuit Justice. The material facts, stated in the libels and testified to by the libellants themselves, are that, on the morning of the 11th of April, while the bark was lying in the harbor of Matanzas, the mate came forward at daylight and called all hands. No answer was made to this call. The call was repeated, in what one of the libellants characterizes as a loud, boisterous, and profane manner. Thereupon, Gates made answer, "You need not kick up such a noise, for you were answered the second time." Some insulting words then passed between the mate and Gates; Williams interposed in the quarrel, the mate struck Williams with his fist, the blow was instantly returned, Williams and the mate clenched each other; the master came forward and seized Williams by the hair of the head and drew him down to the deck, or, as Williams says, toward the deck, and, while he was in that position, the mate kicked Williams in the face. Williams cried out, that the mate was kicking him; and Gates approached and said, "Knock off such work as this!" The master let go his hold of Williams, and struck Gates twice in the face. The contest then ceased; the master ordered the men to go to their work, and both officers went aft. The answers of the master state, that he knew nothing of the affair, being below, until two of the crew came aft, and called to him that the men were trying to kill the mate; that he ran on deck, and found five of the men, who constituted, at the time, the whole crew, except two men and a boy, attacking the mate; that he rescued the mate from them, and in so doing received a blow from Gates, and part of his clothing was torn off his back. He denies that he seized Williams in the manner stated, or that, to his knowledge, the mate either struck or kicked him; and he sets forth in his answer that, by reason of the lapse of upwards of a year between the termination of the voyage and the filing of these libels, the mate, and the two men who were faithful to their duty, have gone beyond his reach, so that he cannot produce either of them as witnesses.

I do not deem it necessary, in this part of the case, to weigh very nicely the evidence of the libellants and the answers of the master, so far as they differ; because it does not seem to me that, if all which the libellants testify to were true, damages for an assault by the master ought to be awarded to either of these men. So far as appears, the first knowledge which the master had of this contest was when he saw his first officer and one of the crew grappling with each other on the forecastle, four others of the crew being close at hand, even if they were not taking part in the affray. These men constituted, at that time, the whole crew, except two men and a boy; and one of these two men is said to have been a deserter from a British ship of war, who kept himself concealed in the daytime in the hold. There was no second mate on board, the first mate having been discharged at Havana, as appears by the shipping articles, on the 10th of the preceding March; and though Rooker, the second mate, was, on the same day, promoted to be first mate, no second mate was shipped; and it was not until the 17th of April that Reed, one of the crew, was appointed second mate. So that, when the master first saw this affray between his only officer and one or more of the crew, he had reason to believe that one man and a boy were the only assistants on whom he could rely. That it was not only his right but his duty to interpose, and put an end to the contest immediately, there can be no doubt; and it is equally clear, that he was justified in using such means as a competent master, of ordinary coolness, judging upon the instant of the facts before him, might fairly deem necessary. It should be added that, from the nature of such an interposition, if force be necessary, the person thus lawfully using it, to quell a fight between an officer and one or more of the crew, cannot reasonably be expected to measure his exertions by so nice a standard as would be necessary if there were time for reflection, and opportunity to proportion the force exactly to meet the demand for it. Tested by these principles, I am not satisfied that the force used by the master was excessive. Interposing, as he did, to rescue the mate, it is, to my mind, highly improbable that he struck Gates, unless Gates was assisting Williams in attacking the mate; for it appears there had been no previous difficulty between them, and it was not an occasion when the master would have been likely voluntarily to begin a new quarrel. He used no weapon. He did not manifest any passion; and as soon as the mate was released he went aft, telling the men to go to their work. This does not seem to me to be a fit case in which to award damages against the master, for an assault, in favor of these libellants, who, according to their own showing, were both originally in the wrong. Not to answer when an order was given and heard, and this order is admitted to have been heard, was a breach of

discipline which might well excite the mate, and cause him to repeat the order with violence of manner, which they who had thus provoked it had scarcely a right to complain of, and still less a right to make an insulting reply,—an insult, perhaps the more readily given, and more deeply resented, because the mate had been very recently promoted to that office, from the post of second officer, in which, for many purposes, he was scarcely more than one of the crew. It is true, the assault by the mate, if he struck the first blow, was unjustifiable; but for this the master, who denies all knowledge of it, and who is not proved to have known it, cannot be held responsible; his duty being to put an end to the affray, whoever began it. For this cause of action, therefore, I can award no damages.

The second ground of complaint is, that the master caused the libellants to be imprisoned on shore, in the prison of the local authorities at Matanzas. This is attended with much more difficulty, and presents some questions of general importance, which, so far as I have been able to learn, are now for the first time raised. The material facts sworn to by the libellants, so far as they agree in their statements, are these: that, very soon after the termination of the affray above mentioned. and while the libellants and three others of the crew were engaged in removing the main hatch, the mate said to them, with an insulting address, "I will knock your brains out with a handspike." Williams then said to the master, "Captain Jordan, do you hear that?" And he replied, with an oath, "I do hear it." Williams then said to the master, "I will do no more duty on board this ship until I see the consul." Gates and the other three men said the same; and all five left their work and went forward into the forecastle. The mate came to the forecastle door, and said to Williams, "Williams, are you going to turn to?" The reply was, "No, not until I have seen the consul." The mate told him he was a fool, and he had better think no more about it. The master then came forward, and asked each man if he was going to turn to. Each said no, until he should see the consul. The master replied, with an oath, that they should go in the ship, and that they would wish themselves in hell before the voyage was up. He soon after went on shore, returned with two boats and armed men, who carried the men on shore and took them to prison. On the next day, or the next day but one, the consul came to the prison; they informed him of what had taken place, and he said he would see into it. In a few days he returned, the master being with him, and asked the men if they did not think they had better settle it, and go aboard of the ship again, and he repeated the question to each man. All but one replied, that they were afraid of their lives, after the threats that were made; and that one said he would go, if the consul would give him a paper showing what had happened on board. This the consul refused. A few days afterwards, the master came again to the jail, asked if they were not tired of staying there; and said he had paid three months' board, and there might be enough for another month. He went away; and, on the 8th of May, the consul took them out of jail and sent them to the United States. This is the account given by the libellants themselves. In some material points it is directly met by the answer, and is not consistent with the certificate of the consul, which has been read as evidence by agreement, as a substitute for the consul's deposition, who, it is stated, has ceased to hold that office, and could not be found by the respondent. I shall hereafter advert to some of these discrepancies; but, before doing so, I must inquire whether the men were justified in their refusal to do any more duty on board until they could see the consul. This right is claimed under the 16th clause of the act of July 20th, 1840, which is in these words: "The crew of any vessel shall have the fullest liberty to lay their complaints before the consul or commercial agent in any foreign port, and shall in no respect be restrained or hindered therein by the master or any officer, unless some sufficient and valid objection exist against their landing; in which case, if any mariner desire to see the consul or commercial agent, it shall be the duty of the master to acquaint him with it forthwith, stating the reason why the mariner is not permitted to land, and that he is desired to come on board; whereupon, it shall be the duty of such consul or commercial agent to repair on board and inquire into the causes of the complaint, and to proceed thereon as the act directs." This does not, in terms, give to the crew the right to refuse to do duty until they can see the consul. It may fairly be implied, that they are not bound to do such duty as would prevent the exercise of the right to see him. They cannot be lawfully required to get under weigh to go to sea, and thus be deprived of the right to lay before him their complaint of the unseaworthy condition of the vessel; they cannot properly be kept at work, and thus prevented from landing to lay their complaint before him, unless some sufficient and valid objection exists against their landing. But it by no means follows that they have the right, at any moment, to refuse to do any duty whatever till they have seen him. The master is to allow them the fullest liberty to lay their complaints before the consul; but the exercise of the fullest liberty to do so, when interpreted reasonably, is consistent with the master's being allowed fairly to exercise some discretion as to the time and mode of landing, and as to the prosecution of the work of the ship. Certainly, the refusal of the crew to obey the orders of the master is not the first step to be taken, on the instant, when this right to see the consul is claimed. Such a refusal may be justifiable, when absolutely necessary to prevent the loss of the right;

but I think very bad consequences would follow from admitting that any thing else would justify it. As long as the obligations of the master, to allow the crew to lay their complaints before the consul, and of the crew to obey his orders and do their duty on board, can be reconciled, they must be; and I see nothing in this case which made the latter inconsistent with the former. But, in my judgment, the claim of the crew to see the consul, and their refusal to do duty until they should see him, cannot be supported by this act, because their complaint was not one which the act was designed to enable them to lay before him.

It can hardly be supposed that congress intended to secure to the crew the fullest liberty to apply to the consul concerning any matter or thing, of which they or any of them might desire to complain. Some practical result of such complaint, by means of some jurisdiction of the consul over its subject-matter, must be considered to have been the purpose of this provision of the act.

To secure to the crew the right to land, or to impose on the consul the duty of immediately repairing on board, merely that he might hear and do nothing, because he had no power to do any thing, cannot have been intended. Nor is any such intent indicated by the language of this law. It says, "to lay their complaints before the consul," &c. What complaints? This question is answered by the act, which provides, in clause nine, for a complaint by a mariner to a consul, that he is detained contrary to his agreement, or after he has fulfilled it, and which directs how the consul is to inquire into the truth of the complaint, and what he may do if he finds it well founded; and by clauses twelve to fifteen, inclusive, which authorize a complaint to the consul concerning the seaworthiness of the vessel, and point out what proceedings shall be had, and what jurisdiction shall be exercised by the consul upon such complaint. When, therefore, the next clause says the crew shall have the fullest liberty to lay their complaints before the consul, the natural meaning is, the complaints which, by this act, they are authorized to make, and he required to hear; and this meaning is made quite plain by the concluding words of this clause, which require the consul (in case the crew cannot land) to repair on board, and "inquire into the causes of the complaint, and proceed thereon as this act directs." If he is to do this when he goes to them, I presume he is to do the same when they come to him; and, if so, it necessarily follows, that the complaints which they have, by this act, a right to lay before him, are complaints upon which the consul can "proceed" as this act directs. Not that they must be well founded, in part or in whole, but that their subject-matter must be such that, if well founded, the consul, by this act, has authority to proceed thereon.

Now, I do not find in this act, or elsewhere, that power is conferred on a consul of the United States to take cognizance of a complaint by a part of the crew, that the mate had threatened to beat out their brains with a handspike, followed by an appeal by the mate to the principal party in the quarrel, desiring him to think no more about it; or, to state it more abstractly, I do not find that a consul has power, upon the application of the crew, to inquire into quarrels of this nature. The only approach towards such a case is in the seventeenth clause of the act, which is in the following words: "In all cases where deserters are apprehended, the consul or commercial agent shall inquire into the facts; and, if satisfied that the desertion was caused by unusual or cruel treatment, the mariner shall be discharged," &c. It is to be borne in mind that this is a new power, conferred on the consul for the first time; that it is a power to dissolve a contract, or rather, authoritatively and finally to declare that it has been so far broken by one party that the other party is no longer under obligation to perform it; that this is a very high power, and, consequently, is not to be extended to a case not fairly within the words of the act, which apply only to a particular class of cases, where deserters are apprehended, and the desertion was caused by unusual or cruel treatment; and fall far short of cases like this, where, at the worst, only threats have been uttered.

I am clear, therefore, that the refusal of the men to do duty can find no justification in this act; that this reference, especially after the mate had asked the principal party to the quarrel to think no more about it, is strong evidence of an insubordinate temper, and justified the master in applying to the consul. That he did so apply, I am satisfied; his answer so states; and though an answer has no technical effect as evidence, it is not wholly without weight in considering his conduct. There is nothing in the case tending to contradict this allegation in the answer, and the certificate of the consul, which is made evidence in the case, proves such application to him. Being satisfied, then, that the master did apply to the consul, and that he had, in point of fact, a case to lay before him, in which five out of seven of his crew, after a fight between one or more of them and the mate, had unjustifiably refused to do duty on board, I do not think it reasonable to doubt that he did lay this case before him, as he swears in his answer, especially when the consul certifies that on that day he acted officially, on the very ground that these men had refused to do duty on board. Nor can I come to any other conclusion than that the interposition of the local authorities was by the procurement of the consul. It is true the men both testified that the consul did not see them on that day; but so far as this tends to show that the consul did not interpose at all on that day, it is directly met by the answer, which says that the consul himself

sent the officer, who removed the men from the vessel, and the consul's certificate declares, in so many words, that he ordered the men to be imprisoned for safe keeping, in the Royal Prison. I must consider the imprisonment of these men, therefore, as an act of the local authorities, done upon the request of the consul, by reason of information given him by the master, that the men had unlawfully refused to do duty on board. And the question is, whether the master is responsible for their imprisonment, as for a tort. Prior to the act of congress of the 20th July, 1840, it had repeatedly been decided (U. S. v. Ruggles [Case No. 16,205]; Jay v. Almy [Id. 7,236]; Wilson v. The Mary [Id. 17,823]; Magee v. The Moss [Id. 8,944]; The Nimrod [Id. 10,267]; The Dawn [Id. 3,665]), that a master could not lawfully imprison a seaman on shore, unless he were unable to restrain him on board; that a case of urgent necessity must be made out; and that, although it would be a mark of good faith, on the part of the master, to take the advice of a consul, as being a person confided in by the government, for many purposes, yet such advice would not be otherwise operative to protect the master because consuls had no power or duty in reference to the matter. I am satisfied of the correctness of these decisions, but I think the act of 1840 has materially changed the relation of consuls to this subject. The eleventh clause of the act is as follows: "It shall be the duty of consuls and commercial agents to reclaim deserters, and discountenance insubordination by every means within their power; and where the local authorities can be usefully employed for that purpose, to lend their aid, and use their exertions to that end, in the most effectual manner."

This certainly confers on consuls authority, and in strong terms makes it their duty, to employ the local authorities, to discountenance insubordination, where they can be usefully employed for that purpose; and, by a necessary implication, the consul must judge and determine, whether any particular case is one in which they may usefully be employed. Certainly his decision is not final. If he is guilty of any malversation, or abuse of power, the eighteenth clause of this act makes him liable to any injured person for all damage occasioned thereby, as well as to be punished criminally. But I think it was the intention of the act to intrust him with power officially to invoke the aid of the local authorities, subject always to a just responsibility for any abuse of this power. If the local authorities are to be used, it is a reasonable, not to say necessary, inference, that they are to act in such manner, and by such means as they ordinarily employ; and the most common and obvious means are the use of a place of confinement, under the control of the local government. The power, in the most effectual manner to lend their aid, and use their exertions to employ the local authorities to discountenance insubordination, can hardly be said to be exhausted, while the means most usually employed by those authorities have not been used. I think, therefore, that this act conferred upon consuls the power, and made it their duty, where the local authorities can, in their judgment, fairly exercised, be usefully employed to restrain a part, or the whole, of a crew, who are in a state of insubordination, to use their exertions to that end, in the most effectual manner, and that this restraint may be exercised by confinement on shore, in such place as is ordinarily used by the local authorities for similar purposes. And further, that the consul, in so doing, acts as a public officer, upon his official responsibility, intrusted with the power to judge in the first instance, of the propriety and fitness of so doing, and subject to his responsibility to any injured by an abuse of his power.

The reasons which have led courts to determine that it was not one of the ordinary powers of a master to imprison his men on shore, do not exist, or apply with greatly diminished force to the action of a consul in that behalf, on the information of the master. A public officer is thus interposed between the master and the seaman, who is to act under his official responsibility to the government, whose servant he is, as well as to the party who is affected by his act; he is a resident at the place, and cannot sail away, and leave the man to suffer or die in a foreign prison. He is intrusted by law with the care of destitute seamen, and with their return to their own country. It is to be presumed that he will have a due regard to the safety and rights of all, and, while he discountenances insubordination, by every means in his power that he will not employ the local authorities in a way to oppress the seamen of the United States. But whatever may have been the reasons which operated to produce this law, I think it has conferred on consuls the power above described. If this be so, it it quite clear that the responsibility of the master is modified. If the consul may judge when the local authorities may usefully be employed, it would be a great hardship to hold the master responsible for a mere error of judgment of a public officer, in whose appointment he had no voice, and who is in no just sense his agent. At the same time, if the consul acts on the application of the master, the master is not free from responsibility. In the first place, he is bound to represent the case truly to the consul, and, in the next place, the case must be such that he, as a reasonable man, can honestly believe it to be within the power of the consul. If he knows, or ought to know, that it is not a case in which the local authorities should be appealed to, or in the words of the act, in which they can be usefully employed, then he necessarily knows that the case is not within the limited power of the consul, and that, consequently, he cannot shelter himself under

his authority. But if the master represents the facts truly,—if the facts are such that a competent master might well believe that the local authorities might be usefully employed, and the consul so considers, and applies to them, and they, at the consul's request, take the men on shore, and there confine them, in the place and manner usual at such port, I think the master is not guilty of any tort, although, upon a review of all the facts, the court might be of opinion, that it was not strictly necessary to remove the men from the ship.

Applying these views to this case, I find no evidence that the master misrepresented the facts to the consul, and I am not able to come to the conclusion that the case was of such a nature that the master ought to have known that the local authorities could not usefully be employed in the way they were employed. Five out of seven of his crew had unlawfully refused to do duty; they had been appealed to by the mate, who alone had given them any cause of complaint, in a manner calculated to allay any apprehensions which they might have entertained, but they still refused. Each had been required, by the master, to return to his duty, and each had distinctly refused. The deserter who was on board could hardly be relied on for any very effectual assistance, and one officer, and one man, and a boy, were all that were left; under these circumstances, some masters might, and probably would, have reduced these men to obedience, on board the ship; but I cannot say that it was a case where the master ought to have known that that was the only proper course, and therefore I am of opinion that the master is not responsible for a tort by reason of their imprisonment. Nor do I think he incurred that responsibility by their remaining in prison. It is quite clear that he was anxious to have them return to their duty, and gave them early and repeated opportunities to do so. They steadily refused, alleging that they were afraid for their lives, if they should return on board. If five able-bodied men really had such fear of the master and mate, who alone had shown any disposition to injure them, simply because of some threats uttered in the heat of blood, it seems to me to have been an unreasonable fear. It is observable that neither of the libellants asserts, in his libel, or his testimony, that he did really entertain such fear. Their justification for their refusal to return to the ship resting solely on this fear, I think they should have pleaded it as a fact, and sworn to it as a fact, and not allowed it to rest solely on their statements at the time, which do not seem to have had a reasonable foundation in the occurrences as they detail them.

After they had been in prison some days, the answer says eight days, and after repeated refusals to go on board, or do any duty if forced on board, the consul discharged them from the vessel, the master shipped other men in their place, paid to the consul fifty dollars for their passage money to the United States, and one hundred dollars more for expenses arising out of their arrest, and board in prison, and from that time the answer avers that the master had no control over, or connection with them, and that whatever was done, was by the consul alone. The act of 1840 empowers consuls, upon the application of the master and any mariner, to discharge such mariner, if he thinks it expedient, without requiring the payment of three months' wages. I do not understand, from any of the proofs, that these men applied in terms for their discharge; but I think their unjustifiable refusal to go on board, or do any duty if forced on board, would enable the consul to act upon the request of the master, and discharge them, and the men themselves evidently considered that they had in effect requested their discharge, for they have made no claim to be paid any wages. After they were thus discharged, I consider the consul, and not the master, responsible for their further detention. They no longer formed part of his crew; he no longer sustained any relation to them. The answer declares he did nothing to cause their further detention, and there is not sufficient proof to the contrary.

I am of opinion, therefore, that the responsibility for their further detention must rest with the consul by whose orders they were originally put in prison, and at whose sole instance they were kept there, after they were discharged from the bark. The answer states, that the consul said something to the master about sending them home to be tried; and if he considered it his duty to detain them, by aid of the local authorities, that he might send them to the United States for that purpose, his conduct might be justified. On any other ground it was grossly improper; for he had no right to punish them by imprisonment; and surely, destitute seamen are not to be provided for by a consul by keeping them in a foreign jail.

There is one other cause of action set forth in these libels, which requires to be distinctly considered. It is, that the men were sent to the jail without any clothing or bedding, which was detained on board the bark, and finally sold by the master. It is in proof, that the libellants slept on the flag-stones, using their boots for pillows; and that, during all the time they were in prison, they had no clothes except the working-dress in which each was when taken on shore. This detention of their clothing is not justified; and no excuse is attempted, except that the answer alleges that the consul told the master their clothing was forfeited. But it does not appear when this information was given, and it is difficult to see how it could have been supposed to be correct. Before the men had

finally refused to return on board, and while it was yet uncertain whether they would return, there could be no pretence for treating them as deserters; and when it became certain that they would not voluntarily return, they were regularly discharged, and desertion became impossible. I consider it to have been a breach of duty by the master, and a wrong to these men of a somewhat aggravated character, to detain all their clothing from them during eight days, and then sail away and finally deprive them of it. I shall therefore allow to each the pecuniary value of his clothing, together with the sum of eight dollars, for special damages, arising from its detention while in prison. From analogy to the rule followed by Judge Hopkinson, in the case of Brower v. The Maiden [Case No. 1,970], I should deduct a proportional part of the prison fees and expenses and the cost of shipping the new men, if I did not consider that the wages remaining unpaid to each of these men at the time of their discharge was just about a fair compensation for their proportions of these charges; and it seems to me that, under the circumstances, it is just that the ship should neither lose nor gain by their discharge. It is not easy to affix a value to the clothing of each libellant. It is sworn to be worth from eighty to one hundred dollars for each; and the answer puts it at very much less sums. Upon the best judgment which I can form, I think the sum of forty-eight dollars will be a just allowance for the clothing and the special damage of each. This sum is therefore awarded to each libellant. I do not allow any costs of the appeal to either party. The decree of the court below will be modified accordingly.

I desire to add, that it is stated at the bar, that the evidence upon which the appeal has been heard is not identically the same as in the district court; and that several of the questions which have now been decided were not there raised.

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JORDAN (WILSON v.). See Case No. 17,814.

JORDAN v. YOUNG. See Case No. 7,523.

JORDAN, The OLIVER. See Case No. 10,503.

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## Case No. 7,529.

In re JORDON.

[9 N. B. R. (1874) 416.] [1]

District Court, E. D. Michigan.

BANKRUPTCY—MORTGAGE — CHANGE OF SECURITY WITHIN FOUR MONTHS—PREFERENCE.

1. A being indebted to B executed to him a mortgage upon his entire stock of goods to secure the payment of the sum due in one year. Two years afterward, the mortgage and interest having increased several hundred dollars, A gave B his note for the amount at thirty days, and executed another mortgage on the stock of goods then on hand, part of which consisted of the old stock and part of the new. This last mortgage was given within four months before the commencement of proceedings in bankruptcy, and the assignee claimed that A was insolvent at the time, took possession of the goods and sold them. B then presented proof of his claim as a secured debt and asks that the same be paid him out of the proceeds of the mortgaged property. The assignee asks that the proof of claim be rejected, and that B's application be denied. *Held*, that upon taking the second mortgage the first ceased to have any validity or effect, and the mortgagee's rights as to lien must stand and be determined solely by the second mortgage: that the second mortgage was a preference to the mortgagee under sections thirty-five and thirty-nine of the bankrupt act [of 1867 (14 Stat. 534, 536)]; that B is absolutely prohibited from proving his debt against the bankrupt's estate.

2. Application of B denied, with costs, including attorney's fee of fifteen dollars.

On the objections of the assignee to the proof of claim offered by George D. Moulton, a creditor, and to the application of the latter to have his claim preferred on account of a lien by way of mortgages. On the 20th of February, 1871, the bankrupt [James Jordon], being a merchant and indebted to Moulton for loans of money in the sum of nine hundred and twenty-five dollars, executed to Moulton a mortgage upon his entire stock of goods then on hand, to secure the payment of said sum, in one year from date, with interest at ten per cent. On the 11th day of February, 1873, there was due and unpaid upon this mortgage, for principal and interest, one thousand one hundred and three dollars and twenty-five cents. On that day the bankrupt gave Moulton a promissory note for that amount due in one month from date with interest at ten per cent., and at the same time executed to Moulton another mortgage on his entire stock of goods then on hand, and store furniture and fixtures; which stock consisted in part of goods on hand when the first mortgage was given, and in part of new goods not covered by the first mortgage. The reason for taking the new mortgage was that the debt had become so much increased by accumulations of unpaid interest, and the stock covered by the first mortgage had become so much diminished by sales by the mortgagor, in the usual course of trade, that the security had become insufficient. The mortgage of February 11th, 1873, was given within four months before the commencement of the proceedings in bankruptcy; and it is claimed by the assignee that the bankrupt was insolvent at the time, and that the mortgage was given by him with a view to give Moulton a preference over his other creditors, and that the latter had reasonable cause to believe, etc.; and that not having surrendered the advantage gained thereby, Moulton is prohibited from proving his claim or receiving any advantage on account of his said mortgage. The assignee took possession of the stock, sold it, and the proceeds are now in court. Moulton having presented proof of his

[1] [Reprinted by permission.]

claim as a secured debt, setting up both mortgages, asks that the same be paid to him out of the proceeds of the mortgaged property. The assignee asks that the proof of claim be rejected, and that Moulton's application for payment be denied.

LONGYEAR, District Judge. The mortgage of February 11th, 1873, was to secure the same debt secured by, and it covered all the property covered by, the previous mortgage. It was clearly in substitution for the previous mortgage. In Re Wynne [Case No. 18,117], Chief Justice Chase held, in a case in point, that upon taking the second mortgage the first ceased to have any validity or effect, and that the mortgagee's rights as to lien must stand and be determined solely by the second mortgage. In deciding the question he made use of the following language: "It is doubtless true that a mortgage or other conveyance made as security for a debt evidenced by a note or bond will operate as security for the same continuing debt, though the evidence of it be changed by renewal or otherwise. Winsor v. McLellan [Id. 17,887]. But in this case it is the security itself which has been changed, and not the evidence of the debt. The deed of December 8, 1866, was executed, it seems, in substitution for that of August, which therefore ceased to have any validity or effect." This, I believe, is but a simple declaration of settled law, and announces no new doctrine. It governs this case.

The only question to be determined, therefore, is as to Moulton's rights and disabilities under the mortgage of February 11th, 1873. From the proofs there is no room left in my mind for doubt that the bankrupt was in fact insolvent when this mortgage was given, and, of course, that it was a preference to the mortgagee. I am convinced, also, beyond a reasonable doubt, from Moulton's long and close familiarity with the bankrupt's affairs and business, and from various specific facts and circumstances developed by the proofs, but too numerous to mention in detail in this opinion, that Moulton had not only reasonable but abundant cause to believe the bankrupt insolvent, or at all events in failing circumstances, and that it was such belief, actually entertained by him, that moved him to seek and obtain better security by the taking of the mortgage. This brings the case clearly within sections thirty-six and thirty-nine of the bankrupt act, defining and prohibiting preferences in certain cases. This unlawful preference Moulton has not surrendered to the assignee, but, on the contrary, he is now before the court in the attitude of insisting upon its enforcement. The twenty-third section of the bankrupt act provides that "any person who, after the approval of this act, shall have accepted any preference, having reasonable cause to believe that the same was made or given by the debtor contrary to any provision of this act, shall not prove the debt or claim on account of which the preference was made or given, nor shall he receive any dividend therefrom until he shall first have surrendered to the assignee all property, benefit or advantage received by him under such preference."

By this provision Moulton is absolutely prohibited from proving his debt in this court against the bankrupt estate, beyond the power of the court to grant him any relief whatever from the effects of the prohibition. The claim is for one entire and indivisible debt, and the prohibition applies to every part of it. The debt not being provable no claim could be maintained on account of it to any portion of the assets, by way of lien or otherwise. And this would be equally the case even if the first mortgage could be held to be still in existence. Without proof of the debt no lien can be enforced any more than dividends can be received on account of it. Phelps v. Sellick [Case No. 11,079]. This law may operate harshly in particular instances, but its commands are imperative and the courts have no discretion in the matter. Moulton has, however, only to blame his own anxiety to get the start of the bankrupt's other creditors instead of sharing with them as to any deficiency of the property covered by his former mortgage, according to the spirit, intent and purpose of the bankrupt law. When he took the mortgage of February 11th, 1873, he did so subject to the chances of his mortgagor being thrown into bankruptcy within four months thereafter. Those chances have turned against him, and he must abide the consequences.

It results that Moulton's proof of claim must be rejected, and his application to have his debt or any part thereof paid out of the proceeds of the mortgaged property must be denied; and Moulton must pay the costs of this proceeding, including an attorney's fee of fifteen dollars.

## Case No. 7,530.

In re JOREY et al.

[2 Bond, 336; [1] 2 N. B. R. 668.]

District Court, S. D. Ohio. Feb. Term, 1870.

BANKRUPTCY — FAILURE TO KEEP BOOKS OF ACCOUNTS—BAR TO DISCHARGE.

Under section 29 of the bankrupt act [of 1867 (14 Stat. 531)], the failure of a merchant or tradesman to keep proper books of accounts, is a bar to a discharge in bankruptcy.

[In the matter of John Jorey, William Jorey, and Joseph H. Jorey (trading as John Jorey & Sons), bankrupts.]

Fox & Bird, for creditors.

Warden & Egly, for bankrupts.

OPINION OF THE COURT. The question before the court arises on objections to the

[1] [Reported by Lewis H. Bond, Esq., and here reprinted by permission.]

discharge of said bankrupts. They filed their petition in bankruptcy on December 31, 1868, alleging the insolvency of the firm of John Jorey & Sons, and praying for the benefit of the bankrupt law. On the —— day of February, 1869, there was an adjudication of bankruptcy on the petition of the said firm, and an assignee duly appointed and qualified. Objections to a discharge have been filed by J. O. Flickner, a creditor of the firm, who had duly proved his claim. These objections are numerous; and, on application for that purpose, an order of court was entered referring the same to Register Cranch, to take testimony in relation thereto, and report the same to this court. In pursuance of this order, the members of said firm have been examined, and the testimony of other persons taken, and reported to the court. Counsel for the objecting creditor, and for the firm, have been fully heard, and the question is, whether the members of the firm are entitled to a discharge.

There are seven grounds of objection to the discharge filed by Flickner. Two only of the objections will be noticed, as these, in the judgment of the court, are decisive of the question submitted. The sixth exception is, "that said bankrupts, being merchants or tradesmen, have not, subsequently to the passage of the bankrupt act, kept proper books of account." This objection seems to be fully sustained by the proofs reported by the register. It appears that for some years before their application in bankruptcy, the said firm of John Jorey & Sons had been engaged in the business of manufacturers of and dealers in shoes, at the city of Cincinnati. John Jorey, the father of the other partners, in his examination, states that, in his opinion, the business of the firm, for the two years prior to filing their petition in bankruptcy, was about thirty thousand dollars for each of those years. He admits this was a mere estimate, and that the books of the firm did not afford the means of information as to the extent of their sales. He also states the firm employed no book-keeper, and that, in fact, no regular books were kept. There were no written articles of partnership, and the books did not show the state of the accounts between the members of the firm, or what sums each partner appropriated from the means of the firm, or what each paid or advanced in the prosecution of its business. In short, the books kept contained no exhibit of the state of accounts as between the partners. It also appears there were but partial entries of stock purchased, and no account of the debts and liabilities of the firm; that when sales were made for cash in hand, no entries were made, and when made on credit, they were noted on a slate, and upon payment the charge was obliterated and no entry made in a book. Entries on the slate, when not thus disposed of, were transferred to a book, as the leisure or convenience of the partners would permit. In a word, without noting in detail the singularly loose and imperfect way of keeping the transactions of the firm, it is most obvious from an inspection of the books, that it would be impossible to ascertain the dealings or operations of the firm. This conclusion is verified by the statement of John Jorey in his examination, that he made out his schedule of the debts and liabilities of the firm mainly from memory, as the books did not afford the data enabling him to do it.

Section 29 of the bankrupt act contains a very minute specification of the numerous grounds which shall bar a discharge to a bankrupt; or, if granted, shall invalidate it. The clause relating to keeping books is as follows: "If being a merchant or tradesman, he (the bankrupt) has not, subsequently to the passage of this act, kept proper books of accounts." The members of this firm were clearly tradesmen within the meaning of this act, though not doing a very extensive business in their line. And it was clearly the policy and intention of the statute that no one within the scope of the clause referred to should receive a discharge, unless he kept books, after the passage of the law, that would fully and truthfully exhibit his business transactions. This is well stated by Mr. Justice Grier, late of the supreme court of the United States, in the case of In re Solomon [Case No. 13,167]. The learned judge says: "The policy of the act requires that any merchant and trader should keep such books of account as, considering the business and condition of the debtor, would enable any competent person, from the books and invoices, to ascertain the real condition of the debtor's affairs." And again, in Re White [Id. 17,532], the court refused a discharge because the bankrupt kept no invoice or stock books. I concur fully in the decisions in these cases, and they are directly in point on the question under consideration. It is not easy to conceive of greater looseness and deficiencies in keeping books than are apparent in the case of the firm of Jorey & Sons. Not only were their business transactions and the condition of the firm unintelligible to others from their books, but the parties did not understand them when they filed their petition in bankruptcy. This is clear from the reference before made to the facts.

The suggestion of counsel, that no fraud was intended by the loose and defective way of keeping the books of the firm, is no answer to the objection made to a discharge on this ground. The statute makes it a bar to a discharge, irrespective of the intention. If it were otherwise, it is obvious a wide door would be opened for the commission of frauds, without a reasonable hope of detection.

There is one other exception set forth in the specifications filed by the objecting creditor, to which I will briefly advert. It is, in

substance, that the firm, or some of its members, have made payments and transfers of property, immediately before the application in bankruptcy, involving preferences, in violation of the statute. One clause in section 29 of the act provides, that if the bankrupt "has given any fraudulent preference contrary to the provisions of this act, or made any fraudulent payment, gift, transfer, conveyance, or assignment of any part of his property, he shall not receive a discharge." In his examination, John Jorey admits that just preceding the petition in bankruptcy by the firm, he gave his wife $600 in cash, to pay expenses of the family. This the law does not authorize. He claimed, and there was set off to him by the assignee, certain property and assets, exempt from the operation of the bankrupt act, which was all he had a right to retain. The money given to his wife belonged to his creditors, and should have been entered on his schedule of property and assets. He returns no cash on hand, whereas he should have included the $600 in the schedule. This, however intended, was a fraud upon, and in violation of, the statute. In addition to this, without noticing other unlawful preferences, it appears that John Jorey transferred to his brother-in-law, Dingle, several promissory notes held by him, in payment of a debt due to Dingle. This was after the insolvency of the firm was known by the bankrupts, and by the person to whom the payment was made. It was, therefore, a preference in violation of the statute.

Without referring to the other objections to the discharge of these bankrupts—some of which are clearly sustained by the proofs—I have no hesitancy in holding that their discharge must be refused.

## Case No. 7,531.

Case of JOSE FERREIRA DOS SANTOS.

[See Case No. 4,016.]

## Case No. 7,532.

In re JOSEPH.

[2 Woods, 390.] [1]

Circuit Court, S. D. Georgia. June Term, 1875.

BANKRUPTCY — CLAIM OF ALLEGED CREDITOR — RIGHT OF ANOTHER CREDITOR TO INTERVENE AND OPPOSE—ALLOWANCE OF CLAIM—RIGHT OF INTERVENING CREDITOR TO APPEAL TO CIRCUIT COURT.

1. One creditor of a bankrupt may, without the consent of the assignee, intervene and oppose the allowance of the claim of another alleged creditor.

2. A creditor, whose opposition to the claim of another creditor has been overruled by the district court, may, when such claim is allowed, take the question to the circuit court for review, by bill, petition, or other proper process.

[In review of the action of the district court of the United States for the Southern district of Georgia.]

[In the matter of Adolph Joseph, a bankrupt.] This cause was a petition of review filed under the second section of the bankrupt act [of 1867 (14 Stat. 518)]. It was heard upon a motion made by the defendants to the petition to dismiss the same on the ground that it did not disclose a case for the revisory jurisdiction of the court.

H. R. Jackson, A. R. Lawton, and W. S. Basinger, for the motion.

Charles N. West, contra.

Before BRADLEY, Circuit Justice, and WOODS, Circuit Judge.

WOODS, Circuit Judge. E. Waitzfelder & Co., claiming to be creditors of the bankrupt, proved their debt before the register. Cochran, McLean & Co., who it is was conceded were bona fide creditors of the bankrupt, moved the register to expunge the proof of the claim of Waitzfelder & Co., and testimony having been taken by both parties, the register, by agreement, referred the matter to the judge of the district court. After hearing the evidence, the district judge refused to grant the motion to expunge. Thereupon, Cochran, McLean & Co. filed their petition under the second section of the bankrupt act, alleging that they were aggrieved by the decision of the district judge, and praying a review and reversal of his order. The revision sought was upon the same motion and evidence as that submitted to the district judge. Waitzfelder & Co. now move this court to dismiss the petition on the ground that the case is not within the revisory jurisdiction of the circuit court, and this motion presents the question now to be determined. The second section of the bankrupt act (Rev. St. § 4986), declares that "the circuit court for each district shall have a general superintendence and jurisdiction of all cases and questions arising in the district court for such district when sitting as a court of bankruptcy * * * and, except when special provision is otherwise made, may upon bill, petition, or other proper process of any party aggrieved, hear and determine the case as in a court of equity." Two points are presented by this section for solution: (1) Whether one creditor is authorized to make a case or question by opposing the allowance of the debt of another creditor, and (2), if the bankrupt court has overruled his opposition and allowed the debt, whether any "special provision is otherwise made" except by petition of review, by which he can take the case or question to the circuit court for revision.

Upon the first point, it seems clear that one creditor may oppose the allowance of the claim of any other creditor. There is a fixed amount of assets, out of which the creditors are to be paid pro rata. Each one

[1] [Reported by Hon. William B. Woods, Circuit Judge, and here reprinted by permission.]

is interested in diminishing the claim of every other, for the less the claims of others, the greater will be his own dividend. And the bankrupt act makes direct provision for the intervention of one creditor against the claim of another. Section 22 (Rev. St. § 5881) provides that "the court may, upon application of the assignee, or of any creditor, or of the bankrupt, examine upon oath the bankrupt, or any person tendering, or who has made proof of a claim, and may summon any person capable of giving evidence concerning such proof, or concerning the debt sought to be proved, and shall reject all claims not duly proved, or where the proof shows the claim to be founded in fraud, illegality or mistake." Here is ample warrant for a creditor to intervene and contest the allowance by the district court of the claim of any other creditor. His intervention and opposition raise a case or question in the bankrupt court, and of such case or question the circuit court has revisory jurisdiction by bill, petition, or other proper process, unless special provision is otherwise made therefor. Is provision otherwise made in the case where one creditor, without the concurrence of the assignee, opposes the allowance of the claim of another creditor? Section 8 (Rev. St. § 4980) of the bankrupt act furnishes the only special provisions for the removal of causes or questions in bankruptcy from the district to the circuit court. It provides that appeals may be taken from the district to the circuit courts in all cases in equity, and writs of error, from the circuit courts to the district courts, may be allowed in cases at law arising under the jurisdiction created by the bankrupt act, when the debt or damages claimed amount to more than five hundred dollars; and any supposed creditor whose claim is wholly or in part rejected, or an assignee who is dissatisfied with the allowance of a claim, may appeal from the decision of the district court to the circuit court for the same district. Here is no provision for any appeal or other revisory proceeding by a creditor who is dissatisfied with the allowance of a claim. The assignee may appeal, but a contesting creditor cannot. When a creditor opposes a claim, he raises a case or question. If it is decided against him, the circuit court has jurisdiction to revise it by bill or petition, unless special provision is otherwise made. But, as we have seen, there is no special provision made for such a case, and it follows that the case or question must be reviewed, if at all, by bill, petition, or other proper process under the second section.

The policy and express provision of the bankrupt act is, to allow a review by the circuit court of every case or question not lodged exclusively in the discretion of the district court, arising in the administration of the bankrupt act by the district court, except where provision has been made for an appeal or writ of error. No more comprehensive language could be found, to embrace every controversy arising in the course of the bankrupt proceedings, than that used in the section conferring revisory power upon the circuit court. I am of opinion, therefore, that the opposition by one creditor to the allowance of the claim of another creditor, makes a case or question under the bankrupt act; that if the claim is allowed in spite of the opposition of the contesting creditor, no appeal is allowed him, nor other special provision for removing the case or question to the circuit court, and that he may, therefore, by virtue of the provisions of the second section, take the case or question to the circuit court by bill, petition, or other proper process.

In opposition to the views expressed, we have been cited to the following cases: In re Troy Woolen Co. [Case No. 14,202]; In re Place [Id. 11,200]. In the first case the assignee joined with a creditor in contesting the claim of another creditor, and as the assignee refused to appeal from the allowance of the claim, as he might have done, the court decided that the creditor could not resort to his petition of review. It must be admitted that this case is in point against the views expressed, and that the opinion of the court by which it was decided is entitled to great respect. The case just mentioned appears to involve the same controversy, in a somewhat different shape, that was decided by the United States supreme court in Bank v. Cooper, 20 Wall. [87 U. S.] 171. The proceeding appealed from was a bill filed in the circuit court by the creditor to contest the allowance of the claim of another creditor made by the district court. The supreme court held that, as an original bill, it was without equity. It was then suggested that it might be good as a petition under the second section of the bankrupt act. The court declined to decide whether the case made by the bill presented a proper one for review under that section. But although the bill was demurred to for want of jurisdiction, the court did not decide that a creditor contesting the claim of another creditor could not review by petition in the circuit court, the allowance of the claim by the district court. The other case cited, namely, In re Place [supra], only decides that when the claim of a creditor is disallowed, he must take the case to the circuit court by appeal, and not by petition of review.

Basing my decision upon the express words of the bankrupt act, I am of opinion that under the facts of this case, Cochran, McLean & Co. had the right to take the decision of the district court allowing the claim of Waitzfelder & Co. to the circuit court, by petition of review. It has occurred to me that as the assignee has the right to appeal, and the opposing creditor to proceed by petition of review to have the allowance of the claim of another creditor reversed, it is possible that both these remedies might be re-

sorted to at the same time, and thereby present the same controversy to the circuit court in two different forms, and involving different methods of trial. But this difficulty, if it should ever arise, may be avoided by the exercise of the discretion of the circuit court in determining which form of proceeding should be retained. Practically, I think no embarrassment could arise from the case supposed.

The result of these views is, that the motion to dismiss must be overruled.

## Case No. 7,533.

The JOSEPH.

[1 Gall. 545.] [1]

Circuit Court, D. Massachusetts. Oct. Term, 1813.[2]

TRADING WITH ENEMY—NATIONAL CHARACTER OF PARTY DECIDED BY DOMICIL—IN CASE OF WAR DUTY OF CITIZENS TO RETURN—PRIZE—WHETHER SHIP CONDEMNED TO CAPTORS OR UNITED STATES — CAPTURE WITHIN THREE MILES OF SHORE —PRIVATEERS — CAPTURES BY NON-COMMISSIONED VESSELS.

1. If an American vessel, after a knowledge of the war, proceed from a neutral to an enemy port on freight, it is a trading with the enemy, which subjects the vessel to forfeiture, and she is liable therefor on her return voyage to the United States.

[Cited in Kershaw v. Kelsey, 100 Mass. 567.]

[See note at end of case.]

2. The birth of a party is not that, which decides his national character; but his domicil.

3. On a declaration of war, the citizens are not bound to return from foreign countries, unless so ordered by the government.

4. In cases of trading with the enemy, the property is to be condemned to the captors, and not to the United States.

[Cited in U. S. v. Steever, 113 U. S. 752, 5 Sup. Ct. 768.]

[See note at end of case.]

5. A capture may well be made by a privateer of the United States, within three miles of the shores of the United States.

[See note at end of case.]

6. To what captures the commissions of privateers extend.

[See note at end of case.]

7. Captures by non-commissioned vessels belong to the government.

[Cited in The Siren, 13 Wall. (80 U. S.) 393.]

See The Dos Hermanos, 10 Wheat. [23 U. S.] 306; The Georgiana, 1 Dod. 397.

8. Property captured trading with the enemy is deemed quasi enemy property.

[Cited in U. S. v. One Hundred Barrels of Cement, Case No. 15,945.]

[Appeal from the district court of the United States for the district of Massachusetts.]

[This was a suit brought against the brig Joseph, Charles L. Sargent, master, which was captured as a prize of war by the privateer Fame. In the district court the claim of the owners, William Dall and Isaac Vose, was rejected, and the property was condemned to the United States. From this decree (case unreported) the captors and claimants appeal.]

J. E. Sprague, for captors.

S. Putnam, for claimants.

G. Blake, for the United States.

STORY, Circuit Justice. The brig Joseph, owned by the claimants, who are American citizens resident in Boston, was captured by the privateer Fame, Benjamin Chapman commander, on the 16th of July, 1813, in Boston Bay. There is some dispute, as to the exact place of capture. In the preparatory examinations, the master states, "that she was captured in sight of Half Way Rock," (which rock is about a marine league from the shore), "off Salem harbor." The mate states, "that she was captured about ten leagues east from Boston light house." Taking both statements together, I am satisfied that she was captured a few miles without Half Way Rock, and beyond the territorial limits of the United States, if those limits are to be measured by the distance of a marine league from the nearest shore. It appears from the papers and evidence in the cause, that the brig sailed from Boston on or about the 6th of April, 1812, having on board a cargo on freight, on a voyage from thence to Liverpool, and thence to the north of Europe, and thence directly or indirectly to return to the United States. The brig arrived at Liverpool, and having discharged her cargo there, went to Hull, and took in another cargo of mahogany, which had been deposited there on a former voyage by the claimants, and on the 30th of June, 1812, sailed for St. Petersburg, under the protection of a British license, granted on the 8th of June, 1812, to continue in force until the first of November following, authorizing the export of the mahogany to St. Petersburg, and the importation of a return cargo to England. The license was granted upon the express condition, that the brig should receive convoy instructions, and sail under convoy during the voyage. The brig duly arrived at St. Petersburg, and there the master received news of the war between the United States and Great Britain. In a supplementary affidavit, the master states, that he inquired of the Hon. John Q. Adams, the American ambassador at the court of Russia, if there was any law against his returning to England with a license taken before the war, and was answered, that there was none. The cargo of mahogany not being sold, the brig took on board, on freight, from a German house at St. Petersburg, consigned to German houses in London, a cargo consisting of hemp and iron, with which she sailed from St. Petersburg, on or about the 7th of October, 1812; but the season being late, she was obliged to winter in Carlscrona in Sweden, and in the spring of 1813, having received convoy instructions from the Brit-

[1] [Reported by John Gallison, Esq.]

[2] [Affirmed in 8 Cranch (12 U. S.) 451.]

ish ship Ranger, sailed for London, where she arrived and delivered her cargo; and on or about the 29th of May, 1813, sailed for the United States in ballast. The master alleges, that his reason for taking the cargo of hemp and iron to England was, to enable him, out of the freight, to discharge his expenses at St. Petersburg, and that going to England was the only safe mode of effecting his return to the United States. There is a letter in the case, dated at Boston, 26th of April, 1812, addressed by the claimants to Captain Sargent, which, after informing him of the American embargo, proceeds: "It is the opinion of some, that war will take place between England and America. If that should be the case, we hope that you and Mr. Williams will secure the property." When and where this letter was received does not appear. Such are the material facts of the case, and certainly taken in its fair and reasonable bearing, it is a case entitled to considerable indulgence. Under the new and extraordinary circumstances of a public war, it would be hard to impute sinister motives to actions, which seem to have resulted from cautious attention, and to have been adopted after advice from distinguished authority, to relieve the party from a situation of considerable embarrassment. I am free therefore to declare, that I have come to the decision of the cause with great reluctance; but it has been pressed upon me with such urgency of manner (which I hope does not often accompany the zeal of captors in cases entitled to indulgence), that I readily yield my personal convenience, and will pronounce the decision, which, upon the most mature reflection, I have felt myself compelled to adopt.

The cause has been ably argued on the part of the claimants, and I will proceed to consider the various grounds, upon which it has been contended, that the brig is not subject to condemnation. And, in the first place, it is contended, that there has been no trading with the enemy, which can subject the property to condemnation, because it was lawful, before the war, to sail under a British license to St. Petersburg, and back to England. And the taking in of a return cargo on freight to England, after the war, was from necessity, to obtain funds to pay the expenses of the ship; and the opinion of the American minister, under the circumstances, was equivalent to a license. It will be recollected, however, that although the license was actually obtained before the war, yet the voyage was not actually commenced, until after war was declared; and although this was not known to the master, yet it could not but be known, that a state approaching to hostilities had for some time existed between the two countries. Further, the license was upon the express condition of assuming British convoy for the voyage, and however this might affect the property in an American court, it might be deemed such an adoption of hostile conduct, and such a resistance of the right of search, as might compromit the neutral character of the property, so protected by a hostile convoy, in the courts of the opposing belligerent. See The Maria, 1 C. Rob. Adm. 340. However, I barely state these circumstances, without intending to lay any particular stress on them.

The trading with the public enemy, for which condemnation is sought, is the taking in and carrying a cargo on freight to England, after a full knowledge of the war. This is attempted to be justified, partly upon the opinion of the American minister, and partly on the ground of inability otherwise to meet the expenses of the voyage. To the character and learning of that minister I feel every disposition to pay the most ample homage. And knowing, as we all well do, his extraordinary intimacy with subjects of national law, I confess myself much inclined to doubt, whether the opinion, in the extent and manner it is now supposed, ought to be imputed to him. We have no written statement from himself. The observations appear to have passed in conversation, in which mistakes might easily creep in, and misconstructions easily arise, without any intention on his part to countenance a doctrine, which has been, for more than a century, overruled in national law. Vattel, and Bynkershoek, and Valin, and Sir Wm. Scott, assert a contrary doctrine, in the most explicit terms; and it cannot lightly be imagined, that the opinions of these great men, on this subject, can have escaped his researches. I feel myself bound therefore to believe, that the opinion given was with qualifications, which do not now appear in the testimony before the court. Be this as it may, and even admitting, that our minister did, in the most explicit terms, countenance the voyage, and assert its legality, it cannot vary the legal result before this tribunal. It may add much weight to the other circumstances entitling the party to the indulgence of the government, but it cannot authorize this court to pronounce a decree, which the law would otherwise repudiate. The courts of the United States can admit no other regulators of their conduct, than the laws pronounced and promulgated by the constituted authorities; and I hope it will not be deemed presumptuous, that, when they have felt themselves compelled to reject as illegal the acts and instructions of the executive himself, they should not yield to the mere supposal of an opinion of one of the foreign ministers. I lay out of the case, therefore, all consideration of the opinion imputed to the Hon. Mr. Adams.

As to the supposed necessity of taking the cargo on freight to England, in order to pay the ship's expenses, it is a circumstance entitling the party to the benignant consideration of the government, but can form no legal excuse. The cases cited in The Hoop,

1 C. Rob. Adm. 196, and Potts v. Bell, 8 Term R. 548, are decisive. The result of those cases is summed up by Sir W. Scott, in this emphatic language: "The cases, which I have produced, prove that the rule has been rigidly enforced, where acts of parliament have, on different occasions, been made to relax the navigation law, and other revenue acts; where the government has authorized, under the sanction of an act of parliament, a homeward trade from the enemy's possessions, but has not specifically protected an outward trade to the same, though intimately connected with that homeward trade, and almost necessary to its existence; that it has been enforced, where strong claims, not merely of convenience, but almost of necessity, excused it on behalf of the individual; that it has been enforced, where cargoes have been laden before the war, but where parties have not used all possible diligence to countermand the voyage after the first notice of hostilities; and that it has been enforced, not only against the subjects of the crown, but likewise against those of its allies in the war." And, in the passage immediately preceding, he says, "That the rule is so firmly established, that no one case exists, which has been permitted to contravene it." It has indeed been supposed in the argument, that the authority of these decisions is somewhat shaken by a subsequent decision of Sir W. Scott in The Madonna delle Gracie, 4 C. Rob. Adm. 195. It is clear, however, that the learned judge did not so consider it; and I have repeatedly had occasion to declare, that I consider the case as standing upon peculiar grounds, and not as affecting the general rule. The property, having been purchased on account of the British government, was held to be entitled to the same consideration, as if owned by the government, or as if protected by its immediate license. The supposed necessity of the trade cannot, therefore, upon acknowledged and settled principles (which I forbear to repeat, as they have been so frequently before the court), justify the party in the return voyage to England. Indeed, independent of this supposed necessity, the trade would have been of an extremely obnoxious character. The cargo consisted of hemp, which in general is contraband of war, and of iron, which is highly important to the naval equipments of the enemy. It was undertaken in connexion with the enemy, and accomplished under the convoy and orders of his ships of war. It is a trade, therefore, in which neutrals could not engage without imminent hazard, and I think it would have been difficult to exempt a neutral ship with such a cargo, under such a convoy, from the penalty of confiscation. How much more noxious would such a voyage be in a citizen of the other belligerent? It has been suggested, that the cargo being shipped by a neutral house in St. Petersburg, consigned to German houses in London, the latter are to be considered as neutral, and therefore there was no trade at all with the enemy. There is certainly no foundation for this suggestion. Admitting that the German houses in London consisted altogether of German partners, it is quite impossible to contend, that they are neutrals. It is not the birth or native allegiance, but the domicil, that decides, in cases of this nature, the national character of the parties. See Curt. Dig. tit. "National Character," where all the authorities may be found. If a neutral subject be domiciled, and carry on trade in an enemy's country, he is held, as to all commercial purposes, an enemy. There can be no doubt, therefore, that the German houses in London were, as to all purposes of trade, enemies, and their property liable to confiscation as hostile property.

It has been further argued, that a declaration of war is, in effect, a command to the citizens of the belligerent country abroad at the time, to return home, and that the law allows a reasonable time and way to effect it. I am not aware of any principle of public law, which obliges every absent citizen to return to his country, on the breaking out of a war; nor has any authority been produced which countenances the position. It may be admitted, that the sovereign power of the country has a right to require the services of all its citizens, in time of war, and for this purpose may recall them home under penalties for disobedience. But until the sovereign power has promulgated such command, the citizens of the country have a perfect right to pursue their ordinary business and trade in and with all other countries, except that of the enemy. Upon any other supposition, all foreign commerce would, during war, be suspended; for if it were the duty of absent citizens to return, it would, upon the same principle, be the duty of those at home to remain there. As to citizens in the hostile country, the declaration of war imports a suspension of all further commerce with such country, and obliges them to return, unless they would be involved in all the consequences of the hostile character. If they wish to return, they must do it in a manner, which does not violate the laws; and their property cannot be removed with safety from the enemy country, unless under the sanction of their own government. But even if the position were generally true, that is contended for, the law would never deem that a reasonble mode of conveying property home, which involved it in a noxious trade with the public enemy. That can never be held to be a reasonable mode of returning a ship to the United States, which involves her in a traffic forbidden by the laws. However, I am well satisfied, that the position cannot be maintained in any extent adequate to the purpose, for which it has been introduced.

I have thus considered all the grounds, upon which this case has been attempted to be exempted from the imputation of a trade with the enemy; and as, in my judgment,

they are utterly insufficient, I hold the case to fall within the general doctrine. And here we are met with another objection. It is said, that if any offence was committed, it was completed upon the delivery of the cargo in Great Britain: and the vessel is not liable to capture on that account in the subsequent voyage to the United States. It may be admitted, for the purposes of this argument, that the vessel could be liable to seizure and capture for this offence, only during the voyage (by which I mean the entire voyage), and while the property remained in delicto. But I cannot perceive, how any question, as to two distinct voyages, properly arises in this case. The original voyage, as the claimants themselves admit, and the evidence proves, was from Boston to England, and thence to the north of Europe, and thence directly or indirectly back to the United States. No new voyage is pretended to have been undertaken, unless that from St. Petersburg to London be a new one. And the claimants themselves admit, that it was undertaken, not as a new voyage, but as merely subsidiary to their voyage home. It was, therefore, a voyage for Boston by the way of London. The testimony of the master is full to the same purpose. In his answer to the 7th interrogatory, he says, "that his last voyage began at Boston, and was to have ended there." And indeed if the evidence were not thus decisive, I should have had no doubt, that the right to capture for the offence continued until the brig actually returned to the ports of this country. On the whole, I am satisfied that this vessel was captured in delicto, and that the penalty of confiscation for a trade with the enemy attaches to her.

The remaining question is, to whom the property ought to be condemned—to the captors or to the United States? As it was captured trading with the enemy, the property is considered, as pro hac vice belonging to the enemy, and consequently good prize to the captors. This doctrine was attempted to be shaken in The Nelly, 1 C. Rob. Adm. 219, note, but Sir William Scott, after stating that the uniform course of decisions had pronounced the property to be forfeited as prize, said, "it is impossible for me not to pronounce, that this property is forfeited as prize to the captors." I have uniformly adhered to that decision, and until I am taught otherwise by a superior tribunal, I shall continue to hold it the law of the land. It is, however, argued, that the capture was illegal, and conveyed no title to the captors, because it took place within the territorial limits of the United States, or in other words, within cannon shot of the land. It might be a sufficient answer to this objection, that the facts do not warrant this conclusion. It is clear from the evidence, that the brig was not within a marine league of the shore. I am willing, however, to consider how the objection would have stood, upon the supposition, that the capture was actually made on the coast of the United States, within a marine league of the shore. The objection seems bottomed upon the ancient doctrines in Great Britain, relative to captures, which are droits of the admiralty, or which belong to the king jure coronae. It seems clear, that in England, by very ancient grants from the crown, the lord high admiral has the benefit of all captures made by non-commissioned vessels, and also of all captures, by whomsoever made, of all ships and goods coming or already come into ports, creeks or roads of England and Ireland, by stress of weather or other accident, or by mistake of port, or by ignorance, not knowing of the war, and also of all derelicts. But the king reserved to himself, in right of his crown, all such ships and goods, as should be seized in port on the breaking out of war, and also all such, as should come in voluntarily upon revolt, or be driven or forced into port by the king's men of war. The Rebeckah, 1 C. Rob. Adm. 227, 229, note; The Gertruyda, 2 C. Rob. Adm. 211. The grants to the lord high admiral have always received a strict construction, because they go to create a perpetual alienation of certain prerogatives from the crown. Therefore it is settled, that it is not sufficient, that a ship be about to go into a port or roadstead, to entitle the admiral, but she must be actually entering, and in ipsis faucibus portus (The Rebeckah, 1 C. Rob. Adm. 227); and the roadstead must not only be a place for anchorage, but a place for anchorage to unload and load cargoes (Id., and The Maria Francoise, 6 C. Rob. Adm. 282). Independent however of these grants to the lord high admiral, I apprehend that no doubt could arise in England, as to the right of any commissioned vessel to seize any enemy property, within the ports or on the coasts of the kingdom. It is true, that all rights of prize belong originally to the crown, and the beneficial interests derived to others can proceed only from the grant of the crown (The Elsebe, 5 C. Rob. Adm. 173; 11 East, 619; The Maria Francoise, 6 C. Rob. Adm. 282), and therefore, all captures, wherever made, enure to the use and benefit of the crown, unless they have been granted as droits to the admiralty, or as prize to the captors.

It has been usual, at least since the reign of Queen Anne (St. 6 Ann. c. 13) for parliament, on the breaking out of war, to grant, with a few exceptions, the whole interest in prizes, made by commissioned vessels, to the captors, to be distributed in such proportions, as the crown should by proclamation provide. In cases not within the purview of any act of parliament, the crown has usually made a grant of its royal bounty equally extensive. The beneficial interest of captors in prizes must therefore depend upon the public or royal grant; the authority to capture must depend altogether upon the extent of the commission issued to a public or private vessel. Each may have a right to capture in cases, where no beneficial interest may accrue to

the captors—although, in general, the rights are co-extensive. In former times, the crown, on the breaking out of war, issued commissions to public and private vessels, in such form and extent as suited its own discretion. The authority, as to the commissions of public ships, has not, to my knowledge, ever been restricted; but since the statute 13 Geo. II., c. 4, it has been usual, in the acts of parliament, to restrain the commissions of privateers to "the attacking, surprising, seizing, and taking, by such ship or vessel, or the crew thereof, any place or fortress upon the land, or any ship or vessel, goods, ammunition, arms, stores of war, or merchandize, belonging to or possessed by any of his majesty's enemies, in any sea, creek, haven, or river." This restriction is undoubtedly founded upon the policy of discouraging depredations upon the coasts of the enemy, for the purpose of plundering individuals. See Acts 17 Geo. II. c. 34; 19 Geo. II. c. 67; 21 Geo. III. c. 15, etc.; Thorshaven, 1 Edw. Adm. 102.

With a view indeed to the same policy, by a recent act of parliament, (which I have not had an opportunity to see) the right of capture by public ships is restrained to "any fortress upon the land, or any arms, ammunition, stores of war, goods, merchandize, and treasure, belonging to the state, or to any public trading company of the enemies of the crown of Great Britain, upon the land." And Sir William Scott (Thorshaven, 1 Edw. Adm. 102), commenting upon this clause of the act, observes that the commissions of privateers do not, under the act, extend to the capture of private property on land, and that such a right is not granted even to king's ships: that the interests of the king's cruisers are expressly limited, with respect to the property, in which the captors can acquire any interest of their own, the state still securing to itself all private property, in order that no temptation might be held out for unauthorized expeditions against the subjects of the enemy. And, as to privateers, he states, that it was the intention of parliament to limit their captures "to fortified places, and fortresses, and to property waterborne," "in any sea, creek, river, or haven." Independent, however, of these restraining acts of parliament, and in cases which they do not reach, it never has been doubted, that the crown might grant commissions to privateers as extensive as it pleased. And in the only forms, which have fallen under my observation (Marr. Adm. Form. 110; 2 C. Rob. Appx. Nos. 8, 9), the grant of the crown seems in as general terms as possible. But it has never been thought at any time, that captures by privateers were exclusively confined to the high seas, independent of any acts of parliament; on the contrary, these have been uniformly deemed restrictive. See Lindo v. Rodney, Doug. 613, note; Thorshaven, 1 Edw. Adm. 102. Captures indeed may be made, by privateers or public ships, under circumstances which will entitle the crown to hold them droits of admiralty, but this has never been supposed to destroy the right to capture.

If there be nothing in the language of the acts of parliament, or of the commission or prize proclamations and instructions, to affect the case, I take it for granted, that by the prize law of England, a privateer may lawfully make captures within the territorial limits of the realm on the sea coast. Against the generality of this doctrine, I have not been able to find a single opposing authority, and the very silence of the books in a case of so frequent occurrence affords a strong argument in its favor. On the other hand, in the cases of the Rebeckah, and the Maria Francoise, where the claims of the admiralty were rejected, no question was raised, as to the right of capture within the territorial limits of the country, (although the facts might well have raised it), and the property was condemned to the captors, as good and lawful prize.

In the United States, there are not, strictly speaking, any such things as droits of admiralty. The sole and exclusive right to all prizes rests in the government, and no individual can acquire any interest therein, unless under its grant and commission; and all captures, therefore, made without such grant and commission enure to the use of the government, by virtue of its general prerogative. This, as Sir W. Scott observes, (The Elsebe, 5 C. Rob. Adm. 173), is no peculiar doctrine of the English constitution; it is universally received as a necessary principle of public jurisprudence, by all writers on the subject; "bello parta cedunt reipublicae" (see Vattel, bk. 3, c. 15, § 229). And the government, in such case, do not take the property, as droits of admiralty, but strictly and technically jure reipublicae. In order to decide on the rights of captors in the United States, it is necessary to look into the laws, which the legislature have enacted on the subject; for no beneficial interest can pass to them beyond the terms of the grants, which have been made by congress; and on the other hand, no abridgment of their rights, unauthorized by the laws, can be of validity. By the act declaring war (Act 18th June, 1812, c. 102 [2 Stat. 755]), the president is authorized to employ the whole land and naval force of the United States, to carry the war into effect, and to issue to private armed vessels of the United States commissions or letters of marque and general reprisal, in such form, as he shall think proper, against the vessels, goods and effects of the government of the United Kingdom of Great Britain and Ireland, and the subjects thereof. It has been argued, on behalf of the United States, in some of the causes before the court, that the authority to the president to issue commissions in such form as he should think proper, includes a power to abridge the general rights of capture by excepting classes of cases, as the president shall from time to

time deem expedient. I cannot yield to this construction. The act requires, that the commission should include general reprisals, and leaves nothing but the form to the control of the executive. Nor do I conceive, that the act of the 26th of June, 1812, c. 107 [2 Stat. 759], in any part thereof, and particularly, in the 8th section, by authorizing the president to issue instructions for the better governing and directing the conduct of privateers, meant to restrict, or in any wise abridge the general authorities flowing from the former act. It is not, however, necessary very nicely to sift this point, because the president has not, in fact, either in the commission or in the instructions, restrained privateers from making captures on the coasts of the United States. The commission contains an authority "to subdue, seize and take, any armed or unarmed British vessel, public or private, which shall be found within the jurisdictional limits of the United States, or elsewhere on the high seas, or within the waters of the British dominions, and such captured vessel, with her apparel, &c. and the goods or effects, which shall be found on board the same, together with all the British persons, &c. to bring within some port of the United States." And further, "to detain, seize and take, all vessels and effects, to whomsoever belonging, which shall be liable thereto, according to the law of nations, and the rights of the United States, as a power at war;" and to bring the same within some "port of the United States," &c. The instructions accompanying the commission state, that "the high seas,'" in the commission, generally extend to low water mark; and not a syllable is contained therein, which restrains the general language of the commission. So far from captures being prohibited within our jurisdictional limits, they are expressly authorized by the commission. As therefore there is no limitation, either in the grant of prize by congress, or in the commission or instructions of the president, abridging the right of capturing prizes within a marine league of the coast, I think it clear, that the captors have as full powers and authorities there, as in captures upon the broad ocean. It is quite a distinct question, whether some limitation might not have been prudent, upon which I do not however presume to have an opinion.

It is been further supposed, that the commission and grant of prizes provided by law do not attach upon property like this, because the grant and commission is of the property of the enemies of the United States, to wit, the British government and its subjects. This objection has in part been answered before (see The Nelly, 1 C. Rob. Adm. 219, note); and, certainly, it might be more plausibly urged against the letters of marque issued by the British government. I will content myself with barely quoting from The Elsebe, 5 C. Rob. Adm. 173, the answer of Sir Wm. Scott to an objection of this same nature, which I consider so decisive, as to require no further comment. "It is contended," says he, "that no grant of prize, made by the crown, attaches upon such property as this, (i. e. in the case before him, neutral property) because the grant is of property of the king's enemies, that is, of the French and other nations, with whom we are at war. But the grant is not so construed and applied. It is held, in construction and practice, to embrace all property liable to be condemned as prize, and not particularly reserved by the rights of the crown or of the admiralty. By fiction, or rather by intendment of law, all property condemned is the property of enemies, that is, of persons so to be considered in the particular transaction; and half the business of this court is exercised on such property, in determining, whether it is not liable to be condemned, as prize to the captors. It is therefore a position not seriously to be maintained, that the captors' grant does not reach to this extent, by the constant course of interpretation authorizing such a construction."

It has been further argued, that the capture was not legal, because the brig was actually coming into a port of the United States, and therefore, there was no meritorious service performed, entitling the party to the recompense of prize. But it may be answered to this, that the right of the captors to prize is not like the right to salvage, founded upon any supposed meritorious service. It depends exclusively upon the commission. The captors may have exhibited the utmost gallantry and enterprise, and accomplished the most arduous services, and yet if they have no commission, the prize belongs exclusively to the government. On the other hand, if they have a commission, although there may have been scarcely any exertion, and the property may, by mere good fortune, have fallen into their lap, they share the whole, as undisputed prize. And if the property belong to enemies, or from the nature of the transaction, is to be deemed pro hac vice the property of enemies, it is quite immaterial, whether the property be going from, or coming to a port of this country. And where the offence has been a trade with the enemy, the cases make no distinction, whether the voyage was from, or to the ports of the capturing power. In some of the cases, it is clear, that the property was bound to a port within the British dominions, at the time of capture.[3]

On the whole, as none of the distinctions assumed by the claimants can, in point of law, prevail, I feel myself bound to declare,

[3] Potts v. Bell, 8 Term R. 548; The Elizabeth of Ostend (in 1749) [Sir B. Simpson's MSS.]; The Ringende Jacob (in 1747) [1 C. Rob. Adm. 202]; The Compte de Wohronzoff (in 1781) [Id. 205]; The Expedite van Roterdam (in 1782) [Id. 206]; The William (in 1795) [Id. 214]; and The Hoop, 1 C. Rob. Adm. 196, in which last case, and in Potts v. Bell, the other cited cases will be found.

that the property must be condemned to the captors, as good and lawful prize. It is a case, in which the captors seem disposed to exercise the summum jus, a course which I must regret, but have no authority to prevent.

The operation of the president's instruction of the 28th of August, 1812, on the present case, was elaborately considered by the learned judge of the district court, in pronouncing his decree. I have had an opportunity, in the case of the brig Alexander and cargo, at this term, to express my opinion on that instruction, and to that opinion I do not think it necessary to add any thing in this place.

I reject the claims of the United States, and of Messrs. Dall and Vose, and pronounce the brig Joseph and her appurtenances, good and lawful prize to the captors.

[NOTE. An appeal was then taken by the United States and the claimants to the supreme court where the decree was affirmed in an opinion by Mr. Justice Washington, who said that the sailing with a cargo of freight from St. Petersburg to London after a full knowledge of the war amounted to trading with the enemy, and, as the vessel was still on the same voyage in which the offense was committed, she was liable to confiscation. The voyage was really from St. Petersburg to the United States, and the stopping at London was a mere deviation of the master for the purpose of carrying on an intermediate trade. A privateer has a right to capture vessels within the territorial limits of the United States at any place below low-water mark. The fact that the vessel was on her way and near to an American port did not exempt her from being captured, as the commission of the privateer authorized a seizure anywhere. 8 Cranch (12 U. S.) 451.]

JOSEPH, The (REYNOLDS v.). See Case No. 11,730.

JOSEPH (TREADWELL v.). See Case No. 14,157.

JOSEPHA, The MARIA. See Case No. 9,078.

## Case No. 7,534.

The JOSEPH A. DAVIS.

[9 Adm. Rec. 231.]

District Court, S. D. Florida. Nov. 12, 1866.

SALVAGE—AMOUNT.

[Cited in Buckley v. The William M. Jones, Case No. 2,095.]

[This was a libel in rem by Benjamin Barker and others against the cargo and materials of the bark Joseph A. Davis for salvage.]

Homer G. Plantz, for libelants.

D. W. Whitehurst, for respondent.

Before BOYNTON, District Judge.

This cause having been fully heard, and the court being duly advised in the premises, and the materials of the vessel having been sold by consent of parties for the sum of $3,518.35, and the damaged portion of the cargo for the sum of $979.41, and the remainder of the cargo having been appraised at the valuation of $13,639.85, but a portion of the cargo appraised at the valuation of $5,206.66, having subsequently, on the application of the claimant, been sold for the sum, as appears by the account sales, of $4,916.97, the remaining portion of the cargo, appraised at the valuation of $8,432.69, having been reshipped, it is now ordered, adjudged, and decreed that the said sales be confirmed, and that the libelants and petitioners have, receive, and recover for their services in the premises the sum of $5,200, and that on the satisfaction out of the proceeds in the registry of the court of the said sum of $5,200, together with the costs, and charges to be hereafter taxed in this proceeding, the residue of proceeds be delivered to the claimant for the benefit of the true owner or owners thereof. And it is further ordered that the boats Rosa and Trump, and their crews, receive the sum of $100 for the services rendered by them, and that the residue of the salvage money be divided among the salvors according to the amounts saved by them respectively.

JOSEPH C. GRIGGS, The (HOLMES v.). See Case No. 6,640.

## Case No. 7,535.

The JOSEPH CUNARD.

[Olc. 120.] [1]

District Court, S. D. New York. April, 1845.

COMPRESSING COTTON PREVIOUS TO STOWAGE — RIGHT TO LIEN ON VESSEL FOR EXPENSE OF—CLAIMS WHICH ARE NOT A LIEN ON SHIP—BILL OF EXCHANGE ON OWNERS — REPAIRS AND SUPPLIES—RIGHT OF MASTER TO BIND SHIP.

1. Compressing cotton in a cotton press is a mere shore business, for the purpose of arranging the bulk for more convenient carriage and stowage. The expense of the work is no lien on the ship upon which the cotton is to be freighted, and an action in rem cannot be maintained therefor.

[Cited in Baxter v. Card, 59 Fed. 168.]

2. Neither costs of advertising a vessel for sea, portage, nor commissions for procuring freight, wages of stevedores or lightermen, are liens on the ship, suable in rem.

[Cited in Bradley v. Bolles, Case No. 1,773; The A. R. Dunlap, Id. 513. Criticised in The George T. Kemp, Id. 5,341. Cited in Roberts v. The Windermere, 2 Fed. 724; The Canada, 7 Fed. 121; The Gilbert Knapp, 37 Fed. 211.]

3. A special agent of the charterer of a ship cannot charge expenses, advances or liabilities incurred for the ship by him, in that capacity, against the owners or the ship, on any implied obligation of the owners to him.

4. Where the master of a ship drew a bill of exchange upon the owners, in favor of the agent of the charterer, for disbursements and expenses, the drawee having notice that the master was instructed by the owners not to draw such bills, and the drawee afterwards nego-

[1] [Reported by Edward R. Olcott, Esq.]

tiated the bill to the libellants, *held*, that on the facts the debt for which the bill was drawn was no lien upon the ship, and that the holders could not maintain an action in rem upon it, or stand in a better situation than their endorser.

5. The master of a vessel cannot bind his owners for repairs or supplies to her when some other person is authorized to manage the business of the ship in that respect, and that fact is known to the creditor.

[6. Cited in The J. F. Spencer, Case No. 7,316, to the point that where a person advances money upon the credit of the ship, for the purpose of repairing her or furnishing her with supplies, he has a lien on the ship for such advances.]

This was a proceeding in rem to recover the amount of a bill of exchange drawn at Mobile, by the master at 30 days sight, in favor of Davies, on the charterer of the bark, at Liverpool, for the amount of disbursements for the supplies and lading of the vessel, in Mobile. The bills of lading and the freight were assigned to the libellants as collateral security for the draft, by Davies. The vessel is owned by Irvine & Smith, of Liverpool, England, and was chartered by them to Charles Challinor, of the same place, for a voyage from London to Mobile. After the bill was drawn, and before its maturity, it was endorsed by Davies, and delivered to the libellants; and he, at the same time, assigned to them any lien or privilege which he might have upon the vessel, for a debt claimed to be owing him for advances for her use in Mobile. The answer denies that the libellants are entitled to the relief sought in this court. It alleges that the owners appointed Messrs. Pope & Son, of Mobile, consignees of the ship, and agents of the owners, to make all necessary disbursements on account of the ship for them. That the master was specially instructed as was known by the charterer and Davies, not to draw bills on the owners for repairs, supplies or services for the ship. It avers that the charterer was to load the vessel at Mobile, reserving freight, according to the charter-party, to the owners; and that he appointed Davies his agent at Mobile, for that purpose, and notified the owners and master thereof. That if any advances were made by Davies, they were for the benefit of the charterer, and under his instructions, and not for the ship or owners, nor by their authority.

L. Hoyt, for libellants.
F. R. Tillou, for claimant.

BETTS, District Judge. The proofs produced consisting principally of the charter-party, the letter of instructions to the master, the correspondence and account stated between Davies and Challinor, the depositions of the master and of Davies himself, establish, in substance, this case. That the vessel sailed from London March 1, 1843, under a charter to Challinor, engaging she should arrive at Mobile by the 10th of May, and there be loaded with cotton at the charge and expense of the charterer, but in other respects she was to be under the charge and directions of the owners. She was consigned to John H. Davies, at Mobile. The master was specially instructed not to draw bills on the owners for expenses or disbursements of the ship, but was referred to their agents, Messrs. Pope & Son, at Mobile, for supplies and advances, if necessary. Davies was the agent of the charterer, and saw the charter-party before he made any advances to the master for the vessel, and also the letter of instructions to the master before the bill of exchange was drawn, and the bill was drawn by the master on the owners at the urgent instance of Davies. It is further shown, that the disbursements made by Davies were chiefly for pressing the cotton, and transporting it by lighters from the shore to the vessel, and charges connected with his agency for the charterer in obtaining and shipping the cargo, there being out of the amount of the bill (£590, with exchange), only the sum of about $661.16, which would seem to have any direct application to the necessities or service of the vessel, with the exception of a questionable charge of $87.64 in jail fees, board, &c., advanced in favor of sailors, and including $15 for medical attendance for one of them on shore. I can perceive no foundation under the special appointment of Davies as agent or broker for the charterer in procuring a cargo, and placing it on board, upon which he can raise a claim against the ship or owners for those services, although he may have acted with the concurrence of the master; and even if the owners could be made personally liable for the charges, several of them are not of a nature to admit their being imposed in invitum on the ship, and enforced in rem by an admiralty court. The account charges $1,027.50 for compressing the cotton. This is mere shore business, performed in cotton presses on land, at the port or in the interior, as may be desired by the purchaser, and would probably be alike useful and important whether the transportation is to be on land or on shipboard, the only object being to fit it for more convenient carriage and stowage. Charges for advertising and posting ($10) and commissions on procuring freights ($338.80) on the employment of the charterer, and not that of the owner or master, cannot be regarded demands or services attaching as liens to the vessel. It may be inferrable from the facts, that the freight was expected to be made by purchasing and shipping cotton for the charterer, but there is no higher reason for charging the vessel with commissions on such operation, than upon the purchase price of the cargo itself. Nor would the privilege be varied, if the shipment was solicited or procured by the agent from a third party for consignment to the owner. The service of the agent would be simply a mercantile one rendered on land, and bearing none of the qualities necessary to bring it under the securityship of the vessel. Fur-

thermore, in this case, Davies was employed by the charterer, and had direct notice that the owners had their own agent at the port to respond for the ship. The charge of $457.60, for stevedores' work, is only for labor at the wharf or moorings of the vessel, in stowing cargo, and is not distinguishable in character from charges of draymen or lightermen, who bring the cargo to the ship to be laden on board.

It has been decided in this court, that stevedores cannot proceed by libel against a vessel for their services in loading or unloading her. The Amstel [Case No. 339]. And the charge of $481.17, for lighterage, would seem in principle to stand on the same footing. It is an employment outside of the vessel, not contributing to her capabilities or security in navigation or serviceable to her voyage; there is no difference of principle, whether the cargo is brought to her side in the stream or placed near her on a wharf. The ship is responsible for disbursements necessary to equip and put her in a condition (by men, provisions, &c) to perform her voyage, but it would be giving a novel extension to the notion and range of tacit liens to subject her also to all claims collateral and incidental to her despatch. A cargo is no more than an incident to a voyage, and in no sense necessary to enable the ship to perform one. Debts arising out of such collateral services or engagements may be chargeable upon the owner personally, as resting upon his implied contracts; but the ship is not necessarily pledged to their satisfaction more than for wages of the master, or other benefits to the mercantile adventure of the owner. In the same category the charge of $70 for commissions, and $41 for insurance on the master's draft, should be placed. There is no reason or equity for the latter charge against the owners. Their letter of instructions to the master shown to Davies, forbids the master drawing on them for necessities of the vessel, and referred him to an adequate resource supplied by them for that purpose, in the port where the expenses were to be incurred. I am of opinion, therefore, that not over $763.80 of the amount claimed could be charged against the ship, had Davies been acting under direction of the master, or as agent of the owners; but under the facts in proof, he must be regarded the particular agent of the charterer, making advances on his credit, and relying on his personal responsibility. This responsibility Davies had strengthened by obtaining an assignment of the bill of lading, freights, &c., as collateral security. If these resources have failed him, there is nothing in the legal relation he bore to the ship or her owners, nor in the equity of his debt, which entitles him to claim that he acted as their agent, or that gave him a privilege upon the ship.

I do not enter into the question, whether taking the bill of exchange by Davies would operate as a waiver of an implied lien against the ship, because, in my opinion, no lien accrued to him out of his transactions in the case. The libellants cannot stand in a better condition than Davies, the drawee and endorsee of the bill; and as he had no claim or lien upon the ship for his demands, he could confer none upon the holder or his assignees. He was apprised that the master was specially instructed by the owners not to draw bills for expenses, repairs, &c., upon them. He knew, also, that the ship was chartered to Challinor, for whom he was agent. In such case it is clear that the owners would not be liable to Davies for any contracts of the master with him. Abb. Shipp. (Ed. 1829) 92; 3 Kent. Comm. 163. The master cannot even bind his owners for repairs, &c., when it is known to the creditor that some other person has authority to manage the business of the vessel in this particular case. Philips v. Ledley [Case No. 11,096].

It is unnecessary to discuss the question, whether the assignment to the libellants by Davies carried with it his privilege of lien for his advances, because, as already stated in the opinion of the court, he was not entitled to claim the security of the vessel for his demands. They can accordingly stand, in that respect, merely in his place, if they hold a full assignment of the original indebtment to him. But it is by no means a clear proposition in law, that a bill of exchange, drawn to cover that debt, and endorsed by him to them, would operate as an assignment of the consideration for which the bill was drawn; and a full assignment of the collateral securities he held for the original claim will not, per se, transfer also the consideration on which the claim rested. But the point of formality or inaptness of the title set up by the libellants, or their capacity to maintain this action, are not material points in the case. The judgment rests upon the broader ground that Davies acquired no right he could transfer to others, or exercise himself, against the vessel by action in rem. The libellants could not, therefore, as holders of the bill of exchange, or assignees of Davies, set up an equity in their favor beyond their strict legal rights. Libel dismissed, with costs.

## Case No. 7,536.

### The JOSEPH E. COFFEE.

[Olc. 401.] [1]

District Court, S. D. New York. Oct., 1846.

MARITIME LIEN—FERRY BOAT—REPAIRS—DEPARTURE FROM STATE—LOSS OF LIEN.

1. A steamboat employed upon a ferry between the city of New-York and Bull's Ferry and Fort Lee, in New-Jersey, is a ship or vessel subject to a lien under the act of the state of New-York. 2 Rev. St. 493.

2. Such vessel does not depart from the state within the meaning of the statute, so as to de-

[1] [Reported by Edward R. Olcott, Esq.]

stroy the liens, by going from this port to the above places in New-Jersey and back again to New-York on Sunday, whilst her repairs are in progress and before they are completed.

3. The lien given by the act will not be lost or defeated by the vessel leaving the state fraudulently or clandestinely, at a time when the lien creditor could not legally arrest her.

[Cited in The Alida, Case No. 199.]

4. Nor if she makes her departure on Sunday, or whilst the contract for labor, &c., upon her is in progress of execution and not finished.

This was a suit in rem, by a blacksmith, against the steamboat Joseph E. Coffee, for repairs and materials put by him on her, in this port, in July last, at the request of the then owner, Joseph E. Coffee. The answer denies the existence of any lien. It alleges that the steamboat is a domestic vessel, and left the state after the services and supplies charged for were furnished, and before action brought. It appeared in evidence that the boat was built for Joseph E. Coffee, who owned an iron foundry and steam-engine manufactory, conducted by his brother George. That after the work now sued for was done to the boat, Joseph E. Coffee failed and assigned the boat, and she afterwards came to the ownership of the claimant. She was built to run from New-York to Fort Lee and Bull's Ferry as a ferry boat. That the libellant's account of charges for making the steering gear for the boat closed on Saturday, the 18th of July, but his bill of charges was not rendered the owner until the 22d. That on Sunday, the 19th, by the owner's consent, the boat ran a trip to Bull's Ferry, about seven miles up the river, on the New-Jersey side, and she was there made fast to the wharf; that passage money was charged and received on the trip. She returned the same day to New-York and was taken to the dry dock, where the work of finishing her continued for several days, and early in August she was completed and put upon regular employment as a ferry boat to Bull's Ferry and Fort Lee. It further appeared, by the accounts of the libellant rendered and not objected to, that he continued doing work and supplying materials for the boat up to July 22d. The libellant was employed to do blacksmiths' work upon the boat by Benjamin C. Terry, the shipwright, who had the boat in his charge, and was completing her at the time. The owner directed Terry to obtain the blacksmiths' work of the libellant. It was charged on the libellant's books to the steamboat and owners.

G. A. Schufeldt, for libellant.

C. Van Santvord, for claimant.

BETTS, District Judge. In so far as Terry took part in ordering or procuring the work and materials for which the action is brought, he did not act in his own right as contractor and builder of the boat, but as agent of the owner expressly directed to obtain them of the libellant. Terry's testimony, moreover, clearly proves that the owner did not expect the charge for that service was to be made by the libellant on his, Terry's, account, as both he and the claimant well knew Terry's contract had already been fully satisfied and paid. The demand exceeding fifty dollars, this case, prima facie, falls within the statute of the state giving a lien for work and materials upon the vessels to which they are applied. 2 Rev. St. 405, § 1. Section 2 of the statute declares, that "in all cases such lien shall cease immediately after the vessel shall have left the state." This provision plainly imports that the departure from the state is to be made in the usual course of business, and cannot apply to vessels surreptitiously taken away. Nor can the fact be of any avail when the vessel has been clandestinely run out of the state to defeat the lien.

The creditor who permits a vessel, subject to his debt, to leave the state in the regular course of her employ, or in such manner as to import that he has notice of her intended departure, would properly be presumed to have waived his lien. The law gives him the privilege so long only as the vessel continues within the state. This condition is vital to his right. Still it is an inherent quality of every condition dependent upon the volition and action of a party, that he shall not be prevented performing it by one to whose benefit the non-performance is to enure. Williams v. U. S., 2 Pet. [27 U. S.] 102; U. S. v. Arredondo, 6 Pet. [31 U. S.] 746; Whitney v. Spencer, 4 Cow. 41. Any act of the owner of the steamer, with design to cut off or evade the lien, such as a removal of the vessel from the state in a manner rendering it impossible for the lien creditor to pursue his remedy against her, within the terms of the statute, or any fraudulent concealment or deceit hindering it, would interpose no bar to his right. Here the steamboat was run from this port across the state line on Sunday, a dies non juridicus, when no process could be issued against her, or be served if already taken out; and scarcely more than touching the Jersey shore on the opposite side of the river, her course was reversed, and she returned directly to this port again. If taking the vessel out of the port into another state was done with no purpose to withdraw her from the libellant's lien, but with intent to try her machinery or find a more commodious place to finish her, or on a pleasure excursion, in neither case would the rights of the libellant be prejudiced (Hancox v. Dunning, 6 Hill, 494), especially as it does not appear the libellant had then completed his work or contract, and was in a condition to enforce his lien. A part of his job, that of fitting on the steering gear, seems to have been completed on Saturday, but he continued his labors upon her the Monday and Tuesday following; on which day, being the 22d of July, he made up and presented his bill, certified by Terry to be correct, to the owner, who received it without objection, the

boat then lying in this port. The account not being satisfied, this libel was filed, and the boat was arrested the 31st July, before she sailed from here on her regular employment.

It is contended by the claimant that the lien does not attach to ferry boats, and this vessel being used as a ferry boat is exempt from it. The cases, 5 Wend. 564, 17 Johns. 54, are relied upon to support this position. The case in Wendell has no analogy to the point now raised; the vessel there attached was a small, open, undecked boat, probably a row-boat. The decision in 17 Johnson was in relation to horse ferry boats, used on the ferry between New-York and Hoboken, and the court held that ferry boats used between New-York and Hoboken were not the description of vessels contemplated in the act of February 28, 1817. That the act embraced only vessels navigating the ocean, or at most those sailing coastwise from port to port. The doctrine declared in that decision is essentially qualified if not wholly discarded in subsequent cases (Walker v. Blackwell, 1 Wend. 557; Farmers' Delight v. Lawrence, 5 Wend. 564), which consider all vessels, not being row-boats, scows, or like small craft, included within the statute. The first legislation of the state, giving a lien to material men, was in relation to foreign vessels only. The act of February 28, 1817, extended the lien to domestic vessels, but the supreme court, in 17 Johns. 54, were disposed to consider the provisions of the amendatory law as applicable only to vessels of like class with those coming under the original act. They gave emphasis to particular terms and phrases employed in the act of 1817, as limiting its operation to ships and vessels employed in navigation, if not upon the high seas, at least as coasters.

The Revised Statutes do not appear to indicate an intention to discriminate in respect to the dimensions or employment of the vessels which shall be subject to a lien. The provision is most ample in its terms. Section 1 enacts, that "whenever a debt, amounting to fifty dollars or upwards, shall be contracted by the master, owner, agent or consignee of any ship or vessel, within this state," &c.—language applying in all its terms equally to home vessels and small craft, as those of the largest dimensions and owned abroad. The reason inducing these provisions would seemingly no less affect the one class than the other. The smallness of the debt which shall carry with it the privilege, and the notorious fact that mechanics are most usually engaged in furnishing repairs and supplies to home vessels of small value are evidences that the aim of the legislature was to protect the humble description of claims with no less care than those of greatest magnitude. Nor is it easy to perceive how the occupation of the vessel as a ferry boat can vary the application of the law. Steam vessels so employed are of great cost, and not uncommonly of a size sufficient for any other service. Such is the case with numbers constantly employed in this harbor, and on other waters of this state to serve ferries. The boat now arrested is constructed in build and size like ordinary passenger or freight steamboats, and it would be an extraordinary anomaly to hold she is subject to the lien if engaged as a freighter on the river, but must be discharged from it when placed on a ferry. Her cost, too, was probably four times that of a sloop of her tonnage. The decision in Hancox v. Dunning, 6 Hill, 494, brings such sloops within the lien act, and, upon parity of reason and necessity, this steam vessel should be included also within its operation. The decree will be in favor of the libellant for $123, with interest from July 31st, 1846, and costs.

## Case No. 7,537.

The JOSEPH GORHAM.

[2 N. Y. Leg. Obs. 388; 7 Law Rep. 135.]

District Court, D. Connecticut. Oct. 28, 1843.

ATTACHMENT OF VESSEL — ILLEGAL REMOVAL TO ANOTHER DISTRICT — RIGHT OF MARSHALL TO FOLLOW AND RETAKE — LIBEL — TO WHOM ADDRESSED.

1. The deputy marshall of the United States for the Southern district of New York, on the 4th of August, 1843, by virtue of a warrant granted by the district court for that district, seized and attached a brig in the harbor of New York. On the 7th of August following, while the ship keeper was temporarily on shore, E. S. and A. S., with notice of the existence of such attachment, forcibly carried away the brig out of the Southern district of New York, and brought her into the district of Connecticut. On the 8th of August following, they caused her to be attached at the suit of A. S. and others, for the private debts of E. S. Application was thereupon made by the deputy marshall of the United States for the Southern district of New York to the United States district court of Connecticut for, and a warrant was granted directing the marshall of the United States district court of Connecticut to deliver and restore to the deputy marshall of the United States district court of New York the brig in question. On application to stay the proceedings on such warrant: *Held*, that the right to the possession of the brig from the 4th of August, 1843, was in the deputy marshall of the Southern district of New York, and that he might follow her anywhere, and retake her, resting his claim on that right.

2. E. S. and A. S. and all others concerned in seizing the brig in the Southern district of New York were trespassers, and acted in violation of the Penal Code of congress.

3. The writs obtained for seizing the brig in the district of Connecticut were utterly void.

4. It is immaterial whether a libel in admiralty be addressed to the judge or to the court in which he presides.

5. The district court, by virtue of its admiralty jurisdiction, has the power to order the restoration of property, the right to the possession of which is in an officer of a court possessing similar powers in an adjoining district.

At a special district court held at Hartford, within and for the district of Con-

necticut, on the 5th day of September, 1843, William S. Stillwell, deputy marshall of the United States for the Southern district of New York, came into court, and here filed his certain affidavit under oath, setting forth and alledging that on the 4th day of August, 1843, one Hiram Benner, of Florida, presented to the district court of the United States for said Southern district of New York a libel against the said brig Joseph Gorham, her tackle, apparel, and furniture, for the cause therein specified, upon which a lawful warrant issued on the same 4th day of August, 1843, directed to and put into the hands of the said deputy marshall, with and by virtue of which the said deputy marshall, on the same 4th day of August, did attach and seize the said brig in the harbor of New York, to respond to said libel in the district court of the United States within the Southern district of New York, and that thereupon the deputy marshall put on board said brig, as ship keeper, one John Williams, the captain of said brig, with orders to keep the same for the deputy marshall. Said affidavit further alledges that on the 7th day of August, 1843, while the ship keeper was temporarily on shore, the brig was, by Elisha Seely and Albert Seely, collusively, in fraud and in violation of the process of the United States issued by the district court of the Southern district of New York, and with a view and for the purpose of defeating the said process, forcibly and fraudulently did seize the brig, make her fast to a steamboat, and carry her away from and out of the jurisdiction of said district court of the Southern district of New York, and immediately thereafter did bring her into the district of Connecticut; and that, having so brought said brig out of the Southern district of New York, Elisha Seely and Albert Seely did in like manner, and with like intentions, cause the brig, her tackle, apparel, and furniture, at the town of Darien, within said district of Connecticut, to be attached by one George A. Bowler, a constable of said Darien, at the suits of Albert Seely, and others, for the private debts of Elisha Seely, and that the brig is now forcibly and unlawfully detained at said Darien; the affidavit concluding with a prayer and application to the district judge of the United States for the district of Connecticut to issue an order and warrant to the marshall of the United States for the district of Connecticut to attach, take, and seize the brig, her tackle, apparel, and furniture, and deliver and restore the same to the custody of the marshall of the United States for the Southern district of New York, to abide the further order of the district court of the United States for the Southern district of New York respecting the same. To the affidavit and prayer there was also annexed a copy of the original libel and warrant, duly certified and authenticated by the proper clerk of the district court of the United States for the Southern district of New York.

Whereupon the judge of the United States for the district of Connecticut, finding the facts true, as stated in said affidavit, and agreeably to the prayer annexed to the said affidavit, did on the 5th day of September, 1843, grant and issue his certain warrant directed to the marshall of the United States for the district of Connecticut, commanding him forthwith to attach and seize the brig Joseph Gorham, her tackle, apparel, and furniture, if it be found within its precincts, and the same to deliver and restore to the custody of the marshall of the United States for the Southern district of New York, to abide the further order of the district court of the United States for the Southern district of New York respecting the same, which last mentioned warrant bears date the day last above mentioned. This warrant having been delivered to the marshall of the district of Connecticut, he did therewith, on the 7th day of September, 1843, at Darien, in the district of Connecticut, take, attach, and seize said brig, for the cause and purposes mentioned in his warrant. Before the brig was either removed or delivered to the marshall of the United States for the Southern district of New York, George S. Bowler and Joseph Gorham, for themselves and in behalf of others, holding said brig, by their counsel, Chas. Hawley, Esq., made written application to the judge of the United States for the district of Connecticut, to stay the further execution of said last mentioned warrant, that they might shew cause why the same should not be served and executed. This application was granted, and the warrant stayed until the further order thereon might be made known. The 18th day of September, 1843, at 10 o'clock forenoon, was appointed for the hearing of all parties interested in the premises, and notice thereof was accordingly given. Now, on the 18th day of September, 1843, William S. Stillwell appeared in support of the affidavit by him heretofore made; and the Hon. R. S. Baldwin, and the Hon. Charles Hawley, counsel for Elisha Seely, Albert Seely, George A. Bowler, Joseph Gorham, and all others interested, appeared in court, to shew cause against the affidavit and warrant, that the latter might be stayed altogether. George A. Bowler and Joseph Gorham filed their written answer to the proceedings in this court, and were then and there fully heard, with their evidence and arguments. The counsel for Stillwell produced in court the return of the deputy marshall, together with the affidavit of Capt. John Williams, who testified that he was present on board said brig when Stillwell came there with his warrant, and he attached the brig on the 4th day of August, 1843, and put the vessel in his charge and keeping; that he was on board every day from said 5th to the 7th of September, and when necessarily absent the

said Williams testifies that he ordered Murray, the mate, to keep said brig; that on the 7th day of August, Elisha Seely and Albert Seely ran away with said brig, by means of attaching to her a steamboat, and carried her to Darien, in Connecticut. The affidavit of William A. Murray was also introduced by Stillwell, who testifies: That he was mate of the brig Joseph Gorham, and was on board when Stillwell, the deputy marshall, came on board and attached the brig, on the 4th day of August, 1843. That he remained some time on board, and, having served his process, gave charge of the brig to Capt. Williams, and ordered him to keep her. Williams agreed to do so. That from the 4th to the 7th, whenever Capt. Williams went on shore, he ordered this witness, as mate, to keep the brig. He did so, and that on the 4th of August, 1843, this witness informed Elisha Seely that the brig had been libelled and attached. That after such information was given, the witness saw Elisha Seely and the libellant conversing together. That on the 7th of August, Elisha Seely, Albert Seely, and several others, came on board the brig, and in haste, while Capt. Williams was absent, made her fast to a steamboat, and carried her to Darien. After she was cast off, Albert left her and went to Darien by land. Saw no more of him until they got within six miles of Darien, when he came on board with a constable from Darien, and with writs, attached the brig and took her into Darien.

The written answer of those interested was then submitted, specifying six objections against proceeding in this court. 1st. That the judge has no power or authority to grant any warrant or process in conformity with the prayer annexed to the affidavit of Stillwell. 2d. That the district court hath no power to entertain this application of Stillwell, or to grant the warrant or take cognizance of the application. 3d. That if either the judge or the court can in any case grant any such warrant as is prayed for, or exercise any such power as said application calls for, then it should be in the form of a libel with a process of monition or citation to those in interest to be heard. 4th. That it appears on the face of the libel and proceedings in the Southern district of New York that the matter was not within the jurisdiction of the court of the United States for that district; that the proceedings there were nugatory and void. 5th. That the affidavit here is untrue; that the brig was never attached by Stillwell, but, if attached there, it was abandoned by Stillwell. 6th. That George A. Bowler, one of the persons now appearing to object and show cause, is in possession of the brig at Darien, being a constable of that town, and as such having on the 8th day of August, 1843, at said Darien, attached the brig by virtue of several attachments, under the authority and laws of Connecticut, specifying the number of attachments, dates, names, &c.; some in favor of Albert Seely, and all against Elisha Seely. Accompanying the answer, were brought into court the attachments, with the return of the officer, and also the affidavit of George A. Bowler, who swears to the service of these several writs, and to a conversation with the witness Murray, tending to contradict his testimony. The respondent also introduced the evidence of George Pierpont, who swore that on the day on which the brig was taken away, at the request of Elisha Seely, he went on board the brig in the morning, and remained there until 4 or 5 in the afternoon, when she was taken away, as ship keeper, and had no knowledge that the marshall had attached the brig. The mate was on board all Monday. She was towed up to Throg's Point by steamboat. Albert Seely went up to Stamford in a sloop, and came out from Darien and met us in the Sound with Constable Bowler, six miles out. The respondents also introduced Daniel Sommers, who testified that at the request of Elisha Seely he went to the clerk's office to see if the vessel had been libelled. A young man he met at the outer office said he knew of no libel. Elisha Seely also testified, in behalf of the respondents, that he never knew that the brig had been attached. There were many other circumstances and facts adverted to in the progress of the trial which need not here be recapitulated. The evidence and arguments having been submitted, the court took time for deliberation, and now, on this 28th day of October, the following decision is given.

Before JUDSON, District Judge.

THE COURT, upon full consideration of the evidence, doth find, as matters of fact, that Stillwell, the deputy marshall of the Southern district of New York, on the 4th day of August, 1843, by virtue of a warrant issuing out of the district court of the United States for the Southern district of New York, did seize and attach the brig Joseph Gorham, and took possession of her in the harbor of New York; that Elisha Seely and Albert Seely knew the fact of this attachment by the marshall, and that on the 7th day of August, 1843, Albert Seely and Elisha combined unlawfully, and in violation of the said process of the said district court of the United States for the Southern district of New York, collusively and fraudulently and forcibly did carry said brig out of the Southern district of New York, and with the view to have her attached for the debts of Elisha, they did bring the brig into the district of Connecticut, and on the 8th day of August, 1843, did carry out this fraudulent combination, by having the brig attached, as is stated in the answer of the respondents on file, and now claim to hold her against the deputy marshall.

Having found these facts, THE COURT will proceed to consider the application of

the law to them. In doing which, the answer of the respondents will be taken up, and the several objections duly considered and determined, as we proceed in the case, taking up these objections in a more natural order than that in which they stand in the answer.

The 5th objection may be first considered. The respondents, in their answer, deny that the brig was ever attached by Stillwell. If right here, there is no necessity of proceeding any farther with the case. The whole proceedings rest on the fact that the brig was attached and seized by Stillwell's warrant on the 4th of August. Take away this foundation, and there is nothing left but to end the process commenced here. But this denial is against the evidence. The proof is conclusive that Stillwell served his warrant on the 4th of August. This objection also embraces another proposition,—that, if attached by Stillwell, he had abandoned the attachment; thus loosing his lien on the brig, and leaving her free to be attached by Seely's creditors in Connecticut. Or, in other words, that as the deputy marshall, after the seizure, entrusted the brig to Capt. Williams, who had ever commanded the vessel, he thereby lost his lien, and the attaching creditors in Connecticut had right to interpose their claim. The facts in this part of the case are quite simple. Capt. Williams owned half the brig, Elisha Seely one-fourth, and Joseph Gorham the other quarter. The latter gave to Elisha Seely a power to act for him, so that Williams owned half, and Seely owned and represented the other half. The vessel arrived on the 29th of July. Elisha Seely residing in Darien, went to New York on the 1st of August. On the 4th of August a libel was filed by Benner. The warrant is served and the attachment is made the same day. Capt. Williams was on board when the attachment was served, and the marshall left the vessel in his keeping. This was made known to E. Seely on the 5th of August. Immediately thereafter, E. Seely went to the New York custom house and represented himself as master, got a clearance for the brig, which was privately done. And on the 7th of August, while the marshall's ship keeper was on shore, Capt. Seely and Albert Seely took the brig away, and, as soon as she was cleared from her fastenings and made fast to a steamboat, Albert Seely proceeded to Darien, where he procured the attachments, and, with the constable to serve them, came out in a small boat, where Capt. Elisha Seely was lying to in waiting. They went on board about six miles from Darien, and were then taken into port by Capt. Seely, the defendant in all these cases; his own property being thus attached. To say the least, this was a very extraordinary proceeding, and to the mind of the court fully confirms the statement made by some of the witnesses that the two Seelys knew that the brig had been attached.

These facts do not present any such case as the law will declare to be an abandonment of the rights under the attachment of the marshall. There is no new credit obtained by the marshall leaving the brig in the possession and keeping of Capt. Williams. The Seelys do not procure process and incur expense in securing a debt upon property which they believed to be free, but they knew it to be incumbered with the prior attachment, and they seek to avoid that prior incumbrance by running the brig into another jurisdiction, where they suppose that process cannot come. Sufficient for this part of the objection is it that the two Seelys had knowledge of Stillwell's attachment, and collusively attempted to throw it off by their own unlawful conspiracy and combination.

The 6th objection very naturally follows the one last considered. The substance of this objection is that George A. Bowler is a constable of Darien, and as such has attached the brig in the state of Connecticut, by virtue of state process, and this cannot be interfered with by any proceeding or process of the United States. This proposition might be well founded, and would indeed be, if this were a lawful attachment. No court of the United States ever interferes with any state liens or state process. But in the present case there has been no attachment of this brig by any state process which can ever be recognized by any tribunal, either state or national. A single moment's attention to the case will make this clear to every one. The brig, while in the harbor of New York, is seized by the marshall, under a warrant from the United States court, and while under that seizure two men who know the fact contrived a secret plan to run away with the brig. They combine for the fraudulent purpose of interrupting the regular administration of justice in the United States court, and in violation of the known laws of the United States they seize the brig, and hasten her out of that jurisdiction into Connecticut. What was this act? A trespass, and these men who bring away the brig are trespassers, and violators of the Penal Code of congress. What do they do when they arrive here? We answer, they fraudulently procure writs and attach the brig. These trespassers do this. They use the forms of law as mere instruments to continue their own illegal acts—to perfect their own trespass. Can such proceedings be tolerated? Surely not. A good title to property cannot be engrafted upon wrong doings—upon a high-handed trespass. Every man who has intermeddled with this brig in aid of the fraudulent combination of the two Seelys is also a trespasser. It may well be said, then, that here is no interference of collision with state authority. The interference is on the other side. The Seelys are the aggressors, but the state never lends its authority to a trespasser—a wrong doer. It cannot do it. The right of the possession of this brig from

the 4th day of August has been in the deputy marshall, and he might have followed her any where and retaken her, resting his claim on that right.

It follows, then, that each and all the writs enumerated in the answer of these respondents, as to this brig, were utterly void. They were procured and used in fraud of the law. They constitute no obstacle to the possession of the marshall of the district where the brig was first attached.

The fourth objection contained in the answer of the respondents is that the original libel in New York is not within the jurisdiction of the district court of the United States for the Southern district of New York. That court has no jurisdiction. All that need be said to this part of the answer is that this is not the place to try that question. The present proceedings are founded upon a process issued by a court of competent jurisdiction in admiralty. That was a suit in admiralty, and the place to settle the truth or legality of that libel is in the court from whence it issued. This objection cannot avail.

The third objection is that this should be a libel, and have accompanying it a monition or citation. This objection is founded in a mistaken idea of the nature and form of a libel in admiralty. There is no form prescribed by law. The party may adopt his own form, and use his own language, provided he make his complaint or claim intelligible to the court. But to all intents this is a libel. The suffering party sets forth his complaint, and prays the court to issue process of restoration. But there is superadded to this objection that a monition or citation should have accompanied the libel or complaint. In this case the marshall takes his warrant, and having secured the property, so that it may be well considered as in the custody of the court, all parties come into court, and the respondents make answer and shew cause; they produce all their evidence, interpose their arguments, and are fully heard before any removal of the property, before it is restored, or even in fact taken out of their possession. Nominally it is seized, but actually remains and awaits the full hearing ordered by the court. What is the object of a citation? To give notice to the opposite party that he may appear and contest the claim set up against him. What has been done in this case? We answer, the respondents come in voluntarily, make their answer in writing, thereby waving all previous objections of form as to notice, when and where the questions between them are amply defended and tried. This is deemed sufficient.

The first and second objections may be considered as one, and answered as one. The substance of these two objections seems to be that in a case like the present the district court of the United States possess no power to hold cognizance of the matter in question. Involved in these two objections there is a matter of form also, which may be stated in this manner: If addressed to the judge by name, there is a want of authority to act. If addressed to the district court, there is no power in the court to grant the relief prayed for. This part of the objection may be disposed of by stating that it is immaterial whether a libel be addressed to the judge by name, superadding his office, or whether it be addressed to the district court. Either will be sufficient, and one may be as proper as the other. The substantial part of this objection embraces a very important question, and should be gravely considered. What, then, is this important question? The United States district court of Connecticut has issued a process in the exercise of its admiralty jurisdiction in aid of the powers and jurisdiction of a court possessing similar powers, in an adjoining district, where the property, being in its nature within the admiralty powers of the court, has been once lawfully seized and taken into its jurisdiction; and while there to be adjudicated hath been fraudulently and clandestinely withdrawn from that jurisdiction and brought here. The court having began the case originally was the district court of the United States within the Southern district of New York, and while proceeding to adjudicate upon that property it is arrested from that court, and brought into the district of Connecticut, by trespassers and wrong-doers; and, having possessed themselves of the property in the manner stated, they now come here and interpose their objections to its restoration! All that this court has been called upon to do is, through its admiralty powers, to restore this property to the marshall of New York, so that it may be there proceeded with according to law. If this court possesses no such power, where is the remedy? Upon the facts found, no man can hesitate for one moment that there should be a remedy for a case so flagrant, and where is it? It is not in the district court of New York, because the marshall of that district possesses no authority here. Is it in a state court? No one will pretend that. The remedy, then, is in the admiralty in that district where the vessel may be found, and its duty is obvious. The vessel should be restored. It is the opinion of this court that this case falls directly within its admiralty jurisdiction.

The facts and circumstances of the case warrant the court in coming to the result that the warrant issued on the 5th day of September, 1843, in the matter of the brig Joseph Gorham, after full hearing, be no longer suspended, but the same be executed, and that the said brig Joseph Gorham, now in custody of the marshall of the United States for the district of Connecticut, be forthwith restored, with its tackle, apparel, and furniture, unto the said Wm. S. Stillwell, a deputy marshall of the said Southern

district of New York, to be there proceeded with as to law and justice shall appertain. The decree will be so entered.

## Case No. 7,538.

### The JOSEPH GRANT.

[1 Biss. 193.] [1]

District Court, D. Wisconsin. Oct. Term, 1857.

BILL OF LADING SIGNED IN BLANK VOID.

1. Although the master of a vessel employed in navigating the lakes is agent of the owners for giving bills of lading for goods shipped on board, he has no authority from the owners to sign bills of lading in blank, and a bill of lading so signed is not valid against the owners, even in the hands of a bona fide holder.

[Cited in the R. G. Winslow, Case No. 11,736; Robinson v. Memphis & C. R. Co., 9 Fed. 139.]

2. A bill of lading signed in blank by a master is no maritime contract binding on the vessel or owner.

[Cited in The John K. Shaw, 32 Fed. 493.]

3. Where two bills of lading describing the cargo shipped, were made out in full; one of which was signed by the master, and the other by the shipper, and a third one was signed in blank by the master and left with the shipper, who, after departure of the vessel, filled up the blank bill with a change of the consignee, and transferred it to a bank as collateral security for advances for the owners of the cargo, no maritime contract is thereby created between the bank and the vessel without notice to the master before delivery of the cargo according to the first bill of lading sent with the vessel.

4. The owner of the vessel is not estopped from having the circumstances attending the signing and transfer of the blank bill of lading inquired into by the court.

[Cited in Robinson v. Memphis & C. R. Co., 9 Fed. 139.]

[Cited in Sioux City & P. R. Co. v. First Nat. Bank of Fremont, 10 Neb. 556, 7 N. W. 311.]

In admiralty. Fitzhugh & Littlejohn, millers, in Oswego, New York, by George M. Chapman, their agent, in Chicago, were purchasing and shipping grain from that place to Oswego, Chapman from time to time drawing on his principals, through the Marine Bank of Chicago, and procuring from the bank advances on the security of bills of lading. The schooner, Joseph Grant, on the 19th of August, 1857, was freighted at Chicago, with 18,744 bushels of corn to be transported to Oswego and delivered to Fitzhugh & Littlejohn. Duplicate bills of lading were made out, consigning the corn to Fitzhugh & Littlejohn. One bill was signed by the master, and one by Chapman, which the master retained as his guide in the delivery, and the third was signed by the master in blank. From three to five days after the vessel departed, Chapman, having occasion to give the bank a bill of lading to cover advances on drafts, filled out the blank bill in every respect the same as the other two, except as to the consignee, which was "account Marine Bank, care Delos DeWolf, cashier, for Fitzhugh & Littlejohn, Oswego, New York." The vessel in due time arrived at Oswego, and the master delivered the cargo to Fitzhugh & Littlejohn, on the 5th of September, according to her bill of lading, signed by the agent, without notice or knowledge that the third bill of lading had been filled up with a different consignment, and delivered to the bank. Two or three days after the receipt of the cargo by Fitzhugh & Littlejohn, they failed in business. This libel is brought by the bank against the vessel for not delivering the cargo on account of the Marine Bank to Delos DeWolf for Fitzhugh & Littlejohn. It did not appear that the bank had notice that the bill of lading had been signed in blank by the master and filled up by Chapman after the departure of the vessel, until after the failure of Fitzhugh & Littlejohn. Nor had the bank notice that the bills of lading, under which the vessel departed, consigned the cargo directly to Fitzhugh & Littlejohn. The bank knew that this firm was the owner of the cargo.

Wm. P. Lynde, for libellant, cited Bush v. Person, 18 How. [59 U. S.] 82; Pars. Mar. Law. 346; Chit. Carr. 250; Dickerson v. Seelye, 12 Barb. 100; Violett v. Patton, 5 Cranch [9 U. S.] 142; Howard v. Tucker, 1 Barn. & Adol. 712.

Mr. Emmons, for claimant, cited Craighead v. Wilson, 18 How. [59 U. S.] 199; Grant v. Norway, 2 Eng. Law & Eq. 337; Warden v. Greer, 6 Watts, 424; Abb. Shipp. 408–414; Low v. De Wolf, 8 Pick. 101; Allen v. Williams, 12 Pick. 297; Salem Bank v. Gloucester Bank, 17 Mass. 1.

MILLER, District Judge. So far as a bill of lading partakes of the character of a receipt, it is open to explanation between the parties to it, but as a contract, when legally executed by the proper party, in the proper and usual manner, the master or owner of a vessel shall not be permitted to show a mistake in stating the destination of the property, unless when fraud or imposition is practiced on the party. Fland. Shipp. § 479, and note.

The masters of vessels employed in the lake trade are considered the agents of the owners, to sign bills of lading or goods received on board for transportation. Usually triplicate bills of every shipment are made out,—one is signed by the shipper, which goes with the vessel as a guide for delivery, two are signed by the master, one of which is retained at the place of shipment, and the other is forwarded to the consignee. The master is the general agent of the owner,

[1] [Reported by Josiah H. Bissell, Esq., and here reprinted by permission.]

and his acts in the scope of his duties as such bind the vessel. In the exercise of the duties of a general agent, the liability of the principal depends upon the fact that the act was done in the exercise and within the limits of the powers delegated. The acts of agents do not derive their validity from professing, on the face of them, to have been in the exercise of their agency. But the facts in relation to the powers and duties of general agents are necessarily inquirable into by the court. Mechanics' Bank v. Bank of Columbia, 5 Wheat. [18 U. S.] 326.

The bank did not acquire an interest in the cargo or any service of the vessel by the shipment. It became an apparent assignee of the cargo, subsequent to the date of the bill of lading and the departure of the vessel. The libel raises the question, whether the bill of lading created a maritime contract between the master and the bank binding on the vessel, to estop the owner from inquiring into the circumstances attending it. The owner is not estopped from enquiring into the necessity of a sale of his vessel by the master, or of his creating a lien by a bottomry bond, or of his purchase of supplies. Maritime liens are stricti juris, and will not be extended by implication or construction. Vandewater v. Mills, 19 How. [60 U. S.] 82; Thomas v. Osborn, Id. 22; Pratt v. Reed, Id. 359; Tod v. Pratt, Id. 362.

When the master, as agent, receives goods on board, and gives a bill of lading, a contract is made between the shipper and the vessel. But he cannot bind either the vessel or its owner by a receipt for goods not delivered on board, for it is not a contract entered into by the master in good faith, or within the scope of his authority; and the general owner is not estopped from proving the facts, even against a bona fide holder of the bill of lading. Grant v. Norway, 2 Eng. Law & Eq. 337; The Freeman v. Buckingham, 18 How. [59 U. S.] 182. The master has no apparent authority to sign a bill of lading for goods not actually shipped, and there can be no implication that the owner of the vessel consented that false pretences of contracts, having the semblance of bills of lading should be created as instruments of fraud; or that if so created they should in any manner affect him or his property. To sign a bill of lading made out in full, describing the goods shipped, is within the authority of the master, but not a blank bill. A blank bill of lading is no contract binding on the vessel or owner. The master has no implied authority from the owner to sign any such paper. An agent of limited powers cannot bind his principal when he exceeds those powers. Schimmelpennich v. Bayard, 1 Pet. [26 U. S.] 264; Manella v. Barry, 3 Cranch [7 U. S.] 415; Lanusse v. Barker, 3 Wheat. [16 U. S.] 101; Parsons v. Armor, 3 Pet. [28 U. S.] 413; Owings v. Hull, 9 Pet. [34 U. S.] 607. Signing a blank bill of lading by the master should no more bind the vessel, than signing a bill of lading of goods not put on board,—or putting goods on board without the knowledge or consent of the master or receiving officer; but in such case the vessel may charge for freight of goods actually carried.

The vessel departed from Chicago, under a bill of lading signed by the owners of the cargo by their agent, and by the master, in which the cargo was consigned to said owners, Fitzhugh & Littlejohn. The cargo was so delivered in due course, without any knowledge on the part of said owners, or of the master, of the third bill of lading having been filled up and delivered to the Marine Bank. The vessel had no goods on board consigned to Delos DeWolf, cashier, on account of the Marine Bank, for Fitzhugh & Littlejohn. No maritime lien attached to the vessel in favor of the bank, and the libel must be dismissed, with costs.

NOTE. For a discussion of the rights of a bona fide transferee of a bill of lading as against the consignee, see Marine Bank v. Wright, 46 Barb. 45. If master signs bill of lading for goods never shipped, principal not bound. See cases cited in 1 Pars. Shipp. & Adm. 190. Or for greater quantity than actually on board, Hubbersty v. Ward, 8 Exch. 330. Master cannot, by signing bill of lading for goods not on board, charge the vessel or owner. And where bill of lading was signed upon misrepresentation, the vessel is not liable even to a bona fide holder. The Loon [Case No. 8,499].

## Case No. 7,539.

The JOSEPH HALL.

[10 Ben. 246.] [1]

District Court, E. D. New York. Jan., 1879.

SEAMAN'S WAGES—SEIZURE OF VESSEL.

A pilot was employed on a propeller, engaged in making short trips in and about the harbor of New York, by the month. His month expired on September 24th. On September 25th, the boat was seized by the marshal under process issued on libels against her. She at once stopped running. Her master abandoned her and the rest of the crew libelled her for their wages. The pilot, who had been living on board, thereafter lived at home, but he went on board the boat every day of his own accord, and pumped her out. The vessel being sold by the marshal, the pilot claimed to recover wages up to the time of her sale. *Held*, that the libellant had reasonable notice on the seizure of the boat that his services as a pilot were no longer required, and his right to wages terminated at that time.

In admiralty.

Noah Tebbetts, for libellant.

Alexander & Ash, for creditor.

BENEDICT, District Judge. In this case a lien creditor, having a demand against this

[1] [Reported by Robert D. Benedict, Esq., and Benj. Lincoln Benedict, Esq., and here reprinted by permission.]

vessel, inferior in rank to the claim of the crew, and which will be reduced by the amount paid the crew because the proceeds of the sale of the vessel are insufficient to pay all the liens in full, presents to the court the question whether the pilot of the boat is entitled to recover wages up to the time the boat was sold by the marshal, or only up to the time of her seizure, under the process issued upon libels filed against her.

The decision of this question must depend upon other facts than the fact that the boat of which the libellant was pilot was seized by the marshal on a certain day. The mere fact that a vessel is seized by the marshal by virtue of process in rem is not sufficient to terminate the contract with the seamen composing the crew at the time of such seizure. But there may be circumstances attending the seizure known to the seamen, equivalent to notice to him that his services will no longer be required by those who employed him; and in such case the seaman will be deemed discharged and entitled at once to pursue the vessel for whatever may then be due him.

In this case the circumstances are these: The boat was engaged in making short trips from New York up the North river to Jersey City and to ports on the Sound. The pilot was hired by the month, and not for any specific period. His month expired September 24th. On September 25th, the boat was seized under a libel, and upon the seizure the boat stopped running. The master left her; the rest of the crew at once libelled her for their wages, and the boat was wholly abandoned by her owners. From that time the pilot, who had up to that time lived on board the vessel, lived at his own home, but during the custody of the marshal and up to the 10th of October, he went on board the boat daily and pumped her out. This he did of his own volition and not by any direction of the owners, nor is there any evidence that the service was required by the condition of the vessel. Within a few days after the seizure the libellant sought other employment, although without success. It does not appear that what the libellant did in the way of pumping or otherwise on board the vessel, formed any part of the labor usually performed by him in the capacity for which he was hired.

These circumstances are sufficient to show that the libellant had reasonable notice that his services as pilot would no longer be required on board the boat, and his right to wages must be deemed to have terminated at the time of the seizure of the boat by the marshal and her abandonment by her owners.

In the case of The Monte Christo [Case No. 9,718], referred to by the libellant, there was evidence of an express request by the owners that the seamen remain on board notwithstanding the seizure by the marshal.

## Case No. 7,540.

### The JOSEPH H. TOONE.

[Blatchf. Pr. Cas. 124.] [1]

District Court, S. D. New York. March, 1862.

PRIZE—NEUTRAL PROPERTY—VIOLATION OF BLOCKADE—REQUISITES OF AN ANSWER IN PRIZE SUIT—INVOCATION OF PAPERS—RIGHT OF OWNER OF CARGO TO INTERVENE.

1. Motion by the owner of the cargo for leave to put in a claim to that, as neutral property, shipped from one neutral port to another, there being, in the proposed claim, averments denying that the vessel violated or attempted to violate the blockade, and invoking the test oath of the owner of the vessel, previously made to the claim. The court allowed the claim to be filed, omitting the averments in question.

2. An answer or claim in a prize suit need contain nothing more than a general denial of the grounds of condemnation alleged in the libel. The invocation of papers is to be obtained, not by pleading, but by motion.

In admiralty.

BETTS, District Judge. The schooner Joseph H. Toone and her cargo were seized in the Gulf of Mexico, on the 1st of October last, by the United States steam ship-of-war South Carolina, as prize of war, and sent, with a prize crew, into the port of New York, and there libelled by the United States November 19, 1861. Proofs in preparatorio were regularly taken, and, on the 31st of December thereafter, William H. Aymer intervened, as a British subject, and claimed the vessel as owner, and alleged that various torts and wrongs were committed on him personally by the captured vessel. Delays were incurred in bringing the suit to hearing, from term to term, until the owner of the cargo applied to the court for leave to intervene for that, and put in his claim to the libel, and served a copy of his proposed claim upon the district attorney, with notice of a motion to the court to be allowed to file it by his attorney. He represents himself to be a Spanish subject, and a resident of Havana, and alleges that the cargo was Spanish property, shipped by him from one neutral port to another. The district attorney objects to the clause proposed to be inserted in the claim by the claimant, denying that the vessel violated or attempted to violate a blockaded port; and also to his invoking the test oath of the owner of the vessel, made to his claim of ownership, and the schedules annexed thereto.

The application before the court is not one to change the ordinary method of proceeding by libel and claim into formal issues upon pleas and allegations. This would strictly be allowable only after a first hearing on the preparatory proofs, and for the purpose of bringing further proofs into the case. Wheat. Mar. Capt. 283. The privilege now sought is for the owner of the cargo to make a general defence to the allegations of the libel. The special clause proposed to be made

[1] [Reported by Samuel Blatchford, Esq.]

part of the claim, to that end, adds nothing to the rights of defence which enure to him on the most general appearance and opposition to the grounds of confiscation charged in the libel. The particular terms of the defence to be offered to the prosecution need not be specified in the answer or claim filed in opposition to a prize libel, all the evidence to obtain a decree of condemnation being, in the first instance, to be produced by the captors. The construction of the claim offered on the part of the owner of the cargo is, therefore, quite immaterial. The suit is only to be litigated on the case made by the libellants; and it is only when that case affords grounds for conviction of the property seized, and is so pronounced by the court, that it becomes necessary for the claimant to show a defence through pleadings or proofs. There is no legal relevancy in the invocation of papers set forth in the claim, proposed to be put in by the claimant of the cargo, because that relief is not attainable through pleading, but is granted only on motion, and at the discretion of the court. Prize Rules, 30–33. There being no necessity for, or pertinency in, the clause prayed by the claimant to be inserted in his claim, but it being needful that he should interpose in the suit, and contest the demand of the libellants, and no unreasonable delay being shown in his so doing, it is ordered by the court that the claimant of the cargo captured be allowed to file forthwith his claim thereto in the suit, omitting therefrom, as inappropriate, the third clause of the same, objected to by the district attorney.

[See Cases Nos. 7,541–7,543.]

## Case No. 7,541.

### The JOSEPH H. TOONE.

[Blatchf. Pr. Cas. 223.] [1]

District Court, S. D. New York. Oct., 1862.[2]

PRIZE — VIOLATION OF BLOCKADE — ABSENCE OF LOG-BOOK IN TIME OF WAR — SIMULATED PAPERS—EVIDENCE IN PRIZE CASES — BEING OFF REGULAR COURSE AS PROOF OF FRAUD—WRONGS COMMITTED BY CAPTORS.

1. Cargo condemned for an attempt by the vessel to violate the blockade, and the vessel not being taken on process in the suit.

2. Effect of the absence of a log-book, unaccounted for, in time of war.

3. Simulated papers as to the destination of the vessel.

4. The general rule of evidence in prize cases is that, in the first instance, only the ship's papers and the preparatory examinations can be adduced; but in seizures for breach of blockade the captors are permitted to put in affidavits contradicting the preparatory testimony as to the nearness of the captured vessel to the blockaded port, and the acts denoting an intent to evade the blockade.

5. Redress for wrongs committed by the captors, or for want of diligence in proceeding to the trial of the case, cannot be had by way of defence in the prize suit. It must be sought for by proper pleadings and further proof.

6. One of the chief evidences of fraud is a vessel's being out of the regular course leading to the port of destination shown on her papers.

In admiralty.

BETTS, District Judge. Although the issue in this suit was taken under formalities manifesting preparations for a formidable contest on the trial, the case was finally heard on the attendance of counsel for the libellants only, with the privilege allowed by the court to the counsel for the claimant of the vessel and the several claimants of the cargo to file briefs in their behalf on the next day. The first libel was filed November 19, 1861. After a short delay, permitted by the court, the answers and claims of the owner of the vessel, for himself as to the vessel, and in the capacity of agent for several parties, Spanish subjects, residents within the Spanish dominions, for the whole cargo, and the further sole answer in full of one of those claimants personally for a portion of the cargo, were filed on the 31st of December thereafter. The libellants obtained an order of court authorizing the libel to be amended, April 26, 1892; and on the same day filed an amended libel in the suit against the vessel and cargo. But the warrant thereon was issued against the cargo alone, and no arrest of the vessel in the suit has been returned by the marshal to the court. No further answer was interposed by the claimants; but since the hearing, by permission of the court as above noted, a brief or note of objections was filed to the action on the merits, by way of argument. The vessel and cargo were seized as prize, October 1, 1861, in the Gulf of Mexico, between Timbalier Island and the southwest pass of the Mississippi river, and south of Barataria Bay, by the United States war steamer South Carolina. The vessel was, it seems, on capture, detained for the use and service of the government, but, she not being included in the process or its return, no decree can be rendered against her in this action. The cargo was transshipped and sent in another vessel to this port for adjudication. The alleged owner of the vessel, her master, two seamen, and a passenger, all taken on board, were also sent here, and were examined in preparatorio. The papers found on board of the vessel are voluminous, but most of them will be passed by without detailed notice, as they have no special bearing upon the judgment now rendered, and most of them relate to transactions and voyages anterior to the war, or the establishment of a blockade of the Southern ports in question. The papers exhibit no other title in Aymar, the claimant to the vessel, than her provisional register in his name, in the British consulate, dated the 25th of September, 1861,

[1] [Reported by Samuel Blatchford, Esq.]

[2] [Affirmed in Case No. 7,543.]

and the execution by him on the same day, at the same place, and before the same officer, of a power of attorney to Pennington, the master of the vessel, as his agent, to manage and sell the vessel for him, and in his name. Aymar testifies, in his examination in preparatorio, that he bought the vessel from Pennington, the master, in September, 1861, who gave him a bill of sale of her, as attorney of Thomas Flood, a British subject; but no bill of sale is produced in evidence, nor any proof of the payment of the consideration price therefor; and the circumstances indicate that the act of passing the title to Aymar, and his power to dispose of it over, were simultaneous, and in furtherance of a common purpose, whether that be a lawful or illicit one in relation to this country. The vessel was of American build, and at what time she assumed a British character is not shown, otherwise than as above stated. Aymar swears that he is a British subject by birth, and that he is unmarried, and has resided and been in business in New Orleans for eight years. The contrary not being alleged, it will be presumed that his residence and business relations in New Orleans directly preceded his obtaining title to the vessel and appointing the master. He says that he had known the vessel for six months, and had known about her for at least eighteen months previously. Though not directly declared in the testimony, the inference is strong that Aymar accompanied the vessel on her voyage out to Havana, for he says that she cleared at New Orleans to sail from Berwick City, in Louisiana, which place she left August 25th or 27th for Havana, in Cuba; and Monsall, the steward, says that he first saw Aymar, who came on board the vessel, at Berwick Bay, whence she sailed on her voyage to Havana. The master testifies that she left Berwick for Havana on the 27th of August, and that on the voyage prior to the last one she went from Havana to Berwick Bay. The owner and the master, both of them, knew of the war between the Confederate States and the United States, and that the Louisiana ports were under blockade, before and at the time this and the last voyage were undertaken. The voyage from Havana commenced on the 27th of September. The capture was made October 1st, in the evening, at a point supposed to be 35 or 40 miles off the Louisiana coast, and, upon some of the representations of the locality, between the island of Timbalier and the mainland off and south of Barataria Bay. No log was found on the vessel at her capture, and no account is given, in the proofs, respecting its suppression or existence. As geographical facts, the place of the vessel's departure and the place of her declared destination were on about the same parallel of latitude, Havana being about 23° north latitude, and Tampico, named in the manifest and shipping articles as the port of destination, differing but a few minutes from the latitude; whilst the place of capture was in the vicinity of the outlet of the Mississippi river, and on a line nearly equidistant from Havana and Tampico. As given on ordinary maps and charts, Havana, the starting point, is in latitude 23° 9′ north, and longitude 82° west, and Tampico is in latitude 22° 40′ north, and longitude 92½° west, so that a direct line from the former to the latter would tend with a slight angle south of west; but the course from Havana, in latitude 23° 9′ north, to bring the vessel to Timbalier Island or Barataria Bay, in latitude 28° north, and longitude 90° west, must necessarily be largely north of west, and be, in length, a distance almost as great as the distance, on a direct course, between Havana and Tampico. The master, in his testimony, says that his course from Havana to the place of capture was northwest. The statement of the relative distances and bearings might be noted with more exactness from accurate sea charts, if at hand, but these estimates are sufficiently precise to suggest the just influence of those facts upon the questions to be considered by the court. The manifest and bills of lading found with the vessel on her capture showed her to be laden with various military stores and equipments, arms and ammunition, contraband of war, together with a general cargo of merchandise.

The defence to the suit is that the vessel and cargo were neutral property, cleared and intended for a neutral port, and on their direct passage to that port, and were in no way designed for a blockaded port, or one in possession of enemies of the United States. The United States do not controvert the allegation that the cargo was neutral. They question the integrity of the transfer of the vessel to the claimant Aymar, at Havana, and deny that the cargo was honestly obtained for a neutral voyage by the claimants, or was intended to be sent to a neutral port, but, on the contrary, assert that it was destined for a blockaded port, and was to be delivered to the enemies of the United States. The answer and claim was, in the first place, interposed for Aymar, in his own right, to the vessel, through his proctor, and for the cargo, in behalf of various of its shippers. A subsequent answer was, by leave of the court, filed in behalf of other consignees of the cargo, on the 28th of April, 1862. Appended to these papers were long protests and allegations, setting forth irregular and oppressive conduct of the captors, exercised by them in making the capture, both in relation to the vessel and the captured crew. These latter matters will not be regarded on the present issues. The views of the court in respect to that method of defense, and its effect under this state of pleading, have been sufficiently indicated in previous decisions.

The main points upon which the prosecution is resisted are (1) that the preparatory proofs and the ship's papers produced on the hearing demonstrate that the property seized

was all of it held by neutral owners, and was on transportation when seized, from one neutral port and country to another, and that no purpose or attempt was made, on the part of the claimants, to violate the blockade laid by the United States on any port of the seceded states; and (2) that no imputation of illegality attaches, by the laws of war, to any portion of the voyage, or to the acts or purposes of the claimants in concocting or conducting it. The counter positions by the libellants are, that the proceedings in employing the vessel and the ship's company, and in documenting and conducting her, are replete with indications and presumptions that the enterprize was an illicit one, set on foot and pursued with a manifest design to violate the blockade of the coast of Louisiana, and to convey to the enemy supplies essential to his necessities, and also to transport there a large quantity of the articles contraband of war, consisting of munitions and arms. The witnesses taken on board of the vessel, who are cognizant of any important facts relative to the issue, are Aymar, claiming to be her owner; Pennington, her master; Lewis, a passenger; and two of the hands, one of them being the steward, and the other a seaman—probably the mate. The last two furnished no proof respecting the fitting out or conduct of the voyage, except that they knew when the vessel left Berwick Bay for Havana that the ports of Louisiana were under blockade; and that Brown, the seaman, says that the vessel had before her capture been heading northward till about 4 p. m. on that day, and then changed her course to south-southwest, because it was thought they sighted the South Point light-house. Brown says that he saw the capturing steamer about 5 o'clock p. m. Both of these witnesses assert that they shipped for Tampico, and believed that the vessel was destined to that port. Pennington, the master of the vessel, in answer to the thirty-sixth interrogatory, evidently attempts to cover the language of the interrogatory by a strict verbal reply to its queries. He says that the light of the South Carolina ahead was discerned at 4 p. m., and was taken to be a light-house; and that, on seeing the vessel, he altered his course from northwest to south-southwest, for Tampico, which course was away from the light; that, when he bore away, he was brought nearly before the wind; and that, when captured his vessel was six degrees to the northward of her regular course from Havana to Tampico, and between 400 and 500 miles, he should think, from Tampico. Aymar, the owner, says, in answer to the same interrogatory, that he does not know the course the vessel was steering, nor how much she was off her true course, when she was captured, nor what alterations were made in her course; and that he heard the captain say his nautical instruments were out of order, and he was anxious to get on to soundings to ascertain his whereabouts. Lewis, the passenger, answers to the same interrogatory, that he understood that the vessel was, when captured, steering for Tampico, and that he does not know that her course was altered on the appearance of the capturing vessel, or to any other course than to Tampico. He says that the wind the whole time from Havana was ahead, and the weather stormy and boisterous, and such as to prevent the master from taking frequent observations, and that he seemed very much at a loss as to his course, owing to some irregularity of the chronometer. The master answers to the same interrogatory, that when he so changed his course (on coming in sight of the South Carolina) he "then thought his chronometer was right;" and he says that, "owing to the wind and weather, the vessel was obliged to be where she was" taken. To the nineteenth interrogatory, he says that he had no observation for 36 hours, and that his chronometer was between two and three minutes out of the way. It is open to remark that the witness Lewis, a citizen of New Orleans, appeared to have been suspiciously connected with the voyage. He shipped under a fictitious name, was a late officer of the United States, and had in his charge 1,200 blankets, obviously, from his account, provided for military stores, of which he represents himself to be a mere carrier, without any interest in the commodity, and apparently without any acquaintance or connexion with the owner.

Upon this exhibition of facts, the assertion, in the evidence of the owner and master, that the vessel was supposed by them to have been pursuing her direct voyage to Tampico the whole distance she ran until she was intercepted by the capturing vessel, is most inconclusive and suspicious. She left Havana September 27th, with a course northwest, and maintained the same for four days, when she was arrested. No witness intimates that the course adopted was a proper one to run from Havana to Tampico. The alleged irregularity of the chronometer may have left the master uncertain as to the distance the vessel had run, and as to how near he was to the soundings on the coast for which he was seeking; but it is not shown to have in any way affected or interfered with the due working of his compass, or with his probable knowledge whether a four-days' northwest course would lead to Tampico, or would terminate on the coast of the United States about opposite, in that direction, to the island of Cuba. Manifestly, as the voyage directly preceding this one, coming from Berwick Bay, was in about a southeast direction, the return one on a northwest line would be likely to end about where the former one commenced. The testimony of the passenger, Lewis, does not support the allegations of the master, that the weather prevented his obtaining an observation for 36 hours. He only says that the weather was so boisterous and adverse as to prevent frequent observations on the transit, which necessarily implies that some observa-

tions were actually taken. Where those were made, and at what time, and what was the result, is not disclosed in the evidence of the master, or of any other witness. Besides, as the weather had become moderate and the wind mild at the time the capturing vessel came in view, it is not made to appear but that the weather was of a like character all the period of the run, except (according to the estimate of the master) a term of 36 hours; leaving it to be presumed that during nearly two-thirds of the period of the passage of the vessel ample time and opportunity were afforded her to be navigated without wandering, for the whole distance she sailed, in a direction entirely away from the point to which she is alleged to have been destined, and almost literally back in the track pursued on her outward voyage. The absence of a log-book, unaccounted for, is matter of distrust, in time of war, as to the integrity of purpose in the outfit and operation of a trading vessel captured under equivocal and disparaging circumstances; as it is a document so usual and important, as evidence of the transactions of a ship navigating abroad, and one which so universally accompanies trading vessels employed in foreign commerce. Dana, Seaman's Friend, 145, 198. Its absence gives room for presumption that material matters have been fraudulently suppressed, and particularly where an object may exist for keeping it out of view. Entries of the casualties occurring on the voyage, of the courses and distances pursued, and of other incidents attending the navigation, are items appropriate to the log, and are always appealed to, and forcibly so, in support or refutation of testimony given by the crew in regard to navigation on board, and may become especially pertinent in prize cases in reference to voyages in face of blockaded ports. Under these considerations of the proofs given respecting the real destination of the vessel from Havana, there arise cogent suspicions that Tampico was not at the inception of the voyage intended to be its termination, and that the bills of lading, manifests, and shipping articles were simulated and falsified in that particular. It is to be observed, moreover, that the bills of lading are drawn to order or assigns, or are indorsed in blank, and would thus be as available at New Orleans as at Tampico, and no letters of instructions to any consignees are found among the ship's papers. The owner of the vessel is with the vessel, accompanying the voyage and cargo, on no avowed business; and the whole affair wears, on the proofs, the aspect of being under his sole charge and for his interests. Brown, the mate, speaks of no defect in the chronometer, or lack of observations on the voyage. He denies that the vessel changed her course because of the appearance of the capturing vessel, and alleges that the steamer was first seen an hour after the change of course. In this his testimony conflicts with that of the master, and the other witnesses make no express statements on the point. All of these witnesses seem to concur in the representation that the vessel was captured out at sea, some 35 or 40 miles from the coast. It was mild weather and nighttime, and under such circumstances, a ship of war would be apt to lie close in shore while enforcing a blockade, particularly on a low coast, with numerous inlets and outlets of the character of that approached by this vessel, in order to have a readier inspection of and control over them.

The general rule of evidence in prize suits in that, in the first instance, only the ship's papers and the preparatory examinations can be adduced, and the case must ordinarily be put to hearing on these proofs. The Vigilantia, 1 C. Rob. Adm. 1. But this rule is not inflexible, and, particularly, in seizures for breach of blockade, the captors are permitted to put in affidavits contradicting the preparatory testimony as to the nearness of the captured vessel to the blockaded port, and the acts denoting an intent to evade the blockade. The Charlotte Christine, 6 C. Rob. Adm. 101. The deposition of the prize master in this case (a master's mate in the United States navy) states that he was present at the capture of the schooner, and that when first seen she was heading in shore, about half way between Timbalier Bay and the southwest pass, being about 9 miles distant when first discovered. But without regarding this deposition as of any necessity in the cause, other than as importing that the conjectural estimate of the men on board of the prize, that she was 35 or 40 miles out at sea from the coast when seized, cannot be confided in as affording a reliable assertion that she was not heading towards the coast in such vicinity as to imply a purpose to make a landing there; and laying out of view this deposition entirely, I am convinced, from the preparatory testimony itself, that the vessel was on the direct road to a blockaded port with intent to enter it, and that she changed her course only after discovering the blockading ship, and did so to avoid that ship. Had she been honestly searching for soundings, under the expectation that she was upon a lawful course, she would eagerly have put herself in communication with that ship to obtain information of the fact, and would not have veered off to sea before the wind in a direction widely divergent from, if not opposite to, the one she had been pursuing. The allegations of the witnesses examined in preparatorio were intentionally deceptive, in stating that she was steering towards Tampico when seized, because she turned suddenly and broadly off the course she had headed and pursued during her whole run, and only took that towards Tampico on the appearance of the steamer in her way immediately before her arrest, and, without attempting to speak the steamer, ran from her before the wind until chased and brought to by the guns of the latter.

I do not need to lay any stress, in the decision of the cause, as a reason for the condemnation of the vessel as enemy property, on the fact that she was owned by a domiciled trader in New Orleans at the time her voyage was undertaken thence, and when she sailed from Berwick Bay, in August, 1861; or on the fact that she was transferred also to a domiciled trader, the present claimant, in September afterwards; or on the fact that, with the knowledge of both vendor and vendee, she evaded the blockades of the ports of Louisiana on that voyage, and that her present voyage, if not a continuance of the same voyage, was the next or subsequent one in time to it; or on the consideration that the alleged transfer of the title to the vessel is not proved by the bill of sale thereof, and is not shown to have been on an actual payment therefor of any money consideration; or on the consideration that the alleged purchase, if valid in law as a transaction in a neutral territory, conferred no title to the claimant as against the United States; for I think that the evidence adequately proves that the prize vessel was despatched from Havana with the purpose of evading the blockade in the Gulf of Mexico, and of conveying and landing within an enemy port articles contraband of war, destined for the use of the enemies of the United States, then being in a state of war against this country, and that such purpose was attempted to be carried out during her whole voyage.

Several grounds of defence are taken by the claimants to the suit. One of them is that these proceedings on the capture are irregular and erroneous, because the vessel was, after seizure, appropriated to the use of the government, and has since also, without trial and condemnation, been totally destroyed, and lost to the claimant. This objection is not before the court by any form of legal issue, but is presented by way of argument. The allegation cannot in that way become the subject of adjudication and judicial remedy. If the public prosecutor has been guilty of remissness in not pursuing the condemnation of the vessel with due diligence, that delinquency may probably be corrected by libel and monition sued out on the part of the claimants; and redress for other collateral injuries, supposed to have been wrongfully committed by the captors, should be sought for by proper pleadings and further proofs. Prima facie, it will be assumed by the court on this trial that reasonable cause existed in the case for the commanding officer to take the captured vessel directly into the public service, without awaiting the usual course of a prosecution at law, and that the act is justifiable in law. Jecker v. Montgomery, 13 How. [54 U. S.] 498; Same Case, 18 How. [59 U. S.] 110. By "the port of destination," in maritime law, is meant the real one the vessel is going to, not merely the one entered on the ship's papers. Mos. Contr. War, 29. One of the chief evidences of fraud is a vessel's being out of the regular course on which she ought to be going,—her being found off the road to her destined port, as shown by her papers. Id. 98. An illusive destination is one of the most heinous falsifications of a ship's papers in time of war, and in such case the ship carrying contraband of war, and all the rest of the cargo, as being in common infected with fraud, are embraced in a common condemnation and forfeiture, when not otherwise protected by treaty stipulations. 1 Kent, Comm. 143, notes a, b.

I think the deduction from the evidence in the case is irrefragable that this vessel and all her cargo, composed in part of contraband of war, were intentionally on the road to an enemy port, and off the course to the port of destination named in the vessel's papers, and were attempting to enter an enemy port and violate the blockade thereof, and that both the vessel and her entire cargo are subject to forfeiture therefor. I am of opinion that just grounds exist, upon the proofs, for the condemnation of all the property captured and libelled in this case; but the proceedings in court against the vessel not having been regularly perfected, the decree of condemnation will be entered against the cargo alone.

This decree was affirmed, on appeal, by the circuit court, July 17, 1863 [Case No. 7,543].

[See Cases Nos. 7,540 and 7,542.]

## Case No. 7,542.

The JOSEPH H. TOONE.

[Blatchf. Pr. Cas. 258.] [1]

District Court, S. D. New York. Nov., 1862.

CONDEMNATION—MONITION—SERVICE ON PROCTOR—DECREE BY DEFAULT.

In this case the court has condemned the cargo, but had withheld condemnation of a vessel, on the ground that no monition had been returned against her. Afterwards, the court, on the application of the libellants, made an order, under the 44th admiralty rule of the supreme court, no notice by monition having been given to the owner of the vessel, and she not being in port, that the monition be served on the proctor for the owner. It having been so served, the proctor appeared in court and made, under oath, an exception in writing on behalf of the owner against the requirements of the monition, the district attorney at the same time moving for a decree of condemnation against the vessel for want of an answer to the libel. *Held*, that the proceedings were regular, and that the vessel must be condemned.

In admiralty.

BETTS, District Judge. The proceedings on the institution of this suit and the constructions of the pleadings, were noticed in the decision of the court in October term past. [Case No. 7,541.] On the 10th day of November instant the district attorney applied

[1] [Reported by Samuel Blatchford, Esq.]

for and obtained an order from the court for a monition to attach the vessel by delivering a copy of said monition to Charles Edwards, Esq., proctor for the claimants in the suit, in pursuance of the supreme court rule 44, in admiralty. The monition was returned in court by the marshal on its return day, "Served by delivery that day to the said proctor." Thereupon the district attorney moved a decree of condemnation against the vessel, for default of an answer to the libel in that respect. On the 18th instant Mr. Edwards appeared in court, and made, under oath, "an exception, objection and protest in writing on behalf of Aymar, the owner of the vessel, and as his advocate and proctor, against the requirements of such monition," setting forth in the instrument, in detail, the facts and grounds upon which it was founded, and praying and claiming that it be filed in the above suit. The court cannot understand this paper as a defence to the motion made by the district attorney, as it is specifically exceptive, and in bar to the competency of the court to act on the subject-matter of the additional process and monition. The appearance is not sub modo to the deficiency and irregularity of the proceedings against the vessel, and the inadequacy of evidence to convict her. That would be a defence in chief on the merits—the result and consequences which the protest seeks to prevent or render nugatory. The court, in its sentence against the cargo, expressly forbore to act on the allegations in the libel against the vessel, on the ground that no monition had been returned against her. If it had been understood that the owner had appeared by a proctor in defence of the vessel, such appearance would undoubtedly have cured the want of a monition or due notice to the vessel, and would have stood as such notice to the owner. Penhallow v. Doane [Case No. 10,925]; Hills v. Ross, 3 Dall. [3 U. S.] 331. The 44th admiralty rule of the supreme court meets the case where no notice by monition has been given to the owner of property proceeded against as prize, and not in port, and authorizes the service of the monition on the owner personally, or his agent or proctor residing in the district. The latter course has been pursued in the present instance. If the appearance of the proctor for the owner of the vessel was not absolute at first, so as to render the proceedings against her perfect without direct notice to him, then the service of the monition personally on him on the day of its return is adequate notice to bind his principal as to all subsequent steps regularly taken by the libellants in the cause. They are, accordingly, entitled to a decree of condemnation of the vessel by default, according to their prayer. A decree will be entered against the vessel, confirming her appropriation to the use of the government on the appraisal of value made of her at the time of her seizure.

[See Cases Nos. 7,540, 7,541, and 7,543.]

## Case No. 7,543.

The JOSEPH H. TOONE.

[Blatchf. Pr. Cas. 641.] [1]

Circuit Court, S. D. New York. July 17, 1863.[2]

VIOLATION OF BLOCKADE—EVIDENCE OF.

[The fact that a vessel loaded with ammunition was several hundred miles out of the proper course to her alleged destination, and heading towards a pass which was the customary entrance to a port, at that time in a state of blockade, is sufficient evidence to warrant her condemnation.]

[Appeal from the district court of the United States for the Southern district of New York.]

In admiralty.

NELSON, Circuit Justice. This vessel was captured on the first of October, 1861, by the war steamer South Carolina, in the Gulf of Mexico, off Timbalier Island and Barataria Bay, on the coast of Louisiana. She was of the burden of 145 tons, and was laden with arms, ammunition, coffee, &c., and on a voyage from Havana to Tampico, Mexico. The vessel belongs to Aymar, a British subject, doing business at New Orleans, where he has resided for the past eight years. He was on board at the time of the capture. The cargo belongs to Spanish subjects, and was shipped on board at Havana, ostensibly destined for Tampico.

The only question in the case is, whether or not the vessel was, at the time of her capture, attempting to enter the port of New Orleans, which was in a state of blockade. The owner, who was on board, and the master, knew of the blockade. The vessel, at the time she discovered the war steamer, was heading northwest, and immediately tacked to the southwest, and was chased some four hours before she was overtaken and captured. She was some six degrees, or over five hundred miles, north, out of her proper course for Tampico, and heading towards a pass that would lead to the Mississippi river and New Orleans. Tampico is some eight or nine hundred miles south of west from Havana. The attempted explanation of this departure from the usual course to Tampico, namely, headwinds, and a defective barometer, is not satisfactory. Indeed it is admitted that the wind, at the time of the capture, was from the northeast. No one can look on the map without being struck with the insufficiency of the excuse for the position of the vessel in her extreme northern latitude, compared with her port of destination, and in the vicinity of one of the customary passes to New Orleans. I say nothing about the cargo on board. She had a right to carry it to Tampico. The difficulty in the case is, that the course of the vessel, from the commencement of the voyage until she was discovered by the South Carolina, was utterly

[1] [Reported by Samuel Blatchford, Esq.]

[2] [Affirming Case No. 7,541.]

inconsistent with an honest destination to that place, and was consistent with an intent to run the blockade of the port of New Orleans. I think that the intent is apparent, and that the vessel was in the act of carrying it into effect. Decree below affirmed.

[See Cases Nos. 7,540–7,542.]

## Case No. 7,544.

The JOSEPHINE.

SEAMEN—MALTREATMENT BY MASTER—JUSTIFICATION.

Captain Lendholm, of the ship Josephine, was charged with maltreating his crew of Lascars. THE COURT held that, although the captain was apparently honest in the belief that the men had conspired to poison him, yet he had no right to flog them.

Decided by SPRAGUE, District Judge.

[Cited in 2 Pars. Shipp. & Adm. 90, to the point as stated above. Nowhere reported; opinion not now accessible.]

## Case No. 7,545.

The JOSEPHINE.

[Abb. Adm. 481.] [1]

District Court, S. D. New York. Feb., 1849.

APPEAL—MOTION TO DISMISS—WHERE MADE.

1. A motion to dismiss an appeal taken from a decree in the district court to the circuit court, must be made in the circuit court.

2. The authority of the district court, in cases pending on appeal, extends only to the protection of parties against unreasonable delay.

This was a libel in rem, by Joseph Smith and others, against the brig Josephine. The final decree in the cause, which was in favor of the claimants, was rendered March 8, 1847. An appeal from this decree was taken in due time by the libellants. The claimants now moved that they be discharged from their stipulations given on the appeal, and that the appeal be dismissed. In support of this motion they produced the certificate of the clerk of the circuit court, that the notice of appeal and affidavit of service, with the papers required to be returned with the appeal, had not been filed in the circuit court, as late as February 3, 1849.

Mr. Bliss, for the motion.

E. C. Benedict, opposed.

BETTS, District Judge. The application for relief in this matter must be addressed to the circuit court; as the question relates to the regularity and sufficiency of the proceedings to vest that court with cognizance of the cause. That court, and not the district court, must determine whether the rules of the circuit court have been complied with, and whether the cause is to remain with that tribunal or to be dismissed from it. The authority of the district court in appealable cases extends only to the protection of suitors against unreasonable delays therein. Ten days after notice of the decree is allowed to the failing party to appeal. Dist. Ct. Rules, 152. If he omits to enter an appeal within that time, the successful party may proceed and execute the decree rendered in his favor. Id. 153. So, if after regularly entering the notice of appeal, the appellant neglects for thirty days to have the proceedings transcribed in order to be transmitted to the circuit court, the decree may be executed in the court below. Id. 155. It is not charged that either of these steps have not been regularly taken; and it is only on the failure to take them that relief can be sought in this court. The relief given by this court in the cases indicated does not act upon the appeal itself. With that this court has no concern. The relief extends no further than to allow the prevailing party to proceed upon his decree in this court as if no movements for an appeal had been signified to the court. The present motion, therefore, cannot be granted in this form. Order accordingly.

[See Case No. 7,546.]

[1] [Reported by Abbott Brothers.]

## Case No. 7,546.

The JOSEPHINE.

[2 Blatchf. 322.] [1]

Circuit Court, S. D. New York. Oct., 1851.

SALVAGE—SERVICES RENDERED BY CREW OF VESSEL OF WAR.

1. Where the officers and crew of a vessel of war belonging to the United States government rendered, under the direction of her commander, and in obedience to the general instructions of the government to all its vessels to render relief freely and promptly to American vessels in distress, services in towing into an American port an American merchant-vessel found abandoned at sea five hundred miles distant, but the delay thus caused was one of only two days, and no extraordinary service was rendered, and no unusual hardship or peril was encountered: *Held*, that the officers and crew were not entitled to salvage.

2. Whether the officers and crews of the naval vessels of the United States are in any case entitled to salvage for services rendered to American merchant-vessels in distress, notwithstanding such instructions, quere.

[Appeal from the district court of the United States for the Southern district of New York.]

Joseph Smith, on behalf of himself and others, the crew of the United States sloop-of-war Plymouth, filed a libel for salvage in the district court against the American brig Josephine. The libel charged that the Plymouth, on her passage from Rio Janeiro to Boston, on the 30th of September, 1846, fell in with the wreck of the Josephine on the high seas, some five hundred miles from the port of New York, drifting about at the mercy of the waves, entirely abandoned by

[1] [Reported by Samuel Blatchford, Esq., and here reprinted by permission.]

her crew, derelict and partly plundered; that a boat was lowered from the Plymouth and a boat's crew sent to take possession of the wreck; that, after considerable exertion, a hawser was made fast to her, and the course of the Plymouth was altered to New York, to which place she towed the brig and her cargo in safety, being engaged in such towing for four days; that, but for the assistance so rendered to the brig and her cargo, the same would have been entirely lost; that the libellants were on board the Plymouth at the time and assisted in saving the brig and her cargo; and that the captain, officers and crew of the Plymouth, for the service thus performed and the risk run, were justly entitled to reasonable salvage. The answer, after admitting substantially the facts set forth in the libel, set forth that the Plymouth, in rendering assistance to the brig, was acting under instructions from the government of the United States to render relief freely and promptly to American vessels in distress; that, in the opinion of the government, it best comported with the interest of the navy and the policy of the government, that no compensation should be asked or received for such services; that, in rendering assistance to the brig, the officers and crew of the Plymouth were in the discharge of their legal duty only, for which they were paid by the government, and that such services were not within either the reason or the policy of the ordinary maritime law in regard to salvage. The district court dismissed the libel, but without costs, on the ground that there was probable cause for filing it. The libellants appealed to this court.

Erastus C. Benedict, for libellants.

I. Salvage is the compensation due to persons by whose voluntary assistance a ship or its lading has been saved to the owner from impending peril or recovered after actual loss. Abb. Shipp. 554; Hand v. The Elvira [Case No. 6,015]. The right to salvage depends solely upon the consideration that property has been saved to the owner from maritime peril by the salvor. His intrepidity, humanity, relief to distress or preservation of life do not affect his right to compensation; they only affect its amount. The Emblem [Id. 4,434]; The India, 1 W. Rob. Adm. 406, 408. II. Salvage does not depend upon the character of the parties rendering the service, nor upon the character of the assistance rendered, nor upon the kind of peril or cause of loss, nor upon the national character or ownership of the property saved or of the owners. 1. There is no limitation to the kind of persons who may be entitled to this compensation. (a) Persons in the employ of the nation. Officers and seamen of vessels of war. The H. M. S. Thetis, 3 Hagg. Adm. 14; The Porcher, 2 Hagg. Adm. 270, note; The Gage, 6 C. Rob. Adm. 273; The Lord Nelson, Edw. Adm. 79; The Pensamento Feliz, Id. 115; The Mary Ann, 1 Hagg. Adm. 158; Pritch. Adm. Dig. 385; The Lustre, 3 Hagg. Adm. 154; The Ewell Grove, Id. 209; The Helene, Id. 430, note; The Wilsons, 1 W. Rob. Adm. 172; The Iodine, Pritch. Adm. Dig. 385, note; U. S. v. The Amistad, 15 Pet. [40 U. S.] 518. The royal coast-guard and revenue-officers. The Helene, 3 Hagg. Adm. 430, note; Le Tigre [Case No. 8,281]; Pritch. Adm. Dig. 393, § 323, and note. (b) Semi-official persons. Pilots. The Balsemao, 2 Hagg. Adm. 270, note; The Nicolaas Witzen, 3 Hagg. Adm. 369; Hobart v. Drogan, 10 Pet. [35 U. S.] 108. Lloyd's agent. The Traveller, 3 Hagg. Adm. 370. (c) Persons having some relation to the subject saved. Passengers. Pritch. Adm. Dig. 360, § 38; Newman v. Walters, 3 Bos. & P. 612; Abb. Shipp. 560. The crew, in extraordinary circumstances. The Neptune, 1 Hagg. Adm. 227, 237; Pritch. Adm. Dig. 385, note 55. Consorts. The Waterloo, 2 Dod. 433, 443; The Ganges, Pritch. Adm. Dig. 389, note 62. (d) Persons of no independent right. Women. The Jane and Matilda, 1 Hagg. Adm. 187, 194. Apprentices. Bell v. The Ann [Case No. 1,245]; Mason v. The Blaireau, 2 Cranch [6 U. S.] 240, 270; The Two Friends, 8 Jur. 1011; The Columbine, 2 W. Rob. Adm. 186; Pritch. Adm. Dig. "Salvage" (Civil) §§ 308, 314, 320, 335, 337. Boys. Id. §§ 327, 330. Slaves. Small v. The Messenger [Case No. 12,961]; Mason v. The Blaireau, 2 Cranch [6 U. S.] 240, 241. Masters, mates, sailors, cooks, surgeons, carpenters, passengers and landsmen of every national character. 2. Neither does salvage depend upon the character of the assistance rendered, nor upon the kind of peril or the cause of loss. It need only be the saving a vessel or cargo in danger—supplying stores—loaning an anchor—going for assistance—towing—helping to navigate in a storm—piloting into a port—fishing up from the bottom—quelling a mutiny—taking from pirates—recapturing from an enemy. 3. Neither does it require a request. It must be voluntary; that is to say, it must not spring from any particular duty, or from any particular relation to the saved property, or from any specific contract. It must be a service which the party may lawfully decline to render. 4. Nor does it depend upon the national character of the property saved or of the owners. III. Salvage service is highly favored in law in all commercial countries, from motives of clear public policy and a regard to the interests of commerce. Mason v. The Blaireau, 2 Cranch [6 U. S.] 240, 266; The Joseph Harvey, 1 C. Rob. Adm. 312, note; The William Beckford, 3 C. Rob. Adm. 355; Hand v. The Elvira [supra]; The Louisa, 1 Dod. 317–319; The Emblem [supra]; The Centurion [Case No. 2,554]; The Boston [Id. 1,673]. IV. The stimulus which public policy and the interests of commerce supply is simply the spur of private interest. Adams v. The Sophia [Id. 65]; The Emblem [supra]. V. Compen-

sation for salvage service is an absolute legal right. VI. This right is personal to the salvor, notwithstanding his relation to others. Le Tigre [supra]. VII. It being thus, a personal right, a party cannot be deprived of it except by law. VIII. The right to salvage depends upon the saving of the property; but the rate or amount of salvage depends upon the amount of the property, the probability of loss, the amount of peril to the property, the value of the service to the owner of the property, and the personal toil, loss of time, daring and danger of the salvors. The highest order of merit, in a pecuniary estimate, is the safe bringing in of property entirely abandoned and lost to the owner—derelict. For such a service courts have sometimes awarded seven-eighths for salvage, and it is usual to give one-half. The present is such a case. IX. The only real point is, that the salvage was performed by an American vessel of war, in saving American property. There was never, before this, a case decided in which the right of a national vessel to salvage was denied on that ground. The contrary has been held in numerous British, French, American, Mexican and South-American cases. The Hope, 3 C. Rob. Adm. 215; The Edward and Mary, Id. 305; The Helen, Id. 224; The John and Jane, 4 C. Rob. Adm. 216; The Gage, 6 C. Rob. Adm. 273; The Lord Nelson, Edw. Adm. 79; The Louisa, 1 Dod. 317; The Mary Ann, 1 Hagg. Adm. 158; The Iodine, Pritch. Adm. Dig. 384, note 54; The Charlotte, Id., note 55; The H. M. S. Thetis, 3 Hagg. Adm. 14, 42; The Lustre, Id. 154, 155; The Ewell Grove, Id. 209, 224, 225; The Helene, Id. 430, note; The Wilsons, 1 W. Rob. Adm. 172; The Iris (S. C. Dist. Ct.) MS.; Ex parte Kearney, Id.; The Ant, in Mexico, National Intelligencer, Sept. 29, 1849; The Active, in Montevideo, Id.; U. S. v. The Amistad, 15 Pet. [40 U. S.] 518; The Eugenie, Evening Mirror, Sept. 26, 1849; Op. Attys. Gen., Supp. N. Y. Tribune, Sept. 24, 1849. X. The same law and the same principles, in civil and military salvage, apply to the navy of the United States and to that of Great Britain. XI. Neither the navy in the aggregate, nor any individual national vessel, nor any officer or seaman thereof, holds any particular relation to any commercial vessel, much less to property wrecked and deserted on the high seas. XII. The various acts of congress in relation to vessels in distress make no distinction between American and foreign vessels. XIII. The executive circular does not apply, in its letter or spirit, to salvage cases, nor has it any general or permanent operation. The Josephine was not a vessel in distress. She was wrecked property, abandoned at sea. XIV. There is no rule that salvage is to be withheld because the services were not extraordinary. XV. The objection that salvage is not due to the salvors because the commissioned officers declined to receive their share, is immaterial, if the right to salvage be personal. The Lustre, 3 Hagg. Adm. 154. XVI. This is a case of highly meritorious salvage services. It is of that class for which the highest pecuniary allowance is made—a case of actual total loss—of property deserted and derelict, which could not otherwise have been saved.

William Bliss, for claimants.

NELSON, Circuit Justice. The proofs show that no very extraordinary or hazardous service was required of the officers or crew of the Plymouth, or was rendered by them in saving the brig. She was discovered in latitude 37° N. and longitude 73° W., about one hundred and forty miles from the port of New York. The weather was fine from the time she was taken in tow till her arrival at that port, with the exception of some twenty-four hours, during which there was a pretty heavy blow, and on which occasion an additional hawser was used; but none of the crew were exposed on account of, remaining on the wreck during the blow, as the officer and the few men on board were removed to the Plymouth. The only delay that occurred to the Plymouth in her usual service was one of about two days, owing to the change of her course from Boston to New York. All the service rendered was under the direction of the commander of the Plymouth, and agreeably to the general instructions of the secretary of the navy to all the naval vessels of the government. The officers renounced all claim to salvage for the service, and so advised the secretary of the navy; but the crew refused to renounce. It is not necessary to determine, in this case, in order to dispose of it, whether or not the officers and crews of the naval vessels of the United States are in any case entitled to salvage for services rendered to American merchant-vessels in distress, notwithstanding the instructions on the subject, given by the government. I have no doubt that cases may exist in which they are entitled to salvage compensation, both on principle and authority. The Gage, 6 C. Rob. Adm. 273; The Lord Nelson, Edw. Adm. 79; The Pensamento Feliz, Id. 115; U. S. v. The Amistad, 15 Pet. [40 U. S.] 518; The Alligator and The Enterprise [Case No. 247], MS. decision of Judge Lee, S. C. Dist.; The H. M. S. Thetis, 3 Hagg. Adm. 14; The Helene, Id. 430; The Lustre, Id. 154; Le Tigre [Case No. 8,281]. But, in such cases, something more than the usual peril should be encountered by the officers and crew, and an extraordinary service should be rendered, exceeding the duty imposed upon them by their employment in the public service and the special instructions of the government on the subject. Ordinary service in rescuing American vessels in distress, requiring no great hardship or peril on the part of the officers and crew, would seem to fall directly within the line of the general duty thus enjoined. It is a service bestowed by the gov-

ernment for the protection and encouragement of its commercial marine, and the right to impose this duty on government vessels is too clear to be controverted. Great and extraordinary service and peril in rescuing a vessel and her cargo would present a different question and stand upon different principles and policy. Such acts should of themselves be the subject of reward and encouragement, and would not be necessarily comprehended in the duty resulting from the public employment of the persons rendering it or from the instructions of the government. It appears, from the proofs in this case, that the services upon which the claim for salvage rests were in no way extraordinary or perilous, and consisted wholly in boarding the schooner, securing to her the hawsers, and towing her into port, the crew having been removed from her when the weather rendered it dangerous for them to remain. As a service performed in obedience to the orders of the officer in command of the sloop-of-war, and, also, in itself, it was very commendable, and is deserving of all praise; but it was not specially meritorious, nor did it at all hazard the lives of any portion of the crew. There would be neither reason nor sound policy in construing this description of service, on the part of the officers and crew of a naval ship of the government, as a salvage service, or in placing them on the footing of common salvors. I shall therefore affirm the decree of the court below dismissing the libel, with the costs of this court. Decree accordingly.

[See Case No. 7,545.]

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JOSEPHINE, The (SENAB v.). See Case No. 12,663.

JOSEPH JOHNSON, The (STURGIS v.). See Case No. 13,576.

JOSEPH STEWART, The (SMITH v.). See Case No. 13,070.

JOSEPH WALKER, The (TAYLOR v.). See Case No. 13,795.

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## Case No. 7,547.

The JOSHUA BARKER.

[Abb. Adm. 215.] [1]

District Court, S. D. New York. April, 1848.

CAPSIZING OF VESSEL AT WHARF—DAMAGED CARGO — SALE BY CARRIER WITHOUT NOTICE— UNLAWFUL CONVERSION — RIGHTS OF OWNER OF CARGO—COMPUTATION OF DAMAGES—EXCEPTIONS TO COMMISSIONER'S REPORT—COSTS.

1. A vessel having on board a cargo of flour for transportation, capsized at her wharf before sailing, and the cargo was much damaged. The carriers might easily have communicated with the owners of the cargo, and sought instructions as to the disposal of it; but they neglected to do so, and sold the cargo upon their own authority, at auction; after which the vessel sailed, and in due time arrived at the port of delivery. *Held*, that the sale of the flour, under these circumstances, was an unlawful conversion by the carrier.

[Cited in Astsrup v. Lewy, 19 Fed. 541; Moore v. Hill, 38 Fed. 335.]

2. The owners of the cargo were entitled to recover the value of the cargo at the port of delivery, deducting freight and charges, and adding interest on the balance.

[Cited in The Boston, Case No. 1,671.]

3. The value of the cargo should be computed by the market price at the port of delivery, at the time of the arrival of the vessel, it appearing that except for the accident, the cargo would at that time, in the ordinary course of things, have been delivered; with a privilege, however, to the owner to claim the amount realized upon the sale of the goods at auction.

4. Of the allowance of costs upon exceptions to a commissioner's report made in the alternative.

This was a libel in rem, by James M. Hoyt and Jesse Hoyt against the bark Joshua Barker, to recover the value of goods shipped on board that vessel, but never delivered pursuant to the affreightment. The owners of the vessel intervened by claim and answer, and contested the action. The facts in the case were, that in October, 1847, the libellants shipped on board the vessel at Albany, for transportation to the city of New York, a large quantity of flour, to be there delivered to consignees. The bark was secured to the wharf at Albany in such manner, that on the falling of the tide, after the flour was laden on board, she capsized and sunk. This was on October 8, 1847. On the following day she was raised, and the flour taken out and immediately sold by order of the owner of the vessel, without any communication with the consignees or libellants, who were then in New York. The bark was pumped out, laden with lumber, and despatched to New York, where she arrived on the 15th of October, bringing to libellants the first intelligence received by them of the loss of the flour. The cause came before the court for hearing on the merits, in February, 1848, when the court, by interlocutory decree, determined that the libellants were entitled to recover in the suit the value of the flour, and directed a reference to a commissioner to ascertain and report its value "at the time when the libellants were deprived of it." On the hearing before the commissioner, the libellants contended that they were entitled to recover the market value of the flour at New York City on the 15th of October, (the day of the bark's arrival at that port,) with interest from that day, but deducting freight. The claimants insisted,—first, that they were not responsible for more than the amount received from the auction sale, which they claimed fixed the value of the flour for the purposes of the suit;—and, second, that at most they were not liable for more than the market value of the flour at the time of the sale. The commissioner reported that the market price in New York, of such flour as that shipped by the libellants, was, on the 8th of October, $4,290.50, and that it was on the 15th of October, $4,491; referring it to the

[1] [Reported by Abbott Brothers.]

court to determine which valuation the libellants were entitled to recover. He also reported the amount due for freight and for interest. The sum received by the claimants from the auction sale of the flour was $3,648.88. The cause now came up on exceptions by the claimants to the commissioner's report.

I. By the phrase "the time when the libellants were deprived of the use of their property," referred to in the decree, in the connection in which it is used, and in reference to the subject-matter of the suit, must be understood, the time when, under the circumstances of this case, the claimants should have delivered the property in question in New York. This construction is according to the rule of law, and the only one which will afford the libellants adequate indemnity. Arthur v. The Cassius [Case No. 564]; Amory v. McGregor, 15 Johns. 24; Sedg. Dam. 370, 372. Upon a contract to deliver goods, the general rule of damages for nondelivery is the market value of the goods at the time and place of the promised delivery. 2 Greenl. Ev. 215, § 261. The same principle applies to this case. See Commercial Bank of Buffalo v. Kortright, 22 Wend. 348, and cases cited.

II. Instead of selling the flour without consulting the owners, which they might have done in a few minutes by telegraph, the claimants should have put the flour back again, and it should have been delivered at New York on the arrival of the boat on the 15th of October last, when, for the first time, the libellants had notice of the loss of their property. The damage to the flour would then have been measured by the difference between what the flour sold for and the market value. There was no necessity for selling it, and the claimants had no right to sell it. Arnold v. Halenbake, 5 Wend. 33. As to the time of delivery, the extent of the carrier's liability is to deliver within a reasonable time, and what time is reasonable must depend on the circumstances of each particular case. Story, Bailm. § 545a (Ed. 1846); Howe v. The Lexington [Case No. 6,767a].

III. The libellants, therefore, ask for a decree for the amount found due upon the valuation of the flour of the 15th of October last, the time of the arrival at New York of the Barker, and of the first notice to the libellants of the loss.

IV. But if the libellants are not entitled to the amount found due on that valuation, then, although this does not amount to an indemnity, they ask for a decree for the amount found due on the valuation of the 8th and 9th of October last, when the property was wrongfully sold at a sacrifice, and the money withheld from the libellants, to force them to agree to the claimants' terms.

V. The allowance of interest is expressly provided for in the decree, and is proper in this case. In cases where interest has been withheld on the value at the port of destination, in suits against carriers, it has been expressly on the ground that the loss complained of happened by misfortune, without any fault or misconduct on the part of the carrier. It was not misfortune, but gross misconduct on the part of the claimants to sell the flour, and retain the use of the proceeds, (nearly $4,000,) and during a time when money has been worth more than legal interest. There never was a case where interest was disallowed when the defendants had converted or received the proceeds of the property; and this is the foundation of the rule allowing interest in actions of trover.

E. Ellingwood, in support of the exceptions.

C. Van Santvoordt and Henry E. Dodge, opposed.

BETTS, District Judge. The answer admits that the flour was taken out of the bark at Albany, after her disaster, and immediately sold, and that the sale was made without authority from the libellants. It is matter of notoriety that communication could have been had with the owners of the flour at New York in a few minutes, by telegraph, and their instructions thus taken on the subject; and also, that the regular mail conveyance by steam from Albany to New York and back, is made within forty-eight hours, while by the ordinary running of the steamboats, a special messenger could have obtained orders in New York, and returned with them to Albany within twenty-four hours. Under these circumstances, the acts of the claimants, in making peremptory sale of the flour at their own discretion, immediately on the bark being raised was, in respect to the rights of the libellants, unnecessary and wrongful. The libellants were accordingly entitled to charge the claimants with the full value of the flour laden on the vessel and not delivered at the port of destination, as tortiously disposed of by them.

No case of necessity for the sale being shown by the claimants, the fact in proof that subsequently to the sale they demanded of the libellants the allowance of an account against them, amounting to $1,175.15, arising upon prior distinct transactions, before they would pay over the proceeds of the flour, indicates that the claimants assumed the power to dispose of the flour at their own discretion, and having its avails in hand, to force the libellants to a settlement of antecedent dealings between them, as a condition to their accounting for the conversion of the property. Common carriers cannot coerce payment of debts in that manner out of property committed to them for conveyance. This would be an abuse of the bailment, amounting to a trespass. They have not power, in any emergency, to sell the entire bailment, so as to give a purchaser title to it against the bailor or shipper. Arnold v. Halenbake, 5 Wend. 33. Upon the general principles of mercantile law the libellants are entitled to the full value of the property at the port of

delivery. Watkin v. Laughton, 8 Johns. 213; Amory v. McGregor, 15 Johns. 24; Brackett v. McNair, 14 Johns. 170; Gillingham v. Dempsey, 12 Serg. & R. 188; 12 Barn. & A. 932. And the wrongful disposal of it also justifies imposing interest on carriers. See same cases. Interest is the appropriate recompense in case of loss of property by the fault or misconduct of another. 17 Pick. 1; 21 Pick. 559; 1 Metc. (Mass.) 172; Stevens v. Low, 2 Hill, 132.

The exceptions raise the question whether the libellants can demand more than the value of the flour at the time it might have been reasonably delivered at New York if it had not been sold. This point becomes material, because between the 9th of October, when the bark, in her ordinary course of navigation, might have reached New York, and the 15th, the time of her actual arrival after being raised, the price of flour was materially enhanced. The commissioner reports the difference upon this shipment to amount to $200.50.

The delay of the vessel in this case was merely temporary. The accident did not disable her from completing her voyage, and it was well known, when the flour was taken out and sold, that the bark was uninjured, and that she could be immediately despatched to her port of destination. The interruption was no more than a circumstance which prolonged her voyage. The delivery of the flour at New York on the 15th could incontestably have been made within the undertaking of the claimants, and the libellants must then have accepted it, subject to compensation for the injury it had received. Carriers by water are liable for the actual value of goods withheld or lost, without legal excuse, computed at the time when the goods might have been delivered at the place of destination. Arthur v. The Cassius [Case No. 564]; Howe v. The Lexington [Id. 6,767a]. The arrival of the vessel herself (she not having made intentional deviation) on which the goods were laden, would ordinarily be received as satisfactory evidence of the time at which the delivery might reasonably have been made. Casualties which should retard the arrival beyond the usual period would not vary the rule so as to enable the consignee to charge the carrier upon the footing of a wilful or unreasonable delay. Accordingly, when the goods are sold, or applied to the necessities of the ship during the voyage, the measure of compensation to the owner is the clear net value at the port of destination, as the market stands on the failure of the ship to deliver the goods; with the privilege, however, to the owner, to take the sum for which the goods actually sold. Abb. Shipp. 455. And the inquiry as to value does not seem, from the authorities, to turn at all upon the consideration, whether without the accidental delay, the goods would have come into a better market. In a case of tort, the owner, doubtless, might have taken either period for fixing his damages; that at which the wrong was done and his property destroyed or converted, or that at which he might have had possession of it but for the wrongful act; and where he has notice he might be compelled to declare at once his election. But I do not pursue that question, because the laches of the claimants prevented the libellants insisting upon having the property delivered to them in its then condition, which could have been easily and safely done in a few hours; and also, because the arrival of the vessel, notwithstanding her misadventure, was in a reasonable time after the flour was laden on board; and the libellants are, accordingly, entitled to take the time of her arrival as that at which the value of her cargo, put on board, shall be determined.

I think that the finding of the commissioner, that the flour was worth in New York, on the 15th of October, $4,841, is justified by the proofs. In addition to the deduction of $350, admitted by the libel and answer to be properly allowable, the freight from Albany to New York, amounting to $70, is also to be deducted as composing in part the value of the flour at New York. The libellants will therefore take a decree for the balance, of $4,421, with interest thereon from October 15, 1847, to the date of the final decree, together with their costs to be taxed.

Costs will not be allowed to either party upon the exceptions. They are not allowed against the claimants, because the report is in the alternative, and does not fix definitely the sum with which they are chargeable, and because they are not allowed by it the freight to which they are entitled. And costs are not allowed against the libellants, because the claimants are defeated upon the merits of the exceptions to the report, and because the refusal of the commissioner to allow the freight, was the consequence of the inadvertent admissions of the claimants in their own answer. Decree accordingly.

## Case No. 7,548.

The JOSHUA BARKER v. HOYT et al.

[See Case No. 7,547.]

## Case No. 7,549.

The JOSHUA LEVINESS.

[9 Ben. 339; [1] 10 Chi. Leg. News, 230; 24 Int. Rev. Rec. 124.]

District Court, E. D. New York. Feb., 1878.

Seizure of Vessel—Jurisdiction — Forfeiture —Inspection—Certificate of Inspection.

1. In a proceeding against a vessel to recover the penalty of $500, to which the vessel is made liable, and subject to be proceeded against by way of libel in any district court having ju-

[1] [Reported by Robert D. Benedict, Esq., and Benj. Lincoln Benedict, Esq., and here reprinted by permission.]

risdiction of the offense, by section 4499 of the Revised Statutes, it is unnecessary to aver or prove an executive seizure of the vessel prior to her seizure under the process issued upon the filing of the libel.

2. The subject matter of such a proceeding is the enforcement of a navigation law against a vessel employed on navigable waters of the United States, and the district court takes jurisdiction of the case because it is by reason of the subject matter "a civil case of admiralty and maritime jurisdiction," and not because it is a case of "seizure on land or on waters not within the admiralty and maritime jurisdiction of the United States" (Rev. St. § 563, subd. 8). The absence of a seizure therefore does not affect the jurisdiction of the court.

3. Executive seizures are "for forfeiture under any law of the United States" (Rev. St. § 734). The authority to seize conferred by section 3059, is limited to cases of forfeiture, and this authority is not extended to other cases by section 3072. The absence of authority to seize from section 4496, shows an intent to withhold that power in cases covered by the section.

4. Neither the duty to make application for inspection of a vessel, nor the duty to inspect, created by section 4417, attaches while the vessel is unfinished.

5. The moving of an unfinished vessel from one place to another in the course of her construction, and not for the purpose of earning money, is not navigation of the vessel within the meaning of section 4499.

6. A voyage from City Island to New York, made by a vessel just constructed, by direction of the inspectors, to enable her to be inspected at New York, is a part of the proceeding to obtain inspection; and not a violation of the navigation laws.

[Cited in U. S. v. Guess, 48 Fed. 588.]

7. The duty to display in a conspicuous place a copy of a certificate of inspection, created by section 4423, does not attach in the case of a vessel that has never been inspected.

In admiralty.

Asst. Dist. Atty. Geo. W. Hoxie, for the United States.

C. E. Crowell, for the steamboat.

BENEDICT, District Judge. This is a proceeding to enforce against the steamboat Joshua Leviness a penalty of $500 for violation of the navigation laws. The proceeding is instituted under section 4499. The violation of law charged is running without having her hull and boiler inspected, as required by sections 4417, 4426, and 4427, and omitting to have a certificate of inspection displayed, as required by section 4423.

An exception and an answer to the information were filed, and the evidence thereafter taken, upon which pleadings and proofs the cause is now to be determined.

The question raised by the exception, which question was again presented upon the close of the testimony, is to be passed on first. That question is whether in a proceeding like this it is necessary to aver and prove an executive seizure of the vessel prior to the filing of the libel. This information contains no such averment, and the question is therefore fairly presented by the exception filed. This question appears to be similar in character to the question raised and decided by this court, and afterward by the circuit court of this district on appeal, in the case of The Missouri [Case No. 9,652]. U. S. v. The Missouri [Id. 15,785].

In that case the question arose under what is now section 3088, of the Revised Statutes. The language of that section is as follows: "Whenever a vessel, or the owner or master of a vessel, has become subject to a penalty for a violation of the Revenue Laws of the United States, such vessel shall be holden for the payment of such penalty, and may be seized and proceeded against summarily by libel to recover such penalty." Under that section it was held, in the case of The Missouri, that an executive seizure of the vessel prior to the commencement of an action was not necessary to give jurisdiction to enforce the lien there sought to be enforced. The present case arises under section 4499, which is part of the title (52) devoted to the regulation of steam-vessels. The words of section 4499 are as follows: "If any vessel propelled in whole or in part by steam be navigated without complying with the terms of this title, the owner shall be liable to the United States in a penalty of $500 for each offence, one-half to the use of the informer, for which sum the vessel so navigated shall be liable and may be seized and proceeded against, by way of libel, in any district court of the United States having jurisdiction of the offence."

I am unable to discover any difference between the legal effect of this provision of law and the provision considered in the case of The Missouri. The language is identical or nearly so, and all the reasons assigned for holding an executive seizure to be unnecessary in cases arising under section 3088, are equally applicable to a case like this. The determination of this case is, therefore, controlled by the case of The Missouri [supra], which, until reversed, must furnish the law for this circuit.

It may properly be added, that the rule laid down in the case of The Missouri has been followed in several cases that have since arisen in this port, and no case has been called to my attention in which any difficulty has been occasioned by the case of The Missouri, or in which it has been suggested that a different rule would be desirable. I am not unaware that in the case of The May [Case No. 9,330], a conclusion was reached different from that announced in the case of The Missouri; but I conceive that the opinion delivered in the case of the tug May leaves it still open to be claimed that the considerations which impel to the opposite conclusion are of controlling weight, and, as before stated, the case cannot furnish authority for a decision of this court.

In view of the difference that has thus arisen between two circuit courts, it may be permitted to me to allude here to some questions suggested by the view of the law pre-

sented in the opinion delivered in the case of the tug May. The statute under which the proceeding against the vessel is taken seems to declare that the jurisdiction shall be determined by the offence. If a subsisting executive seizure be necessary to support the jurisdiction, what would be the effect of such a seizure made in a district other than the one where the offense had been committed?

The subject matter is the enforcement of a navigation law against a vessel employed in navigable waters of the harbor. Is it doubted that the district court in admiralty has jurisdiction of such a case as "a civil case of admiralty and maritime jurisdiction," and not as a case of "seizure on land or on waters not within the admiralty and maritime jurisdiction?" Rev. St. § 563, subd. 8. In the absence of any statute making an executive seizure to be a jurisdictional fact, can an executive seizure have then any effect upon the question of jurisdiction?

It is admitted that cases of this description do not involve forfeiture. They are simple cases to enforce a lien for $500, in which the vessel may be sold in order to realize the amount of the lien, but cannot be sold as forfeited to the United States. But executive seizures are "for forfeiture under any law of the United States" (Rev. St. § 734). In section 941 the implication appears to be that all cases of seizure are cases "for forfeiture," as also in section 923, where the language is, "when any vessel, goods, wares, or merchandize, are seized by an officer of the customs, and prosecuted for forfeiture by virtue of any law respecting the revenue," and by section 3059, the authority to seize is limited to cases where "it shall appear that any breach or violation of the laws of the United States has been committed, whereby or in consequence of which such vessel, or the merchandise or any part thereof on board of or imported by such vessel, is liable to forfeiture." Does not this last provision control the provision in section 3072, the latter being intended simply to extend the territorial jurisdiction of the officers? And in the absence of any known statute authorizing a custom house officer to seize property not forfeited, can it be considered clear that such authority can be derived from the general tenor and effect of the act of February 28, 1871? (Now title 52 of the Revised Statutes.) If it was intended by that act to authorize executive seizures, it would certainly have been easy to say so in section 4496. The studied absence of authority to seize from that section affords room to infer an intention to withhold a power that, if unduly exercised, must often greatly embarrass "steamers arriving and departing."

In regard to the 22d admiralty rule, which by its terms is confined to cases based on an executive seizure, it may be asked how can such a rule show that all informations must be so based? In regard to the forms in Benedict's Admiralty, as well as the decision of the supreme court of the United States in respect to seizures, I remark that so far as I know, when those cases arose no statute was in force which gave a lien for a fixed sum as punishment for a violation of law. So far as my examination extends, the cases were all cases where the property seized had become the property of the United States by reason of acts entailing a forfeiture.

These considerations are with great respect submitted, as throwing light upon the question involved, but the exception is overruled upon the authority of the case decided by the circuit court of this district.

The remaining question is raised by the answer to the information. The averments of the information are that, on the 1st day of January, 1877, and at all times since, the vessel was navigating the bay and harbor of New York, within the jurisdiction of this court, without any application in writing having been made by her owner or master for an inspection, and without having been inspected or any certificate of inspection having been issued, and without having a certificate of inspection kept framed under glass and placed as required by section 4423, and without having had her hull and boilers inspected, as required by sections 4426 and 4427 of the Revised Statutes. The answer sets up facts which, it is claimed, show that the vessel, at the time in the information mentioned, was in an unfinished state, and that she never was navigated within the meaning of the statute, and, further, that she was proceeded against in this action pending an application for inspection.

It appears from the evidence that the hull of the vessel was built at City Island, in the Sound; that, in September, 1876, the hull was taken through the canals—as the answer says—to Norfolk, Virginia, for the purpose of having the engine there put in; that the engine was then put in, and the boat, being still not fully completed, was brought back from Norfolk to City Island, and on her way back stopped at New York, and, the next day, was taken to City Island, for the purpose of being there completed. After her return to City Island, a verbal application was made for an inspection, to which the reply was made that the boat would not be inspected until completed, and that she must be brought down to New York and would there be inspected. Thereupon, on the 18th of January, the boat was brought down to New York, carpenters being still at work on her as she came. She was libelled the day after her arrival in New York, not having made any voyages other than those described.

It will be seen that the inquiry here is, by the averments of the information, limited to navigation in the bay and harbor of New

York and the East river, and to a period including and subsequent to January 1, 1877. The question that arises, then, is whether transporting this vessel while in an unfinished state, from New York to City Island on her way from Norfolk, or transporting her back from City Island to New York, without having been inspected, was navigation of her without complying with the navigation laws within the meaning of section 4499. I am of the opinion that it was not, and for this reason. It seems quite clear that according to the intention of the statute, inspection of a vessel is not to be made when she is in an unfinished state. It is only a completed vessel, ready for the business for which she is intended, that can be passed by the inspectors, as constructed in accordance with the navigation laws. It follows that neither the duty to make application for inspection nor the duty to inspect attaches, while the vessel is unfinished. Therefore, to hold that moving an unfinished vessel from one place to another in the course of her construction, is navigating her within the meaning of the statute, is to forbid the construction of vessels except at places where they can be completed in all their parts. Such was not the intention of the statute. The object sought by the statute is attained when it is held that as soon as the vessel is completed she shall be inspected, and that the obligation to apply for inspection does not attach until she is completed. It is true that this construction of the statute affords some opportunity for attempting to evade the law, by continuing work upon a new vessel after she has, in fact, begun to be employed as a vessel for the transportation of freight and passengers; but I apprehend that little difficulty will be found in dealing with such cases when they arise.

If the transportation of this vessel had been undertaken for the purpose of earning money, I should unquestionably hold her liable to this prosecution, upon the ground that after a vessel has begun her work, it is not open to her owner to say that she is not finished as he intended to have her finished for such work. But this is no such case. The good faith of the parties is apparent. The vessel went from City Island to Norfolk for the sole purpose of having her engine put in her. She earned neither passage-money nor freight, and the transaction was similar in character to the ordinary and necessary moving of a new vessel from the ship-yard where she is launched, to the engine builder's, where she takes in her engine. The only object of going from City Island to Norfolk was for the purpose of being there completed. The stoppage at New York on her return was a mere incident to that voyage. She took on no freight or passengers at New York. I am, for these reasons, of opinion that the passage from New York to City Island, under such circumstances, was not a violation of the navigation laws.

The passage from City Island back to New York might also be held to be disposed of by what has been said, inasmuch as the evidence shows that the workmen engaged in her construction had not yet left her. But the evidence is not very definite as to what work was done on her after she left City Island. I therefore dispose of this branch of the case upon another ground, namely, that the transportation from City Island to New York was in consequence of the direction from the inspectors that the boat be brought from City Island to New York, to enable her to be inspected at New York. That voyage was, therefore, in a fair sense, a necessary voyage, undertaken for the sole purpose of bringing the boat to the place of inspection designated by the officers, and is to be considered as part of the proceeding to obtain inspection, which the law enjoins. The vessel was libelled on the day after her arrival in New York, and when she had not removed from the wharf at which she moored upon her arrival. It cannot, therefore, be held that the voyage from City Island to New York was a navigation of the boat in violation of the navigation laws.

I have not overlooked the fact that this boat, when she came from City Island to New York, brought a few baskets of oysters. Such a fact requires explanation. And it has been furnished, for it appears that the boat became frozen up at City Island, and was unable to procure any proper ballast; Whereupon the owner put on board a few baskets of oysters, for the purpose of trimming his vessel, so as to enable her to proceed to New York with safety. The oysters were not taken on freight, but belonged to the owner, and their presence on board does not change the aspect of the case.

The information contains a count under section 4423, charging as a non-compliance with the navigation laws, the omission to have any certificate of inspection placed in a conspicuous place in the vessel; and it has been contended that the omission to have a certificate so placed renders the vessel liable, whether the vessel had been navigated or not. But the sufficient answer to this proposition is, that no certificate could be displayed when none existed, and the statute is not intended to require an impossibility. Section 4423 can have no effect in the case of a vessel that has never been inspected, and where for that reason it is impossible to have a certificate displayed.

Upon these grounds, therefore, the information in this case must be dismissed.

## Case No. 7,550.

In re JOSLYN.

[2 Biss. 235;[1] 3 N. B. R. 473 (Quarto, 118); 2 Chi. Leg. News, 137.]

District Court, N. D. Illinois. Jan., 1870.

PRIORITY OF DISTRESS WARRANT — WARRANT IS MESNE PROCESS—CERTIFICATE IS FINAL PROCESS —LEVY OF WARRANT GIVES NO PRIORITY.

1. Under the statute of Illinois the levy of a distress warrant is in the nature of an attachment under mesne process, and is within the 14th section of the bankrupt act [of 1867 (14 Stat. 522)].

[Cited in Morgan v. Campbell, 22 Wall. (89 U. S.) 394.]

2. The certificate granted by the court is in the nature of final process, and if issued before the commencement of proceedings in bankruptcy gives the landlord a perfected lien and priority over general creditors.

3. Even though the landlord has levied his distress warrant, neither the common law nor the statute gives him a priority, if the petition in bankruptcy has been filed before certification by the court of the amount of rent due; but he must prove his claim with the general creditors.

[Cited in Re Butler, Case No. 2,236; Re Dyke, Id. 4,227. Explained in Voyles v. Parker, 4 Fed. 212, 213.]

[See Bailey v. Loeb, Case No. 739.]

In the case at bar David H. Wells, the landlord, had, previous to the filing of the petition in bankruptcy, levied a distress warrant upon the property of Joslyn & Swan, partners doing business in Chicago, and return was made to the circuit court of Cook county according to the Illinois practice, and a summons was issued, but the court had not certified the amount due when Joslyn & Swan filed a voluntary petition in bankruptcy in the district court for this district. The case in the circuit court was by stipulation suspended until the question of the priority of the landlord's lien could be decided by the district court, Walker claiming by virtue of the levy of his distress warrant a lien upon the property distrained. The firm was largely insolvent, and this was a petition by Walker to have the property subjected to his lien and secure payment in full. The Illinois statute will be found in Gross' St. 1871, p. 412.

Jewett, Jackson & Small, for landlord.
W. R. Page, for assignee.

DRUMMOND, District Judge. Various affidavits and petitions have been filed in different cases in bankruptcy, concerning rent due by the bankrupts. They do not present in precisely the same form, nor in the same stages of progress, the acts of the landlord for the recovery of rent, so that, looking at them all together it has become the duty of the court to decide in a general way what is the effect of the bankrupt law upon the right of the landlord, in this state, to recover his rent, when due from a bankrupt to the landlord at the time the proceedings in bankruptcy are commenced.

It is necessary to consider in the first place what are the provisions of law in this state upon the subject of rent and the right of distress in the landlord therefor. The earlier acts did not, in express terms, authorize a distress for rent, but simply recognized the existence of a right in the landlord, it being, as is well known, a common law right; and the adjudications of our courts upon these earlier statutes proceeded upon that principle, but yet treated it as an absolute right. The law provided that where there was a distress for rent it should be lawful for the landlord by himself, his agent, or attorney, to seize for rent any personal property of his tenant that might be found in the county where such tenant should reside, and in this respect it was different from the common law which confined the right of the landlord to distrain for rent to property on the premises. The later statutes have in express terms authorized the landlord to distrain for rent in arrear, and inasmuch as it was somewhat uncertain during what time the right of distress existed after the rent was due, the act of 1857 gave the right to the landlord to distrain the goods of the tenant for the period of six months after the expiration of the term for which the premises were demised. There are also some statutes which declare that the landlord shall have a lien upon certain products of the premises demised, for example upon the crops growing or grown upon the premises.

There is, however, one provision of our statute which becomes very material in the view which the court takes of the questions now under consideration. It declares that in all cases of distress for rent the person making such distress, where the claim does not exceed one hundred dollars, shall file with a justice of the peace, and where it exceeds one hundred dollars with the clerk of the circuit court, a copy of the distress warrant and an inventory of the property levied upon, and thereupon the party against whom the distress warrant shall have been issued, shall be duly summoned and the amount due from him assessed and entered upon the records of the court finding the same, and then the court is to certify to the person or officer making the seizure the amount so found due, and thereupon the officer is to proceed to sell the property so distrained, and make the amount thus certified to him, and return the certificate so issued to him with an indorsement thereon of his proceedings, which return and certificate shall be filed in the proper court.

Under this statute it has been held that the only province of the court is to ascertain whether there is the relation of landlord and tenant, and what is the amount due. The question is, how does the bankrupt law af-

[1] [Reported by Josiah H. Bissell, Esq., and here reprinted by permission.]

fect the right or lien of the landlord to distrain for rent. In other words, has the landlord the right under the law to distrain for rent, notwithstanding the filing of the petition in bankruptcy, and, can he, although there may be a distress warrant out at the time of the filing of such petition, proceed to obtain a certificate from the proper court and sell the property, notwithstanding a petition may have been filed in bankruptcy between the date of the levy of the distress warrant and the time when the certificate to sell is granted by the court?

The only provision upon the subject of rent in the bankrupt law is contained in the nineteenth section, which is: "Where the bankrupt is liable to pay rent, or other debt falling due at fixed and stated periods, the creditor may prove for a proportionate part thereof, up to the time of the bankruptcy, as if the same grew due from day to day, and not at such fixed and stated periods."

Under the English law, it is well known, the proceeding in bankruptcy did not interfere with the right of the landlord to distrain for rent, provided the property remained on the demised premises. Undoubtedly the right may vary in different states under the bankrupt law, because the right of the landlord is different in different states. In some the right to distrain is entirely taken away, thus placing the landlord upon the same footing as other creditors, and giving him no priority. In some the right to distrain still exists, as in our own state, modified more or less by statute.

Under the bankrupt law of 1841 [5 Stat. 440], the right of the landlord to distrain, in those states where such right existed, was not lost. Under the second section of that law, "all liens valid by the laws of the states respectively, and not inconsistent with the provisions" of that law,were preserved; and in Peck v. Jenness, 7 How. [48 U. S.] 612, it was decided that an attachment on mesne process, levied upon property, and valid by the law of the state where it was issued, was one of the liens preserved by the second section of the law, notwithstanding the property might be held simply upon mesne process.

The twentieth section of the bankrupt law of 1867 declares that "when a creditor has a mortgage or pledge of real or personal property of the bankrupt, or a lien thereon for securing the payment of a debt owing to him from the bankrupt, he shall be admitted as a creditor only for the balance of the debt."

The question is whether the lien of a landlord for rent is such a security as binds the property as against the assignee of the bankrupt and against the rights of the other creditors. To prevent some of the difficulties which sprung up under the administration of the law of 1841, the fourteenth section of the bankrupt law of 1867 declares that the assignment in bankruptcy shall relate back to the commencement of the proceedings, (the filing of the petition,) and by operation of law thereupon the title to all such property and estate, both real and personal, shall vest in the assignee, notwithstanding the same is then attached on mesne process as the property of the debtor, and it shall dissolve any such attachment made within four months next preceding the commencement of the proceedings. Another clause of this same section declares, "that no mortgage of any vessel or of any other goods or chattels, made as security for any debt or debts, in good faith, and for present considerations, and otherwise valid, and duly recorded pursuant to any statute of the United States or of any state," should be invalidated or affected. It is a little singular that while the bankrupt law of 1867 makes this declaration as to the effect of mesne process and of certain other securities upon property, it is silent as to the effect of the law upon final process; and the inference has been that while it cut off those attachments levied on property under mesne process, it did not necessarily interfere with the right of a particular creditor upon final process; and, therefore, where under the law of a state, a fi. fa. issued on a judgment was a lien on the property from the time of its delivery to the sheriff, such lien would be good, provided the judgment was obtained and execution issued in good faith and not in fraud of the bankrupt law. The latest case decided by the supreme court of Illinois, to which the attention of the court has been directed, is that of O'Hara v. Jones, reported in 46 Ill. 288. In that case the court refers to the decisions which had been previously made by that court to the effect that under the law the landlord had a lien and a right to distrain in all cases where the rent was certain, whether the right was reserved in the lease or not. The point decided in that case was, that the landlord had a right to distrain for rent upon the property of the tenant even after he had made a general assignment for the benefit of creditors, of all his property, real and personal, on the ground that the assignee of the tenant could not hold the goods free from the lien of the landlord; that the assignee took the goods of the assignor as a volunteer and subject to all the liens to which they were then liable. The court stated in that case that the lien in favor of the landlord was superior to other general liens, and might be enforced against all but prior liens and bona fide purchasers without notice, and adds: "And if the goods of the tenant are seized under execution or attachment, the landlord's lien for his rent is superior and will hold the property."

Great stress has been laid upon this sentence, and it is claimed that under the construction which has been given to the law of the state by its supreme court, the assignee has no right to the goods of the tenant in bankruptcy, upon which the landlord has a lien. It may be conceded that under the law

of the state as construed by the supreme court, the lien of the landlord might be enforced against all but prior liens and bona fide purchasers; but, when it is said that the landlord's lien for rent is superior to that of a creditor holding the property under execution or attachment, such general language needs qualification in order to be regarded as strictly correct, and it must be understood as meaning that the landlord's lien would hold the property, provided it was not seized or held under a paramount lien; for if it is meant that the landlord would have a right to distrain goods held by virtue of an execution in the hands of the sheriff when the distress warrant issued, then it certainly is not law, because that point was expressly ruled after full argument and great consideration by the court, in the case of Rogers v. Dickey, 1 Gilman, 636. There the distress warrant was levied on the first day of May, 1842, on the property of a tenant found on the premises for rent due on the 18th day of March previously; and the court held that an execution delivered to the sheriff on the 8th day of March, against the tenant, bound the property, notwithstanding the levy was not made until the 26th day of May, after the distress warrant was levied upon the property. In that case the court held that the execution creditor had a prior lien upon the property, because the execution was in the hands of the sheriff before the distress warrant was levied.

It is claimed, and with apparent reason, that a distress for rent is not an attachment upon mesne process, and therefore is not within the meaning of the clause of the fourteenth section already referred to; that it is an act of the landlord himself, enforcing his own lien, existing by operation of law, by issuing a distress warrant, and causing the levy to be made upon the property.

It is true it is not, strictly speaking, an attachment upon mesne process; but the question is whether it is not in the nature of an attachment upon mesne process, and whether the order that is given by the court in the form of a certificate after the case is heard, is not in the nature of an execution, and thus bringing the first case fairly within the general scope and spirit of the clause of the fourteenth section. The language of the state statute is that after the property is levied upon the party shall be summoned. Now the most that can be said about the effect of such a warrant is that it seizes the property for the purpose of enforcing a certain right on the part of the landlord. The party against whom it is issued must be summoned to appear before a magistrate or before the court. Although this is not mesne process, it is in the nature of mesne process, requiring this proceeding in order to bring it under the sanction and action of the court. Without this the landlord can take no further step in the cause; and in this respect it is exceedingly similar to the case of an ordinary attachment upon regular mesne process issuing out of a court.

It seems to me, looking at the whole scope and tenor of the bankrupt law, that when a case is in this way brought (as our law brings the distress warrant of the landlord) within the spirit of the clause already referred to, it may be fairly said that the law operates in the case, and that the property is attached upon mesne process.

So when the party has been summoned and brought into court, and the court ascertains whether the relation of landlord and tenant exists, and what is the amount due for rent, and the amount due is entered upon the records of the court finding the same, and thereupon the court certifies to the person or the officer the amount so found due, together with the costs of court; this certificate given by the court, is not, strictly speaking, final process, but it is in the nature of final process, and without it the officer cannot proceed to sell the property, and, therefore, the landlord cannot realize from the property attached the amount due for rent. When the certificate has once been issued it is like a writ of fieri facias to the sheriff, directing him in effect to sell the property of the party. It is to be borne in mind that our law is not like the English law, where there is interference between the right of the landlord and that of the execution creditor upon the goods of the tenant. The English law, as is well known, provided that where there was this conflict betwen the right of the landlord and that of the execution creditor, the officer making the levy under the execution should pay the landlord one year's rent, and to that extent the landlord had a priority over the execution creditor. We have no such law in force in our state, and, therefore, as has been already mentioned, the supreme court decided in the case of Rogers v. Dickey, that the right of the execution creditor was superior to that of the landlord under the circumstances stated.

On the whole, then, I am of the opinion that the fair construction of the bankrupt law upon the right of the landlord, in our state, is to vest in the assignee all the property of the bankrupt tenant, upon which a distress warrant has been issued and levied prior to the granting of the certificate of the court to the officer of the amount due from the tenant, and assessed and entered of record; but that, analogous to the rule in the case of final process, where the right of the landlord has been exercised by the issuing and levy of the warrant and filing a copy thereof and of the inventory of the goods before the magistrate or in the proper court, and the obtaining of the certificate of the amount found due, that becomes in the nature of final process where it is issued, and so has a priority over the general creditor in bankruptcy.

Of course it follows from what has been said that where no distress warrant has been issued, as is the fact in some of the cases upon which the judgment of the court has been asked, prior to the filing of the petition in bankruptcy, the landlord can have no priority or preference over the general creditors, but that he must prove his debt like any other general creditor of the bankrupt, and consequently that all the property so held by the tenant is vested in the assignee.

The question is undoubtedly an important one, and will affect a very considerable amount of property. I have given it full consideration in view of the importance of the subject, and the effect it might have upon the rights of the landlord and of the general creditors of the bankrupt. It is to be remembered that in equity the landlord may have no just preference over many of the general creditors of the bankrupt, and in view of the general scope and spirit of the bankrupt law itself, and of the effect which it was to have upon the rights of creditors, I have thought that unless the intention of the statute was clear to allow the common law or statutory lien of the landlord to have a priority over the general creditor it ought not to be so regarded, and looking at the statutes in our state bearing upon the right of the landlord to distrain for rent, it seems to me that fairly construing the two laws together and the effect which one has upon the other, it must be said that under the bankrupt law, as operating upon the state law, the landlord, except in the particular case referred to, must be treated as being upon the same footing as the general creditors of the bankrupt, and can only have a right to come in like them, and prove his debt in the usual way.

This case was, on appeal, affirmed by Judge Davis in the circuit court.

NOTE. Rent is a lien under the laws of Virginia, New Jersey, South Carolina and Maryland. In re Wynne [Case No. 18,117]; In re Dunham [Id. 4,145]; In re Trim [Id. 14,174]; In re Rose [Id. 12,043]. See, also, In re Appold [Id. 499]. But distress warrant cannot be issued after commencement of proceedings in bankruptcy. Brock v. Terrell [Id. 1,914]. For state practice in cases of distress, examine Sketoe v. Ellis, 14 Ill. 75; Uhl v. Dighton, 25 Ill. 154; Alwood v. Mansfield, 33 Ill. 452. Where the landlord has under the state law a lien for his rent, it will be sustained by the court in bankruptcy. In re Wynne [supra], decided by Chase, C. J. As to landlord's lien under the statutes of Pennsylvania, consult In re Butler [Case No. 2,236].

The supreme court have recently passed upon this question of landlord's lien for rent, under the statutes and laws of Louisiana, holding that the service of a writ of provisional seizure, corresponding to a warrant of distress, gives the landlord a valid first lien upon the property levied upon, and comparing the case to that of an execution as distinguishable from an original process of attachment. This case, however, arose in a state where the landlord's lien is specially favored by statute. Marshall v. Knox [16 Wall. (83 U. S.) 551].

## Case No. 7,551.

JOSSE v. SHULTZ.

[1 Cranch, C. C. 135.] [1]

Circuit Court, District of Columbia. July Term, 1803.

REPLEVIN—PLEADING—NO RENT-ARREAR—EVIDENCE.

If the landlord take a single bill of a third person for the amount of rent due from his tenant, and give time of payment to the third person until he fail, this is good evidence to support the plea of no rent-arrear.

Replevin. Avowry, for sixty dollars, for six months' rent due on a demise, not under seal. Shultz called on Josse for the rent, and threatened distress. Josse could not raise the money, and for the express purpose of raising the money to pay the rent he offered to sell a billiard-table to Hankart for sixty dollars. Hankart agreed to take it, but not having the money offered his note to Josse, payable at thirty days. Josse agreed, provided Shultz would take the note. Shultz agreed, and Josse made a bill of sale to Hankart, who took the table to his own house. Hankart gave a single bill to Josse, for sixty dollars, payable at thirty days, due January 4–7, 1802. On the note's becoming payable, Shultz called on Hankart, who could not pay, and notice of non-payment was given to Josse afterwards, to wit, on the 9th of January. Shultz agreed to give further time on Hankart's giving to Shultz a bill of sale of the billiard-table; this was given, and was absolute in form. Shultz was, by a verbal agreement made at the time of executing the bill of sale, to be at liberty to sell the table when he pleased, or to take it away. About the 1st of February Shultz called on Hankart, and requested him to go with him to Loring, the auctioneer, and request him to sell it at auction in two or three days. He did so. Before the sale Shultz came back and countermanded the sale, and informed Hankart he had or was about distraining for the rent. In a few days after the billiard-table was seized for rent due from Hankart. The plea was, no rent arrear, and issue. The question was whether these facts are evidence tending to support the issue on the part of the defendant.

KILTY, Chief Judge. The acceptance of the note alone is not a discharge of the rent, unless it appears that the note is paid. But if the jury should be of opinion, from the evidence, that the note was held up by Shultz, and credit given on it to Hankart, either by taking an additional security on it, or from any other cause, or that by any negligence of Shultz, Josse has lost the sum intended to be secured by the note, these facts are competent evidence to the jury to

[1] [Reported by Hon. William Cranch, Chief Judge.]

show that there was no rent due to Shultz, and that his avowry for such rent is not supported.

MARSHALL, Circuit Judge, absent.

JOURDINE (UNITED STATES v.). See Case No. 15,499.

## Case No. 7,552.

JOY v. ALLEN et al.

[2 Woodb. & M. 303.] [1]

Circuit Court, D. Massachusetts. Oct. Term, 1846.[2]

SEAMEN'S WAGES—WHALING VOYAGE—LIABILITY OF OWNERS—AUTHORITY OF MASTER—EMBEZZLEMENT.

1. The owners of a vessel in a whaling voyage, where they and the crew are shareholders, in certain agreed portions in the cargo, are trustees to manage and dispose of it for the benefit of all concerned. The title is in them, but the interest in the proceeds belongs to the shareholders. They are not like common carriers for others, liable for robbery, as the property is, in a large proportion their own, and there is no danger of collusion with highwaymen and pirates; but as trustees, or co-partners, or directors in a company, when they are joint stockholders, or depositaries or private carriers, they are responsible for only ordinary care in selecting agents, and carrying the cargo.

[Cited in Macy v. De Wolf, Case No. 8,933.]

2. They are liable at law in an action, if not otherwise, for ordinary care in selecting a master, and prosecuting him for misbehavior, and in storing or selling the cargo.

3. Owners of vessels are generally responsible for the misconduct of the master committed in their business, to third persons or strangers, but are not so liable to their cestui que trusts, or co-partners, or joint shareholders, if using due care in selecting him.

4. The master of a vessel may, in certain exigencies, to obtain supplies or repairs, hypothecate or sell the vessel and cargo, but the necessity for it must be clearly shown before it can be considered right.

[Cited in Perkins v. Currier, Case No. 10,985.]

5. It is also decisive against the claim for the oil lost abroad, that the libellant has not prosecuted the owners for it, till near six years have elapsed, and the master is dead and insolvent.

[Cited in Smith v. Sturgis, Case No. 13,111.]

6. The statute of limitations is not a bar to the rest, as an acknowledgment of some debt due was made within six years, and the long delay to prosecute for the oil, which arrived home, is not shown to have led to any losses, acts, or divisions of profits, injurious to the owners, or to have been accompanied by any other evidence than the length of time, raising a presumption of payment to the libellant.

[Cited in Packard v. The Louisa, Case No. 10,652; Southard v. Brady, 36 Fed. 561; Bailey v. Sundberg, 1 C. C. A. 387, 49 Fed. 586.]

7. The freight on oil home, where a whale vessel is condemned abroad, as not seaworthy, is to be charged to the owners, unless there is a usage at the port to make it a general charge on the cargo.

8. No part of the oil sold abroad is to be charged to the owners, as going for supplies and repairs, unless clearly necessary, and shown to be so applied.

9. If the master of the vessel is guilty of embezzlement or barratry, the crew are not to be answerable for his wrong to other owners.

[Cited in The Antelope, Case No. 484.]

10. If a whale-ship never returns to this country, but is lost, or condemned, or sold abroad, yet if the owners realize some net proceeds of her cargo, they are bound to account for it to the shareholders, though the contract be not to pay them till her return.

This was an appeal from a judgment of the district court, rendered March 13, 1846, charging the respondents [Gideon Allen and others] with the payment of $1,961.21, for wages under the following libel. It was filed June 30, 1845, averring that the libellant [Alexander S. Joy] had been employed as mate on board the ship Victoria of New Bedford, of which one Colter was master, and the respondents owners; and that, in the shipping articles it was agreed to give him as wages one twenty-eighth of the catchings or earnings of said ship in the whale fishery. It next averred, that on the 5th of December, 1836, he went to sea, and continued to serve in said vessel till the 19th of January, 1838, when he was discharged, at his own request; that in the mean time, the vessel had taken 1250 barrels of oil, and he was entitled for his share to the sum of $2,103.37, which, though demanded of the respondents January 1, 1839, had never been paid. [Case No. 7,235]. One of the respondents, Frederick Parker, was discharged in the district court, on the ground, that he was not a part owner; and the others, in their answer, admit that the libellant sailed in said vessel as mate, at the time, and on the terms described, they being owners thereof; that she prosecuted her voyage till July, 1838, when she was condemned at the Island of Tahiti, having taken in all about 1700 barrels of oil; that after said condemnation, her master shipped home 15,235 gallons of oil, and no more, which they sold for $15,749.10, and received no other part of the catchings of the vessel; that the libellant neglected his duty while on board, and deserted at a place in New Zealand called the Bay of Islands, and thus forfeited any share he might otherwise be entitled to in said earnings, and that the libellant soon after returned to the United States, and demanded his share; but the owners being satisfied of his desertion, refused to pay it, and more than six years have since elapsed, and, therefore, they pray a decree against the libellant, and for their costs. At the hearing here in September, at an adjourned session of the May term, 1846, it was admitted, that the respondents had received 578 gallons more of oil, sent home from the Cape de Verds, in the early part of the voyage, and hence overlooked. Its net value was agreed to be $428. It was found, also, that Allen,

[1] [Reported by Charles L. Woodbury, Esq., and George Minot, Esq.]

[2] [Affirming Case No. 7,235.]

one of the respondents, wrote a letter to the libellant, October, 10, 1839. requesting to know the particulars of his claim, and which was addressed to him at Nantucket, where he then, as well as since, has resided, with the exception of one short absence. Again, on the 28th of the same month, T. Coffin, the attorney of the owners, wrote to him, saying a settlement could not be made till it was seen what the owners were able to obtain of the offices where the vessel was insured; adding, he would soon be at Nantucket and see him. No communication whatever after this was proved by either side to have taken place between these parties, or their agents, till the filing of the libel. The master of the Victoria and his clerk never returned to this country, and the former died abroad about two years since, not having paid for the residue of the oil, or the sales of the vessel, or satisfied the owners that the vessel was properly condemned and sold. It appears that he had been furnished with some funds for repairs and provisions, which might be required abroad; but still had sold most of the oil, and charged the owners in some of his accounts with provisions and repairs. But no proof was given on either side as to the making of such repairs or not, and the necessity, or not, of any funds to be used beyond the amount with which he had been supplied at home. Accounts were put into the case from the captain, called for by the libellant, which showed that when the first oil was sold by him, he had a balance of funds on hand greater than the proceeds of the oil. It appeared further from the same accounts, that he sold more oil afterwards abroad, by about $6000 than was necessary to pay the shares of himself and the seamen, with whom he settled; and that he still owes his employers over $5000 for the oil, and $8981, including what he sold the vessel for. But there is no evidence or voucher, sustaining any of these accounts rendered by him, and several of the charges in them are such as are manifestly improper on the face of them. The shipping articles were not put in, having never been returned to this country; but it was agreed that they were in the usual form, and like one put into the case and hereafter referred to. Most of the other testimony relates to the discharge of the libellant abroad, whether regular, or that he deserted.

Mr. Crowninshield, for libellant.
T. Coffin, for respondents.

WOODBURY, Circuit Justice. The right of seamen to wages, as a general principle, after freight has been earned and the voyage ended, and to recover the same of the owners, or the master when their agent, or of the vessel in rem when not lost, is well defined and clearly regulated by many adjudged cases, as well as by elementary principles. But the rules on this subject, in the case of whaling voyages, where usually the wages are not a fixed sum per month, or a quantum meruit, but a portion or share in the earnings, and controlled by specific provisions in the shipping articles, are less uniform and distinct. In this particular case it is agreed, that the share of the libellant was to be one twenty-eighth of the catchings. This was under the general stipulation in the shipping articles, that he went on the voyage "at such share of the net proceeds, or of the actual products of the voyage, to be paid pursuant to this agreement of the custom and usage in the port of New Bedford." Further, in respect to the time when the payment was to be made, it is agreed that it was according to the true meaning of the stipulation, that each seaman, when there had "been no plunderage, embezzlement, or other unlawful acts committed on the said vessel's cargo or stores, shall be entitled to the payment of his share of the net proceeds of the voyage, &c. as soon after the return of the said ship to New Bedford, as the oil or other products of the voyage can be sold, and the settlement adjusted by the owners of said ship." According to another stipulation, no officer or seaman shall "be entitled to any payment on account of his interest in the said voyage, until the said vessel shall have returned to the said port, and her cargo have been delivered." Without much doubt, after all these events have happened, the amount due to any seaman in a whaling voyage, may be sued for in assumpsit, on the special contract. See act of congress, 19th of June, 1813, in 3 Stat. 2; 3 Es. Ca. 141; Macomber v. Thompson [Case No. 8,919]; 5 C. Rob. Adm. 8; Curt. Merch. Seam. 60. And it is not objected here, that a libel cannot be instituted for the same in a court of admiralty, because it is a claim in the nature of wages, though not eo nomine for them; nor the vessel itself liable for them, as in other cases in admiralty. Dunl. Adm. Prac. 61; 3 Pick. 439; Harden v. Gordon [Case No. 6,047]. Nor has it been objected here to the jurisdiction of the court, that it is a suit to settle a joint partnership concern, as this may not be such a partnership, technically, however it may be in equity as to the proceeds. The Sydney Cove, 2 Dod. 12; Coffin v. Jenkins [Case No. 2,948]. In England, however, recently, in the case of The Riby Grove, 2 W. Rob. Adm. 52, the court of admiralty declined jurisdiction in a claim by a seaman, to enforce such a whaling contract as this. It is a case of a special contract certainly, though as a partnership, it may be proper to regard it as an imperfect one, if any. Abb. Shipp. 442; The Crusader [Case No. 3,456]; 1 Valin, Comm. 676. Such is the case, when the master divides the profits with the owners in a common voyage. 17 Mass. 197; 2 H. Bl. 235; 4 Greenl. 264. I shall, therefore, not press exceptions of this kind, when apparently waived by the parties.

The first objection, in respect to the right to recover all which is claimed is, that an embezzlement was committed of a portion of the cargo, and hence, under a stipulation in the articles, it should bar a recovery. But though under these stipulations it seems clear that none of the crew or officers, guilty of "embezzlement," or "plunderage," could recover, yet if the embezzlement or fraudulent loss of the cargo has been, by some misbehavior of the captain alone, as is understood to be the case here, it would be harsh to make the crew responsible to other shareholders for his misconduct, or to be insurers against it. Thus, if some of the seamen are absent when an embezzlement happens, they are not answerable for it. Sullivan v. Ingraham [Case No. 13,595]; Frederick v. The Fanny [Id. 5,077.]

The next objection is, that the vessel has never returned within the meaning of the articles, so as to render the owners at all liable. But, if the vessel is condemned abroad, or lost at sea, or captured or sold, and a part of the cargo was saved, or regained, it would seem just to let the seamen have a share, though the vessel never returned, in specie, to this country. Sheppard v. Taylor, 5 Pet. [30 U. S.] 675. Such is the rule, in substance, in common cases of wages, or in a loss at sea, where freight is before earned. 2 Dod. 502–504. Such cases constitute equitable exceptions. Much more should they here, where the voyage was broken up by the respondents' ship becoming unseaworthy, or by the wrongful acts of their master and agent.

In the next place, the owners except, that they are not responsible for any oil, or its proceeds, not actually received by them, nor gone to their benefit. It is true, that the written stipulations indicate expressly that nothing can be recovered as wages in such a case, except what was "the net proceeds," or "actual products of the voyage." Such a provision is very natural and proper, where the owners and mariners embark together in a fishing adventure, full of danger and loss, speculative and doubtful in some degree as to its results, but holding out a prospect of gain at times very large, and much beyond the ordinary rate of seamen's wages, as well as of mercantile profits. In such a case, each party, if claiming and entitled to those large gains when made, must of course submit to smaller ones, and less profit or wages, when the gains happen to be small from losses or other causes. But the libellant insists, that the owners are liable, on account of the oil sold abroad and lost there by the embezzlement of the captain, as well as for the proceeds of that which reached this country. Whether this position can be sustained or not, must depend on the special contract in the shipping articles, made between these parties, the nature of their respective interests, and their several duties and liabilities to each other.

It is a matter of some surprise, that when the whaling business has been pursued so long and extensively as in this country, the adjudged cases should be so few that go to fix the rights and relations of all concerned. But it may be considered as settled, that the seamen, in such cases, are not to be treated as jointly interested in the ship or cargo, with the owners, in the common acceptation of such an interest. Abb. Shipp. pt. 5, c. 1 (New Ed.) 715; 4 Es. Ca. 182; 4 Maule & S. 248; 1 Camp. 329; 3 Pick. 435; 4 Pick. 234; 23 Pick. 492; 17 Mass. 206; The Crusader [supra]; The Sydney Cove, 2 Dod. 12. Yet it is certain, that they are jointly interested in the proceeds or products of the cargo, leaving the technical title in it till sold to be in the managing part of the concern, the owners of the vessel. 23 Pick. 492. What is the true nature of the interests, then, in the cargo on the face of the transaction? The owners seem to be a species of trustees for the seamen in common with themselves. It is a sort of joint stock operation, under directors, and between whom and the other shareholders the net products of the trust are to be divided in certain agreed shares. It is, then, a doubtful question, under these views of the contract and undertaking in this voyage, whether the owners can be considered chargeable, and be made to account for a share in any oil in this case, which never came into their possession, and from which they never realized any proceeds, but which was embezzled and sold by the master. Their liability for that, it seems to me, must depend on the care and diligence they were bound to use, and did use under general principles applicable to trustees and agents, and the nature of this kind of business.

It is only by analogy to some act of congress, and by reference to the specific contract in this case and others like it, and by resemblances between this and other transactions in some degree similar, that any just result can be reached in the present case. There is no act of congress which seems to bear on this question. That of June 19, 1813, as to those engaged in "the bank or cod fishery," is limited to them. 3 Stat. 2. And nothing is prescribed about what shall and what shall not be chargeable in their account, or what the owners may be answerable for in it at common law or in admiralty. If we go from that to the liability of owners in freighting vessels for the cargo, when embezzled, and if there they would be answerable for robbery, or barratry in the master, or theft by the crew, the ground for the liability of owners there as common carriers, does not seem to exist here. Their relations here to the cargo, as carriers of what in part belongs to other shareholders in equity, and in part to themselves, but the legal title to all being in themselves alone, seems to create a responsibility entirely different. The interests in it, the dangers of the

public policy concerning it, are all different. To hold the owners to be insurers of the cargo against all events, when they were acting only as trustees or agents for those interested in the cargo, partly themselves and partly others, could not be supported either by precedents or the nature of the business. Thus, though owners, when common carriers, whether by land or water, are liable in case of loss by robbery or embezzlement, on account of the danger of collusion and fraud in any other course, it is not so even there in case of loss by perils of the sea or public enemies, where no such danger of collusion exists. Abb. Shipp. 286, 291. So here, it does not exist in case of embezzlement or fraud, as the property carried by the owners is technically their own, and in equity belongs to them and the crew and officers in charge of it; and it is not received by them as common carriers from and for strangers. So far as it is property, the title to which is in themselves, they are of course bound by law to no diligence, except what they please to exercise over their own property; but so far as they hold it in trust for others, and carry what others have a claim to, as cestui que trusts, they are responsible to those others to the extent that trustees are generally. If likened in this respect to directors over joint stock property, such as banks, manufactories, &c., in which they are shareholders, they are from their position liable for reasonable diligence and care, but nothing more. So, if they are considered as a species of special co-partners in the cargo, though in managing it the seamen are regarded as dormant, was it ever heard that an acting partner was liable to a dormant one for any thing but ordinary diligence? or, for a loss sustained by the wrongful acts of agents? They must, to be sure, carry the cargo with ordinary diligence, so far as others may possess some interest in the proceeds of it. But they are not compensated so as to justify requiring from them more care than that, and their relation to the cargo does not render it necessary to exact greater diligence than that, their own interests in it being so large as usually to furnish a sufficient guarantee for the use of all reasonable vigilance. The owners supply the vessel and provisions, and usually receive therefor one half or two thirds of the voyage, according to the express agreement in the shipping articles, or the usage of the port, when not otherwise provided for. Did they, then, use ordinary vigilance here, as to the property lost or misused, or plundered by the master, and in the selection or prosecution of him? Nothing appears in evidence to the contrary. They had an ample motive to use it, being such large proprietors of the cargo, as well as owning all the vessel. The master, for aught which is shown, had been experienced in this business, and up to that time considered trustworthy. He never returned to this country so as to be prosecuted for his misbehavior, and damages recovered of him for all interested. Such a suit at Tahiti could hardly be expected, or elsewhere near. No insurance is shown on the cargo, either for themselves or all concerned, though a letter is put in about a resort to the offices for some indemnity; and, for aught which appears, nothing could be or has been received from the offices, by way of insurance on the cargo, and could not have been, unless the offices choose to insure against barratry, and after some cargo was known to be on board. I have no doubt that if the owners should neglect to prosecute for barratry or robbery on the cargo, or sell it to persons apparently irresponsible, or be negligent in storing it before sold and after arriving here, they would either be liable to suits at common law by the seamen, or be made to account in a libel like this for the loss sustained. But I know of no duty on them to insure for themselves or the seamen, even if able to, and that they should be held answerable when in all these subjects they have exercised ordinary diligence, and which, from their own large interest in the cargo, it is presumed they will and do exercise, till the contrary appears; or that they should be held answerable for oil destroyed by shipwreck or fire, or wrongful or tortious acts of the master or others, does not seem to accord with their peculiar relations to such property, and the peculiar terms of the shipping articles between them and the seamen. Any loss, so sustained, falls on them also at first more heavily than on the seamen, and not, as in cases of ordinary freights, on others, the owners of the cargo, or their insurers. The officers and men too, are, in this view, in a case like this, interested to prevent loss in any way, as they are deeply interested in the cargo and its proceeds.

The whole of this whaling business depends so much on the special contract of the parties, that congress appears to have regarded the vessel not liable at all for the share due to the seamen instead of wages, in similar fisheries and contracts, without a particular law, and then renders the vessel liable during only six months after the sale of the fish, but makes no provision whatever as to the whale fisheries. They left them to their special contracts. 2 Stat. 2. The conclusion is then forced on my mind, that the owners, being under strong inducements to use due diligence to recover more of the cargo than actually came to their hands, and the evidence in the case failing to show any neglect to use such diligence; they ought, therefore, in law as well as justice, to be held to account for no more than in truth reached their custody or possession. See The Riby Grove, 2 W. Rob. Adm. 64.

In fixing the responsibility of the owners, in a case like this, for the embezzlement and loss of the cargo, by the misbehavior of the master or crew, the contract and nature of the case being peculiar, it would be useful to look to some further analogies bearing on the special character of this voyage and the fiduciary

relation in which the owners stood to the crew and the cargo, and see if they do not fortify the conclusions I have formed. It is undoubted, as before suggested, that if they were common carriers for others for hire, they would not be excused from liability to others, owning the cargo, for embezzlement and losses by the master and crew, though exercising ordinary diligence. Story, Bailm. § 528; Abb. Shipp. pt. 3, c. 3, § 3; Jones, Bailm. 107; 3 Es. Ca. 127; 4 Day, 287; 3 Day, 389; 6 Johns. 170; 8 Johns. 213; 4 Burrows, 2298. The law on this point, however severe in appearance, has been long and well settled on grounds of public policy, and should not be now changed, except by legislation. 10 Johns. 1; Story, Bailm. §§ 488, 489; 9 Wend. 114; The Maria, 4 C. Rob. Adm. 348, 349; 1 Durn. & E. [Term R.] 27. In such case they are insurers as to all, not excepted. But here it is equally undoubted, that they were not common carriers. They did not hold themselves out for freight for hire to any persons offering to employ them. Their vessel was, in substance, dedicated or chartered for a special private purpose, in which they and the crew were mutually interested; and they were to carry only their own property and that of the crew, of the special kind, taken or caught on the voyage. Their business in carrying, then, was not common and open to the world; nor was it for hire from others, but to benefit merely themselves and the crew by bringing home their earnings, for the mutual advantage of all of them. See cases distinguishing what carriers are not common ones. Story, Bailm. §§ 457, 495; 2 Kent, Comm. 40, 597; 2 Bos. & P. 417; 4 Taunt. 787; 1 Wend. 272; 6 Taunt. 877; 1 Salk. 249; 1 Bell, Comm. 467, § 399; Caton v. Rumney, 13 Wend. 387. See further, Story, Bailm. § 501; 11 Mass. 99; 19 Johns. 235; 15 Johns. 370; 2 Wend. 327; 9 La. 33, 34. What then was their position as bailees, by analogy, if not that of common carriers? It seems to me to have been that of depositaries, with some interest in the thing deposited belonging to the depositary. The catchings were to be deposited in the vessel, and the owners were to take into their charge, in connection with the officers and crew of the vessel, the whale and oil, as caught and prepared, and bring it to this country. All on board were interested in its safety, and the diligence required by law in such cases may be even less than ordinary. Story, Bailm. § 63. At all events, it would be no more than owners generally, or depositaries in such business, usually exercise in relation to their property. 14 Serg. & R. 275; 2 Adol. & E. 256; 2 Kent, Comm. 40, 561; 4 Nev. & M. 256; Story, Bailm. §§ 62, 63, 67, 79; Jones, Bailm. 31. If stolen or embezzled by others, it is the loss not of the depositary if using ordinary diligence, but the loss of those making the deposit. See same cases, and Foster v. Essex Bank, 17 Mass. 479; 1 Dane, Abr. c. 17, art. 11, § 3. And the case is not altered when the depositary, as here, may be regarded as jointly interested in the property. Jones, Bailm. 82, 83; Story, Bailm. § 62. The civil and French laws are similar in this respect, as to depositaries. See 17 Mas. 479, 499; 4 Burrows, 2298; 2 Bl. Comm. 452. See Coggs v. Bernard, 2 Ld. Raym. 909-914; 2 Show. 172, 184; 4 Coke, 84; Cro. Eliz. 815; Willes, 118. But if by analogy they are not common carriers, or depositaries, with an interest in what was deposited, they may, so far as carrying the oil for others be regarded in this instance as private carriers for hire, to be paid out of, or by their share in, the oil, as their hire. That comes nearest, probably, to the naked truth. Story, Bailm. § 457. In such a capacity they are liable for only ordinary diligence. Story, Bailm. § 457; 2 Bos. & P. 417; 6 Cow. 173; 11 Mass. 99; 8 Car. & P. 207-211; 2 Moody & R. 80; 1 Moody & R. 38. And theft, or injury by force, committed on the property, in such a case, they are not responsible for, unless failing to use ordinary diligence. See same cases, and Jones, Bailm. 97, 98. But one plausible answer has been urged to objections like these, and, on its face, till the proper principles are applied to this peculiar kind of business and contract, seems to have much force. It is, that the master was the agent of the owners; and as the whole cargo is shown to have been in the possession of the master, it must be deemed in law to have come into the possession of the owners, and they ought, therefore, to account for the whole. It must be conceded, that, for many purposes, the master of a vessel is to be regarded as the agent of the owners. 9 Johns. 227; 2 Selw. 582; Abb. Shipp. 791, note; 6 Mass. 300; U. S. v. Hamilton [Case No. 15,290]; Bray v. The Atalanta [Id. 1,819].

In all cases, generally, of a loss of cargo by embezzlement, sale, or destruction of it by the master or crew, the owners of the vessel will be held responsible to the owners of the cargo; "because all persons employed in the navigation of a vessel are the direct servants of the owners of the ship, in different grades of authority." Jordan v. White, 4 Mart. [N. S.] 339; Merch. Mag. June, 1846, p. 550. But this, of course, must mean other owners of the cargo than the officers and crew, or the owners of the vessel, as it would be the worst policy imaginable to make them answerable to the officers and men for their own misbehavior; and it would be absurd, no less than useless, if the owners themselves are the technical owners of the cargo, to make them liable for it to themselves. Independent of this, in cases generally the master is not the agent of the owners, in any wrongful acts by him, unless in law or fact he was authorized by them to do those wrongful acts, or placed in a position so as to make them liable for such acts to strangers. He, of course, is not their agent in selling and embezzling their own property, so that they cannot recover of him for such wrongful acts; and hence, when they are bound to others by such wrongful acts of his, it must be, because they adopted

them, or put him in a position where they are answerable to others for him, whether acting wrong or right. But that must be to others who are third persons or strangers, and cannot be to such as their own cestui que trusts, joint stockholders, or co-partners in real interest, and when ordinary care was used by the owners in selecting the master or agent. To illustrate this fully, their liability for him does not extend beyond acts done within the compass of his employment, and he never is empowered to sell the cargo; it is not within the compass of his employment unless expressly authorized, except, in case of extreme necessity, to pay for repairs. 2 Browne, Civ. & Adm. Law, 134, 139. Where he is expressly or impliedly empowered to sell the vessel, may be seen in other cases. None of them are shown to be like the present case. Abb. Shipp. 93; 6 Mass. 422; 1 Pick. 389; 6 Cow. 173; 9 Johns. 325. So they may be liable for him ex delicto, no less than ex contractu; for acts done in executing his agency, which acts, from neglect or want of skill, injure others. McManus v. Crickett, 1 East, 106. But beyond that, I see no reason for making them responsible for his wilful and intentional wrongs, whatever may be the doctrine of some few foreign courts, or foreign jurists as to this. See cases in The Rebecca [Case No. 11,619]. Nothing is proved here to make them liable for him as an agent, under these views, nor is his conduct in condemning this vessel, and disposing of that and the cargo, as hereafter explained more fully, shown to have been justified by any facts, bringing the acts within those general principles, which sometimes allow such acts from the necessities of the case, or the policy of the law. His behavior, therefore, was a wrong to the owners as well as the seamen interested in the cargo; and no exigency is proved, which made it rightful in him as an agent, or requires them to be responsible for his conduct in doing it, to the persons suffering and interested only in common with themselves.

If there had been an exigency shown for a sale, in this case, of the cargo, perhaps it would be just to regard such sale as the sale by the owners, and to hold them to account for it, as much as to account for the others made at home. For though the vessel has never arrived home, and hence the owners are not strictly liable, within the words of the shipping articles, till she does; yet if she was condemned and sold abroad correctly by their agent, it does not, as before suggested, lie in their mouths to object that she has not yet returned; and by parity of reasoning, if their agent correctly sold some of the cargo abroad, and received the proceeds of it, they are not to be heard to say, these proceeds have not come to their hands. The George [Case No. 5,329]; Cloutman v. Tunison [Id. 2,907]; Pitman v. Hooper [Id. 11,185]; U. S. v. Winn [Id. 16,740]; The Saratoga, [Id. 12,355]; 2 Hagg. Adm. 171. Whatever is legally and properly done and received by an agent, is to be regarded as legally and properly done by the principal. But the evidence required as to the legality and propriety of the conduct of the agent on this subject, so as to bind the owners, is here entirely wanting.

So far as any evidence exists, it is almost all the other way. Beside this answer to the claim to hold them responsible to the crew for the captain's acts on this subject, he was in another view of the transaction as fully the agent of the crew as of the owners. To be sure, he was not selected by them directly, and answerable to them directly; but he was selected by and answerable to their trustees, the owners acting as well in the behalf of the seamen as to their interests in the cargo as in behalf of the owners. This connection and relation are useful to prevent what the shipping articles call "plunderage," and make the seamen vigilant as to any neglect or misbehavior of the master, of robbery by others, and to give seasonable information of them to consignees abroad and the managing owners at home. It seems to make the business more lucrative for all, when all are partners in the profits, and have imperative reasons for attention. But on the other construction, the seamen would be indifferent to all this, and might be tempted to unite in depredations on the very property in whose proceeds they are jointly interested, but for which, if lost or embezzled, the owners of the vessel are, by this other construction, to be held responsible, and the crew not to be in some degree common sufferers. It is a matter of regret, that evidence and admissions here are not more distinct as to the nature of the embezzlement, barratry or loss by the captain, being chiefly derived from his own accounts sent home to the owners. But it seems conceded to have amounted to some wrongful and fraudulent act, which prevented him from ever returning to this country. The definition of barratry is fraud and deceit by the master, committed on the owners of the vessel or cargo. 8 East, 126; [Swan v. Union Ins. Co. of Maryland] 3 Wheat. [16 U. S.] 170, note; 14 Mass. 1; 13 Johns. 451. Such was it here, so far as explained. It may be by running away with the property, or smuggling, so as to forfeit vessel or cargo, or any other fraudulent destruction or loss of them; though it must not be mere neglect. 3 Wheat. [16 U. S.] 171, note; 1 Strange, 581; Cowp. 143; 4 Durn. & E. [Term R.] 33; 1 Durn. & E. [Term R.] 330; 2 Ld. Raym. 1349. If they insured here, it was not probably against barratry. 8 Mass. 308; 13 Johns. 451. Insurers are not liable for barratry, unless it is specially insured against. 7 Durn. & E. [Term R.] 505; 1 Durn. & E. [Term R.] 323; 2 Strange, 1171; 3 Durn. & E. [Term R.] 278. The owners can insure against it if they please, and offices deem it good policy to take such an insurance. Patapsco Ins. Co. v. Coulter, 3 Pet. [28 U. S.] 232; 2 Barn. & Ald. 82; Grim

v. Phoenix Ins. Co., 13 Johns. 451. But here they could hardly be expected to be liable for or to insure against frauds and losses of property, to be committed by part owners in equity. There was quite as much reason for the seamen to insure as to the cargo, as the owners.

Seamen cannot insure their wages in common cases of freighting voyages, as it might prevent so much exertion to save the vessel and earn freight. The Juliana, 2 Dod. 509; McQuirk v. The Penelope [Case No. 8,925]; 1 Hagg. Adm. 239; 3 Dod. 201. But after they are earned, and especially if invested in a cargo on board, the objection would not seem to apply. And though then, it would not answer to allow them to insure against embezzlement or barratry generally, I see no reason why seamen may not in a voyage like this, insure their own share, after some cargo is taken, and against the barratry of the captain or embezzlement by him or other seamen. But however this may be, a neglect or inability in law thus to insure, furnishes no reason why the loss must not fall on themselves rather than the owners, as the latter are here only private carriers, and not obliged to insure, and liable only for ordinary diligence, and presumed to exercise it here in respect to a cargo where the title was nominally all in themselves, and held in trust for themselves no less than others. If they are liable, it would seem also more proper to subject them in a special action on the case or on the contract, and not by charging them with the net proceeds of what they never received at home; and when the gist of the complaint is misfeasance, in employing an unfaithful captain, rather than actual receipts by them of further proceeds, than they proposed to account for. There are some conflicting analogies and cases on this point, I admit, and it is not without some hesitancy I have come to the conclusion, that this exception, thus set up, growing out of the general agency of the master for the owners, ought not to prevail to make the owners liable for his misconduct abroad in relation to this cargo, without further evidence than has been offered in the present case. But it need not be a matter of surprise, that most questions in litigation have to be disposed of doubtingly, and resort be had often to general reasoning and analogies, to get any thing like certainty on the one side or the other. Because if precedents existed in point, the counsel could seldom advise parties to contest questions; and much less would they do it, if positive statute or well settled principles applied directly in point to the matter controverted. The most that courts can do, when not able to find such precedents, or statutes or principles to guide them, and which have been overlooked by counsel, or disregarded by parties, is to grope their way to what seems most just and truthful and right by the aid of collateral illustrations, indirect analogies, precedents bearing on the question, but not running on all fours, and inferential reasoning from other settled rules. And after all that, the result may be only an approximation to what is correct, having the balance of legal probabilities in its favor, rather than being clear or undoubted. It is fortunate sometimes to be thus far fortified. It may be strong enough to form a new landmark in the law, a new and authoritative rule or guide; or it may only throw some new light on a difficult question, and furnish scaffolding to aid others to mount higher.

I am, however, more strengthened in the conclusion to exonerate the owners of the vessel for the master's embezzlement in this case and on this evidence, from another circumstance, about to be explained. It relates to the long delay, which has been indulged in by the plaintiff in prosecuting this whole claim, and which, it will be seen, bears specially and unfavorably on that part of it for oil sold abroad by the master's misbehavior, as, during that delay, he has become both insolvent and dead. This is a consideration separate from the statute of limitations pleaded as a defence against the whole claim, and which I shall consider hereafter. When there is no technical bar by statute, and no delay, which has changed the condition of the parties by sale, or settlements of the property at home, there may still be such a delay as to produce changes greatly affecting the property abroad. In respect to any oil, not actually received in this country by the owners, there may be an injury by so long delay to call on them as to that oil, lost or improperly disposed of by the master abroad, as ought to exonerate them entirely from accountability for it, though otherwise liable. Thus applying a like rule in an admiralty case as in equity, the libellant not appearing ever to have apprized the respondents, that he should hold them accountable for the particular oil lost abroad by the unfaithfulness of their captain, and never having prosecuted them for the same here till the captain was dead, and a remedy over on him by the respondents probably worthless; it would not answer to justify a long neglect of that character and tendency, and of such injurious results, without further explanations than have yet been given in this case. The action of congress in making vessels engaged in the bank and cod fisheries liable for only six months after the sale of the fish, to pay the share of a seaman, shows by analogy that they ought to be prompt, and more especially in any doubtful claim to oil lost abroad, and should not lay by till death and insolvency, and loss of papers, and changes of responsibility, may have made the claim entirely destitute of equity. If sustained at all, it may be only on the sharp points of the law, apices juris. A court of admiralty, however, in cases within its jurisdiction, proceeds on equitable rather than strict legal principles, and is hence called "the chancery

for the sea." The Juliana, 2 Dod. 521; [The Orleans v. The Phoebus] 11 Pet. [36 U. S.] 175; [The Virgin v. Uyfhins], 8 Pet. [33 U. S.] 538; Hardin v. Gordon [Case No. 6,047]; Andrews v. Essex Fire & Marine Ins. Co. [Id. 374]; 1 Hagg. Adm. 176, 357. On this cause of exemption, see a case in equity, Mason v. Crosby [Case No. 9,234]. For this and the ground before mentioned, I think the respondents in this admiralty proceeding should, in the first instance, be charged with only the share or "lay" of the plaintiff in the one twenty-eighth of the net proceeds of the oil, which reached the hands of the owners in this country.

The statute of limitations, as operating on this amount, and indeed the whole claim, is next to be considered. The length of time which interposed between the sales of the oil here and the time this libel was filed, and which has been set out in the answer of the respondents in the nature of a bar by the statute of limitations, is very unusual. I have no doubt that this statute should prevail in proper cases, when a party chooses to rely on it, in admiralty as well as in common law proceedings; and, if not as a technical bar, yet as an equitable defence, showing unreasonable neglect by the complaining party. Willard v. Dorr [Case No. 17,679]; Brown v. Jones [Id. 2,017]. The statute of 4th of Ann expressly reaches cases in admiralty for seamen's wages. Doug. 1, note; 2 Browne, Civ. & Adm. Law, 187. It is a little singular in this case, that the libellant, not pretended to be wealthy, and impatient as seamen generally are for their dues, and having so large a demand against responsible persons, should have slept over it so long and so soundly, if it was deemed valid or had not been seasonably settled. But it may have happened because he expected a claim was still pending by the owners against the insurance offices, which might, if successful, increase the trust fund, in which he was interested; or it may be that he did not wish to encounter the defence there intimated and now pleaded against his recovery, but abandoned at the hearing that he had deserted from the vessel. It is certain that Colter, the master, in one of the letters put into the case, charges him with having left the vessel without leave; and the libellant might hesitate in pushing his claim for some time, under such a charge to be contested, in expectation of Colter's death, who seems to have become very intemperate, and who died about two years since, and could not now be a witness against him. But there is no pretence of actual payment to him since the demand which he made in May, 1839. Nor is there any evidence of a change in the position of the owners here, during this delay, by a division of the proceeds among them, and the loss of any remedy over if some are now made liable, and thus raising strong equities to bar a recovery on either of those accounts.

My impression then is, that the claim for what actually reached the owners ought not to be barred by the delay to enforce it, unless it has been such, as at law would make the statute of limitations available against it. How this is, depends on the time when the right of action commenced. The right to some share in the proceeds commenced whenever there were any catchings, contingent on there being enough in the end to yield a net balance after deducting proper expenses, and on their reaching the owners so as to be sold and the products ascertained. That contingency having probably been fixed by the arrival of the oil here, the liability of the owners, if then fixed by it as a debt, was one not payable at once, in presenti, but payable after the sales, and readiness to make a final adjustment. This readiness did not exist in October, 1839, when the two letters before referred to were written; and if there be some doubt, whether they are to be construed as acknowledgments of something due to the libellant or not, which being within six years of filing and serving the libel would take the case out of the statute, as the law then stood, there is no substantial doubt, that they showed a want of readiness then, as provided for in the shipping articles, to make a final adjustment of the proceeds of the voyage. They were an admission by the respondents, that the legal time for such an adjustment, under the contract and the facts of the case, had not arrived. Hence no action could be maintained against them till after October 10, 1839; and the statute, it is well settled, does not begin to run till an action can be sustained. See Ang. Lim. 45, 60, and cases there cited; Pothier, by Evans, 404; 2 Story, Eq. Jur. § 1531. Six years did not elapse from that time to the filing of the bill. It follows then, that six years not having expired since the right to sue accrued, and also not, since the claim was recognised or acknowledged by Allen and his agent as unpaid and soon to be adjusted, there is no technical bar to a recovery here, by means of the statute of limitations.

The judgment below is, therefore, in most respects affirmed. If the counsel do not agree in making up the proper sum to be paid under this opinion, I will refer it to an auditor to make the proper computations and allowances, and report the amount due.

And it may be useful now to submit a few remarks in relation to one or two of these allowances under the peculiar circumstances of this case. Thus in respect to any charges and deductions, proper in this case for the freight of the oil home after the condemnation of the ship, I should, as a general principle, think it was a part of the duty of the owners to carry the cargo, after taken, to this country; and that the expenses of doing it are chargeable to them, rather than to the cargo. If the vessel becomes not seaworthy on the voyage by perils of the seas, as is supposed to have been the case

here, the owners must, by analogy to other cases, on shifting the cargo, not receive freight on it, (or, in other words, have their share or proportion of the catchings,) unless they are at the expense of carrying it to the place of its original destination, so as to earn their freight, or what is a substitute for it. In that way only can they equitably or legally earn their share in the net proceeds of the cargo. But it may be, that by the shipping articles, or usages of the whale fisheries, which the articles recognize expressly as binding, this rule would apply only where the vessel was not seaworthy at the time of leaving home. This last is not pretended to be the case here, and is seldom likely to be, as the owners of the vessel, on account of their large interest in the cargo, no less than the vessel, are deeply interested to have her seaworthy, and could not indemnify themselves by insurance, if she was not seaworthy when sailing from this country. The articles of contract and the usage may therefore control what otherwise would seem proper, and make this misfortune, so far as regards the freight of the oil home, fall as a general charge on all the cargo, and all those interested in it. If they do, the allowance must be made, otherwise not. If they do, it will be another circumstance in the usages of this business, strengthening the opinion as to the joint stock or co-partnership nature of it in equity; and hence exonerating the owners as to all oil, not received by them nor applied to their use, if exercising ordinary diligence. Again, if any of the cargo, sold abroad, appears to have been sold and applied under one of those necessities, to make repairs or obtain supplies for the vessel, which impart to the master an authority to hypothecate or sell the cargo, the owners ought to be answerable for the share of the libellant in what has thus clearly and rightfully gone to their benefit. But if the evidence and papers prove nothing as to such a sale and application under such a necessity, and nothing has yet been seen in them or pointed out which renders this probable, then, as before suggested, nothing can be charged to the owners on this ground. The answer and evidence might have been fuller as to this, and as to the barratry and embezzlement by the captain. But the accounts rendered by him show great misconduct and peculation; making sales of some oil in the first account, which still brought or left him in debt to the owners for more than the whole proceeds of the sale, and in the other accounts showing sales, which left him in debt for oil several thousand dollars, and for both oil and the vessel, after many unallowable charges, in debt to the amount of nearly $9000.

This may be placed in a different light on further attention being directed to it by the counsel for the libellant. But if it cannot be, nothing must be added for any of the sales made by the captain abroad, as no necessity is shown, and it is necessity alone that can justify the exercise of such a strong, and in some degree dangerous power. The authorities are full to this effect. Thus the master cannot pledge the freight to raise money for himself. Keith v. Murdoch [Case No. 7,652]. Yet he can bind owners for supplies necessary and suitable in kind. The Rhode Island [Id. 11,743]; 4 Barn. & Ald. 352; [Wainwright v. Crawford] 4 Dall. [4 U. S.] 226; Ross v. The Active [Case No. 12,070]; Keith v. Murdoch [supra]. And so for necessary repairs. 6 Mass. 163; 11 Mass. 34; [Wainwright v. Crawford] 4 Dall. [4 U. S.] 226; 1 Starkie, 27; 2 Starkie, 428. But he must not hypothecate or sell, if furnished with means, or can draw, &c., as then it is not necessary. 1 Abb. Shipp. 125; [The Aurora] 1 Wheat. [14 U. S.] 96; Patton v. The Randolph [Case No. 10,837]. And though he can sell the cargo, if necessary, for repairs abroad (3 C. Rob. Adm. 240; Abb. Shipp. 176, 245; 17 Mass. 478; 18 Johns. 208; 1 Johns. 106; 11 Johns. 293; Willings v. Consequa [Case No. 17,767]; 2 Pick. 249; The Fortitude [Case No. 4,953]; 2 Browne, Civ. & Adm. Law, 153; Pope v. Nickerson [Case No. 11,274]), yet there must be strong necessity, and this shown by those justifying the sale (Tunno v. The Mary [Id. 14,237]; Boreal v. Golden Rose [Id. 1,658]; Sloan v. The A. E. I. [Id. 12,946]; Liebart v. The Emperor [Id. 8,340]; Canizares v. Santissima Trinidad [Id. 2,383]; 6 Bing. 262; Abb. Shipp. 244, note, 107; Scull v. Briddle [Case No. 12,569]; 1 Bing. 243, 445; The Tilton [Case No. 14,054]; 8 Taunt. 755; The Triton,[3] 3 Brod. & B. 151). And the laws of Oleron and of Wisbuy, and the code of Louis 14th, did not allow a sale in any case by the master, without express authority of the owners.

If the master in this case was specially empowered by the owners to sell oil abroad, whenever deemed profitable by him, that would present a different justification and perhaps a new ground for the liability of the owner; unless, in such case, by the agreement or usage of the business, the owners were to account for only such sales abroad as actually were settled for with them by the captain. Nothing has been shown as to this, and nothing probably exists; and without such an authority given expressly, the master is not agent of the owners to sell (2 Browne, Civ. & Adm. Law, 134); and can only sell in the emergency before described. There may have been, in fact, some payments made to seamen abroad with this oil, beyond the other means furnished; and if so, and if it is the usage to allow the master to make such payments, some claim may perhaps be upheld for some allowance to the libellant for his share in that. But this point was not raised at the hearing, and no evidence is offered about it, except some statements in the accounts rendered by the master. If the parties do not

[3] [Case No. 14,181.]

agree on this, the auditor can report the facts bearing on it, before the final decree is made up. The judgment below is to be affirmed, but with the deductions from its amount I have indicated.

JOY (LANGDON v.). See Case No. 8,062.

## Case No. 7,553.

JOY et al. v. WIRTZ et al.

[1 Wash. C. C. 417.] [1]

Circuit Court, D. Pennsylvania. April Term, 1806.

EQUITY PLEADING—JOINDER OF PARTIES — CREDITORS OF BANKRUPT—RELEASE.

1. A & B were indebted to the plaintiff and others; and A having become insolvent, and a commission of bankruptcy having issued against him, the creditors of A & B joined in releasing A from all the debts due to them from the firm of A & B. The commission of bankruptcy being superseded, the plaintiffs filed a bill on the equity side of the circuit court, to set aside the release. *Held*, that all the parties to the release of A should have joined in the bill; and the demurrer, for want of such parties, was sustained.

2. Where creditors are to be paid out of a particular fund, or are all united in the same transaction, so as to produce privity between them; all should join in a bill which may bring their proceedings into the consideration of a court of chancery.

3. To set aside a release, in such a case, all the parties to it must apply by name to the court; and one cannot act for the whole.

The defendants having been indebted to the plaintiffs [Joy and Laurence], and to several other persons, and the defendant, Charles Wirtz, having got into insolvent circumstances, his property, under the bankrupt law of this state, was assigned over to certain persons, for the benefit of his creditors; upon which, they executed a release to him of the debts due to them, from Charles & William Wirtz. The commission of bankruptcy, being afterwards superceded, because the petitioning creditor was not such a person, as was intended by the law; the plaintiffs brought their action against William Wirtz, to recover the debt due from Charles and William Wirtz; but failed, in consequence of the above release, given to one of the joint debtors, being pleaded. This bill is filed by two of the creditors, who joined in the release, for the purpose of having it set aside, and for obtaining payment of their demand, out of the estate of the said William Wirtz, in his possession; and to set aside certain voluntary conveyances, made by him, in favour of his wife and children, on the ground of fraud. The defendants demurred to the bill, for want of proper parties, alleging, that all the creditors should have joined.

[1] [Originally published from the MSS. of Hon. Bushrod Washington, Associate Justice of the Supreme Court of the United States, under the supervision of Richard Peters, Jr., Esq.]

Mr. Rawle, for defendants, read Hinde, Ch. Prac. 151, 152; 2 Hinde, Ch. Prac. 312. All the creditors should join; or if a part only sue, they should state in their bill, that they sue for themselves, and for the others.

Mr. Tilghman argued, that separate creditors were not obliged to join, nor would it be proper; unless they were all to receive payment out of the same fund appropriated by law, or by a third person, 1 Atk. 282.

BY THE COURT. Where the creditors are to be paid out of a particular fund, or are united in the same transaction, so as to produce a privity between them, all are to join; and the defendant shall not be obliged to litigate the same question, with each separate creditor. In this case, all the creditors joined in an instrument, which at law discharged the defendant, William Wirtz, from the payment of the debts due to them by himself and Charles Wirtz. The object of this bill, is to set aside this release, which affected all the creditors equally, and in which they all united. The court cannot set it aside, in respect of part of the creditors, and leave it to operate against the others; nor can we set it aside as to all, unless all were parties, either by name, or as being represented by a part, suing in the names of all. The demurrer must be sustained; but the plaintiffs have liberty to amend.

[An amended bill was accordingly filed, to which there was a plea in bar for the reason that a party had been omitted, he being a citizen of Pennsylvania. Upon demurrer the plea was overruled. Case No. 7, 554.]

## Case No. 7,554.

JOY et al. v. WIRTZ et al.

[1 Wash. C. C. 517.] [1]

Circuit Court, D. Pennsylvania. Oct. Term, 1806.

EQUITY PLEADING—PLEA TO JURISDICTION—PROPER PARTIES—DECREE.

1. A bill, on the equity side of the court, was filed by all the parties to a release of the defendants, except one, who was a citizen of Pennsylvania. The complainants in the bill were all citizens of another state. To this bill, there was a plea to the jurisdiction of the court, alleging the want of jurisdiction, because one creditor was not joined in the bill. *Held*, that the court had jurisdiction of the case.

2. In chancery, there is a distinction between active and passive parties; the former being such as are so involved in the subject in controversy, as that no decree can be made without their being in court; the latter are such, as that complete relief can be given to those who seek it, without affecting the interests of the passive parties.

3. If a decree can be made, without affecting the rights of a person not made a party, or without his having any thing to perform, necessary to the perfection of the decree; the court

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will proceed without him, if he be not amenable to the process of the court, or no beneficial purpose is to be effected by making him a party.

[Cited in West v. Smith, 8 How. (49 U. S.) 410; Abbott v. American Hard-Rubber Co., Case No. 9.]

4. There is no difference between a person, who, on account of his residence beyond seas, cannot be made answerable to the process of the court, and one who, by the laws of the United States, cannot be brought into court; and wherever, in the former case, a person, so circumstanced, need not be made a party, he need not be made a party in the latter case.

5. Care will be taken not to make a decree, which will affect the person who is not party to the suit.

[Cited in Smith v. Ford, 48 Wis. 145, 2 N. W. 134, and 4 N. W. 462.]

This case [Case No. 7,553] was tried at the last term, on a demurrer, for want of parties. The complainants amended their bill, by making all the relators complainants, except A. Dubois, a citizen of Pennsylvania. A plea was put in, stating this in bar, to which there was a demurrer.

It was argued by Lewis and Tilghman, for the plaintiff, that, though all the creditors joined in the release, yet, they expressly released each for himself, and not for the others. Of course they were not connected in interest; there was no privity; and each might be released without the others. But, at any rate, Dubois not being permitted to sue in this court, being a citizen of Pennsylvania, there is no necessity to make him a party, any more than if he was beyond the reach of the process of the court; and that, whenever a person is not amenable to the process of the court, he need not be made a party. So in many other cases. 1 Eq. Cas. Abr. 72–74; 2 Eq. Cas. Abr. 166; 2 Atk. 510; Finch, Prec. 99, 112; Mitf. Eq. Pl. 52, 53; Finch, Prec. 592; 1 Ch. Cas. 35; 1 Atk. 282; P. Wms. 33; Hind, Prac. 151.

WASHINGTON, Circuit Justice. When this cause was heard at the last term, on demurrer for want of parties, the court did no more than sustain the demurrer, and direct proper parties to be made. All those who executed the release, have since been made complainants, except Abraham Dubois, a citizen of Pennsylvania; and his not being made a party, is the subject of a plea, which is now to be decided upon. In support of the plea, it is contended, that the court cannot make a decree, without having all the parties, who united themselves together by the release, before them; and that to proceed, without making all the releasors parties, would be to violate one of the fixed principles of a court of equity, which professes to prevent multiplicity of suits. It is admitted, that Dubois cannot be made a party; but this is urged as a reason, why the suit is improperly brought in this court. In deciding who ought to be parties, it is necessary to distinguish between active and passive parties; between those who are so necessarily involved in the subject in controversy, and the relief sought for, that no decree can be made without their being before the court; and such as are formal, or so far passive, that complete relief can be afforded to those who seek it, without affecting the rights of those who are omitted. The Case of Fell, 2 Brown, Ch. 276, presents us with the rule, and with a strong illustration of it. A second mortgagee brought a bill against the first, to redeem, without making the heir of the mortgagor a party, who was stated to be resident in another country. An objection for want of parties being made, the chancellor observed, that there was a distinction as to proceeding in the absence of parties abroad, between their being active and passive: that the mortgagor, or his heir, cannot be considered as a passive party; because, the decree is, that the second mortgagee shall redeem the first, and that the mortgagor redeem him, or stand foreclosed on this account; the mortgagor or his heir, being an active party, the court cannot proceed without him; and his being a party cannot be dispensed with, though he is not amenable to the process of the court. Many other cases might be mentioned, equally strong with that just cited; and, in all of them, the rule is so stubborn, that I doubt, if, under any circumstances, it can be made to bend to the plea of necessity. But, if a decree can be made without affecting the rights of a person not made a party, or without his having any thing to perform necessary to the perfection of the decree; reason, as well as adjudged cases, will warrant the court in proceeding without him, if he be not amenable to the process of the court, or no beneficial purpose is to be effected by making him a party. The object of a court of equity is to prevent a multiplicity of suits, to do complete justice, and to make the performance of its decrees safe to those who must obey them. Hence results the rule, that all persons concerned in the demand in the question in dispute, must be made parties. But this rule is not so inflexible, that, to preserve it, the court will not deny relief to those entitled to seek it, because there are others, who cannot be made parties, and who need not be so, otherwise than for the sake of principle, on which the rule is founded. This would be to make the great and primary objects of this court, subservient to those which are merely secondary. I admit, that the cases cited, apply to defendants. But, no case like the present could occur in England; and the reason of those cases, as applicable to defendants, is equally strong when applied to those who are complainants. I shall only add, that there is, in reason, no difference between a person, who, on account of his residence beyond seas, cannot be made answerable to the process of the court, and one who, by the laws of the United States, cannot be brought into this court; and that wherever, in the former case, a person so

circumstanced need not be made a party, he need not be made a party in the latter case.

The court will take care to make no decree to affect Mr. Dubois; and a complete decree may be made, without his being a party. At the same time, to prevent multiplicity of suits, it would be proper to make him a party, if the court could make a decree for or against him. Plea overruled.

## Case No. 7,555.

JOY et al. v. WURTZ et al.

[2 Wash. C. C. 266.] [1]

Circuit Court, D. Pennsylvania. Oct. Term, 1808.

EQUITY JURISDICTION—SETTING ASIDE RELEASE—FRAUD.

Where a release is given to one joint debtor, although under a misapprehension of its operating to discharge the co-debtor, a court of equity will not relieve from it, unless where there was fraud or unfair practices.

[Cited in U. S. v. Murphy, 15 Fed. 594.]

[Distinguished in Upjohn v. Ewing, 2 Ohio St. 19.]

The bill was brought to set aside a release, executed by the plaintiffs to William Wurtz, of a debt due to the several complainants, by W. & C. Wurtz, copartners in trade, and which by a settled account, they had agreed to pay. In the year 1788, Joy, one of the complainants, took out a separate commission of bankruptcy against Christopher Wurtz, and all his estate, real and personal, was assigned to certain persons, amongst whom Joy was one, for the benefit of all his creditors. In order to obtain from William Wurtz the title papers of some of the real property belonging to the copartnership, and in consideration of other separate property delivered by William Wurtz to the complainants, they, on the 30th of March, 1789, executed a release to him of all debts, demands, suits, &c., which they have, or might have, for dealings and transactions by the said William Wurtz, or in the name of Christopher & William Wurtz. Some time after, the supreme court of Pennsylvania, in an ejectment brought by the plaintiffs to recover part of the real property of Christopher Wurtz, decided, that the commission of bankruptcy, issued against the said Christopher Wurtz, was void under the law of this state; but the debt of the petitioning creditor having been contracted before the passage of the law, although the agreement of Christopher & William Wurtz to pay, was made afterwards. Upon this decision, one of the complainants brought an action against Christopher Wurtz, to recover his debt, and the release to William Wurtz being pleaded in bar, this bill was filed, in order to have the release put out of the way, as to Christopher Wurtz.

[1] [Originally published from the MSS. of Hon. Bushrod Washington, Associate Justice of the Supreme Court of the United States, under the supervision of Richard Peters, Jr., Esq.]

For complainants, were cited, by Mr. Hallowell and Mr. Lewis, the following cases, tending to show that in cases of mistake, even of law, a court of equity will relieve: 13 Vent. 549, pl. 2; 2 Ir. Ch. 154; 1 Eq. Cas. Abr. 27, pl. 2; Id. 28, pl. 6; 1 P. Wms. 727; 2 Ves. Sr. 310; 1 P. Wms. 130; 2 Ves. Sr. 100; 2 Atk. 31; 1 Vern. 32; 3 Atk. 522.

On the other side, were cited: 1 Fonbl. Eq. 116; 2 Vern. 615; 3 Bos. & P. 35; 7 East, 456; Doct. & Stud. 147; 1 Fonbl. Eq. 128; 9 Ves. 125; and particularly 1 Fonbl. Eq. 106, 108, to show that in such a case as this, ignorantia legis non excusat.

WASHINGTON, Circuit Justice (PETERS, District Judge, absent). I have considered this case with attention, with a view to discover, if I could, any solid ground upon which to relieve the complainants: for it is clear, that the release to William Wurtz was given under a mistaken opinion, that the proceedings, then depending against Christopher Wurtz under the commission of bankruptcy, would render the instrument inoperative as to him. But if a misapprehension of the legal consequences of a release to one joint debtor, can furnish a sufficient reason for setting it aside, the principle from which such a consequence flows, would be of no other use than to send the releasor, in almost every instance, into a court of equity: for, I think it may safely be affirmed, that it can seldom happen that a creditor, who gives a release to one of two joint co-obligors, without receiving full satisfaction, intends thereby to discharge the other; and whether the misapprehension is of the legal effects of the release by itself, or as dependent upon some other legal question which is also mistaken, the reason is the same. It is not pretended in this case, that any unfair practices were used by either of the joint debtors in order to procure this release; or that the complainants were ignorant of any facts material for them to know; or that a different kind of instrument was intended by the parties, or directed to be drawn, than the one which was actually executed. In such a case, I am aware of no case in which equity has not followed the law.

The strongest cases cited for the complainants, are those from Vesey and Atkins: but in them, the court detected the mistake in the bonds, by referring to the nature of the original contracts, of which they were only the evidence, and by this test, the obligors were considered to be severally bound in equity, because they were so by the original contract of loan. It is upon the same principle, that if a settlement differ from the articles, or an instrument is drawn differently from the agreement of the parties, equity will look at the intention. But the principle of those cases is inapplicable to this, which is purely a question of law, attended by no circumstance of fraud, and none of mistake, but

such as is common in similar releases, to warrant the interposition of a court of equity. Mistakes of this kind are not unfrequent, and yet it is worthy of remark, that no instance has been furnished, in which chancery has relieved. There are, besides, circumstances which present this case in an unfavourable point of view for the complainants. It is now twenty years since all the estate of Christopher Wurtz, against whom relief is sought, was assigned to certain persons, in whom the right to dispose of it upon such terms as they might think proper, was completely vested. It is true, that these sales, if any were made, would not conclude Christopher Wurtz, at least as to his real estate; but it is, perhaps, impossible at this day to calculate the injury which that defendant has sustained by an act, which, I am bound to say, violated the law of this state, and the rights of the individual. Can the complainants restore him to the situation in which he was, at the time the commission of bankruptcy was taken out, or at the time when by the operation of the law, he was discharged from the debts due to the complainants? Can they furnish a plain and satisfactory rule, for estimating and compensating those injuries? And unless this can be done, I am at a loss to discover the principle upon which they can entitle themselves to the assistance of a court of equity. The bill must be dismissed with costs.

## Case No. 7,556.

Ex parte JOYCE.

[23 Int. Rev. Rec. 297; 25 Pittsb. Leg. J. 17.] [1]

District Court, W. D. Missouri. Aug. 15, 1877.

HABEAS CORPUS—PRACTICE—FORMER JUDGMENT—REVIEW—INTERNAL REVENUE LAW—VIOLATION—APPEAL.

1. On habeas corpus a court has the power to review its former judgment so far as to determine whether it exceeded its power in passing a judgment claimed to be illegal.

2. Under section 3169 of the Revised Statutes of the United States, two or more offences—the conspiracy to defraud and having knowledge of a violation of the internal revenue laws by others without reporting the same—may be committed by an officer of the internal revenue department, and these offences may be joined in the same indictment. A knowledge of the violation of the internal revenue law by others, may be had by such officer, with a guilty failure to report the same, without such officer necessarily being in the "conspiracy to defraud."

3. Where there has been a separate verdict of guilty, on the several counts in the same indictment under that section, and the various offences charged are related to and connected with each other, so as to substantially constitute but one offence, the court should render but one judgment on the verdict.

4. Where a separate sentence was rendered on the verdict on each count of such an indictment: *held*, that the court exceeded its power; the judgment on the conspiracy count exhausted the legal power of the court to inflict punishment, and the rest of the judgment is a nullity. The petitioner, Joyce, having served the full term of imprisonment required by the sentence for conspiracy, his further detention under the sentence on the other counts is illegal.

5. From the final decision of the judge, discharging on habeas corpus a prisoner held under an illegal sentence of a federal court, an appeal to the circuit court of the United States is allowed the United States, on the application of the district attorney.

On habeas corpus.

The United States was represented by Hon. M. T. C. Williams, Asst. U. S. Atty.

Col. Joyce was represented by his attorney, Gov. Fletcher.

KREKEL, District Judge. Petitioner is before me on writ of habeas corpus seeking to be discharged from imprisonment in the penitentiary of Missouri, on judgment of this court in one of the whiskey cases. The indictment, under which the conviction was had, is drawn under the fourth and ninth subdivisions of section 3169 of the Revised Statutes of the United States. The pleader saw cause to reverse the order of the statutes, and in the three first counts of the indictment—under the ninth subdivision of the section cited—charges that defendant, Joyce, had knowledge of Feineman and of Sheehan violating the revenue law, and failing to report such knowledge as required. The fourth count charges that Joyce conspired and colluded with Sheehan to defraud the United States, an offence under the fourth subdivision of the section cited. On trial, the defendant was found guilty on each count in the indictment, and after filing motion for new trial, he withdrew the same before hearing, and demanded judgment, which was entered, and is in the following form: "That the said John A. Joyce, defendant, be imprisoned and confined for the term of two years in the Missouri penitentiary under the fourth count of the indictment, the first term to commence on this 13th day of November, 1875, and that under such count he pay a fine of one thousand dollars; and that he be further imprisoned and confined in such penitentiary for the term of eighteen months under the first, second and third counts of the indictment, and that under such counts he pay a fine of one thousand dollars, the second term of eighteen months to commence on the expiration of the first term of two years, and said two terms to constitute a continuous imprisonment of three years and six months."

Joyce, in his petition for the writ of habeas corpus, claims that the four counts of the indictment charge but one offence, and that when the court entered judgment on one count, it exhausted its power, and that Joyce having served out his sentence of two years—after allowing due credit for good behavior—he is entitled to a discharge, thus virtually claiming that the conspiring and colluding to defraud the United States under the fourth subdivision of section 3169, and the ninth

[1] [25 Pittsb. Leg. J. 17, contains only a partial report.]

subdivision, the having the knowledge of the commission of offences against the revenue law and failing to report, is one and the same offence. There is no doubt that two offences —the conspiring and colluding to defraud, and the having knowledge of the violation of the revenue law without reporting—may be committed, for they have no necessary connection in so far at least, that a knowledge of the violation of the revenue law by others may be had, without the person having the knowledge being in the collusion to defraud. The various counts of the indictment under consideration so charge the offences as to connect them with the conspiracy to defraud entered into between Joyce, the revenue agent, and Sheehan, the distiller. Joyce, the revenue agent, must necessarily have known that others besides the distiller must violate the revenue law in order to carry out the design of the conspiracy to defraud, for without such violation it could not have been carried out and made effective. Feineman, the rectifier, was made the willing instrument in the conspiracy. The gauger and warehouse keeper became the paid tools. As soon as the conspiracy to defraud went into effect, Joyce, the revenue agent, well knew that the gauger, warehouse keeper and rectifier were violating the revenue law, such violations being calculated on in entering into the scheme to defraud. The evidence on the trial was all directed to the establishing of the conspiracy to defraud, for while the prosecution might have fallen short of a conviction in this particular, it could still have succeeded in showing that Joyce knew of violations of the revenue law without having reported them, so that the jury was justified, under the evidence, in finding guilty upon all counts, after being satisfied of the guilt of defendant on the conspiracy count. The proper judgment upon the verdict rendered was for the court, and the present inquiry is, did the court exceed its power in rendering the judgment it did. There is now no doubt upon my mind that the judgment of the court should have been as but for one offence and had the motion for a new trial not been withdrawn but considered it is probable that on consideration the conclusion now reached would have been arrived at, but certainly not to the advantage of the petitioner who would undoubtedly have received the full measure of punishment allowed by law. The Joyce case happened to be the first of the long line of whiskey fraud cases afterward tried here, and in other courts. Well do I remember my deep anxiety to bring offenders to justice on the one hand, and not to be unjust to defendants upon whom outraged public justice was about to descend. The justice of the case is now comparatively easy to determine. Not so the law, for the question is a grave one, in how far a court under habeas corpus proceeding can review its former judgments, for it amounts to nothing less than this. Upon the point of pronouncing one judgment only upon the various counts of the indictment, I have the indirect support of Justice Nelson, quoted in the Tweed Case;[2] upon the extent of the power of a court to review its former judgment in order to see whether it had power to pass the judgment it did, the supreme court of the United States, in Ex parte Lange, 18 Wall. [85 U. S. 163], has passed. But above all I feel relieved because the judgment about to be entered can be reviewed and the various questions involved authoritatively settled on appeal.

The conclusions arrived at are that the indictment under consideration in its various counts charges but one offence; that when the court entered its judgment on the conspiracy count it exhausted its power and that the rest of the judgment is void; that Joyce having served the full term of his sentence of two years in the penitentiary, (after allowing due credit for good behavior), is entitled to a discharge, which is granted him on condition that he and surety enter into recognizance of one thousand dollars to appear and obey any order of court which may be made in this or the appellate court.

At the conclusion of the judge's remarks in deciding the case, Col. Williams presented the application of the government for an appeal to the circuit court of the United States of this district. The appeal was granted, and Col. Joyce gave as his bondsmen for his appearance to abide the judgment of the court on the appeal, T. C. Fletcher and Wm. G. McCarty, in the sum of one thousand dollars.

## Case No. 7,557.

The J. R. HOYLE.

[4 Biss. 234.][1]

District Court, D. Indiana. July, 1868.

ADMIRALTY JURISDICTION — AFFIDAVITS TO LIBEL —LIEN FOR ADVANCE MONEY.

1. A person who in one state advances money to release a boat belonging in another state from the possession of the marshal for the former state, has a lien upon [the boat for] the money so advanced which he can enforce in rem in a court of admiralty.

[Cited in The Robertson, Case No. 11,923; Bovard v. The Mayflower, 39 Fed. 42.]

2. There is no rule in admiralty, in the district court for Indiana, requiring that libels in rem in civil causes shall be supported by the affidavit of the libellant.

3. Libels in civil actions in rem need not state the occupation and residence of the libellant.

In admiralty.

Chas. E. Marsh, for the motion.

Gordon & March, contra.

McDONALD, District Judge. On the 30th of November, 1867, John H. Lee and Joseph

[2] [9 Wall. (76 U. S.) 425.]

[1] [Reported by Josiah H. Bissell, Esq., and here reprinted by permission.]

R. Hoyle filed in this court a libel, in a cause civil and maritime, against the steamboat J. R. Hoyle. Afterwards, under this proceeding, divers other persons—among whom were Wadkins and Raymond, and George Brose and John J. Brose—intervened, and filed libels against the same boat. George Brose and John J. Brose now appear, and move that the libel of Wadkins and Raymond be dismissed.

Various causes for this motion have been stated; but they are all comprehended within the following: 1. That there is nothing stated in the libel to authorize the court to render any judgment in favor of Wadkins and Raymond. 2. That the libel is sworn to by the proctor, and not by either of the libellants. 3. That the occupation and residence of the libellant are not stated in the libel. The libel, after reciting the filing of Lee and Hoyle's libel, and the seizure of the boat under it, alleges that, at Shreveport, Louisiana, on the 2d of February, 1866, Wadkins and Raymond "loaned to the said boat the sum of five hundred dollars, for the purpose of releasing said boat from an attachment at that place, where said boat had been attached and held in custody for a debt of said sum of five hundred dollars;" that "said sum of five hundred dollars was, by said libellant, for the purpose aforesaid, paid to one W. B. Lewellen, who was then the clerk and owner of said boat; and that, at the time said sum of money was thus loaned, the libellants received from said Lewellen a receipt as follows: 'Steamer J. R. Hoyle, Dr. W. H. Wadkins and J. Raymond $500, borrowed, money, this Feb. 2d, 1866. W. B. Lewellen.'" The libel further avers, that this five hundred dollars was applied to said purpose, and that no part of it has been repaid. There are other allegations in the libel; but it is unnecessary to state them with reference to the present motion. We will proceed to examine the objections on which the motion to dismiss the libel is founded.

I. It is insisted that there is nothing stated in the libel that would authorize the court to render any judgment in favor of the libellants. This objection is in the nature of a demurrer, and proceeds on the supposition that the claim set up in the libel is not one of admiralty cognizance. It is correctly said in support of this motion, that the writing copied into the libel is not a bottomry bond. It has scarcely a feature of such a bond. Indeed, it is no bond at all, for it is not sealed. But is not the transaction set out in the libel a maritime loan operating in rem? If so, it furnishes ground for maritime jurisdiction. "For if a master borrow money abroad for the necessities of the ship, and so apply the same, and no instrument of bottomry or hypothecation is given the law merchant gives to the lender a lien on the ship for the amount, in addition to any remedy he may have at common law." 1 Pars. Mar. Law, 408. Such a lien, it seems, the lender would have, though nothing was expressly stipulated as to the liability of the vessel. Indeed, it is at this day a well established doctrine, that a person who lends money for the use of a ship in a foreign port has the same lien on the vessel as material men have. Davis v. Child [Case No. 3,628]; The Sophie, 1 W. Rob. Adm. 368. Shreveport, where this loan was made, is a foreign port within this rule. The General Smith, 4 Wheat. [17 U. S.] 438.

The case of Maitland v. The Atlantic [Case No. 8,980], has been cited in support of this motion. It is my opinion that the case gives no countenance to the motion. It decides that a bottomry bond with exorbitant usury is invalid if it stipulates that the payment of it shall not depend on the fortunate issue of the voyage; and that if a master borrows money at a foreign port to repair his ship, and executes a bill of exchange for its repayment, the lender waives his lien on the vessel for the money. But that is not the present case. Here was no bottomry bond, no bill of exchange, nothing done to waive a lien. And the judge, in deciding that case, said: "It is perfectly true, * * * that the very fact that advances had been made to defray the expenses of repairs, would create a lien upon the vessel, if such advances had been made upon the credit of the vessel; and that such a lien would exist, if there had been no special act of hypothecation or mortgage. It would indeed exist by operation of law. But if instead of relying on the general principles of maritime law, the lender of the money chooses to exact of the master a special hypothecation of the vessel and cargo, and causes to be inserted in the instrument clauses which operate as a waiver of his lien, or as a forfeiture of his right to proceed in rem, how can a court of admiralty grant him relief? If, as in the case now under consideration, he exacts maritime interest on his loan, and at the same time, expressly refused to assume maritime risks, is it not clear that the very instrument on which he relies for his security is, by the well recognized principles of maritime law, an abandonment of all claim against the vessel? It is well settled, that if a material man gives personal credit, even in the case of material furnished to a foreign ship, he loses his lien." This reasoning strongly supports the libel under consideration, in which there appears to have been no waiver of any kind.

But it is understood that this case from Newberry is cited as applicable to the present one on the ground that the instrument copied into the libel is a personal security like the bill of exchange in the case of Maitland v. The Atlantic [supra], and is therefore a waiver of the lien on the boat. I cannot so regard it. The instrument in question is neither a bill nor a note. It is no personal security. It is, indeed, signed by W. B. Lewellen. But it contains no promise by him. On the contrary, it plainly expresses

the steamer as the debtor; and I think it must be construed rather as creating a lien on the boat, than as destroying it. It is plainly intended to show that the steamer is liable for the money borrowed; and it is extraordinary that it should be adduced to establish the extinction of that liability.

It is argued, moreover, that the libel does not allege that there was any necessity for this loan, and is therefore bad. It is certainly a general rule that the master or captain of a vessel cannot, without the owner's consent, create a lien on it for money loaned or materials furnished, unless the same are necessary in order to prosecute the ordinary business of the vessel. But this rule does not apply to the owner of it. The rule is restricted to masters and other agents on this obvious principle, that, as generally the owner does not expressly authorize the master or other person to create liens on his vessel, the agency is only implied, and it is not reasonable to imply such an agency unless there was a necessity for the money advanced in order to prosecute the voyage. Smith, Merc. Law, 411. This reason does not apply where the owner obtains the loan. In that case, the lender is under no obligation to inquire whether the loan is necessary in order to the prosecution of the voyage. It is enough that the money is to be applied to the purposes of the voyage. 1 Pars. Mar. Law, 410, and cases cited in note 6. Now the libel in this case avers that the loan was obtained by W. B. Lewellen, "who was then the clerk and owner of said boat." As owner, he could create the loan whether there was any special necessity for it or not.

But I do not concede that there was not such a necessity for this loan as to justify an agent in making it and binding the boat for it. The steamer was seized under an attachment, and was in the legal custody of an officer. She could not proceed on her voyage till she was released. How long she would be delayed thereby, who could tell? This was as strong a necessity as the want of provisions, or materials, or even repairs on the boat, could be. The Aurora, 1 Wheat. [14 U. S.] 96. The first objection to the libel, therefore, cannot be sustained.

II. It is objected that the libel is sworn to by a proctor, and not by either of the libellants. I find nothing in the rules promulgated by the supreme court requiring libels like the present to be sworn to. By the third and fourth rules of the court of the Southern district of New York, a libel praying an attachment in personam or in rem, or demanding the answer of any party under oath, must be sworn to by the libellant. Betts' Adm. 22, 23. But even these rules, if we had such here, would not reach the present case. Prof. Parsons says: "Regularly, the libel should be signed by the libellant or his agent, and by a proctor of the court, and, unless brought in behalf of the government, verified by the oath of the libellant. This matter, however, is of course very dependent on the practice and rules of the several district courts of this country." 2 Pars. Mar. Law, 680. In Coffin v. Jenkins [Case No. 2,948], that distinguished judge says, "I observe, too, that there are some irregularities in the present case. The libel is sworn to, but not the answer. The reverse is the usual and proper practice, although there is no objection to the libel being sworn to if the libellant chooses." From this language, I suppose that Judge Story did not consider that, as a general rule, libels must be sworn to. The seventh admiralty rule of the supreme court provides, that "in suits in personam no warrant of arrest, either of the person or property of the defendant, shall issue for a sum exceeding five hundred dollars, unless by the special order of the court upon affidavit or other proof showing the propriety thereof." The present case is not within this rule; and it is a fair deduction from the rule, that libels not falling within it, need not to be sworn to. The fourth rule in admiralty adopted by this court is very similar to the seventh rule of the supreme court. It provides that "all libels praying process of arrest, whether in rem or in personam, shall be verified by oath or affirmation of the libellant, unless for sufficient cause such oath shall be dispensed with by the special order of the judge." I do not think that the present case is within this rule. But even if it were, I would not sustain the motion made by G. and J. J. Brose to dismiss the libel. The rule was not made for their benefit, but for that of the owner of the boat. The want of an affidavit to the libel can do them no harm; and they have no right to complain of it. Even if the owner made this motion, I should be inclined to overrule it, and permit the affidavit now to be added.

III. It is also objected to this libel that it fails to state the occupation and residence of the libellants as required by the twenty-third rule of the supreme court. That rule only requires that the libel, "if in personam," shall state "the names, and occupations, and places of residence of the parties." The present is a libel in rem, and not in personam. Therefore this objection is without weight.

The practice of moving to dismiss libels for defects apparent on their face, ought not to be indulged. If a libel is defective, the proper course is to file exceptions to it. If these are sustained, the court would allow the libellants to amend. But if the motion to dismiss is sustained, the cause is out of court, and no amendment can be made. Admiralty courts are very liberal in allowing amendments; and the indulgence of motions to dismiss would hardly be consistent with that liberality. If, therefore, the objections taken to this libel were well founded, I should be reluctant to sustain a motion to dismiss it—especially so, if, as in the present

case, the motion is made, not by the owner of the boat, but by interveners asserting claims against the boat, and occupying the same position in the suit as the libellants Wadkins and Raymond do. The motion to dismiss is overruled.

## Case No. 7,558.

JUANDO v. TAYLOR (two cases).

[2 Paine, 652; [1] 3 Wheeler, Crim. Cas. 382.]

District Court, S. D. New York. Aug., 1818.

PRIZE—CITIZENSHIP—RIGHTS OF CITIZENS — NEUTRALITY.

1. The doctrine of perpetual allegiance grew out of the feudal system, and was supported upon a principle which became imperative with the obligations on which it was founded.

2. In the United States, expatriation is considered a fundamental right. As far as the principles maintained and the practice adopted by the government is evidence of its existence, it is fully recognized, and its constant exercise has never in any way been restrained.

3. The general evidence of expatriation is actual emigration, with other concurrent acts, showing a determination and intention to transfer one's allegiance.

4. Where the evidence was, emigration more than twelve years ago—swearing allegiance to another government eight years since—entering into its service and continuing in it, uniformly; *held*, that the defendant had lost his character as a citizen of the United States. *Held*, further, that to sustain his expatriation the government to which he had sworn allegiance, if independent in fact, need not have been recognized as such by the United States, but that the fact of emigration and the intention to remain abroad and to abandon his citizenship here, as manifested by his oath of allegiance to another government claiming to be independent, were sufficient.

5. When one portion of an empire rises up against another, no longer obeys its sovereign, but by force of arms throws off his authority, and is of sufficient strength to compel him to resort to regular hostilities against it, a state of civil war exists as distinguished from rebellion; and the conflicting parties are to be regarded by other nations as two distinct powers, each independent of all foreign authority.

6. Whether the independence of the new government was recognized by the United States or not, the principles of law which place the parties on an equal footing in the view of foreign powers, and consider them regular combatants, would still operate, and exclude the idea of making a party in the war liable in a civil suit in the courts of the United States, for damages that might arise to his adversary from acts committted in the prosecution of the hostilities.

7. The citizens or subjects of one country or government, are not prohibited, by the law of nations, from entering the military or naval service of another.

8. The subjects of one government entering the military service of another, incur no personal liabilities other than the common hazards of war; and the government under which they act is alone responsible for their conduct.

9. In time of war, the courts of the belligerents have exclusive jurisdiction of the prizes made by their armaments; and they have jurisdiction not only of the question of prize, but of all its consequences.

10. It is no breach of neutrality on the part of a belligerent to equip vessels of war in a neutral port, unless the act be interdicted.

11. It would be a departure from neutrality on the part of the nation that permitted one belligerent to equip vessels of war in its port, and withheld the like privilege from the other.

12. Prizes made by armed vessels, either equipped originally, or whose force has been augmented here, are to be restored if brought within our jurisdiction.

13. Captures made by vessels equipped in a neutral nation are illegal only in relation to such nation, and if they are brought infra presidia her ports, restitution will be ordered.

14. A condemnation of a prize in a court of admiralty, is binding and conclusive against all the world.

15. In matters of prize, made by foreign cruisers, the courts of the United States can take no jurisdiction, unless the prizes be brought within our ports, although the capturing vessel be outfitted here.

16. The court which has jurisdiction of the question of prize, has jurisdiction also of all its incidents and consequences.

17. A seizure as prize is no trespass, though it may be wrongful. The authority and intention with which it is done, deprive the act of the character that would otherwise be impressed upon it. The tort is merged in the capture as prize.

18. Although the ultimate validity of the prize will depend upon subsequent investigations; yet if the capture is made by the authority of the sovereign, the original taking must be deemed legal as to the party committing the act.

19. Captures made by means of equipments obtained here, if brought within our jurisdiction, cannot avail. But the capture, if authorized by the sovereign of the captor, is legal as between the parties, and if carried into his possession, or infra presidia his ports, cannot be recovered here.

20. No suit or proceeding can be maintained in the courts of a neutral nation, by the subjects of one belligerent against the subjects of the other, for acts growing out of the war.

Assumpsit. Damages $30,000. Trespass, and taking away goods and chattels. Damages $30,000. On the 26th of August, 1818, Commodore Thomas Taylor, the above defendant, was arrested in the city of New York by Thomas Morris, Esq., the United States marshal, and held in close custody on two writs, wherein the damages were laid at $30,000 each, issued in the circuit court of the United States, at the suit of Juan Juando. The defendant, by Aaron H. Palmer, Esq., his counsel, obtained from Judge Livingston an order requiring the plaintiff to show cause of action before him the next day at 10 o'clock a. m., at which time James Stoughton, Esq., counsel for the plaintiff, appeared and discontinued these suits. Before Commodore Taylor was discharged from custody, however, Mr. Stoughton commenced three other suits against him in the ad-

[1] [Reported by Elijah Paine, Jr., Esq.]

miralty court, in behalf of the same and three other plaintiffs, and lodged process with the marshal, entitled as follows:

Thomas Stoughton, Consul, on Behalf of the Owner or Owners of the Vessel General Morales and Cargo, v. Thomas Taylor.

Trespass, civil and maritime. Damages laid at $35,000.

Same, on Behalf of the Owner or Owners of the Brig Teneriffe and Cargo, v. Same.

The like. Damages $40,000.

Same, on Behalf of Juan Juando and Others, v. Same.

The like. Damages $40,000.

The counsel for Commodore Taylor procured from his honor, Judge VAN NESS, an order, that the libellant show cause before him, at his chambers at Kinderhook, in the county of Columbia, the 9th of September then next, at 11 o'clock a. m. of said day, why the said defendant should not be discharged from arrest in the three above-entitled causes; at which time the parties met by their counsel, and the libellants, on showing cause, produced the affidavits of William Thornton, Lewis Morling, and John Hartley, who were seamen under Commodore Taylor, in the El Patriota, on the cruise during which the captures were made. The affidavit of William Thornton was the same in substance as that produced to his honor the judge, when he endorsed on the process, in each of the causes, his order to hold Taylor to bail; and this, as well as the other affidavits, confirmed the facts and allegations set forth in the libels, abstracts of which are given below. Counter affidavits were read on the part of Commodore Taylor, of which his was the most material; but as the judge's opinion affords a sufficient exposition of their contents, it is thought needless to detail them. It not being stated positively in Taylor's affidavit that he was not a citizen of the United States, and this being deemed material, time was granted to the libellant to produce testimony upon this point. On the 19th of September thereafter, the argument of this matter came on again before the judge. On the part of Taylor an affidavit of his own was read by his counsel, stating, that he became a citizen of Buenos Ayres in 1810, and that since that period he had not been a citizen or subject of any other prince, potentate or state, whatever. On the part of the libellant several affidavits were produced; one was a copy of an oath made by Taylor, at the custom-house in Baltimore, the 10th of April, 1816, stating that "he is the sole owner of the schooner called the Romp, that he is a citizen of the United States, and that no other person, a citizen or subject of any other prince, potentate or state, whatever, has any interest in the said vessel." This paper was certified by the collector of the customs of Baltimore, to be a true copy of the original oath on record in his office; and an affidavit was annexed to it, stating, that the deponent had personally compared the said copy with the original in the custom-house at Baltimore. There was also an affidavit identifying Taylor, who owned the Romp in April, 1816, as the same Thomas Taylor who sailed in December, 1816, from Baltimore in the brig Fourth of July, and that from April to December, Taylor had not left the United States. Another affidavit was produced, stating the fitting out, and arming of the said brig, at Baltimore, in December, 1816; that she was there fitted out by sundry merchants of that place, who owned her in shares; that Taylor was to appear the nominal owner, although, in fact, the property and ownership continued in the persons at Baltimore upon the return of the privateer from her cruise; that she was private property, and the government of Buenos Ayres had no interest or concern in her whatever. An affidavit of Ventura Izquierdo was also read, stating, that he was engaged by Taylor to ship with him in December, 1816, to do the writing of the vessel; that Taylor had a commission which was intended for another vessel, and which he endeavored to alter with vitriol to make it serve for the El Patriota; that in making these alterations the said commission was destroyed by the vitriol. Taylor then employed him to make out a new commission, which he did accordingly; the name of the supreme director was signed to it by another person, and Taylor sealed it with a copper seal or stamp, which he had made in Baltimore; that during the cruise then undertaken, the said privateer had no other commission than this which deponent had forged.

Abstracts of the libels: In the case of Juan Juando, the libel alleged, that in December, 1816, a brig called the Fourth of July, was fitted out at Baltimore, within the jurisdiction of the United States, under the command of the said Thomas Taylor, with a hostile armament procured there, and a crew of about one hundred and forty men, to cruise against the subjects and property of the king of Spain. That the name of the vessel, while yet in the waters of the United States, was changed to the El Patriota, the Buenos Ayrean flag hoisted, and a cruise commenced; that during the cruise, in the month of February following, she captured, near the island of Cuba, an American vessel from the Mediterranean, bound to St. Jago de Cuba, with property on board belonging to the said Juan Juando; that to compel the said Juan Juando to disclose the ownership of the captured vessel and cargo, he was, by the consent and permission of said Thomas Taylor, hung up by the neck on board said American vessel, until he declared that the vessel and cargo, of which he, the said Juan Juando and others, were owners, was Spanish property; that said Juan Juando paid said Thomas Taylor $15,000 for the ransom thereof, and they were thereupon delivered up to him; that said Thomas Taylor is a citizen of the United States, was

sailing under a forged commission from the government of Buenos Ayres, and that this action was brought for the recovery of said $15,000 ransom money, and damages for the said trespass. In the case of the brig Teneriffe, the cause of action was the same; the libel stating that she was taken on a voyage from Cadiz to St. Jago de Cuba, with a cargo of wine, brandy, silks, &c., estimated at from twenty to thirty thousand dollars—a prize crew put on board and sent into Margaretta. The felucca, General Morales, was alleged in the libel to have been captured off the island of Cuba, with a cargo of tobacco, segars and dry goods, estimated at $30,000; that the cargo was taken out of her, put into American vessels at sea, and sent into Baltimore. His honor the judge, whose opinion follows at length, sustained the motion, and ordered the defendant to be discharged on filing common bail.

VAN NESS, District Judge. The orders to hold the defendant to bail in these cases, were granted on the exhibition of several affidavits, stating the defendant to be an American citizen, and to have been concerned, some time in the year 1816, in fitting out and arming a brig, or vessel, called the Fourth of July, or El Patriota, within the limits of the United States; to have proceeded in her to sea, and, under the flag of the government of Buenos Ayres, to have cruised against the property of the subjects of the king of Spain, and to have captured merchandise to a large amount, belonging to the individuals in whose behalf these suits have been instituted by the consul of his Catholic majesty. At a subsequent day, the defendant, by his counsel, applied for, and obtained an order directing the plaintiff to show cause why he should not be discharged from custody on filing common bail. The application was founded on and supported by the defendant's affidavit, stating that he was born a subject of the king of Great Britain, but was now, and had ever since the year 1813, been a naturalized citizen of the united provinces of South America. In support of this last fact, he produced his certificate of naturalization. He further stated, that at the time he took the command of the aforesaid vessel, he was, and still is, an officer in the naval service of that government, and verified that fact by the production of his commissions; one of which bears date so early as the year 1814. He denied, also, all participation in fitting out or arming the said vessel; and alleged, that in his public capacity, as an officer of the government of Buenos Ayres, he had purchased and contracted for the delivery of the said vessel at some place beyond the limits of the United States. That she was accordingly delivered to him more than a marine league from the coast of the United States, and produced a bill of sale dated at sea to verify the fact. The counsel for the plaintiff strenuously opposed the reading of this affidavit, on the ground that according to the practice of the supreme court of this state, where the debt is positively sworn to, no counter affidavit can be received. This, to be sure, appears to be the practice of our supreme court, derived from the king's bench. In the common pleas of England it is not so. There, counter and contradictory affidavits are received, and the matter of bail held examinable in that way. But whatever may be the practice of these courts, this is a case to which the rule does not and cannot apply. This is not an action of debt, or of assumpsit: it is founded on an alleged trespass: the acts complained of are not denied, but justified; and whether the defendant is at all liable to arrest for having committed them, is purely a question of law—a question depending not on the laws of any particular country, but on the public law of nations; and on which I think the party is entitled to a decision in this stage of the proceedings; the more so, because in this action bail is not a matter of course, and it lies with the plaintiff to show himself entitled to hold the defendant in custody. This affidavit being received, further time is asked to show, by supplementary affidavits, that although the defendant, as he has stated, may be a native of the island of Bermuda, and may have been thus born a subject of the king of Great Britain, yet he is a citizen of the United States by naturalization. The time required to substantiate this fact having been allowed, further affidavits have been produced by both sides in relation to this point; I shall not examine them minutely, because, on further reflection, I do not consider the fact material. If the defendant was ever a citizen of these states, he is no longer so. If the right of expatriation was ever exercised by any individual, it certainly has been by him. If the exercise of that right can ever be effectual, it must be so in this case.

The occasion will not permit me to go into a full examination of the principles of public law in reference to this right of expatriation. I think, however, that it can be maintained under the established law of nations, and even by the laws and the practice of those who have become the most strenuous advocates for what may be termed the modern doctrine of perpetual allegiance—a doctrine which grew out of the feudal system, and was supported upon a principle which became imperative with the obligations on which it was founded. In this country, expatriation is conceived to be a fundamental right. As far as the principles maintained, and the practice adopted by the government of the United States is evidence of its existence, it is fully recognized. It is constantly exercised, and has never in any way been restrained. The general evidence of expatriation is actual emigration, with other concurrent acts showing a determination and intention to transfer his allegiance.

The evidence in this case is emigration more than twelve years since—swearing allegiance to another government eight years ago—enter-

ing into its service, and continuing in it uniformly from that time to this. On this evidence, I cannot hesitate to say, that the defendant has lost his character as a citizen of the United States; he has abandoned his rights as such; he cannot now claim them, and cannot be called on to perform any of the duties incident to that character. It may, perhaps, be said that the government to which he has sworn allegiance is not independent, and that the act is, therefore, inoperative and void. If that were so, yet the fact of emigration, and the evidence of the animus manendi —the intention to remain abroad and to abandon his citizenship here, as manifested by his oath of allegiance to another government, claiming to be independent, are sufficient to sustain his expatriation. In whatever light the government to which he professes to belong may be viewed by other nations, it is independent in fact, and may forever remain so, although not recognized in form. The obligation, therefore, which the defendant has contracted, I conceive to be binding on him, and utterly incompatible with allegiance or citizenship elsewhere.

Although I am satisfied with this view of the subject, there is another circumstance well worthy of consideration: It appears that the defendant was in the naval service of Great Britain immediately antecedent to his becoming a resident in Buenos Ayres, and assuming allegiance to the government of that country. It is well known, that upon the principles maintained by the British government, the native character, if, under any circumstances. it can temporarily be lost, easily reverts. A return to the country, or into its military or naval service, restores it. In the view of that government, therefore, the defendant was completely a British subject prior to his becoming a citizen of the united provinces of South America. I am inclined to think, that even here this return to the service of his native country must be considered an abandonment and forfeiture of his citizenship.

Under all the circumstances of the case, I am clearly of opinion that the defendant is no longer a citizen of this country. Not being a citizen of the United States, the question is presented broadly, whether this court will take cognizance of this case? or rather, whether it will order the defendant to be arrested and held to bail for acts committed against the subjects of the royal government of Spain, in his capacity of a citizen and public officer of the government of the united provinces of Rio de la Plata, claiming to be independent? Our own citizens can at all times appeal to the tribunals of their own country to enforce their rights, and through the intervention of the same means, they can be coerced to a performance of their duties. In the application, moreover, of our own laws to their conduct, or to questions growing out of a war between a foreign prince and his subjects, this court may find it necessary to decide upon the political independence of a foreign people; but I know of no principle of the law of nations, and certainly there is no municipal law, that authorizes, or at least requires it to take cognizance of questions arising between a foreign monarch and a portion of his subjects. The law of nations, as promulgated by the most respectable authorities, and as illustrated by the usages and practice of modern times, affords, I think, a sufficient and distinct rule for our government in cases of this sort. It is well settled, that when one portion of an empire rises up against another, no longer obeys the sovereign, but, by force of arms, throws off his authority, and is of sufficient strength to compel him to resort to regular hostilities against it, a state of civil war exists, as distinguished from rebellion. It is equally well settled, that in the prosecution of a civil war, all the maxims of humanity and moderation inculcated by the common laws of war, should be observed. The same case in which these principles are found, points out the course to be pursued by foreign nations in such a crisis. It expressly requires that they consider the conflicting parties as two distinct powers, each independent of all foreign authority, contending for rights and for a dominion which no foreign government can justly give or take away; and, therefore, in the words of this great authority, "nobody has a right to judge them." It is said that this government of Buenos Ayres, not having been recognized by our own as free and independent, it cannot be recognized as such by this court; and its decision in the case of The American Eagle is cited to show that this position was adopted in that case. Certainly it was, and so it will be here, without affording any aid to the plaintiff's case, for it will be sufficiently shown in the progress of this investigation, that such recognition, either by the government or this court, is not necessary to entitle the defendant to his discharge. Most assuredly I am not now to determine what would be the operation of a municipal law interdicting trade and intercourse with a foreign prince or state. If that were necessary, I should decide now, as I did then, that it did not prohibit trade with a power not recognized by our government as independent. But, with great respect to the dicta of learned men, very learned, no doubt, in equity and common law, I maintain that it is a question which has nothing to do with that now before the court; and no claim to infallibility, however vainly and presumptuously upheld, can obliterate the distinctions between the operation of a local act, intended to regulate our own trade, and the conduct of our own citizens, and the great principles of public law, whose coercive efficacy pervades the civilized world.

The question is, not whether the government of Buenos Ayres be a foreign prince or state, but whether a civil war is raging between that colony and the government to which it once professed allegiance; and if there be, in what light the parties are to be

viewed by foreign and neutral nations. The solution of this question will scarcely be found in Maddock or in Blake; but that they are to be considered as nations at war, and on an equal footing, as to all the purposes of the war in which they are engaged, is the clear and explicit law of nations. "When a party is formed in a state, which no longer obeys the sovereign, and is of strength sufficient to make head against him, this is called a civil war." "A civil war breaks the bands of society and government; or, at least, it suspends their force and effect." "When a nation becomes divided into two parties, absolutely independent, and no longer acknowledging a common superior, the state is dissolved, and the war between the two parties stands on the same ground in every respect as a public war between two different nations." "This being the case, it is very evident that the common laws of war, those maxims of humanity, moderation and honor, which we have already detailed in the course of this work, ought to be observed by both parties in every civil war." [3] That the present contest between Spain and her colonies is distinguished by all the features of a civil war, will not be denied. The provinces are not contending for a redress of grievances, or to limit the authority of an acknowledged sovereign. They have rejected all authority but that which emanates from themselves—they have proclaimed their independence, and are in arms to support it. It is a great convulsion of a mighty empire. There is no tribunal on earth to decide between them. The contest must be settled by their own swords.

What I have stated is conceived to be the law applicable to this subject; the law not only as written, but as founded on the great and general principles of justice, and consonant to the reason of mankind. The obligations it imposes were claimed by us during our own Revolution, and almost uniformly recognized, not only by other nations, but by the mother country. Although sometimes violated to soothe the wounded pride of power, its force and efficacy have partially, at least, pervaded all similar contests. Whatever, therefore, the courts of the United States might be bound to do, in cases involving the rights of citizens of their own country, I apprehend that they cannot be required, by one of the parties in this war, to decide on the rights or powers of the other. Another view may be taken of this subject. I think it follows from the law, and the reasoning upon it, which have been brought to the consideration of this case, that whether the country to which the defendant claims to belong, has been recognized by the United States as independent, or not; or whether this court is bound to entertain and decide that question, or not; or whether the defendant be a citizen of this country, or not; yet that, in no event, can be held liable in the way now proposed, and that this proceeding must eventually fail.

If the law to which I have referred, must govern the case, of which I think there is no doubt, the parties in this war must be considered as regularly at war under the government and protection of the common laws of war; to be treated as prisoners of war; and on the ocean not pirates. If not pirates, then, of course, acting under an authority that justifies their acts; and thus, individuals not liable as such. Whether or not, then, the independence of these provinces was recognized by the government or this court, the principles of this law, which places the parties on an equal footing in the view of foreign powers, and considers them as regular combatants, would still operate, and exclude the idea of individual responsibility in damages. If this be so, and I am not aware of any authority or principle that can in any way invalidate the position, then whether the defendant be a citizen of the United States or not is immaterial. Quoad this transaction, he is a party to the war, standing, as regards the contending powers, on the footing of every other individual engaged in it; entitled to the same immunities, and not liable, in a civil suit, for damages that may arise to his adversary from acts committed in the prosecution of his employment. If it be objected that he is violating the laws of his own country in entering into this war, the answer is, that then, if there be such laws, he is liable, criminaliter, for their violation. But while a party in the war, acting under the authority of a power, which, for the purpose of this war, must be considered on an equality with its opponents, I think he cannot be prosecuted in a civil suit. Nothing is more common in Europe than for the subjects of one government to enter the military service of another—and they certainly incur none but the common hazards of war. It has never been pretended that they were subject to any personal liabilities not common to the original parties in the war; it is a matter of state, and the authority or government under which they act is alone responsible for their conduct. This remark is particularly applicable to this instance. If this be a public vessel, the property of the nation, then, most especially, the acts of her commander, pronounced valid by her tribunals, are the acts of the nation. A further objection to taking jurisdiction of these cases is, that the property has already been condemned by the sentence of a foreign tribunal, acting as a court of admiralty. It is no objection to the validity of the condemnation that the proceedings were had in a part of Venezuela, if, as I understand the fact to be, Venezuela is an ally in the war. A condemnation in the port of an ally is good. It would be an anomaly in the law to entertain in one country an action for

[3] Vatt. Law Nat. 244, 626; and to the same effect, Id. 630.

personal damages against the captor, when his prize had been legally condemned in the courts of another. The courts of the belligerents have exclusive jurisdiction of the prizes made by their armaments. They have jurisdiction, not only of the question of prize, but of all its consequences. This, as a court of a neutral nation, cannot take cognizance of prizes made by either. If the jurisdiction of the principal matter be exclusive, must it not be so in all matters necessarily incidental? That this country, in a legal point of view, is to be considered neutral, is very clear—not only under the law of nations; but this government, although it has not recognized the independence of the provinces in question, has officially assumed a neutral attitude. As far as any decision has been made, it has decided not to interfere, as announced by the president in his message. As neutrals, then, we must be impartial—and if impartial, we should be as well bound to take cognizance of the causes of action alleged by the one party as by the other. Thus, our courts would be incessantly occupied with the controversies between the subjects of Ferdinand and the inhabitants of the colonies contending for their independence. This would be a strange administration of international law. On occasions of this kind, I apprehend they would only think themselves justified in extending their authority to cases implicating the rights or the conduct of our own citizens, or in protection of our neutral limits, as established by the public law of nations.

The preceding remarks dispose of all the points which were originally presented to my consideration in this case. In a late stage of its examination, however, another ground was taken and exclusively relied on, in opposition to this motion. It was contended, that the vessel by which these captures were made, having been fitted out in the United States, in violation of the act of June, 1794 [1 Stat. 395], the court would take jurisdiction of prizes made by her, and, consequently, of this action. My view of this subject has hitherto been confined to the general principles of national law which it involved; but the earnestness with which this new position was maintained, and my respect for the counsel, who pressed his arguments with great zeal upon the attention of the court, call for an examination of the decisions of the supreme court, in reference to the questions embraced by this controversy. This will necessarily lead to a partial review of the principles I have already laid down, and will require a reference to additional authorities to support them.

I have already stated, that the courts of the belligerents have the exclusive jurisdiction of prizes made by their armaments. This, as a general rule, is too well established to admit of doubt or controversy. It has been adopted as public law for centuries, and uniformly maintained by the authority and practice of all the nations of Europe. That the rule admits of exceptions, is admitted; that this case forms one of them, cannot be conceded. The exceptions found in the books are as follows: "All neutral powers reserve to themselves the right of adjudging the prize, in case the privateer should be accused of having made it within their jurisdiction, or in so far as the prize belongs to their own subjects, whether wholly or in part." I have already recognized the principles of this rule nearly in the same terms. Sir William Scott, in the case of The Flad Oyen [1 C. Rob. Adm. 135], seems disposed to limit the jurisdiction of neutral courts to the "single case of an infringement of neutral territory"—that is, to captures made within neutral limits, which are admitted by the law of nations to extend to a marine league from the coast. The reason on which this exception is founded applies to the other with equal force. If, as a neutral nation, we have a right to protect our territory from violation, it would seem to follow that we have the right to protect our citizens and their property from oppression and plunder. It is very obvious, however, that belligerents have, at all times, and particularly during recent wars, been very tenacious of their exclusive jurisdiction in cases of captures made by their armed vessels. They are extremely jealous of the interference of third parties; and the decisions of the high court of admiralty in England, are at variance with those of the supreme court of the United States, on the right of neutrals to interfere with their authority in matters of prize. The former confines the right to "an infringement of the neutral territory"—the latter has gone a step further, and, although its decisions have fluctuated somewhat since the organization of our government, as is apparent from the cases of Glass v. The Betsey [3 Dall. (3 U. S.) 6], and U. S. v. Peters [Id. 121]; yet, from the cases of Talbot v. Janson [Id. 133], The Den Onzeheren [unreported], and The Alerta [9 Cranch (13 U. S.) 359], the following rule may be extracted: That the courts of this country have jurisdiction over captures made by foreign vessels of war, provided such vessels were equipped here, and the prizes are brought infra presidia of this country. This modification of the rule is probably conceived to be a right incident to that of protecting our territory from infringement. Its exercise, however, is attended with much difficulty, and it is, perhaps, worthy of consideration, whether the neutrality of a country is not more certainly and safely preserved by adhering closely to the general rule, than by multiplying exceptions and attempting to regulate the exercise of equivocal and unimportant rights. The sensibility of belligerents is ever active on the subject of their military and naval operations; and neutral interference, even in cases of acknowledged propriety, is often productive of complaints

and perplexing controversies. The general rule is simple in its principles and explicit in its terms: when our citizens complain to the tribunals of their own country of injustice and oppression, they must be heard, and the arm of the government must be extended to their relief: it is justified and required by the fundamental obligations of the social compact—protection is due to allegiance. When our territory is infringed, it must be protected; this is a matter of plain, palpable right, on which rests the safety and integrity of every independent nation. But what shall be considered an infringement of neutral territory? The answer involves neither doubt nor difficulty: neutral territory is violated by every hostile act committed within the jurisdictional limits of its government; neutral limits are well defined, and, at this day, well understood—and making captures within them are acts so distinct and violent in their nature, and so injurious in their effects, as to satisfy at once the understanding and the reason of mankind. But how a capture on the high seas can be an infringement of our territory, a violation of our neutrality or sovereignty, is not so easily comprehended. There is difficulty in the explanation, abstruseness and complexity in the doctrine, which places our neutral rights upon nice and critical distinction, and upon the constructive operation of a general rule, otherwise plain and definite in its outline. It seems to me, that by the construction which has been thus adopted, the operation of the rule has been extended to the utmost limit which its principles will justify. The cases in which it was first applied were sufficiently gross; they involved directly the dignity and responsibility of the government, and appealed forcibly to the justice of the court; they presented the case of American citizens, pretending expatriation, pronounced fraudulent by the whole court, and obtaining commissions from a foreign government for temporary purposes; American citizens, in fact, fitting out vessels belonging wholly to American citizens, making captures in our neighborhood and bringing them immediately within our jurisdiction. More flagrant violations of our own laws, and of all neutral obligations, can hardly be imagined. But other occasions may arise, in which this extended application of the rule in question may generate great and serious perplexities. It cannot be intended, as would seem to be implied by the opinion of Judge Bee, in Moodie v. The Betty Carthcart [Case No. 9,742], that a vessel fitted out in our ports is so tainted by the illegality of that transaction, as to be rendered incapable of making a valid capture, under any circumstances, or at any distance of time or place: if not, when is her incapacity to cease? Is it when she has been transferred bona fide by those concerned in her equipment, to an innocent purchaser, whether an individual or a government? or after her commander has been changed, or her commission renewed? or after she has entered a port of her own government, and commenced a new cruise? If, as Judge Bee contends, "vessels of war so fitted out (that is, in the neutral country) are illegal ab origine, and no prizes they make lawful, as to the offended power," I am utterly at a loss to determine where their inability to capture legally terminates. It must be perpetual, if the principle be correct, or at least must continue while the vessel endures. This view of the subject exhibits at once the difficulties in the application of the rule, as modified by our own courts. I have not suggested any improbable event, and in testing the correctness of a rule or principle, it is certainly admissible to trace its operation and effect upon any state of things that may be produced by common and natural occurrences. It is further stated, in the decision of the same case, that, "by the law of nations, no foreign power has a right to equip vessels of war in the territory or ports of another; and that such acts are breaches of neutrality." This position, I conceive, is laid down too broadly. I apprehend it is not, in itself, a violation of the law of nations, to equip vessels of war in a neutral port. It may be a departure from neutrality on the part of the nation that permits one belligerent to equip, and withholds the like privilege from the other; but it is no breach of neutrality on the part of the belligerent, unless the act be interdicted. It is, therefore, common on the breaking out of hostilities between any two nations, for others who intend to remain neutral, to prohibit the belligerent to arm or equip within their territory or jurisdiction. The question is then presented, whether, if this prohibition be disregarded, the transgressor is punishable otherwise than under the municipal law of the country which enacts it. It seems to me, that, as it was not unlawful to arm or equip before it was interdicted by a local regulation, the punishment must be exclusively under the law which creates the offence. Neither are the citizens or subjects of one country or government prohibited by the law of nations to enter the military or naval service of another; but as such conduct may compromit the neutrality of a nation it is not unusual to prohibit it. The offence is declared, and the punishment provided, by the municipal law of their own country.

With great deference and respect, I have suggested some of the most obvious difficulties that may arise in the execution of the law, as now settled in the United States. It would not be difficult to show, that the principle upon which it rests, if pressed to the extent of its spirit, would lead to other inconveniences, and might open sources of collision with other nations, not easily closed against the angry spirit that pervades them. But whatever may be my humble view, and hasty impressions of this subject, I yield

them, without hesitation or reluctance, to the exposition of the law, as handed down to all inferior courts by the enlightened wisdom of the highest judicial tribunal in the country. Its decision on the subject is the law of the land, and emphatically the law of this court. It will be conceded, however, as a sound rule, that a law which, in its effects and operation, involves matters of great delicacy and national importance, is to be enforced only in cases fairly within its spirit and its terms. With a view, then, to apply it to the case before the court, it will be necsary to ascertain, with precision, what the law is, as settled by the supreme court of the United States. The decision of Judge Bee, of the district court of South Carolina, in the case of Jansen v. The Vrow Christina Magdalena [Case No. 7,216], seems to be the first to have presented to the consideration of the supreme court (3 Dall. [3 U. S.] 133) the effect of captures by vessels fitted out in our ports. The judge, in delivering his opinion in that case, says: "This court, by the law of nations, has jurisdiction over captures made by foreign vessels of war of the vessels of any other nation with whom they are at war, provided such vessels were equipped here, in breach of our sovereignty and neutrality, and the prizes are brought infra presidia of this country. By the law of nations, no foreign power, its subjects, &c., has a right to equip vessels of war in the territory or ports of another. Such acts are breaches of neutrality, and may be punished by seizing the persons and property of the offenders. Vessels of war, so equipped, are illegal, ab origine, and no prizes they make will be legal as to the offended power, if brought infra presidia."

I have already stated some of my objections to the broad principles here laid down, and have merely referred to them again in this place, to point out more plainly what concurrence of circumstances is necessary, even upon the doctrines maintained in that case, to give jurisdiction to this court. It will be seen, that even in the opinion of that able judge, the vessels must not only have been equipped here, but their captures must be brought infra presidia of this country. That is deemed essential to vest jurisdiction in the court, and to institute the only proceedings that can be originated under the law of nations. 'Tis true, the court there say, that the offenders may be punished by seizing their persons and property: but, surely, it does not mean under the law of nations. What is the offence? Certainly it is no crime to capture enemy property on the high seas, under a valid commission, and in pursuance of instructions from a sovereign as supreme as our own. The captor is not only authorized, but bound to make the capture; and the utmost extent to which the doctrine I am examining can be strained, is to declare it unavailing and ineffectual, if brought within our jurisdiction: not that it was a crime to make it—the crime consisted in equipping the capturing vessel in our ports which was prohibited by a municipal law, and under that, if it provides a punishment and a penalty, the persons and property of the offenders may be seized. Under the law of nations, the court would only, I apprehend, set the captured property at liberty—declare the capture void, and as if not made. And here it becomes a natural inquiry, as directly connected with the case before me, whether the court would, under any circumstances, proceed to assess damages against the captor, supposing him to be the subject of a foreign prince, and duly authorized by his sovereign to make prize of enemy property. The act of making the capture would, in such case, be unquestionably legal, and if the capturing vessel had, at any time, been fitted out in the United States, the capture, if brought infra presidia its ports, would be voidable only. On no ground, then, of law or reason could a claim for damages be sustained. It is not possible, I conceive, for the courts of this country to punish, in damages, the subject of another government for executing the laws or mandates of his own sovereign without or beyond its jurisdiction. In the case of Talbot v. Jansen [supra], allowances were made for interest and demurrage, but not in the shape of damages, and upon a very different principle, I apprehend, from that which would operate in a naked case of illegal equipment. There the whole transaction was American; the capturing vessel built in this country and owned by American citizens; the commander and his crew American citizens. He pretended an expatriation, but his home, his domicil, and that of his family, was still in this country; he set up a sale, too, of the vessel, but the whole transaction was a fraud throughout. The capture, therefore, was illegal in its inception. Not void only, but he had no right to make it. These features distinguish this case from that of The Den Onzeheren. There restitution of a prize was ordered in the district court, on the ground that the force of the capturing vessel had been augmented in this country; but without damages, as the privateer was admitted to be French, and regularly commissioned. The decree, however, was reversed in the court above, on new evidence, which sufficiently repelled the charge of augmentation of force. I shall have occasion presently to recur for a moment to this view of the subject. Both these cases recognize the principle that prizes made by armed vessels, either equipped originally, or whose force has been augmented here, are to be restored, "if brought within our jurisdiction."

In Rose v. Himely, 4 Cranch [8 U. S.] Append. 513, Mr. Justice Johnson lays down the principle as follows: "A prize brought into our ports would be in nowise subjected, by that circumstance, to our jurisdiction, except, perhaps, in the single case of its being

necessary to assume the jurisdiction to protect our neutrality or sovereignty, as in the case of captures within our jurisdictional limits, or by vessels fitted out in our ports." The expression of this opinion was produced by the discussion of an incidental point in that cause. The main question was not analogous to that under the consideration of this court. In the case of The Alerta, 9 Cranch [13 U. S.] 359, Washington, J., delivered the opinion of the court, and states: "If the capture be made within the territorial limits of a neutral country, into which the prize is brought, or by a privateer which had been illegally equipped in such neutral country, the prize courts of such neutral country not only possess the power, but it is their duty, to restore the property so illegally captured to the owner." Again: "All captures made by means of such equipments are illegal in relation to such nation, and it is competent to her courts to punish the offenders; and in case the prizes taken are brought infra presidia, to order them to be restored."

These are all the cases which it seems necessary to examine. They afford a perfect view of the law, as laid down by the supreme court; and it is plain that the utmost extent of the doctrine they maintain is, that captures made by vessels equipped in a neutral nation are illegal only in relation to such nation, and if they are brought infra presidia her ports, restitution will be ordered; no other remuneration is held forth; no other resource is opened to the captured complainant. It will not be denied that an exception to a general rule is to be taken strictly; that it goes no further than its terms clearly imply. Indeed, it would be impossible, upon any known principles of admiralty or prize law, to take jurisdiction and award restitution under any other circumstances. No court can exercise prize jurisdiction, unless the res ipsa, the corpus, be actually or constructively in its possession. If authorities be necessary to support a position so universally known and understood by every civilian, I refer to 2 Browne, Civ. & Adm. Law, 100–102; 4 Browne, Civ. & Adm. Law, 46; [Rose v. Himely] 4 Cranch [8 U. S.] 254, 277; [Hudson v. Guestier] Id. 297, 513, 514. I might now call upon the counsel for the plaintiff to prove, affirmatively, that their case is within the exceptions established by these decisions of the supreme court. They have furnished neither analogy nor precedent for their proceeding, but have relied entirely upon the irregular and unsound inference, that because the capture was illegal as to this country, it was illegal as to Spain; and that, because the property would have been restored if brought infra presidia, therefore they will be permitted to pursue a personal remedy. But is it not fallacious, grossly fallacious, to infer that an act illegal as to the offended power, a neutral, must be so as to the opposing belligerent; and that, because the property captured would be restored if brought within our jurisdiction, therefore, if it be not brought within it, we will give a remuneration in damages, through the medium of an action of trespass. This reasoning is unworthy of a formal refutation. It is destitute of all legal precision, and, if permitted to prevail, would confound all the established distinctions between belligerent rights and neutral duties. As no positive authority of any sort has been produced to authorize this extraordinary proceeding, I should be justified by the usages of all courts to stop here, and order the defendant to be discharged; but I shall proceed to show, negatively, by authority, and by reasoning conclusive (at least to my own mind), that this action cannot be maintained, and that the plaintiff is not entitled to hold the defendant to bail. Here it is proper to recur to a fact which will render the authorities to which I shall refer directly applicable to this case, to wit: that this capture was condemned by a court of admiralty, sitting and proceeding under the authority of the government that authorized the capture; or if the certificates of condemnation should be deemed irregular, or not sufficiently proved, yet that the prize was carried infra presidia a port of the capturing power.

It would be an idle waste of time, and trifling with the understanding of the profession, to cite many authorities to prove that a condemnation of a prize in a court of admiralty is binding and conclusive against all the world. The following abundantly show it: T. Raym. 473; 1 Coll. Jur. 153; [Penhallow v. Doane] 3 Dall. [3 U. S.] 78; Rose v. Himely, 4 Cranch [8 U. S.] 269–271, 282, 283. In Penhallow v. Doane [supra], Patterson, J., says: "The sentence of a court of admiralty, or of appeal in questions of prize, binds all the world, as to everything contained in it, because all the world are parties to it. The sentence, so far as it goes, is conclusive to all persons." But if the condemnation has not been sufficiently proved, yet the prize was carried infra presidia the ports of the captor. That is undoubted. To prove that this excludes all remuneration in damages in the courts of the United States, I shall first cite the case of U. S. v. Peters, 3 Dall. [3 U. S.] 121, as directly in point. Most of the facts in that case were the same as in this; the capturing vessel was alleged to have been fitted out in the United States; the commander alleged to be an American citizen, and neither allegation denied; but there were other facts, which made the case stronger than this, and pressed with great force upon the justice of the court. The property captured was American, but, as in this case, had not been brought into the ports of the United States, and damages were sued for by the American owner. The capturing vessel and

her commander were both within the jurisdiction of the court, and both had been arrested by process issued out of the district court of Pennsylvania, and a motion was now made to the supreme court of the United States, for a writ of prohibition, directed to the district court. Upon the argument, the very question now under consideration here was raised, and stated in terms; that is, in the words of the reporter: "The controversy turned principally upon this point: whether the district court could sustain a libel for damages, in the case of a capture, as prize, made by a belligerent power on the high seas, when the vessel captured was not brought within the jurisdiction of the United States, but carried for adjudication infra presidia of the captors." It will not be disputed that this is the very point I am called on to decide; and it must be remembered that the captain, in that case, was under arrest as well as his vessel. The supreme court, after solemn argument, directed a writ to issue, prohibiting the district court from holding further plea of the premises, and directing, forthwith, both the commander and his vessel to be released. With this case on record, it is a matter of surprise, and worthy of animadversion, that this proceeding should have been attempted, and still more singular, that a refusal to sustain it should be deemed extraordinary, and pregnant with alarming consequences.

I shall advert to one authority more. It is not a decision of the supreme court, but of a very enlightened judge, who elucidates every subject he examines with great ability and research, and whose judgments are entitled to the confidence and respect of every tribunal acting under the laws of the United States. It is the opinion of the circuit court of the United States for the First circuit, in the case of The Invincible [Case No. 7,054]. I was referred to it, as showing that the court, in that case, recognized the doctrine laid down by the supreme court in Talbot v. Jansen, and The Alerta [supra]; and so it was bound to recognize it, as is every subordinate tribunal—so does this court, in the very terms in which it is given. Judge Story's construction and application of the law is precisely that which is adopted here. Alluding to the cases I have just cited, he says: "But allowing these cases to have the fullest effect the most liberal construction can impute to them, they only decide that the jurisdiction of our courts in matters of prizes made by foreign cruisers, attaches whenever the prize property is within our ports. In the case before us, the cruiser itself only is within the country; and not the captured ship in the character of prize. It is, therefore, clearly distinguishable." The cruiser was in the country and so was her commander, but not a word escaped the counsel or the court, that would authorize a pretence to hold him liable. If prize jurisdiction does not attach when the cruiser and the commander are both within the jurisdiction of the court, is not the conclusion irresistible and complete, that it does not when the latter alone is here? But more is said in this opinion applicable to this case. After stating, that in general, in cases of marine torts, the admiralty will sustain jurisdiction, where either the person or his property is within the territory, and arrest either, he adds: "But it affords such remedies only where the tort is a mere marine trespass, and not where it involves directly the question of prize." Further: "In the next place, the principal question involved in a trial under such circumstances, necessarily is the question of prize." And again: "Whether damages shall in any case of capture be given, must depend upon the law of prize, as understood and administered by the foreign sovereign, or in a case of probable cause, upon the subsequent conduct of the captors. The damages, therefore, are not an independent and principal inquiry, but a regular incident to the question of prize, in whatever manner the process may be instituted; and this consideration disposes of that part of the argument in which it is assumed, that although a neutral tribunal may not directly entertain the question of prize, yet it may collaterally, when it is a mere incident to the question of damages." This opinion supports all the position I have taken in this cause. And as my attention had not been directed to it when I decided several points in the early stages of this controversy, it is a matter of great satisfaction to perceive, that the principles I maintained were in strict conformity to this exposition of the law.

The conclusion will no longer be resisted, I trust, that in matter of a prize made by foreign cruisers, the courts of the United States can take no jurisdiction, unless the prizes be brought within our ports, although the capturing vessel be outfitted here; and it is proved as well as admitted, that when a neutral power does not take cognizance of the case, under one of the exceptions to the general rule, then the courts of the capturing power have the sole and exclusive jurisdiction. It is next to be shown, that the court having exclusive jurisdiction of the principal question, has also of all its incidents and consequences. As this opinion has already been extended to a length somewhat unusual, I shall be concise in what remains to be said.

Two cases in Carth. Possine Daug. 398, 474, are full to this point, and, also, Le Caux v. Eden [2 Doug. 594], and Lindo v. Rodney [Id. 613, note]. "If the admiralty is possessed of a cause, it has a right to try every incidental question." [Glass v. The Betsey] 3 Dall. [3 U. S.] 6. "The original act derived its quality from the intention of the seizure, which was as prize; and the law precludes any court from deciding on the incident, that had no jurisdiction of the original question."

3 Dal. & Coll. Jur. "From the very nature of things, the question of damages must be determined by the same tribunal that determines the question of prize; it is an incident, and whoever takes cognizance of the principal question, must likewise take cognizance of that." [U. S. v. Peters] 3 Dall. [3 U. S.] 126.

This is from the argument of counsel, but it derives the weight of authority from the recognition of the opposite counsel in the one case, and of the court in the other.

Mr. Justice Johnson's opinion in Rose v. Himely [supra] recognizes these principles as undoubted law; and, as has been shown in the case of The Invincible [supra], it is decided expressly, that the court not having jurisdiction of the question of prize, had not of the question of damages, in whatever manner they might be claimed. Jurisdiction, then, of the question of prize, draws after it jurisdiction of all its incidents; and, in the language of Mr. Justice Story, "damages are a regular incident to the question of prize." They are not only a regular, but an inseparable incident. There can be no damages for a taking as prize, unless the prize be tried and acquitted. It can only be tried in a prize court. By the constitution and fundamental laws of that court, it is not only authorized, but bound to give redress, by way of damages, for a capture, which, upon the trial, proves to have been illegally made; they can nowhere else be ascertained and awarded. There are the parties to make, to hear, and repel each other's allegation—there are the papers, documents and testimony, by which alone the court can be governed in its examinations and decisions. This investigation forms a part of the trial of the prize—the same facts that establish the character of the capture, viz.: whether it be prize or no prize must determine whether there shall be damages or no damages. If they are not claimed in that court they cannot be claimed elsewhere. The opinions of Buller and Lord Mansfield establish these positions beyond all controversy; and that a distinct and independent action of trespass will not lie for a taking as prize. A seizure as prize is no trespass, though it may be wrongful. The authority and intention with which it is done deprive the act of the character that would otherwise be impressed upon it. The tort is merged in the capture as prize. It is one of the objects of a prize court to inquire into the authority by which the capture is made. If by the authority of the sovereign, the original taking must be deemed legal, as to the party committing the act; the ultimate validity of the prize will depend on subsequent investigations; but the party making the capture is justified by the orders of his sovereign. They convert the act of the individual into a matter of state. The moment an act is authorized or directed by the supreme power of a nation, the contest is national, not personal—the dispute is not between the individuals but between their governments. This capture is proved to have been made under the authority of the government of Buenos Ayres: the defendant, therefore, incurred no personal responsibility. However the act may have been considered in relation to the offended power, if the prize had been brought within its jurisdiction, it was, unquestionably, legal as between the parties.

From all the decisions, therefore, of our courts, taken in connection with the general principles of international law, the following rule indubitably results:—That captures made by means of equipments obtained here, if brought within our jurisdiction, shall not avail; but the capture, if authorized by the sovereign of the captor, is legal as between the parties; and if carried into his possession, or infra presidia his ports, cannot be recovered here. On this conclusion I rest with perfect confidence. Enough has now been shown for the purposes of this case; but as it has been made the subject of animadversions not altogether decorous or proper, I shall proceed to show, that upon principle and indisputable authority too, no suit or proceeding of any sort can be maintained in the courts of a neutral nation, by the subjects of one belligerent against the subjects of the other, for acts growing out of the war. If an action of trespass could be maintained for an act committed beyond our jurisdictional limits, so could every other calculated to repair the injuries and redress the grievances that would naturally flow from a state of war; and how preposterous would be the spectacle afforded by belligerents prosecuting each other in neutral courts in actions of trespass, false imprisonment, and even assault and battery. All their battles would be fought over again on neutral ground. But these things are not permitted. Neutrals have nothing to do with questions of right or wrong between the belligerents, and will not suffer them to be agitated in their tribunals. This rule of conduct is prescribed by all writers who have treated of the rights and duties of neutrality. I shall cite a few authorities that are very explicit on this point: "The neutral ought to consider as lawful whatever either of the belligerents may do to the other; and should regard no act of warfare as unjust. Those who are not judges between the contending nations, and who are no parties in the war, have no right to take cognizance of their acts, or to decide on the justice of their cause: it is necessary, therefore, that every act done by either of them, during the war, should be regarded by all neutral powers as lawfully done." 2 Az. 64. "As between the belligerents the neutral is bound to see right; whenever he sees possession of a right unaccompanied by possession, he cannot take notice." Byn. 118. In this case the prize is in possession of the sovereign of the captor, and we, as neutral, are bound to consider that possession right-

ful. "When a nation remains neutral in war, she is bound to consider it equally just on both sides, as relates to its effects, and, consequently, to look upon every capture made by either party as a lawful acquisition. To allow one of the parties to enjoy in her dominion the right of claiming things taken by the other, would be declaring in favor of the former, and departing from the line of neutrality." Chit. Law Nat. 94. These principles are laid down by Vattel, in different places. C. 2, 3, 4. I shall cite but one case, from Robinson, out of many that lie before me. In The Henrick and Maria, 4 C. Rob. Adm. 46, 47, Sir William Scott says: "The neutral state has nothing to do with the rights of force possessed by the one belligerent against the other; it has nothing to do with the enforcement or consummation of such rights: it owes to both parties the simple rights of hospitality—and even these are very limited in the practice of most civilized states." "The neutral state can have no compulsory jurisdiction to exercise upon either party upon questions of war depending between them; nor can any such jurisdiction be conveyed to it by the authority of one of them." These are the principles that prevail in the courts of Europe, and they have been recognized by our own. In the case of U. S. v. Palmer, 3 Wheat. [16 U. S. 610], the supreme court says: "If the government of the Union remains neutral, but recognizes the existence of a civil war, the courts of the Union cannot consider as criminal those acts of hostility which war authorizes, and which the new government may direct against its enemy." These principles are derived from elementary writers of established reputation, and adopted as rules of decision, as well in foreign as domestic tribunals, instituted for the administration of public law. They are founded in good sense, and seem to have anticipated the absurd consequences that would necessarily flow from permitting belligerents to pursue each other into neutral countries, and there seek civil remedies for acts of war.

It seems unnecessary to pursue any branch of this inquiry further. Unless my view of the law, and the authorities I have submitted, are imperfect or fallacious, every position I have assumed has been supported by authorities alone binding and conclusive. Although the blind zeal and hardihood of the partisan may resist conviction, unprejudiced reason and common sense must be satisfied. There is now no ground left on which this proceeding can be sustained, and the defendant must be discharged on common bail.

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JUANITA, The (WAGNER v.). See Case No. 17,039.

JUARES (UNITED STATES v.). See Case No. 15,500.

JUDAH (EISEMAN v.). See Case No. 4,321.

JUDD (MIDDLETOWN TOOL CO. v.). See Case No. 9,536.

## Case No. 7,559.

JUDD LINSEED AND SPERM OIL CO. v. The JAVA.

[Holmes, 15.] [1]

Circuit Court, D. Massachusetts. Sept., 1870.[2]

COLLISION—STEAMSHIP AND SCHOONER—INEVITABLE ACCIDENT.

A steamship undertaking, in a channel frequented by small vessels and boats, to run at an acute angle under the stern of a vessel at anchor, so large and standing so high out of water as to intercept the view from the steamship of small vessels and boats, is bound to proceed at such rate of speed and with such vigilance as will enable her to keep out of the way of a sailing-vessel passing from behind the anchored vessel.

[See note at end of case.]

Appeal from the district court of the United States for the district of Massachusetts.

[This suit was brought by the owners of a cargo of linseed shipped on the James McCloskey against the Cunard steamship Java (James Burns, John Burns, and Charles McIver, claimants), to recover the damage to the cargo, caused by collision. The district court decreed for the claimants (Case No. 7,234), and the owners of the cargo appeal.]

R. H. Dana, Jr., and L. S. Dabney, for appellants.

W. G. Russell, for claimants and appellees.

SHEPLEY, Circuit Judge. The libel in this case is brought by the owners of a cargo of linseed, which was shipped on the schooner James McCloskey, and damaged to the extent of about seven thousand dollars, in consequence of a collision in Boston harbor between the schooner and the steamship Java, of the Cunard Line.

Libellants claim that "the steamship caused the collision by not seasonably altering her course, and by not seasonably stopping and backing her machinery, and by her unusual and venturous navigation, or by one or more of said faults."

The claimants contend that a good lookout had been kept by the Java during the whole time she was coming up the harbor; that it was impossible for her to discover the schooner sooner than she was discovered, owing to the fact that the school-ship George M. Barnard was interposed between her and the schooner; that immediately upon discovering said schooner, the helm of the Java was put hard to starboard, and her engines were reversed at full speed, and that all that was possible to be done was done aboard the Java to avoid the collision; that at the time of the collision the speed of the steamer was so reduced as not to be equal to that of the schooner drifting with the tide. They also

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[1] [Reported by Jabez S. Holmes, Esq., and here reprinted by permission.]

[2] [Reversing Case No. 7,234. Decree of the circuit court reversed in 14 Wall. (81 U. S.) 189.]

contend that there was fault on the part of those in charge of the schooner, in allowing her to drift, without being under steerage-way, and without sail set, and concealed by the ship George M. Barnard, into the way of the steamship; and that if the schooner had been under sail so as to have answered her helm, she might, by putting her helm to starboard, even after the schooner was discovered by the steamship, have avoided the collision. The answer also claimed exemption of the steamship from liability by reason of her being an inward-bound ship, in sole charge of a pilot, taken on board under a compulsory statute of Massachusetts. This ground of defence was not relied upon in argument, it not being considered an open question in this circuit since the decision in Camp v. The Marcellus [Case No. 2,347].

The undisputed facts in the case are, that the schooner, between the hours of twelve noon and one of the afternoon of Nov. 7, 1866, was towed from one of the wharves in East Boston into the stream, and was getting under way near the school-ship George M. Barnard, having her foresail partly hoisted, when her master saw the Java coming round the stern of the George M. Barnard, heading directly towards the schooner. The schooner's helm was put hard a-starboard. The steamer was proceeding very slowly, having stopped her engines a short time before in order to avoid a collision with another schooner which had passed down the harbor inside of the George M. Barnard and ahead of the James McCloskey. Immediately upon seeing the McCloskey, the helm of the Java was put hard to starboard and her engines were reversed; but the steamer struck the schooner abaft of the main rigging and knocked a hole in her, whereby the cargo of linseed was damaged. The weather was clear and fine, with a good breeze from a westerly direction. The tide was from one to two hours ebb, running from one and a half to two knots an hour. The Java, a propeller steamer of twenty-seven hundred tons burden, three hundred and sixty feet in length, drawing about nineteen feet of water, was coming up the harbor to her dock in East Boston. The McCloskey was a fore-and-aft schooner, one hundred and twenty-one feet long, proceeding down the harbor from her wharf at East Boston.

The school-ship is a large vessel, light and high out of the water, which, during the winter months, was kept constantly moored near the East Boston side of the channel, leaving a large space on the outside between her and Boston, and a comparatively narrow passage on the other side between her and East Boston. Vessels of the size of the Java rarely take this passage, because they could not pass inside of the school-ship, excepting at or near high water. But the evidence shows that, at the state of the tide at the time of the collision, it would be prudent and safe for a vessel of the size of the Java to go through that passage, if it was unobstructed by other vessels.

It is contended, on the part of the libellants, that the Java was in fault in coming up as she did to a point about midway of the channel, "about abreast the Slate Ledge," and "a little above the Slate Ledge buoy," before she determined whether to go inside or outside the school-ship, instead of keeping a course up the harbor more nearly parallel with that in which the school-ship was lying, so as to keep open the view of the channel inside the school-ship. But, as well stated by the learned judge of the district court in his opinion in this case, "whatever direction she had taken, the school-ship would have shut out some points of the compass, and there was no reason to apprehend danger from one point more than from another."

It is also contended that the Java pursued an unusual course in attempting to go to her dock by the passage between the school-ship and the Bird Island Flats. Much testimony has been taken in the case upon the frequency of the use of this passage by steamers of the class of the Java, and there is much conflict in the testimony. But it becomes comparatively immaterial in this case in the view we take of it, for two reasons: First. A vessel is not to be considered in fault merely because she takes, for reasons of her own convenience or necessity, an unusual course; but when there is a usual and an unusual course, the vessel taking the unusual course for her convenience does it at her peril, and is bound to see that she does it in safety. The Fyenoord, Swab. 374; The Peerless, Lush. 31; The Falkland, Browning & L. 204; The Roanoke (New York & V. S. S. Co. v. Calderwood) 19 How. [60 U. S.] 241. Secondly. The collision might and would have happened as it did had the school-ship been anchored in any other place, provided the relative positions of the three vessels in reference to each other had been the same.

It therefore seems properly to resolve itself into a consideration of the duties and liabilities of a steamship running under the stern of a vessel at anchor, at an acute angle, considered in reference to the possibilities and probablities of a small sailing-vessel passing at the same time behind the vessel at anchor, which was so large and high out of water as to intercept the view of a small schooner, tug-boat, or flat-boat, in a channel or passage much frequented by small vessels. It is urged that the steamer under these circumstances proceeded very slowly and with a vigilant lookout, and therefore, as the schooner was not seen from the steamer in season for those in charge of the steamer to avoid the schooner, the collision must be considered in the light of an inevitable accident. But is seems very difficult to apply the term "inevitable accident" to a collision occurring under such circumstances, at midday and in fine weather. The steamer was not disabled; and nothing happened which she was not

bound to anticipate as possible at least, if not probable. A collision is properly regarded as the result of inevitable accident, "which occurs when both parties have endeavored by every means in their power, with due care and caution and a proper display of nautical skill, to prevent its occurrence." Union S. S. Co. v. New York & V. S. S. Co., 24 How. [65 U. S.] 313. "If," says Dr. Lushington in The Plato v. The Perseverance, "the accident could have been avoided by ordinary skill, diligence, and precaution, then it is not an inevitable accident." There is always a period of time before the actual collision when it is inevitable,—when skill, diligence, and precaution are unavailing,—because too late. "Precautions," says Mr. Justice Clifford in the case of Wakefield v. The Governor [Case No. 17,049]; "must be seasonable in order to be effectual; and if they are not so, and a collision ensues in consequence of the delay, it is no defence to say that the necessity for precautionary measures was not perceived until it was too late to render them availing."

The school-ship for many years had been constantly, during the winter months, kept moored in the same position near the edge of the channel. She was large and high out of water. The pilot of the Java knew her position, and that the view of a small sailing-vessel might be shut out by the school-ship. The steamer was bound to guard against the emergency. If she went under the stern of the school-ship at an acute angle, under such circumstances she was bound by law to proceed so slowly and with so much vigilance that she could keep out of the way of a sailing vessel. Any degree of speed or any want of vigilance which left her powerless to prevent a collision with a sailing-vessel after it was seen, which she had a right to expect to meet in the position in which it was seen, was a want of seasonable and proper precaution, and therefore a fault.

It is said a man may drive round the corner of a road, if that is the most convenient way home, though he ought to do it slowly and with more than ordinary care if he cannot see what is on the other side. But suppose one man is driving round the corner of a road where the view is obscured by a high wall or building, and has reason to suppose that there may be coming round the corner in an opposite direction another who has a paramount right of way, who has a right and is under obligation to keep his course, while the first man is bound to keep out of his way. Would not this case better illustrate the relative positions of a vessel under steam and one under sail under such circumstances, and in each case would there not exist an obligation to see a clear course before proceeding?

Although, in the case of The Isaac Newton, 18 How. [59 U. S.] 581, the sails of the schooner were hoisted so as to have been visible over the hull of the vessel at anchor, and in that respect it is distinguishable from the present case, yet the decision was placed by the court on the ground that the attempt of the steamer to come to her landing between vessels at anchor, without first ascertaining that the track was clear, was culpable, and on that ground she was condemned in damages. If the night be too dark to distinguish a small vessel in season, a large steamship should not attempt to go down the harbor. The R. B. Forbes [Case No. 11,598]. It is not easy to see why the principle is not the same whether the view be intercepted by any large object at rest or obscured by darkness.

To hold the steamer free from fault under these circumstances would be to relax the rule well settled in the decisions of the courts of the United States, introducing conflict where there is now uniformity of decision, and establishing a precedent which might lead to danger. See The Oregon v. Rocca, 18 How. [59 U. S.] 570; St. John v. Paine, 10 How. [51 U. S.] 583; The Genesee Chief, 12 How. [53 U. S.] 461; New York & Liverpool U. S. M. S. Co. v. Rumball, 21 How. [62 U. S.] 372; The Carroll, 8 Wall. [75 U. S.] 302; The Rapid [Case No. 11,575]. The Java voluntarily and for her own allowable convenience placed herself in a position where, meeting a small vessel in a place not unusual, and where such a meeting might reasonably have been expected, she could do nothing by her machinery, her anchors, or her helm, to avoid the collision.

We do not perceive that any fault is fairly imputable to the schooner. She came from the dock without her sails being set, because they forced her against the wharf. She obtained the assistance of a tug to pull her out into the stream; and with the aid of the tug and the tide came down rapidly to the vicinity of the school-ship, and was setting her foresail, and had it from half to two-thirds up, when she saw the Java. There is no sufficient proof of any unusual or negligent delay in hoisting the sails, or of her being in fault in any other respect.

Decree of district court reversed. Decree to be entered for libellants. Case to be referred to a master to assess damages.

[NOTE. From this decree the claimants appealed to the supreme court, which reversed it in an opinion by Mr. Justice Bradley. 14 Wall. (81 U. S.) 189. It was held that the case was one of inevitable accident. There was no evidence to show a lack of skill or vigilance on the part of the Java, and she was not bound, having used every reasonable precaution, to anticipate the possibility of a small vessel lying behind the school-ship. If there was any fault, it was on the part of the James McCloskey.]

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JUDGES (UNITED STATES ex rel. WHITE v.). See Case No. 15,501.

## Case No. 7,560.

In re JUDKINS.

Ex parte FERGUSON.

[2 Hughes, 401.] [1]

District Court, E. D. Virginia. Feb. 2, 1875.

BANKRUPTCY—FORCE OF PROCEEDINGS—HOMESTEAD—EXEMPTION.

1. Proceedings in bankruptcy which affect only the assets in bankruptcy are of the nature of proceedings in rem, and bind all the world, but when they affect property not embraced in the assets, they can only bind such persons in interest as have actual notice of them.

[Cited in Re Campbell, Case No. 2,348.]

2. A creditor holding a homestead-waiving bond or note of a bankrupt, may have payment of the amount due upon it out of the homestead, if the homestead has been set apart without notice to him.

This was an application of E. F. Ferguson, creditor of the bankrupt on a bond containing waiver of homestead, for payment out of property which had been exempted as a homestead.

HUGHES, District Judge. W. H. Judkins, the bankrupt in this case, applied in June last for the setting apart of a homestead exemption to him, and observed, in doing so, the special rules of this court directing the proper proceedings to be pursued for securing out of the assets in bankruptcy the homestead exemption allowed by the laws of Virginia. The exemption was duly allowed him, but he did not state in his schedule of debts that those due to certain of his creditors (among others, that due E. F. Ferguson, the petitioner) contained on the face of the bonds or notes evidencing such debts a waiver of the homestead. Nor was personal notice of his application for the homestead exemption given to the holders of such notes and bonds. The order of this court granting the homestead exemption was made without personal notice to the holders of such paper, who of course were unknown to the court. Since then, on the petition of one of these creditors and a rule upon the bankrupt to show cause against it, the said Judkins has been ordered to pay the amount of a homestead-waiving promissory note to the holder of it, and in the event of his not doing so, the assignee instructed to sell enough of the exempted property to pay the note. Now, again, the holder of a bond containing a waiver of homestead petitions for the satisfaction of the amount due upon it, not having had personal notice of the bankrupt's petition for the homestead exemption. The bankrupt answers that the petitioner was a schedule creditor, and had notice as such (constructive notice) of the petition for the exemption and the order granting it. As the principle on which such petitions are allowed is not clearly understood by bankrupts, I will state it in this case.

The question is, whether the proceedings for obtaining the homestead exemption are so strictly a part of the proceedings in bankruptcy as to bind all the world, without personal notice being given to those creditors who are affected by the exemption. Proceedings in bankruptcy, strictly of that character, are so nearly akin to proceedings in rem that they may practically be regarded as such, and, provided the rules of practice prescribed by the bankrupt law [of 1867 (14 Stat. 517)] are strictly observed, these proceedings bind all the world as to the res or assets in bankruptcy. What proceedings are of this description hardly admit of strict definition. Generally, they are those which affect the res only, without affecting property or rights which are but incidentally connected with the res. All proceedings which affect merely the res bind the res against the world, such as the publication of notices in newspapers, the serving of notices by mail, etc., etc. As against such proceedings it will avail nothing to the creditor or other person whose interests are affected to come into court and to say that he had no notice of this or that order or proceeding. For illustration, take the case of land surrendered by the bankrupt in his schedules. If the land be not bound in any way by lien in the form of judgment, deed of trust, or otherwise, then the sale of the land by the assignee under the powers conferred, and upon the notice required by the bankrupt law and the rules of the bankrupt court, is in the nature of a proceeding in rem, and conveys the title to the purchaser against the world. So, if the land be bound by lien in any form, the sale merely of the bankrupt's interest in it, in the manner required by the bankrupt law, and rules of court, is a proceeding in rem, and binds the whole world. But if the bankrupt court undertakes to authorize a sale of the land free of incumbrances, that is to say, undertakes a sale of the fee of land bound by liens, then the proceeding, so far as it affects the lienholder, is not a proceeding in rem. Personal notice must be given to lienholders; they must have a day in court to show cause against the sale, and the rule can only be valid upon full notice after a hearing. The proceeding, as to the interest of the bankrupt, is part of the proceeding in rem, while that against the lienholder is not, but must be had after personal notice and a hearing in court. It would be more regular for this latter proceeding to be by plenary bill in chancery, but it has become the practice of the bankrupt court to permit it to be done by summary petition in bankruptcy, on personal notice to the lienholders.

The question arising upon this petition of the creditor whose bond contains a waiver of homestead is, whether the proceedings which were taken to obtain the setting apart of a homestead were such as bind all the world, especially this petitioner, who had no personal notice of them. I am clearly of

[1] [Reported by Hon. Robert W. Hughes, District Judge, and here reprinted by permission.]

opinion that they were not. The homestead is conferred by the laws of Virginia, and these laws define the circumstances under which and the mode by which the homestead is to be set apart. Those laws are observed by this court as far as practicable; and the proceedings incidental to those in bankruptcy for setting it apart are not proceedings in rem. In order that these incidental proceedings for ascertaining and setting apart the homestead shall bind a creditor who has a claim superior to the homestead, the creditor must have personal notice of them, and a hearing in court. If the bankrupt does not set forth such creditor's rights in his petition for the homestead, and the creditor does not in some regular way receive the benefit of personal notice of the petition, and does not have the opportunity of being heard against it, he is not bound, and the homestead may at any time be subjected by the court to the payment of such creditor's claims.

In this case no notice was given to the creditor. The court, in granting the homestead, had no knowledge that the homestead had been waived in this bond. The homestead, therefore, is not good against the bond, and the amount due upon the bond must be paid by the bankrupt or else the homestead sold for its payment.

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